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Judicial Review of Health Claims Arbitration Awards: Practice and Pitfalls

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JUDICIAL REVIEW OF HEALTH CLAIMS ARBITRATION AWARDS: PRACTICE AND PITFALLS*†

Timothy L. Mullin, Jr.‡

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† This article is dedicated to my partner, David L. Bowers, who kindled my interest in health claims litigation.

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I. INTRODUCTION

In 1976, the Maryland General Assembly enacted the Health Care Malpractice Claims Act¹ (the "Act") in an attempt to remedy, or at least ameliorate, a perceived crisis caused by the rising number of medical malpractice claims.² Since its passage, the Act has been amended several times.³ Whether the arbitration mandated by the Act has achieved its intended purpose is the subject of extensive study and commentary.⁴ Criticism of the Act has led to its recent amendment whereby parties to a health claims arbitration proceeding mutually may waive the arbitration provisions of the Act.⁵

Whether or not the Act accomplishes its stated goals, the Act and companion rules of procedure adopted to implement the Act⁶ (the "BY Rules") evidently have generated substantial litigation over procedures for, and conditions precedent to, judicial review of a health claims arbitration award.⁷ The Court of Appeals of Maryland and the Court of

1. Health Care Malpractice Claims Act, 1976 Md. Laws 495 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to 3-2A-09 (1984 & Supp. 1988)); see also Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74 (1980).
2. See *Bovey v. Executive Director of HCAO*, 292 Md. 640, 641, 441 A.2d 333, 334 (1980); *Attorney Gen. v. Johnson*, 282 Md. 274, 280-81, 385 A.2d 57, 61, *appeal dismissed*, 439 U.S. 805 (1978). See generally MEDICAL MALPRACTICE INSURANCE STUDY COMMITTEE, REPORT TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF 1976.
3. 1988 Md. Laws 1909; 1987 Md. Laws 2721; 1986 Md. Laws 2353 & 2365; 1985 Md. Laws 1245; 1981 Md. Laws 2274 & 2358; 1980 Md. Laws 1431; 1979 Md. Laws 711, 1028 & 1574.
4. See generally MacAlister & Scanlon, *Health Claims Arbitration in Maryland: The Experiment Has Failed*, 14 U. BALT. L. REV. 481 (1985); Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489 (1977); Heintz, *Arbitration of Medical Malpractice Claims: Is it Cost Effective?*, 36 MD. L. REV. 533 (1977); Maryland State Bar Ass'n, Report of Special Committee on Health Claims Arbitration, app. A, reprinted in 89 MARYLAND STATE BAR ASS'N TRANSACTIONS 133, 143 (1984) [hereinafter "Special Committee Report"].
5. 1988 Md. Laws 1909 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06A (Supp. 1988)); see also 1987 Md. Laws 2721 (an earlier provision permitting waiver of arbitration in cases arising prior to July 1, 1987).
6. MD. R. BY1-BY5 [hereinafter the "BY Rules"]. The BY Rules have not been amended as frequently as the Act and consequently do not, in several respects, track the language of the Act or the balance of the Maryland Rules of Procedure. See, e.g., *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 645 n.2, 526 A.2d 46, 48 n.2 (1987); *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 524 nn.6-7, 490 A.2d 720, 722 nn.6-7, cert. denied, 304 Md. 163, 497 A.2d 1163 (1985). Administrative regulations have also been promulgated to implement the Act at the Health Claims Arbitration Office level. MD. REGS. CODE tit. 1, §§ 03.01.01 to 03.01.15 (1980) [hereinafter "COMAR"]. The regulations have not been revised to reflect changes in the Act. Compare *id.* tit. 1, § 03.01.14 with MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988) (regulations have not been changed to reflect the reduction in time for filing notice of rejection from 90 days to 30 days).
7. Judicial review of a health claims arbitration award is popularly referred to as an "appeal" from the arbitration proceeding. Despite this popular terminology, the Act narrowly limits the scope of circuit court review of an arbitration panel deci-

Special Appeals of Maryland have struggled with the provisions of the Act and the BY Rules concerning judicial review and have offered inconsistent interpretations.

This article first examines the procedures established by the Act and the BY Rules. Next, this article describes the development of case law construing the various provisions of the Act and the BY Rules. Finally, the author makes suggestions for further clarification of the provisions of the Act.

II. THE STATUTORY FRAMEWORK

A. Overview of the Health Claims Arbitration Process

The Act establishes a procedure for arbitration⁸ of claims⁹ against health care providers¹⁰ for medical injury¹¹ occurring after the effective

sion. See *infra* notes 268-326 and accompanying text; see also *Su v. Weaver*, 313 Md. 370, 378 n.3, 545 A.2d 692, 696 n.3 (1988). Also, the review permitted by the Act does not resemble traditional appellate review of the substantive legal and factual basis for a trial court decision. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988). Consequently, the use of the term "appeal" is misleading and will not be used in this article. See *Ott*, 309 Md. at 646, 526 A.2d at 49. But see *Tranen v. Aziz*, 304 Md. 605, 608 n.1, 500 A.2d 636, 637 n.1 (1985) (use of word "appeal").

In fact, judicial review under the Act technically only refers to a circuit court's responsibility under section 3-2A-06. See *Tranen*, 304 Md. at 608 n.1, 500 A.2d at 637 n.1. Once that has been accomplished, the case proceeds in the circuit court like any other tort action. See *infra* note 220 and accompanying text. The scope of this article is slightly broader, and will use the term judicial review to include circuit court review of a claimant's compliance with the condition precedent established by the Act. See *infra* notes 204-217 and accompanying text.

8. Until July 1, 1987, the arbitration provisions of the Act were mandatory. See *supra* note 5 and accompanying text.
9. Claims must meet the jurisdictional limit set by the Act of more than \$2,500 in order to be arbitrable. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-02(a)(1), 4-402(d) (1984 & Supp. 1988). Claims of \$2,500 or less may be litigated in either the appropriate district court or circuit court. *Id.* §§ 4-401(1), 4-402(d).
10. The Act defines a "health care provider" as a "hospital, a related institution as defined in section 19-301 of the Health-General Article, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed nurse, a dentist, a podiatrist, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland." MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01(e) (1984 & Supp. 1988). Cf. *Rosenberg v. Institute of the Pa. Hosp.*, 72 Md. App. 617, 620, 535 A.2d 961, 962-63 (1988) (Act inapplicable to health care provider not licensed in Maryland).

One of the more common practical problems encountered under the Act is joinder of a claim for strict liability in tort against a drug manufacturer with a medical malpractice claim. Under the definition of the Act, a drug manufacturer is not a health care provider, and thus the Act does not apply to it. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01(e) (1984 & Supp. 1988); see *Smith Laboratories, Inc. v. Teuscher*, 310 Md. 676, 678, 531 A.2d 300, 301 (1987) (per curiam); *Ralkey v. Minnesota Mining & Mfg. Co.*, 63 Md. App. 515, 518-19, 492 A.2d 1358, 1363 (1985). But see *MacAlister & Scanlan*, *supra* note 4, at 492 n.66 (noting that lower courts allow complaints against non-health care providers to be litigated before the arbitration panel). The court of appeals, however, explicitly has not decided whether a non-health care provider may be required to participate in arbitration

date of the Act, July 1, 1976.¹² The Health Claims Arbitration Office ("HCAO") was created to administer the provisions of the Act.¹³ A claimant¹⁴ commences arbitration by filing a claim with the Director of the HCAO (the "Director").¹⁵ The Director arranges for service of the claim on the health care provider.¹⁶ The health care provider then files a response within the time provided in the Maryland Rules of Procedure.¹⁷

The Director is charged with the responsibility of providing arbitrators for arbitration proceedings. Unless the parties to the proceeding agree to forego arbitration¹⁸ or agree in writing to a single arbitrator,¹⁹ arbitration is conducted before a panel consisting of three arbitrators, one chosen from each of three lists of attorneys, health care providers and members of the public, respectively.²⁰ Within twenty days after the health care provider's response is due, the Director submits to each party a list of six attorneys chosen at random from a list maintained at the HCAO, along with a biographical data sheet for each attorney on the list.²¹ The claimant and the health care provider each may make two

under the Act in certain circumstances. *Smith Laboratories*, 310 Md. at 679, 531 A.2d at 302. At least one proposal has been put forth for resolving this problem. See Special Committee Report, *supra* note 4, at 137-38.

11. The Act defines a "medical injury" as an "injury arising or resulting from the rendering or failure to render health care." MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01(f) (1984 & Supp. 1988). The scope of that definition has been the subject of several appellate decisions. See, e.g., *Cannon v. McKen*, 296 Md. 27, 459 A.2d 196 (1983); *Nichols v. Wilson*, 296 Md. 154, 460 A.2d 57 (1983); *Long v. Rothbaum*, 68 Md. App. 569, 514 A.2d 1223 (1986).
12. 1976 Md. Laws 495, § 5. Various appellate cases have interpreted the impact of this effective date. E.g., *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982); *Dennis v. Blanchfield*, 48 Md. App. 325, 428 A.2d 80 (1981).
13. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03 (1984 & Supp. 1988); see also *Wimmer v. Richards*, 75 Md. App. 102, 112, 540 A.2d 827, 832, cert. denied, 313 Md. 506, 545 A.2d 1344 (1988) (recognizing importance of Director).
14. In health claims arbitration proceedings, the party normally denominated the "plaintiff" is called "claimant," and the party normally denominated the "defendant" is called a "health care provider." See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(a) (1984 & Supp. 1988). Generally, to avoid confusion, this article will retain the designations of the parties used in the arbitration proceedings, even when referring to them in a circuit court action.
15. *Id.* § 3-2A-04(a)(1); COMAR tit. 1, § 03.01.03.
16. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(a)(1) (1984 & Supp. 1988); COMAR tit. 1, § 03.01.05.
17. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(a)(1) (1984 & Supp. 1988); COMAR tit. 1, § 03.01.06. The Maryland Rules provide that the response must be filed within 30 days of receipt of service. MD. R. 2-321(a).
18. 1988 Md. Laws 1909 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06A (1984 & Supp. 1988)).
19. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(f) (1984 & Supp. 1988); see also COMAR tit. 1, § 03.01.07D(3).
20. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03(c) (1984 & Supp. 1988); see also COMAR tit. 1, § 03.01.07A(2).
21. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(c) (1984 & Supp. 1988); see also COMAR tit. 1, § 03.01.07B. Prior to 1986, the Act required that the list of potential panel members submitted by the HCAO contain five names. Contrary to the requirements of the Act, and no doubt due to the difficulty in finding panelists who

strikes from the list within thirty days after receipt.²² The health care provider and the public member panelists are chosen by a similar process which commences within twenty days after the Director is notified that a prehearing conference has been scheduled.²³

The attorney panel member is the chairperson of the panel and is empowered to decide all questions of prehearing procedure.²⁴ Generally,

survive the strike process and thus ultimately serve on the arbitration panel, the Director adopted the practice of submitting lists containing six names. Effective July 1, 1986, this practice was codified into the Act. 1986 Md. Laws 2353 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(c) (1984 & Supp. 1988)).

22. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(d)(1) (1984 & Supp. 1988); *see also* COMAR tit. 1, § 03.01.07D(2). Strikes need not be made if all the persons on the list are acceptable. Strikes for cause may also be made within 15 days after receipt of the list. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(d)(1); *cf.* COMAR tit. 1, § 03.01.07D(2) (inconsistent provision permitting strikes for cause to be made within 30 days). More than one claimant or health care provider are treated as a single party, and all claimants or health care providers must make their strikes jointly. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(d)(2) (1984 & Supp. 1988); *see also* COMAR tit. 1, § 03.01.07D(1).
23. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(c)(2) (1984 & Supp. 1988). Selection of panel members is one of the areas that has caused delays in health claims arbitration proceedings, often at significant expense to the parties. Unless the panel chairperson or the parties diligently monitor the selection of the panel members, it is not unusual for a hearing date to approach without available panel members. At that point, or at the point when a panel member refuses or cannot serve at the last minute, the HCAO offers to the parties its "retiree list," consisting of persons, generally retired, available on short notice to serve as arbitrators. This list is not chosen at random and consequently requires the consent of the parties to its use. *See id.* § 3-2A-04(b). If the parties do not agree to the use of the retiree list, then the hearing usually must be postponed.

The Act's requirement that the selection of public member and health care provider panelists correspond to the scheduling of the pre-hearing conference contributes to this problem. First, the Act neither requires that a pre-hearing conference be held nor sets time limits for the scheduling of such a conference, although the pre-hearing conference is discussed in both the statute and the applicable regulations. *Id.* § 3-2A-04(c)(2); COMAR tit. 1, § 03.01.10; *see also* MacAlister & Scanlan, *supra* note 4, at 496. In practice, a panel chairperson usually holds two conferences: a scheduling conference held shortly after appointment and a conference held closer to the hearing date. It is this later conference which most closely resembles the one contemplated by the regulations. The scheduling of the pre-hearing conference may not provide sufficient time for panel members to be selected prior to the hearing date. Consequently, notwithstanding any requirements of the Act, the panel chairperson and the HCAO should strive to have panel members selected as early as possible. There is no reason not to amend the Act so that all three panel members are chosen at the same time as the panel chairperson.

Health care provider panel members are chosen from lists which include all physicians licensed to practice medicine in the State. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03(c)(4) (1984 & Supp. 1988). In addition, the claimant or the health care provider in a proceeding may designate a specialty which the case involves, and the Director, "if practicable" must include persons in that specialty on the list provided to the parties. *Id.* § 3-2A-03(c)(2). In practice, however, the list provided contains no more than one member of the designated specialty.

24. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(c) (1984 & Supp. 1988); *see also* COMAR tit. 1, § 03.01.08B. This article will use the term "chairperson" in order to be gender neutral.

the HCAO retains limited power over the proceeding once the panel chairperson is selected.²⁵ The Act permits the Director to exercise certain limited powers prior to the selection of the panel chairperson and in the event that the chairperson is not performing his duties in a timely manner or is temporarily unable to serve.²⁶

The Act establishes time limits for the completion of discovery²⁷ and completion of the arbitration process.²⁸ In practice, these time limits generally are waived by the parties in all but the simplest cases.²⁹

At the conclusion of the arbitration hearing, the panel makes its determination in writing and delivers it to the Director.³⁰ The decision must contain determinations of liability, damages if appropriate, and an assessment of costs.³¹ The judicial review process commences after the panel's determination.³²

Parties to an award may seek its modification by the panel.³³ In order to seek modification and delay the time period for seeking judicial review, request for modification must be filed within twenty days after receipt of service of the award.³⁴

25. *Cf.* Attorney Gen. v. Johnson, 282 Md. 274, 285, 385 A.2d 57, 63-64, *appeal dismissed*, 439 U.S. 805 (1978) (purpose of HCAO is to assist parties selecting arbitration panel members).

26. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-03(b)(2), 3-2A-05(a)(2) (1984 & Supp. 1988).

27. *Id.* § 3-2A-05(b)(2) (discovery must be completed within 270 days from the date on which all defendants have been served).

28. *Id.* § 3-2A-05(g).

29. *Id.* § 3-2A-05(j). The Act is designed to provide a prompt, efficient mechanism for considering medical malpractice claims, and the time limits are designed to accomplish those goals. Compliance with the Act, however, imposes significant time delays on the ultimate resolution of a medical negligence case. This is due to a number of factors. First, regular members of the medical malpractice bar are limited, and their trial calendars are booked well into the future. Second, the necessity of using many medical experts, with their very busy schedules, makes the completion of discovery time-consuming. *But cf. id.* § 3-2A-05(d) (Supp. 1988) (generally limiting the number of experts used at the arbitration hearing to two in each specialty). Third, delays in providing panel members often arise from the HCAO. *See supra* note 23. Finally, delays come about due to the schedules of the panel members themselves, particularly the attorney and health care provider members. This circumstance routinely results in waivers of the statutory time limitations.

30. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(g) (1984 & Supp. 1988); *see also* COMAR tit. 1, § 03.01.12E(1).

31. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(e)-(f) (1984 & Supp. 1988); COMAR tit. 1, § 03.01.12E(1); *Munzer v. Ramsey*, 63 Md. App. 350, 358, 492 A.2d 946, 950 (1985); *see also* *Su v. Weaver*, 313 Md. 370, 380-83, 545 A.2d 692, 697-98 (1988).

32. As will be discussed later in this article, some confusion arises over what is the "award" of the arbitration panel for appeal purposes. *See infra* notes 57-70 and accompanying text. In order to standardize terminology, this article will use the term "determination" to mean the decision of the arbitration panel, and the term "award" to mean the determination when it has been forwarded to the parties in accordance with section 3-2A-05(f) of the Act.

33. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(h) (1984 & Supp. 1988).

34. *Id.* § 3-222; *see also* COMAR tit. 1, § 03.01.13.

B. The Judicial Review Process

The Act provides that the Director shall cause a copy of the determination to be served on each party to the proceeding.³⁵ This service is accomplished when the HCAO sends copies of the determination to the parties or their counsel by certified mail, return receipt requested.³⁶ The time limitations for seeking judicial review run from the receipt of the award.³⁷

Once the award has been served by the HCAO, section 3-2A-06 of the Act governs judicial review of the arbitration proceeding.³⁸ Simplistically, section 3-2A-06 sets up a two-part procedure for obtaining judicial review of an award. First, the rejecting party must file a notice of rejection with the Director and with the arbitration panel within the time period provided in the section.³⁹ Second, the rejecting party must file an action to nullify the award in the appropriate circuit court.⁴⁰

The BY Rules supplement the Act and impose additional requirements with respect to the judicial review process.⁴¹ Rule BY2 describes the contents of the notice of action to nullify an award.⁴² Under Rule

35. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(g) (1984 & Supp. 1988); *see also* COMAR tit. 1, § 03.01.12E(2).

36. MD. R. 2-121; *cf.* COMAR tit. 1, § 03.01.05 (refers to superseded Maryland Rules of Procedure).

37. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988); *see also infra* notes 57-70 and accompanying text (discussing determination of when time for seeking judicial review begins to run). This time may be delayed by a timely filed application for modification. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a) (1984 & Supp. 1988). It is important to note that whereas the time for seeking judicial review runs from *receipt* of an award, when an application for modification has been filed, the time runs from the *decision* on the application, not its receipt. *Id.*

38. *Id.* Section 3-2A-06 provides in part:

(a) *Rejection of award* — A party may reject an award for any reason. A notice of rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party, or, if a timely application for modification or correction has been filed within 10 days after a disposition of the application by the panel, whichever is greater.

(b) *Action to nullify award* — (1) At or before the time specified in subsection (a) of this section for filing and serving a notice of rejection, the party rejecting the award shall file an action in court to nullify the award and shall file a copy of the action with the Director. Failure to file this action timely in court shall constitute a withdrawal of the notice of rejection. Subject to the provisions of subsection (c) of this section, the procedures applicable to the action including the form and necessary allegations in the initial pleading shall be governed by the Maryland Rules.

MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (Supp. 1988).

39. *Id.* § 3-2A-06(a); *see also infra* notes 71-74 and accompanying text (discussing pleadings mailed instead of filed).

40. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988). Section 3-2A-06(h) of the Act provides that the usual venue rules should apply. *Id.* § 3-2A-06(h) (Supp. 1988); *see also infra* notes 75-105 and accompanying text (discussing operation of venue provisions).

41. MD. R. BY1.

42. *Id.* BY2.

BY2, the notice must "identify the award and state that it is being rejected by the party filing the notice."⁴³ Rule BY4 describes the procedure and timing for further proceedings in the action to nullify.⁴⁴ Within thirty days after filing the notice of action, the plaintiff⁴⁵ must file and serve an initial pleading.⁴⁶ The pleadings and all other proceedings in an action to nullify are governed by the Maryland Rules of Procedure.⁴⁷

If none of the parties to the arbitration proceeding seeks judicial review, the award is final and binding, and the Director must file a copy of the award with a circuit court and seek confirmation of the award.⁴⁸ Confirmation of the award constitutes a final judgment reflecting the decision of the arbitration panel.⁴⁹ After a notice of rejection is filed, the failure to file an action to nullify constitutes a withdrawal of the notice of rejection, and the award becomes final.⁵⁰

C. Effect Of The Award

Upon commencement of the action to nullify, the case proceeds as if arbitration had never taken place, with one important exception: under the Act, the award is presumed to be correct and is admissible in evi-

43. *Id.*

44. *Id.* BY4.

45. Rule BY3 designates the party making the claim against the health care provider as "plaintiff" and the health care provider as "defendant." MD. R. BY3; see *Wimmer v. Richards*, 75 Md. App. 102, 108 n.6, 540 A.2d 827, 830 n.6, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988).

46. MD. R. BY4(a). Rule BY4 still refers to a declaration, despite the fact that the heading/title of an initial pleading in an action has been changed to a complaint. MD. R. 2-302; see *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 645 n.2, 526 A.2d 46, 48 n.2 (1987); *Wimmer*, 75 Md. App. at 110, 540 A.2d at 831; *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 524 & nn. 6-7, 490 A.2d 720, 722 & nn. 6-7, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985). As the court concluded in *Osheroff*, entitling an initial pleading "declaration" instead of "complaint" is an inconsequential error. Nevertheless, the BY Rules should be modified to reflect the provisions of the current rules in order to reduce confusion. See MD. R. BY4(b) (reference in later portion of same rule which refers to current rule provision).

The initial pleading should conform to the requirements of the Maryland Rules of Procedure, except that the complaint may not contain a statement of the amount of damages other than that they exceed the jurisdictional amount. *Id.*; cf. *Osheroff*, 62 Md. App. at 525-26, 490 A.2d at 723 (complaint described as "inartfully drawn" was sufficient).

47. MD. R. BY4(b).

48. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(i) (Supp. 1988). In practice, the prevailing party usually requests that the Director perform this function and provides the Director with a petition for confirmation for filing. There is often a substantial delay before this is accomplished by the Director. Since there is no important rationale behind having the Director discharge this ministerial step, there is no reason not to amend the Act to permit the prevailing party to seek confirmation of the award without action by the Director. Cf. *infra* notes 361-367 and accompanying text (proposal for abolishing petition for confirmation except in limited circumstances).

49. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(i) (Supp. 1988).

50. *Id.* § 3-2A-06(b).

dence.⁵¹ The Act does provide, however, for limited review of the award by the circuit court.⁵² By filing a preliminary motion to modify or vacate, a party may seek a judicial determination that the award is improper on the grounds contained in the Maryland Uniform Arbitration Act.⁵³ The circuit court must decide this motion outside of the presence of the jury prior to trial⁵⁴ and may modify or vacate the award if it finds sufficient grounds under the provisions of the Act.⁵⁵ The case then proceeds with the modified award or, if the award is vacated, as if no award had been made.⁵⁶

III. INTERPRETATION OF THE ACT

A. Overview

The statutory framework set out above has given rise to a number of appellate decisions interpreting the applicable procedures under the Act and the BY Rules. This section of the article discusses several areas that have been the subject of litigation. This section considers the timing of the judicial review process, the provisions of the Act relating to venue, and the issue of compliance with the provisions of the Act and the BY Rules required in order that judicial review may proceed. This section then addresses the decisions of the court of appeals requiring parties to

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51. *Id.* § 3-2A-06(d); *see also infra* notes 218-267 and accompanying text (discussing effect of award). It is not uncommon for both parties to the arbitration proceeding to reject the award—the health care provider, because of a finding of liability; the claimant, based on the amount of damages determined by the panel. In this situation, the plaintiff usually seeks to utilize the presumption of section 3-2A-06(d) on the liability finding and attempts to dispute the damages awarded by the panel. *See Teimourian v. Spence*, 59 Md. App. 74, 76, 474 A.2d 919, 921, *cert. denied*, 301 Md. 43, 481 A.2d 802 (1984). No appellate decision has directly addressed this issue, although dicta in one opinion implies that when the panel has rendered an award in favor of the claimants and both the claimants and the health care provider have rejected the award, the burden of proof is on the health care provider on the liability issue and on the claimants with regard to the damages issue. *Hahn v. Suburban Hosp. Ass'n*, 54 Md. App. 685, 693, 461 A.2d 7, 12 (1983). The Act, however, makes no provision for piecemeal rejection of the award. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-06(a), 3-2A-06(d) (1984 & Supp. 1988); *cf.* COMMISSION ON CIVIL PATTERN JURY INSTRUCTIONS, MD. STATE BAR ASS'N, INC., MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 27:2, at 595 (2d ed. 1984) [hereinafter PAT-TERN JURY INSTRUCTIONS]. Consequently, if a claimant and a health care provider reject an award, the Act seems to mandate that neither party is entitled to a presumption based on the award. Under those circumstances, it makes little sense for the jury to even be made aware of the underlying arbitration proceeding. *Cf.* 5 L. MCLAIN, MARYLAND EVIDENCE § 301.1, at 188-89 (1987) (generally, jury not told of presumptions).
52. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988); *see also infra* notes 268-326 and accompanying text (discussing motions to vacate).
53. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988); *see also id.* §§ 3-223(b), 3-224(b) (1984); *see also infra* notes 268-326 and accompanying text (discussing motions to vacate).
54. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988) (1984).
55. *Id.*; *see also id.* §§ 3-223(b), 3-224(b) (1984).
56. *Id.* § 3-2A-06(c).

arbitrate under the Act, the effect of the arbitration award on a circuit court proceeding, and the standard for vacating the award. Finally, this section considers whether the proceeding can be remanded to an arbitration panel.

B. *Timing of the Judicial Review Process*

The Act provides that the Director shall serve copies of the award on the parties to the arbitration proceeding.⁵⁷ In the past, the HCAO often took several months to accomplish this procedure.⁵⁸ Because of this delay, the panel frequently mails copies of the determination to counsel to advise them of the results of the arbitration proceeding. When a determination has been mailed by the panel before the award is served by the Director, some confusion arises over when the pleadings for initiating judicial review should be filed.

The provisions of the Act are clear, however. The time period for filing a notice of rejection and the time period for filing a notice of action to nullify begin with service of the award (unless a timely application for modification or correction is filed with the panel),⁵⁹ and only the Director can serve the award in compliance with the Act.⁶⁰ This interpretation of the Act was confirmed by the court of special appeals in *Munzer v. Ramsey*.⁶¹ In *Munzer*, the panel chairperson granted the motion for summary judgment made by one of the health care providers in the arbitration proceeding.⁶² Subsequently, the other health care providers set-

57. *Id.* § 3-2A-05(g) (Supp. 1988).

58. This delay has hopefully been remedied by the provisions of chapter 640 of the 1986 Maryland Laws, which amended the Act to require the Director to serve the award within 15 days of receiving the panel determination. 1986 Md. Laws 2353, 2360 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(g) (Supp. 1988)).

59. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a), (b) (1984 & Supp. 1988).

60. *Id.* § 3-2A-05(g) (Supp. 1988).

61. 63 Md. App. 350, 492 A.2d 946 (1985).

62. *Id.* at 354, 492 A.2d at 947-48. The Director of the HCAO has always taken the position that a panel chairperson, acting alone, had the power to grant summary judgment. *But see* *Stifler v. Weiner*, 62 Md. App. 19, 25 & n.3, 488 A.2d 192, 195 & n.3, *cert. denied*, 304 Md. 96, 497 A.2d 819 (1985). In *Stifler*, the court of special appeals held that the Act did not authorize this practice. *Id.* at 24-25, 488 A.2d at 194-95. While the court did not prohibit summary judgment in general, the opinion made it clear that summary judgment could only be granted by the entire panel. *Id.* at 25, 488 A.2d at 195.

In response to the *Stifler* decision, the Maryland General Assembly amended the Act to permit the panel chairperson, acting alone, to grant summary judgment. 1985 Md. Laws 1245, 1246 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(a) (Supp. 1988)); *see* *McClurkin v. Maldonado*, 304 Md. 225, 234-35, 498 A.2d 626, 631 (1985); *Munzer v. Ramsey*, 63 Md. App. 350, 362-63, 492 A.2d 946, 952 (1985) (effect of 1985 Md. Laws ch. 104); *MacAlister & Scanlan*, *supra* note 4, at 494-95.

In their interpretation of the effect of chapter 104, *MacAlister* and *Scanlan* take an overly technical view of the amendment and the Act's provisions. *MacAlister & Scanlan*, *supra* note 4, at 495-96. They interpret the amendment to permit summary judgment by the panel chairperson only if the Director specifically refers that question of law to him. *Id.* The better view, and the overwhelming practice, is to read

tled their portion of the case, and the remainder of the case was dismissed.⁶³ The panel, however, did not assess costs and never delivered an award to the Director, but instead mailed copies of the award to the parties' counsel.⁶⁴ The claimants then sought judicial review by filing a notice of rejection and a declaration.⁶⁵ When the non-settling health care provider moved to dismiss the case commenced by the declaration, the claimants sought remand to arbitration.⁶⁶

The court of special appeals agreed that no valid award had been made, because the panel had never delivered the determination to the HCAO and no costs had been assessed.⁶⁷ These failures undermined fundamental requirements of the Act, including the necessity for a public record of the panel decision.⁶⁸ Under these circumstances, the panel's case did not constitute an award pursuant to the Act, and the action was dismissed without prejudice.⁶⁹

As is evident from both the language of the Act and the decision in *Munzer*, delivery of a copy of the panel's determination as a courtesy has no procedural significance. Parties seeking judicial review from this informal action do so at their own peril.⁷⁰

the Act as amended to permit the panel chairperson to determine all issues of law, when and if they arise, without further instructions or reference from the Director. The court of appeals adopted this view in *McClurkin*, a case decided after MacAlister & Scanlan completed their work. 304 Md. at 234-35, 498 A.2d at 631. In *McClurkin*, the court of appeals analogized the panel chairperson, acting alone, to a judge in a jury trial with the entire panel the jury. *Id.* at 235, 498 A.2d at 631.

Although the Act had not been amended by the time of the decision of the panel chairperson in *Munzer*, the court did not need to consider the issue based on its holding. 63 Md. App. at 359 & n.4, 362-63, 492 A.2d at 950 & n.4, 952.

63. 63 Md. App. at 354, 492 A.2d at 948.

64. *Id.*; see also MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(f), (g) (Supp. 1988).

65. 63 Md. App. at 354, 492 A.2d at 948. Evidently the claimants failed to file a notice of action to nullify in addition to their notice of rejection and declaration, since that was one basis for the health care provider's motion to dismiss. *Id.* In light of the court of special appeals decision, which had the effect of returning the case to the arbitration panel, this failure became moot. *Id.* at 361-62, 492 A.2d at 951-52; see also *infra* notes 352-358 and accompanying text (discussing *Munzer* in context of returning a case to arbitration).

66. 63 Md. App. at 354-55, 492 A.2d at 948.

67. *Id.* at 356-57, 492 A.2d at 949.

68. *Id.* at 356, 492 A.2d at 949.

69. *Id.* at 362, 492 A.2d at 951-52. The effect of the decision was to return the case to arbitration, without further action by the court. *Id.* at 362, 492 A.2d at 952.

70. See also *McIntyre v. North Arundel Hosp.*, No. 1107639 (Anne Arundel Co. Cir. Ct. 1984). In *McIntyre*, the plaintiff sought judicial review of a panel determination that had been mailed as a courtesy by a panel chairperson. Subsequently, the HCAO served copies of the award as provided in the Act, and when no notice of rejection or notice of action to nullify were filed within the appropriate time period, the defendants moved to dismiss the case for failure to comply with the provisions of the Act. The circuit court agreed with the defendants and dismissed the case. The difference between the decision in *Munzer* and the decision in *McIntyre* is that in *Munzer* the panel never took the steps required under the Act. In *McIntyre*,

C. *Mailing/Filing Pleadings Seeking Judicial Review*

Another common question confronting counsel seeking judicial review of a health claims arbitration award is whether pleadings must be filed with the HCAO and the circuit court by the day on which they are due or whether mailing them on that day is sufficient. Often, delays during the client's decision whether to seek judicial review may cause the filing deadline to loom perilously close, and counsel, accustomed to the usual mailing rules,⁷¹ sometimes rely on these rules. The Act specifically states, however, that both the notice of rejection and the action to nullify must be filed (not mailed) within the prescribed time period.⁷²

The court of special appeals, in an unreported decision, held that under the Act, the pleadings had to be placed in the hands of the filing officer, and not merely mailed, within the applicable time periods. Likewise, the court of appeals has noted:

The word "file" is derived from the ancient custom of filing or fastening writs and other exhibits on a wire or thread in courts and offices for safekeeping and ready reference. Thus a paper is said to be "filed" when it is delivered to the proper officer and received by him to be kept on file. In modern usage, the "filing" of a paper consists in placing it in the custody of the proper official who makes the proper indorsement thereon.⁷³

In similar circumstances, both the court of appeals and the court of special appeals have held that mailing is not the equivalent of filing.⁷⁴

however, the panel did take the appropriate steps, and the claimant missed the time for seeking judicial review.

Seeking judicial review when the award has not been served is not unlike taking an appeal from an order of the circuit court that is not final, and the results can be just as harsh. *Cf. e.g.* Clinton Petroleum Services, Inc. v. Norris, 271 Md. 665, 667, 321 A.2d at 528, 529 (1974) (dismissal of untimely appeal).

71. MD. R. 1-321.

72. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a), (b) (1984 & Supp. 1988).

73. Levy v. Glens Falls Indem. Co., 210 Md. 265, 273, 123 A.2d 348, 352 (1956); *see also* Dickerson v. Robinson, Slip op. No. 1604 (Md. App. 1985) (per curiam); MD. R. 1-322; Mitcherling v. Rosselli, 304 Md. 363, 366 n.4, 499 A.2d 476, 477-78 n.4 (1985) (dicta stating that "the requirement of filing [a notice of rejection] is satisfied only by actual receipt of the document to be filed . . ."); Wimmer v. Richards, 75 Md. App. 102, 106, 113 n.12, 540 A.2d 827, 829, 833 n.12, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988). In *Wimmer*, the circuit court denied appellate review when the notice of rejection was mailed timely but did not reach the HCAO within the time period specified in the Act. The court of special appeals reversed and remanded for a factual finding of whether the notice of rejection was received by the HCAO, but specifically did not address the question of whether mailing alone constitutes proper filing.

74. *See* Renehan v. Public Serv. Comm'n, 231 Md. 59, 63, 188 A.2d 566, 568 (1963); American Casualty Co. v. Department of Licensing & Regulation, 52 Md. App. 157, 162, 447 A.2d 484, 486 (1982).

D. Choice of Forum for Judicial Review Proceedings

One of the first decisions facing a party seeking judicial review of a health claims arbitration award is the court in which to file the notice of action and/or the complaint. Section 3-2A-06 of the Act simply requires that the action to nullify be filed "in court,"⁷⁵ with venue to be determined in accordance with the general venue rules contained in section 6-201 of the Maryland Courts and Judicial Proceedings Code Annotated.⁷⁶ Rule BY4 further provides that if the defendant health care provider files the notice of action to nullify, the plaintiff may file the declaration in any court having venue.⁷⁷ If the notice of action was filed in a different court, the plaintiff must file a certified copy of the notice of action with the declaration.⁷⁸

As demonstrated in the cases of *Teimourian v. Spence*⁷⁹ and *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*,⁸⁰ these provisions have caused considerable confusion when both the claimant and the health care provider reject an award or when a claimant seeks to proceed in federal court.

In *Teimourian*, an arbitration panel made an award against the health care provider.⁸¹ In response, the health care provider timely filed a notice of rejection with the HCAO and a notice of action to nullify the award with the Circuit Court for Prince George's County. Shortly thereafter, the claimants also filed a notice of rejection with the HCAO and a notice of action to nullify with the Circuit Court for Harford County.⁸² Subsequently, the claimants filed a timely declaration against the health care provider in the Circuit Court for Harford County. The health care provider filed a preliminary motion in the Harford County proceeding objecting to venue. This motion was granted, and that case was transferred to Montgomery County.⁸³

Well over one year after the notice of action to nullify was filed in Prince George's County, the clerk of that court dismissed the case pursuant to the provisions of then applicable rule 530 of the Maryland Rules of Procedure.⁸⁴ Apparently believing that they had obtained a tactical advantage by the dismissal of the Prince George's County case, the claim-

75. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988). The term "court" is defined in the Act to mean a circuit court for a county. *Id.* § 3-2A-01(c) (1984).

76. *Id.* § 3-2A-06(h) (Supp. 1988).

77. MD. R. BY4(a)(2).

78. *Id.*

79. 59 Md. App. 74, 474 A.2d 919, *cert. denied*, 301 Md. 43, 481 A.2d 802 (1984).

80. 309 Md. 641, 526 A.2d 46 (1987).

81. 59 Md. App. at 76, 474 A.2d at 920.

82. *Id.* As discussed above, the claimants sought to reject only the damage portion of the award. *See supra* note 51. The court of special appeals never addressed the issue of whether this partial rejection was appropriate.

83. 59 Md. App. at 76, 474 A.2d at 920.

84. *Id.* at 77, 474 A.2d at 920. Rule 530 of the Maryland Rules of Procedure has since been superseded by substantially similar rule 2-507.

ants then dismissed the case pending in Montgomery County and persuaded the Director to file a petition for confirmation of the award. The circuit court ultimately granted the petition for confirmation, prompting the health care provider's appeal.⁸⁵

The court of special appeals, reversing the action of the circuit court, held that when a declaration is filed in a jurisdiction other than that in which the notice of action is filed, the filing of the declaration constitutes automatic consolidation of the two cases.⁸⁶ Once venue questions, if any, are resolved, the court with venue retains jurisdiction and the other court is dispossessed of jurisdiction.⁸⁷ The court of special appeals concluded that the health care provider had done everything required to seek judicial review and that rather than gaining a tactical advantage by dismissing their action, the claimants had abandoned their right to further judicial proceedings.⁸⁸

Neither the Act nor the BY Rules contemplate the continuation of proceedings commenced by a defendant's notice of action other than by prosecution of the declaration filed by a claimant. It makes sense to consolidate the various notices of action and to proceed in a single court having venue.⁸⁹ The claimants in *Teimourian* evidently overlooked one important element when deciding their tactical course: Once the health care provider properly rejected the award and sought judicial review, there was no award to confirm. Section 3-2A-05(i) permits confirmation of an award only if judicial review is not sought.⁹⁰ An award that has been properly rejected⁹¹ has absolutely no further effect on the parties, and their only rights relate to the action to nullify.⁹² By dismissing their action, the claimants abandoned their cause of action against the health care provider.

85. 59 Md. App. at 78, 474 A.2d at 921.

86. *Id.* at 86, 474 A.2d at 925. Presumably, the result would be the same in a case where the claimant chose not to reject the award but merely to file a declaration in a different county than that which the health care provider chose for the notice of action to nullify.

87. *Id.*

88. *Id.* at 85-86, 474 A.2d at 924-25.

89. In a case with more than one health care provider, it is conceivable that each health care provider could file a notice of action to nullify in a different circuit court. Under the holding in *Teimourian*, a single court having venue would retain jurisdiction to continue the proceedings. If multiple courts have venue over all the health care providers, the venue chosen by the claimant when filing the complaint should control. If the circuit court chosen by the claimant does not have venue over all the health care providers, it should either dismiss the case as to those health care providers over which it does not have venue or transfer the case to a court which does have venue over all of the health care providers. See MD. CTS. & JUD. PROC. CODE ANN. § 6-201(b) (1984); MD. R. 2-327(b).

90. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(i) (Supp. 1988).

91. See *id.* § 3-2A-06(b) (1984 & Supp. 1988).

92. *Id.* § 3-2A-06(d) (the award does have an effect in the proceedings commenced by the action to nullify due to its presumption); see also *infra* notes 218-267 and accompanying text (discussing effect of award).

In *Ott*,⁹³ the court considered the procedure to be followed when a claimant seeks judicial review of a health claims arbitration proceeding against one defendant in state court and another defendant in federal district court.⁹⁴ Prior to *Ott*, in *Group Health Association v. Blumenthal*,⁹⁵ the Court of Appeals of Maryland noted that compliance with the Act is a prerequisite to invoking federal diversity jurisdiction.⁹⁶ The United States District Court for the District of Maryland also determined in *Davison v. Sinai Hospital*⁹⁷ that the arbitration provisions of the Act were substantive in nature and thus must be complied with when maintaining a malpractice claim in federal court.⁹⁸ *Ott* provides some guidance with respect to such compliance.

In *Ott*, the claimants sought judicial review of an award rendered by an arbitration panel in favor of an individual and a corporate health care provider, and sought to continue proceedings against the corporate health care provider in federal court based on diversity jurisdiction.⁹⁹ In order to perfect this judicial review, the claimants filed a notice of rejection with the HCAO and an action to nullify in the Circuit Court for Montgomery County. The action to nullify named both the individual health care provider and his corporate employer as defendants. Subsequently, the claimants filed a complaint in the circuit court naming only the individual health care provider as a defendant and a complaint in the United States district court naming only the corporate health care provider as a defendant.

In response to the notice of action, the corporate defendant moved for dismissal and for confirmation of the award.¹⁰⁰ The circuit court dismissed the action and confirmed the award, apparently because the claimants had not filed the complaint in the same court where the notice of action had been filed.¹⁰¹

The court of appeals reviewed the purpose behind the procedural provisions of the Act, and reversed the decision of the circuit court.¹⁰² The court concluded that although the claimants had not fully complied

93. *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 526 A.2d 46 (1987).

94. Judicial review of a single health claims arbitration proceeding could not occur in more than one state circuit court because of the operation of Rule BY4 and the venue provisions of the Courts and Judicial Proceedings Code. See MD. CTS. & JUD. PROC. CODE ANN. §§ 6-201 to -204 (1984 & Supp. 1988); MD. R. BY4(a)(2).

95. 295 Md. 104, 453 A.2d 1198 (1983).

96. *Id.* at 108 n.5, 453 A.2d at 1202 n.5.

97. 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

98. *Id.* at 780.

99. 309 Md. at 644, 526 A.2d at 48.

100. *Id.* at 645, 526 A.2d at 48. The court of appeals does not describe the procedural mechanism by which the defendant sought confirmation of the award. As noted above, the Act only contemplates the Director of the HCAO seeking confirmation. See *supra* note 48 and accompanying text.

101. 309 Md. at 645, 526 A.2d at 48. The defendant apparently intended to dispose of the federal court complaint by the application of the principals of *res judicata*.

102. *Id.* at 645-48, 526 A.2d at 48-50. This discussion has important ramifications with

with the provisions of the BY Rules,¹⁰³ such noncompliance was insubstantial and in no way subverted the policy served by the rules. The court also determined that the legislature did not intend to limit the federal court's jurisdiction and thus the definition of "court" in the Act included a federal district court.¹⁰⁴ Although not specifically enunciating the procedure for seeking judicial review of a health claims arbitration award in federal court, the decision in *Ott* suggests that a party seeking to proceed in federal court should file both the notice of action to nullify and the complaint in that court.¹⁰⁵

E. Standard of Review for Compliance with the Act

The majority of appellate decisions reviewing cases arising under the Act have focused on the question of whether strict compliance with the Act is necessary to invoke judicial review or whether substantial compliance with its provisions is sufficient. A review of these decisions demonstrates that the appellate courts have offered inconsistent interpretations of the Act.

1. Strict Compliance—*Tranen v. Aziz*

The issue as to whether strict or substantial compliance with the provisions of the Act is necessary to invoke judicial review was addressed first by the court of special appeals in *Tranen v. Aziz*.¹⁰⁶ In *Tranen*, the

regard to survival of the strict compliance doctrine. See *infra* notes 176-182 and accompanying text.

103. 309 Md. at 649, 526 A.2d at 50.

104. *Id.* at 649-53, 526 A.2d at 50-52; cf. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06A(c)(1) (Supp. 1988) (after election to waive arbitration, complaint may be filed in circuit court or federal district court). In *Davison*, the United States District Court for the District of Maryland concluded that the legislature could not have intended to attempt to oust federal court jurisdiction over judicial review of health claims arbitration proceedings, and consequently the definition of the term "court" contained in the Act must include a federal district court. 462 F. Supp. at 779. The Court of Appeals of Maryland in *Ott* agreed with this common sense analysis. 309 Md. at 648-49, 526 A.2d at 50; see also *id.* at 654, 526 A.2d at 53 (McAuliffe, J., dissenting) (Maryland General Assembly and court of appeals most likely overlooked possibility of federal diversity jurisdiction when adopting the Act and BY Rules).

105. This may present a procedural difficulty, because the Federal Rules of Civil Procedure make no provision for commencing an action by a notice of action to nullify. See FED. R. CIV. P. 3 (action commenced by complaint). The Court of Appeals of Maryland made clear, however, that filing two separate documents is not necessary to accomplish that purpose. *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 649, 526 A.2d 46, 50 (1987); see also *id.* at 656, 526 A.2d at 54 (McAuliffe, J., dissenting). Thus, a claimant could combine the notice of action with a complaint. The procedure to be followed by a health care provider remains in doubt, although the court of appeals did leave open the possibility that the requirement of a notice of action to nullify, as opposed to the arbitration process itself, might be deemed to be procedural in nature by the federal court and thus might not be required when proceeding in a federal district court. 309 Md. at 649 n.5, 526 A.2d at 50 n.5.

106. 59 Md. App. 528, 476 A.2d 1170 (1984), *aff'd*, 304 Md. 605, 500 A.2d 636 (1985).

arbitration panel rendered an award in favor of the health care provider, and the claimants sought judicial review of that decision. The claimants had filed a declaration which alleged the same acts of negligence as in their HCAO claim,¹⁰⁷ but which did not explicitly ask to nullify the arbitration award. Later, beyond the time permitted for filing a notice of rejection, the claimants filed a copy of their declaration with the HCAO.

In response to the declaration, the health care provider filed preliminary motions objecting to the claimants' failure to fulfill the requirements for invoking judicial review of the award under the Act.¹⁰⁸ Subsequently, in an attempt to cure the deficiencies in their judicial review pleadings, the claimants filed an amended declaration, which contained language purporting to seek both a nullification of the award and a notice of action.¹⁰⁹

The circuit court dismissed the case for failure to comply with the provisions of the Act, and the claimants appealed to the court of special appeals. The court of special appeals affirmed the decision of the trial court.¹¹⁰ The court noted that the claimants had failed to file timely a notice of rejection and had failed to file timely a notice of action to nullify the award.¹¹¹

The claimants had argued that despite their failure to comply with the literal requirements of the Act, they had "substantially complied" with the Act.¹¹² The court, rejecting the claimants' contentions, concluded that, in order to invoke judicial review, compliance with these provisions of the Act and the BY Rules is mandatory.¹¹³

The court noted that the Act itself provides the sanction for non-compliance with these provisions: Unless judicial review is properly sought, the award is final and binding on the parties.¹¹⁴ Thus, the court concluded that non-compliance with the judicial review procedures of the Act mandated dismissal of the proceeding.¹¹⁵

Previous attempts by claimants to avoid the provisions of the Act by commencing an action directly in a circuit court had already been rejected. *Wimmer v. Richards*, 75 Md. App. 102, 108-09, 540 A.2d 827, 830-31, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988); *Schwartz v. Lilly*, 53 Md. App. 318, 324, 452 A.2d 1302, 1305 (1982); *Bishop v. Holy Cross Hosp.*, 44 Md. App. 688, 692, 410 A.2d 630, 632 (1980).

107. 59 Md. App. at 530, 476 A.2d at 1171.

108. *Id.* at 530-31, 476 A.2d at 1171.

109. *Id.* at 531, 476 A.2d at 1171-72.

110. *Id.* at 538, 476 A.2d at 1175.

111. *Id.* at 533-34, 476 A.2d at 1173.

112. *Id.* at 534-37, 476 A.2d at 1173-75.

113. *Id.* at 534-35, 476 A.2d at 1173-74. This interpretation is not surprising in light of the use of the words "must" and "shall" in section 3-2A-06 of the Act and rule BY4, respectively.

114. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(i) (Supp. 1988). Section 3-2A-05(i) makes the award final and binding "subject to § 3-2A-06," implying that all of § 3-2A-06 must be complied with to invoke judicial review. *See Tranen*, 59 Md. App. at 538, 476 A.2d at 1175.

115. 59 Md. App. at 538, 476 A.2d at 1175.

2. Erosion of Strict Compliance — *Mitcherling, Osheroff and Brothers*

The strict compliance rule enunciated in *Tranen* began to erode in *Mitcherling v. Rosselli*,¹¹⁶ the next decision of the court of special appeals to consider judicial review of a health claims arbitration award. This erosion continued in *Osheroff v. Chestnut Lodge, Inc.*¹¹⁷ and *Brothers v. Sinai Hospital*.¹¹⁸ All three cases involved non-compliance with mere technicalities which did not prejudice the other side and thus these cases did not lend themselves readily to the application of the strict compliance rule.¹¹⁹

In *Mitcherling v. Rosselli*,¹²⁰ the court considered whether sending a copy of a notice of rejection to the individual panel members is a prerequisite to invoking judicial review.¹²¹ In *Mitcherling*, the arbitration panel rendered an award in favor of the health care provider.¹²² The claimant sought judicial review of the award by timely filing an action to nullify the award in the circuit court.¹²³ In addition, the claimant filed a notice of rejection with the Director and sent a copy to counsel for the health care provider.¹²⁴ The claimant failed, however, to send a copy to the individual panel members as required by section 3-2A-06(a) of the Maryland Courts and Judicial Proceedings Code Annotated.

The health care provider argued that judicial review of the award was inappropriate because the claimant had failed to send copies of the notice of rejection to the panel members.¹²⁵ Despite the recent opinion in *Tranen*, however, the court rejected the health care provider's strict compliance argument. After reviewing the purpose behind the notice of rejection, the court determined that the legislature could not have intended to require that a notice of rejection be mailed to the panel members as a prerequisite to judicial review.¹²⁶ The implementing regulations for the

116. 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985).

117. 62 Md. App. 519, 490 A.2d 720, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985).

118. 63 Md. App. 235, 492 A.2d 656 (1985).

119. *See Wimmer v. Richards*, 75 Md. App. 102, 109-10, 540 A.2d 827, 831, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988).

120. 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985).

121. *Id.* at 121, 484 A.2d at 1063-64.

122. *Mitcherling v. Rosselli*, 304 Md. 363, 364-65, 499 A.2d 476, 476-77 (1985). The court of special appeals opinion is somewhat unclear in presenting the actual procedural posture of the case, but the decision of the court of appeals clarifies it. In the past, the Director of the HCAO, at the request of the party opposing judicial review, would file a petition for confirmation of the award pursuant to the Act if there was a procedural defect in the attempt to perfect judicial review. Generally, a denial of this petition was immediately appealable, as opposed to the denial of a motion to dismiss the action to nullify, which was only appealable at the conclusion of the case. However, the Director has since ceased this practice.

123. 61 Md. App. at 115, 484 A.2d at 1060-61.

124. *Id.*

125. *Id.* at 115, 484 A.2d at 1060; *see also* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a) (1984 & Supp. 1988).

126. 61 Md. App. at 118, 484 A.2d at 1062. When discussing *Mitcherling*, the court in *Wimmer v. Richards*, 75 Md. App. 102, 108-10, 540 A.2d 827, 831, *cert. denied*, 313

notice of rejection section provided that the party rejecting the award could do so by filing the notice of rejection with the Director and serving the notice on each other party.¹²⁷ The court noted that the agency implementing the statute contemplated a filing only with the HCAO, not with the individual panel members. When the Act was amended in 1979 to consolidate filings with the HCAO, however, the legislature "failed to delete" the requirement that a notice of rejection be filed with the arbitration panel. Thus, the court concluded that this filing became "merely a courtesy."¹²⁸

In both *Tranen* and *Mitcherling*, the court considered the failure of claimants to comply with the statutory requirements of the Act for seeking judicial review of a health claims arbitration award. The analytical approaches taken by the court in each case, however, are almost directly opposed. In *Tranen* the claimants completely disregarded the provisions of the Act, whereas in *Mitcherling* the claimant complied with the Act except for a seemingly inconsequential provision. Nevertheless, because the claimants in both cases complied with some but not all of the requirements of section 3-2A-06 of the Act, the award should have been final and binding pursuant to section 3-2A-05.¹²⁹

In *Osheroff*,¹³⁰ the third case involving this issue, an arbitration panel rendered an award in favor of the claimant, and the health care providers timely filed a notice of rejection with the HCAO and with the circuit court.¹³¹ The claimant then filed pleadings in the circuit court entitled "Action to Nullify HCA Award" and "Amended Action to Nullify HCA Award."¹³² The health care providers sought dismissal of the

Md. 506, 545 A.2d 1344 (1988) focused on the *Mitcherling* court's rejection of "technical irregularities" as means of depriving a party of legal rights. 61 Md. App. at 121, 484 A.2d at 1064. This is not surprising in light of dicta in the *Wimmer* opinion. See *infra* notes 183-191 and accompanying text.

127. 61 Md. App. at 119, 484 A.2d at 1062 (citing COMAR tit. 1, § 03.01.14B(1)).

128. 61 Md. App. at 119, 484 A.2d at 1063.

129. In *Tranen*, Judge Bishop summed up the results succinctly:

Section 3-2A-05(h) of the [Act] makes the award final and binding on the parties "subject to § 3-2A-06," implying that all the requirements of the judicial review section must be complied with to bring suit in court. If court suit could be brought despite noncompliance, the arbitral award would not be "final and binding" on the parties, as the statute prescribes.

59 Md. App. 528, 538, 476 A.2d 1170, 1175 (1984). Despite the seemingly trivial nature of the requirement at issue in *Mitcherling*, the same language would seem to apply.

130. 62 Md. App. 519, 490 A.2d 720, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985).

131. Part of the procedure followed by the health care providers is recorded by the court of special appeals in its opinion. *Id.* at 522, 490 A.2d at 721. The court of special appeals opinion seems to imply that because the health care providers failed to file a notice of action to nullify, they failed to perfect their appeal. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988); MD. R. BY2. The health care providers' brief reveals, however, that they did file a notice of action and therefore properly perfected their appeal. See Brief for Chestnut Lodge, Inc. at 3, *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 490 A.2d 720 (1984) (No. 1016), *cert. denied*, 304 Md. 363, 497 A.2d 1163 (1985).

132. 62 Md. App. at 524, 490 A.2d at 722.

claimant's action, arguing that because the claimant failed to file the appropriate pleadings, the circuit court lacked jurisdiction to hear the claim.¹³³ The circuit court agreed and dismissed the case.¹³⁴

The court of special appeals cited *Tranen*, but distinguished the case before it, holding that dismissal was not warranted. The court distinguished between failure to comply with the requirements of the Act and failure to comply with the rules of procedure after the provisions of the Act had been met.¹³⁵ The court found that although the claimant's original pleading failed to meet the requirements of the rules and the amended pleading only barely met those requirements, dismissal was not proper.¹³⁶

The court of special appeals decision in *Osheroff* used an improper analysis. In its attempt to differentiate between the BY Rules and the Act, the court ignored the fact that the Act itself requires the Maryland Rules of Procedure to establish at least a portion of the procedure for seeking judicial review.¹³⁷ Since the Act further provides that an award becomes final unless the Act's provisions are followed,¹³⁸ and since the Act incorporates by reference the rules of procedure, it is inconsistent to say that a party complied with the Act but not the rules related thereto.

Moreover, the court made no attempt to reconcile the differing analyses in *Tranen* and *Mitcherling*. In fact, having reached a result similar to the one in *Mitcherling*, the court neither cited the case nor explicitly used the substantial compliance analysis.¹³⁹ In an already confused area, the *Osheroff* decision contributed little guidance for practitioners.

Shortly after the *Osheroff* case, the court of special appeals further eroded the doctrine of strict compliance in *Brothers v. Sinai Hospital*.¹⁴⁰ *Brothers* involved claimants' attempts to seek judicial review of an unfavorable arbitration award. The claimants filed a notice of rejection and a notice of action to nullify, both of which were captioned "Before the Health Claims Arbitration Office of Maryland."¹⁴¹ The originals of those documents were filed with the HCAO, while copies were filed with the Circuit Court for Baltimore City along with a declaration. The health care providers sought dismissal of the action, claiming that because the caption of the pleadings indicated that they were filed in the HCAO and because only a copy of the notice of action to nullify was filed

133. *Id.* at 522, 490 A.2d at 721.

134. *Id.*

135. *Id.* at 525-26, 490 A.2d at 723.

136. *Id.* at 526, 490 A.2d at 723. The opinion described the amended pleading as having been "inartfully drawn" and one which "would never suffice as a model." *Id.*

137. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988).

138. *Id.* § 3-2A-05(i).

139. The reason for the court's failure to articulate the substantial compliance analysis may result from the fact that the claimant did not substantially comply with either the Act or the BY rules. See *Osheroff*, 62 Md. App. at 525-26, 490 A.2d at 723.

140. 63 Md. App. 235, 492 A.2d 656 (1985), *aff'd sub nom.*, *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986).

141. 63 Md. App. at 237, 492 A.2d at 657.

in the circuit court, the pleadings were filed in the wrong forum.¹⁴² The circuit court agreed, dismissing the action and confirming the award.¹⁴³

The court of special appeals reversed the action of the circuit court, applying the erroneous distinction between compliance with the provisions of the Act and compliance with the rules of procedure first enunciated in *Osheroff*.¹⁴⁴ Focusing on the claimants' actions taken before reaching the circuit court, the court of special appeals found that the claimants had fully complied with the terms of the statute.¹⁴⁵ The court reasoned that the claimants' miscaption of a pleading, although not constituting strict compliance with the rules, was one that could have been corrected easily by amendment and thus was not fatal to the action.¹⁴⁶

3. *Mitcherling, Tranen and Brothers*—The Court of Appeals

Mitcherling v. Rosselli,¹⁴⁷ *Tranen v. Aziz*¹⁴⁸ and *Cherry v. Brothers*¹⁴⁹ represented an opportunity for the court of appeals to address whether strict compliance with the Act was necessary or whether substantial compliance was sufficient. In reviewing the court of special appeals decisions, the court of appeals had the opportunity to resolve the differences between the various approaches taken below. Despite this opportunity, the court of appeals failed to reconcile the divergent decisions of the court of special appeals. Furthermore, the court of appeals' analysis of the compliance question also remains a source of confusion.

First, in *Mitcherling v. Rosselli*,¹⁵⁰ the court of appeals determined that although the claimant had failed to file a copy of his notice of rejection with the arbitration panel and with the Director as required by the Act, the claimant's actions constituted "literal compliance" with the Act; therefore, the petition for confirmation was properly denied.¹⁵¹ Consequently, the court found it unnecessary to consider whether strict compliance with the provisions of the Act was necessary, since it determined that actual compliance had occurred.¹⁵²

142. *Id.*; see MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988); MD. R. BY2.

143. 63 Md. App. at 237-38, 492 A.2d at 657.

144. *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 525, 490 A.2d 720, 723, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985).

145. 63 Md. App. at 238, 492 A.2d at 658.

146. *Id.* at 238-39, 492 A.2d at 658. The court of special appeals left open the possibility that prejudice to the health care providers might change the result. *Id.* In *Wimmer v. Richards*, 75 Md. App. 102, 540 A.2d 827, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988), the court characterized the decision in *Brothers* as "based on the fact that appellees were not prejudiced." *Id.* at 110, 540 A.2d at 831.

147. 304 Md. 363, 499 A.2d 476 (1985), *aff'g* 61 Md. App. 113, 484 A.2d 1060 (1984).

148. 304 Md. 605, 500 A.2d 636 (1985), *aff'g* 59 Md. App. 528, 476 A.2d 1170 (1984).

149. 306 Md. 84, 507 A.2d 613 (1986), *aff'g* *Brothers v. Sinai Hosp.*, 63 Md. App. 235, 492 A.2d 656 (1985).

150. 304 Md. 363, 499 A.2d 476 (1985).

151. *Id.* at 367, 499 A.2d at 478.

152. *Id.* at 368, 499 A.2d at 478. A dissenting opinion by Judge Smith, in which Judge Eldridge and Judge Couch joined, questioned the majority's analysis of the legisla-

Less than one month after *Mitcherling*, the court of appeals affirmed the decision of the court of special appeals in *Tranen v. Aziz* and squarely upheld strict compliance.¹⁵³ Announcing that it would "determine the procedures an aggrieved party must follow to obtain judicial review of an arbitration award,"¹⁵⁴ the court examined in detail the requirements of section 3-2A-06.¹⁵⁵ The court held that a notice of rejection, a notice of action to nullify, and a declaration were required in order to perfect judicial review.¹⁵⁶ Absent compliance with each of these provisions of the Act and the implementing BY Rules, any attempt to secure judicial review must be dismissed.¹⁵⁷ The court rejected claims of substantial compliance with the judicial review procedures, holding that such procedures were mandatory.¹⁵⁸

The court of appeals' opinion was not a unanimous one, however, and the concurring opinion of Judge McAuliffe foreshadowed the difficulties the court would have applying the doctrine of strict compliance in the future.¹⁵⁹ Judge McAuliffe was troubled by the court's apparent requirement that three separate filings were necessary to achieve strict compliance with the Act.¹⁶⁰ Thus, his concurrence leaves open the possibility that, under the concept of substantial compliance, parties could perfect judicial review by filing a pleading or pleadings combining the attributes of a notice of rejection, a notice of action to nullify, and a declaration.¹⁶¹

Finally, in *Cherry v. Brothers*¹⁶² the court of appeals upheld the court of special appeals' decision in *Brothers v. Sinai Hospital*, but with a slightly different analysis.¹⁶³ The court of appeals once again reviewed

tive intent, but did not intimate how the doctrine of substantial compliance might have changed the result if the majority had determined that the claimant had not complied with the provisions of the Act. *Id.* at 368-70, 499 A.2d at 478-79 (Smith, J., dissenting).

153. 304 Md. 605, 500 A.2d 636 (1985).

154. *Id.* at 608, 500 A.2d at 637.

155. *Id.* at 610-14, 500 A.2d at 638-40.

156. *Id.* at 612-14, 500 A.2d at 639-40.

157. *Id.* at 614, 500 A.2d at 640.

158. *Id.*

159. *Id.* at 614-15, 500 A.2d at 640-41 (McAuliffe, J., concurring). Judge McAuliffe's concurring opinion was joined by Judge Rodowsky. Five judges had joined in Judge Cole's majority opinion.

160. *Id.*

161. *Id.* at 615, 500 A.2d at 641; *see also* *Wimmer v. Richards*, 75 Md. App. 102, 109 n.8, 540 A.2d 827, 831 n.8, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988) (discussion of Judge McAuliffe's concurring opinion). *Cf. infra* notes 359-375 and accompanying text (proposal to abolish notice of rejection and notice of action to nullify). Having authored the opinion in *Mitcherling v. Rosselli*, 304 Md. 363, 499 A.2d 476 (1985), it is not surprising that Judge McAuliffe also left open the possibility that combining pleadings might be literal compliance with the provisions of the Act. What is surprising is that Judge McAuliffe did not utilize the substantial compliance doctrine in *Mitcherling*.

162. 306 Md. 84, 507 A.2d 613 (1986).

163. *Brothers v. Sinai Hosp.*, 63 Md. App. 235, 492 A.2d 656 (1985), *aff'd sub nom.*, *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986).

its earlier expositions of the requirements for seeking judicial review¹⁶⁴ and, as in *Mitcherling*, found that the claimants had fully complied with the requirements despite the miscaption of their pleadings and the fact that the circuit court had never received an original pleading.¹⁶⁵

4. The Bright Line Rule—*Spivey* and *Ott*

Less than one year after the court of appeals decided *Brothers*, the court of special appeals, in *Golub v. Spivey*,¹⁶⁶ sounded the death knell for the doctrine of strict compliance set forth in *Tranen*. Shortly thereafter, the court of appeals in *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*¹⁶⁷ adopted the *Spivey* rationale, although in a distinct procedural posture. Instead of relying on the subterfuge of literal compliance, the *Spivey* and *Ott* courts adopted a bright line rule which may reconcile prior cases.

In *Spivey*, the health care provider filed a notice of rejection with the HCAO and a notice of action to nullify with the Circuit Court for Baltimore City, seeking judicial review of an adverse arbitration award.¹⁶⁸ The claimant failed to file a declaration within the Act's thirty-day time limit provision,¹⁶⁹ whereupon the health care provider filed preliminary motions to dismiss.¹⁷⁰ These motions were ultimately denied, and the case proceeded to trial, resulting in an adverse jury verdict for the health care provider.¹⁷¹

On appeal, the health care provider again attacked the claimant's

164. 306 Md. at 88-89, 507 A.2d at 615.

165. Although presented with a perfect opportunity to do so, the court of appeals did not adopt the bright line rule first enunciated by the court of special appeals in *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 525, 490 A.2d 720, 723, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985), and followed in *Brothers*, 63 Md. App. at 238, 492 A.2d at 657-58; *see infra* notes 166-182 and accompanying text (adoption of bright line rule by court of appeals and court of special appeals). The court of appeals also pointed out that the rules do not require a typewritten original to be filed, *Cherry*, 306 Md. at 90-91, 507 A.2d at 616, and that the rules then in effect did not provide any requirements for a caption, *id.* at 91, 507 A.2d at 616-17. *Cf.* MD. R. 1-301(a) (requirements for caption). Therefore, regardless of whether the pleading was an original and properly captioned, it was "filed" as required by the Act. 306 Md. at 92, 507 A.2d at 616-17. In fact, the records of the circuit court reflected that the document was filed. *Id.*

166. 70 Md. App. 147, 520 A.2d 394, *cert. denied*, 310 Md. 2, 526 A.2d 954 (1987).

167. 309 Md. 641, 526 A.2d 46 (1987).

168. 70 Md. App. at 151, 520 A.2d at 396.

169. *Id.* at 152, 520 A.2d at 396. Counsel for the claimant alleged that the late filing of the complaint was due to their non-receipt of the notice of action to nullify and notice of rejection. *Id.*

170. The procedural history of *Spivey* is tortuous. The health care provider filed both a motion raising preliminary objection and a motion *ne recipiatur* or to strike with the circuit court. Neither of these motions were allegedly received by counsel for the claimant, and no response was filed. Consequently, the circuit court dismissed the case. However, upon receipt of a copy of the order dismissing the case, the claimant filed a motion to set aside the dismissal, and this order was ultimately granted. *Id.* at 152-53, 520 A.2d at 396-97.

171. *Id.* at 153, 520 A.2d at 397.

failure to file a timely complaint.¹⁷² The court of special appeals differentiated between those requirements set forth under the Act and those set forth under the Maryland Rules of Procedure.¹⁷³ The court of special appeals concluded that because the rules, not the Act, require the filing of a complaint within thirty days after a notice of action to nullify, failure to satisfy that requirement did not mandate dismissal.¹⁷⁴ This decision makes clear that, at least with respect to any action required to be taken after the notice of rejection and notice of action to nullify are filed, the court of special appeals will not require strict compliance.¹⁷⁵

The court of appeals indicated its concurrence with this view in *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*¹⁷⁶ In *Ott*, the claimants filed a notice of rejection followed only by a pleading entitled "Action to Nullify Award."¹⁷⁷ The court of appeals held that failure to comply with Rule BY4(a)(1) does not require dismissal¹⁷⁸ and that it was an abuse of discretion to dismiss when the pleading was no more than a complaint subject to dismissal for failure to state a claim but with leave to amend.¹⁷⁹ Thus, the court of appeals would permit an amendment of

172. *Id.*

173. *Id.* at 155-58, 520 A.2d at 399-400.

174. *Id.* In his argument, the health care provider pointed to language in *Tranen* which appeared to be dispositive of the issue in *Spivey*:

If the award is in favor of the claimant and the health care provider rejects the award and files a notice of action to nullify, and thereafter the claimant fails to file a complaint within the allotted time, the arbitral award is nullified and the case is concluded.

Tranen v. Aziz, 59 Md. App. 528, 533-34, 476 A.2d 1170, 1173 (1984), *aff'd*, 304 Md. 605, 508 A.2d 636 (1985) (*quoted in Spivey v. Golub*, 70 Md. App. at 158, 520 A.2d at 399-400). The court rejected this language, however, as dicta. 70 Md. App. at 158, 520 A.2d at 399-400. In *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 650 & n.7, 526 A.2d 46, 51 & n.7 (1987), the court of appeals rejected the language of the court of special appeals in *Tranen* as well as pointing out that it was "conspicuously omitted" from the court of appeals decision in *Tranen*. See *Tranen v. Aziz*, 304 Md. 605, 500 A.2d 636 (1985). The trial court in *Spivey* was vested with discretion to determine the appropriate sanction for untimely filing. 70 Md. App. at 157-58, 520 A.2d at 399-400. The standard to be utilized by the trial court is to examine the consequences of the failure "in light of the totality of the circumstances." *Id.* at 157, 520 A.2d at 399; see MD. R. 1-201(a). The decision of the trial court will only be reversed upon abuse of discretion. 70 Md. App. at 158, 520 A.2d at 399.

175. Although the court of appeals denied *certiorari* in *Spivey v. Golub*, 310 Md. 2, 526 A.2d 954 (1987), in the very next decision dealing with the Act, the court cited the court of special appeals decision with approval when discussing the requirement that a complaint be filed. *Ott*, 309 Md. at 647 n.3, 652, 526 A.2d at 49 n.3, 52.

176. 309 Md. 641, 526 A.2d 46 (1987).

177. *Id.* at 652, 526 A.2d at 52. The reason for the claimants' failure to file a complaint was the claimants' attempt to have their case heard both in state court and the United States district court. See *supra* note 99 and accompanying text.

178. 309 Md. at 652, 526 A.2d at 52. The court termed it an "insubstantial noncompliance" and explained it to be a noncompliance which does not subvert the policy of the rules. In so doing, the court held that violations of Rule BY4(a)(1) are to be considered under the provisions of Rule 1-201, which permits wide discretion. *Id.* (citing MD. R. 1-201).

179. *Id.* at 652, 526 A.2d at 52. Judge McAuliffe dissented from the majority opinion,

the notice of action to nullify to conform to the pleading requirements for a complaint.¹⁸⁰ Although *Ott* may be limited to the peculiar circumstances of that case,¹⁸¹ its language clearly signifies adoption of the *Spivey* rationale by the court of appeals.¹⁸²

5. Beyond the Bright Line—*Wimmer*

Dicta in the most recent opinion by the court of special appeals, *Wimmer v. Richards*,¹⁸³ suggests the inclination of that court to ignore the bright line rule established by *Spivey* and *Ott* and to extend the doctrine of substantial compliance to any requirement of the Act for perfecting judicial review. In *Wimmer*, claimants sought judicial review of an adverse health claims arbitration award by mailing the various required pleadings to the appropriate filing officers.¹⁸⁴ The health care providers moved to dismiss the circuit court proceeding, arguing that the claimants had failed to file a notice of rejection, and the circuit court dismissed the case.¹⁸⁵ The court of special appeals reversed and remanded on a narrow

principally on the ground that the majority went further than to permit the claimants to escape a vexing procedural problem which they did their best to avoid on their own. *Id.* at 653-57, 526 A.2d at 52-55. Judge McAuliffe objected to the majority's decision to allow the claimants to proceed against the corporate health care provider in state court, despite the claimants' express intention not to do so. *Id.* at 656-57, 526 A.2d at 54. Judge McAuliffe would have dismissed the case without prejudice, so that the claimants could proceed in federal court as they desired. *Id.* at 657, 526 A.2d at 54-55.

180. *Id.* at 652, 526 A.2d at 52. In his dissent, Judge McAuliffe seemed troubled by the majority's holding that an amendment is permissible to allow the filing of a complaint when the pleading being amended neither resembled a complaint nor was intended to be one. *Id.* at 657, 526 A.2d at 54-55.
181. The decision in *Ott* was clearly an attempt by the court of appeals to extricate diligent claimants from a procedural problem acknowledged to result from an oversight in the Act and the BY Rules. *See id.* at 654, 526 A.2d at 53. Thus, the decision may not present a fair reading of the view of the court of appeals when presented with less diligent claimants where no such problem exists. However, in *Wimmer v. Richards*, 75 Md. App. 102, 540 A.2d 827, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988), the court of special appeals interpreted *Ott* as "resolv[ing] the uncertainty over substantial versus strict compliance." *Id.* at 111, 540 A.2d at 832. *But see infra* notes 183-191 and accompanying text (criticizing the court's opinion in *Wimmer*).
182. As already noted, the court of appeals cited *Spivey* with approval in *Ott*. 309 Md. at 647 n.3, 652, 526 A.2d at 49 n.3, 52. The court of appeals cited its opinion in *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986), as if it was the genesis for the distinction between the requirements of the Act and the requirements of the BY Rules, which it definitely was not. *See supra* note 165.
183. 75 Md. App. 102, 540 A.2d 827, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988).
184. *Id.* at 105-06, 540 A.2d at 829.
185. *Id.* at 106, 540 A.2d at 829. Whether or not the HCAO actually received the notice of rejection is a subject of dispute. All the other addressees of the mailing had received timely notice of the pleadings. The health care providers, in support of their motions, established that the notice of rejection did not appear on the HCAO docket. *Id.* The court of special appeals, however, held that a legitimate inference could be drawn that the notice of rejection had been timely filed, based on the certificate of service and receipt by other addressees. *Id.* at 106 n.4, 540 A.2d at 829 n.4. *See L. MCLAIN, supra* note 51, § 301.2, at 196-97, § 301.3, at 219 n.61.

holding.¹⁸⁶

Despite the narrow holding in the case, the court of special appeals used the opinion as a vehicle for broad dicta virtually disposing of strict compliance. Although the court acknowledged the previous application of the strict compliance doctrine, the court also discussed its erosion in subsequent cases.¹⁸⁷ The court ignored the distinction established by earlier decisions¹⁸⁸ between violations of the BY Rules and violations of the provisions of the Act, and seemed to extend substantial compliance analysis to any action taken to seek judicial review under the Act.¹⁸⁹ Thus, the *Wimmer* opinion extends the faulty analysis begun in earlier decisions¹⁹⁰ and misinterprets the court of appeals decision in *Ott* to further the reach of the doctrine of substantial compliance.¹⁹¹ Since the dicta in *Wimmer* presents such a broad extension of the doctrine and since the narrow holding in that case precluded full analysis of such an extension, reliance on the *Wimmer* opinion should be severely limited.

6. Standard of Review—Summary

The Maryland appellate courts have had difficulty formulating an approach to reviewing compliance with the judicial review procedures of the Act. Having ostensibly rejected the doctrine of substantial compliance in *Tranen v. Aziz*,¹⁹² the court of appeals thereafter offered the alternative of "literal compliance" when faced with various procedural defects.¹⁹³ Despite sound rejection of the doctrine of substantial compliance in *Tranen*, the appellate courts continue to use the doctrine even if

186. 75 Md. App. at 113, 540 A.2d at 833. The court remanded the case to the circuit court for a factual finding to determine whether or not the HCAO had received the notice of rejection, and if so, whether it was subsequently misplaced. *Id.* The court withheld ruling on whether the doctrine of substantial compliance would save the claims in the latter situation. *Id.*

187. *Id.* at 108-11, 540 A.2d at 830-32.

188. *See supra* notes 166-182 and accompanying text.

189. 75 Md. App. at 111, 540 A.2d at 832.

190. *See supra* notes 137-138 and accompanying text.

191. Although the court of appeals in *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 526 A.2d 46 (1987), adopted the bright line rule, the *Wimmer* court ignores the decision of *Golub v. Spivey*, 70 Md. App. 147, 520 A.2d 394, *cert. denied*, 310 Md. 2, 526 A.2d 954 (1987). For example, the court in *Wimmer* construed the language in *Ott* that discusses "substantial compliance with the Rules" to permit application of the doctrine of substantial compliance to the filing of a notice of rejection. *Wimmer*, 75 Md. App. at 111, 540 A.2d at 832 (interpreting *Ott*, 309 Md. at 651, 526 A.2d at 51). The *Wimmer* case was decided under an abuse of discretion standard. *Id.* at 113, 540 A.2d at 833. This standard is applied to consideration of "rule-prescribed" requirements. *Golub*, 70 Md. App. at 157, 520 A.2d at 399.

192. 304 Md. 605, 500 A.2d 636 (1985); *see supra* notes 153-161 and accompanying text.

193. *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986); *Mitcherling v. Rosselli*, 304 Md. 363, 499 A.2d 476 (1985); *see supra* notes 150-152 and accompanying text. Literal compliance differs from strict compliance in that there is some defect in the attempt to perfect judicial review which the court interprets as being within the literal meaning of the Act.

only for violations of the BY Rules,¹⁹⁴ and broad dicta in a recent case would extend it even further.¹⁹⁵ Each approach has its difficulties: Strict compliance may lead to particularly harsh results;¹⁹⁶ literal compliance is hard to apply and often calls for strained construction of the Act; and substantial compliance conflicts with the mandate of the legislature.¹⁹⁷

Taken together, the various appellate opinions seem to require a party seeking judicial review to comply with the requirement that a notice of rejection be filed, albeit with the place of filing loosely construed.¹⁹⁸ Similarly, the courts seem to require that a notice of action to nullify be filed, although again with some leeway.¹⁹⁹ Nevertheless, the boundaries of the doctrine of literal compliance are not well defined. Since the Act specifically deals with a failure to file these pleadings timely,²⁰⁰ parties seeking judicial review should pay close attention to them and ensure that they are timely filed notwithstanding recent dicta which seems to loosen the statutory restrictions. Beyond the mere filing of those pleadings, the trend is to permit much more latitude. In fact, the latest cases adopt a very liberal attitude toward compliance with the provisions of the BY Rules,²⁰¹ despite the fact that those rules are mandated

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194. *Mitcherling v. Rosselli*, 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985); *Tranen*, 304 Md. 605, 614-15, 500 A.2d 636, 640-41 (McAuliffe, J., concurring). This assumes that substantial compliance differs from literal compliance.
195. *Wimmer v. Richards*, 75 Md. App. 102, 540 A.2d 827, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988).
196. It is not surprising that the doctrine of strict compliance was developed from *Tranen v. Aziz* — the case with the most egregious failure to comply with the Act's provisions. See *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 651, 526 A.2d 46, 51 (1987); *Tranen v. Aziz*, 59 Md. App. 528, 530-31, 476 A.2d 1170, 1171-72 (1984), *aff'd*, 304 Md. 605, 500 A.2d 636 (1985).
197. *Cf.* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06A(c)(3) (Supp. 1988) (failure to file timely complaint after election to waive arbitration *may* constitute grounds for dismissal upon finding of prejudice).
198. Compare *Tranen v. Aziz*, 304 Md. 605, 500 A.2d 636 (1984) (no notice of rejection filed) with *Mitcherling v. Rosselli*, 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985) (notice of rejection filed with HCAO but not with panel members). *But see* *Wimmer v. Richards*, 75 Md. App. 102, 540 A.2d 827, *cert. denied*, 313 Md. 506, 545 A.2d 1344 (1988) (dicta extending doctrine of substantial compliance).
199. Compare *Tranen v. Aziz*, 304 Md. 605, 500 A.2d 636 (1985) (notice of action to nullify filed over 60 days after service of award) with *Cherry v. Brothers*, 306 Md. 72, 507 A.2d 613 (1986) (notice of action to nullify was filed, but arguably filed in HCAO instead of circuit court).
200. Section 3-2A-05(i) of the Act makes the award final and binding on the parties unless section 3-2A-06 is complied with. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(i) (Supp. 1988). A final award may be confirmed and become a final judgment among the parties to the arbitration proceeding. *Id.* The court in *Wimmer* did not intimate how application of the doctrine of substantial compliance to pleadings required under section 3-2A-06 would affect the operation of these statutory sections.
201. *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 526 A.2d 46 (1987); *Golub v. Spivey*, 70 Md. App. 147, 520 A.2d 394, *cert. denied*, 310 Md. 2, 526 A.2d 954 (1987); *cf.* *Wimmer*, 75 Md. App. at 112-13, 540 A.2d at 832-33 (dicta

by the same section of the Act which requires a notice of rejection.²⁰² How far the appellate courts will permit a party to deviate from the BY Rules remains to be seen.²⁰³

F. Failure to Arbitrate

In addition to compliance with the provisions of section 3-2A-06 of the Act, the court of appeals also has interpreted the Act to include a requirement that a claimant actually arbitrate, not just file, a claim with the HCAO in order to be entitled to circuit court review.²⁰⁴ In *Bailey v. Woel*,²⁰⁵ the claimants filed a claim with the HCAO and conducted discovery.²⁰⁶ At the scheduled hearing, however, the claimants refused to produce any evidence in support of their claim, whereupon the panel dismissed the case.²⁰⁷ The claimants sought judicial review of the dismissal, and the circuit court dismissed the proceeding on the ground that the claimants had failed to fulfill a condition precedent to commencement of an action in circuit court.²⁰⁸

On appeal, the court of appeals considered whether the claimants' actions satisfied the "condition precedent" established by the Act.²⁰⁹ Rejecting the claimants' argument that the mere filing of a claim satisfied the condition,²¹⁰ the court held that the Act required "a thorough dispute resolution process in which a plaintiff would produce evidence to prove his case before the arbitration panel prior to filing suit in court."²¹¹

extending doctrine of substantial compliance). A good case can be made for limiting *Golub* to its facts, since the claimant alleged that she did not even receive notice of the health care provider's notice of action to nullify and notice of rejection. 70 Md. App. at 151-52, 520 A.2d at 396-97. Similarly, *Ott* also may not represent the position of the court of appeals when the latter is confronted with the issue of a claimant filing an untimely complaint. See *supra* note 181; cf. *Wimmer*, 75 Md. App. at 109, 540 A.2d at 831.

202. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988); see also *supra* notes 137-138 and accompanying text (discussing distinction between requirements of Act and requirements of BY Rules).

203. The Maryland Rules of Procedure provide considerable discretion to courts dealing with rule violations. MD. R. 1-201(a). On the other hand, the appellate courts consistently have held that the rules are not guides, but "precise rubrics." See, e.g., *Robinson v. Board of County Comm'rs*, 262 Md. 342, 346, 278 A.2d 71, 73 (1971); *Williams v. State*, 22 Md. App. 714, 717, 325 A.2d 427, 429 (1974). Unfortunately, the balancing of these competing policies does not lend itself to predictability.

204. *Bailey v. Woel*, 302 Md. 38, 485 A.2d 265 (1984).

205. *Id.*

206. *Id.* at 40, 485 A.2d at 265-66. The court of appeals described the discovery as "minimal." *Id.*

207. *Id.*

208. The court of special appeals affirmed the decision of the circuit court in a brief opinion. *Bailey v. Woel*, 55 Md. App. 488, 462 A.2d 91 (1983), *aff'd*, 302 Md. 38, 485 A.2d 265 (1984).

209. 302 Md. at 41 n.2, 485 A.2d at 266 n.2 (citing MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02(a) (1984 & Supp. 1988) and *Attorney Gen. v. Johnson*, 282 Md. 274, 283-84, 385 A.2d 57, 63, *appeal dismissed*, 439 U.S. 805 (1978)).

210. 302 Md. at 42, 485 A.2d at 266-67.

211. *Id.* at 42, 485 A.2d at 267. The court of appeals considered and rejected authority

The scope of the *Bailey* decision was considered in *Wyndham v. Haines*.²¹² In *Wyndham*, an arbitration panel dismissed the claimants' case after a hearing on the merits for failure to present a prima facie case.²¹³ After the claimant filed pleadings seeking judicial review, the circuit court dismissed the case for failure to arbitrate based on the claimants' failure to present a prima facie case before the panel.²¹⁴ The court of appeals, reversing the lower court's dismissal, refused to extend its holding in *Bailey* to require that a claimant establish a prima facie case before the arbitration panel. The court held that an "evidentiary shortcoming" cannot be equated with a failure to arbitrate.²¹⁵

In light of *Wyndham*, the scope of *Bailey* seems to be severely limited.²¹⁶ Only if a claimant willfully refuses to present evidence at the arbitration hearing will the case be dismissed at the circuit court level for failure to arbitrate. Less egregious inaction does not constitute failure to satisfy the Act's precondition.²¹⁷

to the contrary, stating that it did not give sufficient deference to the statutory scheme. 302 Md. at 44, 485 A.2d at 267-68 (discussing *Phoenix Gen. Hosp. v. Superior Ct.*, 138 Ariz. 504, 675 P.2d 1323 (1984)); see also *Fisher v. Herrera*, 367 So.2d 204 (Fla. 1978).

212. 305 Md. 269, 503 A.2d 719 (1986).

213. *Id.* at 271, 503 A.2d at 721. The reason for the claimants' failure is not reflected in the record. *Id.* at 272 n.3, 503 A.2d at 721 n.3. However, the court of appeals commented that the failure was not based on a deliberate refusal to present evidence like that in *Bailey*. *Id.* at 271 n.1, 503 A.2d at 721 n.1.

214. *Id.* at 272-73, 503 A.2d at 721-22.

215. *Id.* at 275, 503 A.2d at 722-23. The court of appeals stressed the fact that the circuit court did not independently review the evidence presented before the panel in order to determine whether in the circuit court's view a prima facie case had not been made. *Id.* at 272 n.3, 503 A.2d at 721 n.3. Nevertheless, the court's holding does not seem to permit a circuit court to dismiss a case for failure to arbitrate on the ground that no prima facie case was established, even if the circuit court makes this determination after reviewing the record of the arbitration proceeding.

216. Although the case was not cited in *Wyndham*, the court of appeals indicated in dicta in *McClurkin v. Maldonado*, 304 Md. 225, 233-34, 498 A.2d 626, 630-31 (1985), that the rationale applied in *Bailey v. Woel*, 302 Md. 38, 485 A.2d 265 (1984), is applicable when an award is rendered against a claimant for failure to provide discovery.

217. One of the most common failures of claimants in arbitration proceedings is the failure to present expert testimony. *MacAlister & Scanlan*, *supra* note 4, at 509-10. This should be fatal to the case, except in some very narrow circumstances. See *Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 622-23, 258 A.2d 595, 598-600 (1969); cf. *Thomas v. Corso*, 265 Md. 84, 97-99, 288 A.2d 379, 387-88 (1972) (discussion of exceptions to rule requiring expert testimony). Under the holding in *Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719 (1986), the failure to present expert testimony at the arbitration hearing may not be the basis for dismissal of a circuit court action for failure to arbitrate.

Fortunately, a recent amendment of the Act should provide relief from a claimant's failure to produce an expert in support of his case. Section 3-2A-04(b) of the Act, as amended by 1986 Md. Laws 2353, requires a claimant to provide within 90 days of filing a claim a certificate of a qualified medical expert that the claim is meritorious. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(b) (Supp. 1988). In the absence of such a certificate, the claim is to be dismissed. *Id.*; *Robinson v. Pleet*, 76 Md. App. 173, 544 A.2d 1 (1988). Since the inclusion of this certificate requirement

G. *Effect of the Award upon Circuit Court Proceedings*

Once a claimant has fulfilled the condition precedent²¹⁸ to circuit court action by completing arbitration under the Act²¹⁹ and has properly perfected review in circuit court²²⁰ by complying with the provisions of section 3-2A-06 of the Act, the most important portion of the Act relates to the effect of the award upon the circuit court proceeding.²²¹ Section 3-

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- indicates the importance to the General Assembly of expert testimony in arbitration of a claim under the Act, the holding in *Bailey* should be extended to cover those situations in which a case is dismissed for failure to file an expert's certificate.
218. The Act does not deprive a circuit court of jurisdiction over medical malpractice claims; instead it creates a "condition precedent to the institution of a court action. . . ." *Oxtoby v. McGowan*, 294 Md. 83, 91, 447 A.2d 860, 865 (1982) (citing *Attorney Gen. v. Johnson*, 282 Md. 274, 283-84, 385 A.2d 57, 63, *appeal dismissed*, 439 U.S. 805 (1978)); *accord Stifler v. Weiner*, 62 Md. App. 19, 25, 488 A.2d 192, 195 (1985); *Schwartz v. Lilly*, 53 Md. App. 318, 323 n.1, 452 A.2d 1302, 1305 n.1 (1982). Despite the fact that the condition precedent is not jurisdictional, it has many of the attributes of subject matter jurisdiction. For example, it may be raised by the court *sua sponte*. *Compare Resh v. Resh*, 271 Md. 133, 137, 314 A.2d 109, 111 (1974) (discussing subject matter jurisdiction) *with Oxtoby*, 294 Md. at 91, 447 A.2d at 865 (discussing condition precedent created by Act). The parties are not permitted to agree to waive compliance with the Act's precondition, just as they may not agree to confer subject matter jurisdiction on a court. *Compare Attorney Grievance Comm'n v. Hyatt*, 302 Md. 683, 690, 490 A.2d 1224, 1225 (1985) (discussing subject matter jurisdiction) *with Oxtoby*, 294 Md. at 92, 447 A.2d at 865 (discussing condition precedent created by Act) *and McClurkin*, 304 Md. at 229-30, 498 A.2d at 628-29 (same). *Cf. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06A* (Supp. 1988) (statutory addition permitting mutual waiver of arbitration). The condition precedent also may be raised at any time up to final determination of direct appeals. *Compare Gill v. Physicians & Surgeons Bldg., Inc.*, 153 Md. 394, 399, 138 A. 674, 676 (1927) (discussing subject matter jurisdiction) *with Oxtoby*, 294 Md. at 92, 447 A.2d at 865 (discussing condition precedent created by Act).
219. *Bailey v. Woel*, 302 Md. 38, 485 A.2d 265 (1984); *see also supra* notes 204-217 and accompanying text (discussing requirement to arbitrate).
220. Although the circuit court proceeding commenced by the notice of action to nullify is commonly referred to as an appeal, the cases have accurately stated that it is not: "Although called an action to nullify, the procedure is not analogous to an appeal from an administrative decision. Rather, the action is essentially a separate common law tort action with the added element that the arbitration process must be complete." *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 646, 526 A.2d 46, 49 (1987); *see also Wyndham*, 305 Md. at 275, 503 A.2d at 723 (Act does not abridge or preclude a medical malpractice claimant's right to a common law tort action); *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 525, 490 A.2d 720, 723 (judicial review is not continuation of arbitration proceeding but new, separate and distinct litigation), *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985).
- This common misperception among practitioners has led to practical problems. *See infra* notes 327-358 and accompanying text (discussing return to arbitration). Much of the confusion surrounding this area could be corrected by changing the present judicial review procedure. *See infra* notes 359-375 and accompanying text (discussing proposal for modifying judicial review procedure).
221. This assumes that only judicial effects of the Act have any meaning to the parties. Whether the Act provides an effective mechanism for extra-judicial dispute resolution is beyond the scope of this article, but the proposition is doubtful. *See supra* note 4. Nor does the statement in the text intend to minimize the impact on all the parties of the economic costs associated with arbitration. *See MacAlister & Scanlan, supra* note 4, at 503; *cf. Attorney Gen. v. Johnson*, 282 Md. 274, 297-98, 385

2A-06(d) of the Act states:

Admissibility of award; presumption of correctness.

— Unless vacated by the court pursuant to subsection (c), the arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.²²²

Section 3-2A-06(d) provides an advantage to the successful party to the arbitration proceeding in the subsequent circuit court proceeding.²²³ Thus, careful analysis of the operation and scope of section 3-2A-06(d) is imperative.²²⁴

The first discussion of the presumption established by the Act occurred in *Attorney General v. Johnson*,²²⁵ in which the court of appeals upheld the Act as constitutional. Rejecting the plaintiffs' claim that the Act deprived them of their right to a jury trial,²²⁶ the court held that the presumption was merely a rule of evidence.²²⁷ Section 3-2A-06(d) applied the same burden as the burden of proof in a case in which the Act did not apply, because a claimant who had been unsuccessful in arbitration still bore the burden of proving a case in the circuit court.²²⁸

Attorney General v. Johnson, arising from a declaratory judgment action, not from judicial review of an arbitration award, addressed the operation of the presumption from a claimant's point of view.²²⁹ *Hahn v. Suburban Hospital Association*,²³⁰ however, which arose in the context of judicial review of an arbitration award, considered the effect of section 3-

A.2d 57, 70-76, *appeal dismissed*, 439 U.S. 805 (1978) (discussing whether expenses and delay consequent to arbitration rises to constitutional dimensions).

222. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984 & Supp. 1988); *see also* MD. R. BY5.

223. One of the purposes behind the Act was to decrease the number of malpractice cases in the circuit court. *See* *Bailey v. Woel*, 302 Md. 38, 42, 485 A.2d 265, 266 (1984); *Attorney Gen. v. Johnson*, 282 Md. 274, 290, 385 A.2d 57, 66, *appeal dismissed*, 439 U.S. 805 (1978). If the parties accept the results of arbitration without judicial review, the Act has achieved its goal and the procedural effect of arbitration thereafter is irrelevant because the litigation has terminated. *But cf.* *MacAlister & Scanlan*, *supra* note 4, at 501 (evidence that judicial review is sought in over fifty percent of cases brought under the Act).

224. *See* C. Varner, *Practice and Procedure Under the Health Care Malpractice Claims Act* (May, 1985) (unpublished manuscript) (discussing questions unanswered by appellate cases), *reprinted in* M. SHAR, *THE MEDICAL MALPRACTICE LAW OF MARYLAND*, at A-26 (1985).

225. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978).

226. *Id.* at 291, 385 A.2d at 67; *see* U.S. CONST. amend. VII; MD. CONST. art. XV, § 6.

227. 282 Md. at 291-95, 385 A.2d at 67-69.

228. *Id.* at 293, 385 A.2d at 68.

229. *Id.* at 293-94, 385 A.2d at 68-69. The court of appeals did not directly address the constitutionality of the Act from the point of view of a health care provider seeking judicial review, since it merely held that a claimant would not be able to demonstrate any prejudice as a result of the Act's presumption. *Id.* at 293 n.18, 385 A.2d at 68 n.18.

230. 54 Md. App. 685, 461 A.2d 7 (1983).

2A-06(d) from a health care provider's point of view.²³¹

In *Hahn*, upon the health care provider's filing of a notice of action to nullify the award,²³² the case proceeded to a jury trial, resulting in a verdict in his favor.²³³ On appeal, the claimants argued that the health care provider had presented insufficient evidence to overcome the presumption in favor of the award.²³⁴ The court affirmed the judgment, concluding that the health care provider had sustained its burden of presenting sufficient evidence to permit the case to go to the jury.²³⁵ The court noted that section 3-2A-06(d) sets forth no new rule when the health care provider receives a favorable award from the panel and the claimant appeals; however, when the health care provider loses before the panel, section 3-2A-06(d) shifts the burden from the claimant to the health care provider.²³⁶

One federal case, *Lipscomb v. Memorial Hospital*,²³⁷ is also instructive. *Lipscomb* involved trial court review of an arbitration award rendered in favor of the health care provider.²³⁸ On appeal, the health care provider argued that the trial court erred in failing to instruct the jury that the standard of proof for overcoming the Act's presumption was higher than a preponderance of the evidence.²³⁹ The United States Court of Appeals for the Fourth Circuit affirmed the action of the trial court, however, holding that *Attorney General v. Johnson* expressly adopted preponderance of the evidence as the standard for overcoming the presumption imposed by section 3-2A-06(d).²⁴⁰

Taken together, *Johnson*, *Hahn* and *Lipscomb* outline the operation of section 3-2A-06(d) and indicate that the health care provider has more to lose as a result of arbitration. If the claimant is unsuccessful at arbitration, the claimant has the burden of proof and thus is in the same position as if arbitration had not occurred.²⁴¹ On the other hand, if the

231. *Id.* at 688, 461 A.2d at 9-10. In *Hahn*, the plaintiff also rejected the award. *Id.* For a discussion of piecemeal rejection of awards, see *supra* note 51.

232. The court of special appeals did not discuss whether the claimants, the health care provider, or both, filed an notice of action to nullify. See 54 Md. App. at 688-89, 461 A.2d at 10; MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988); MD. R. BY2(a).

233. 54 Md. App. at 691, 461 A.2d at 11. The plaintiffs' motion for judgment n.o.v. was denied by the circuit court. *Id.*

234. *Id.* at 692, 461 A.2d at 11.

235. *Id.* at 694-702, 461 A.2d at 12-16.

236. *Id.* at 692, 461 A.2d at 11-12.

237. 733 F.2d 332 (4th Cir. 1984).

238. *Id.* at 333.

239. *Id.* at 338.

240. *Id.* (citing *Attorney Gen. v. Johnson*, 282 Md. 274, 293-94, 385 A.2d 57, 68-69, *appeal dismissed*, 439 U.S. 805 (1978)).

241. *Johnson*, 282 Md. at 293, 385 A.2d at 68. This interpretation ignores the ability of the health care provider to admit the award into evidence, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984 & Supp. 1988), and to argue to the jury its presumptive effect, neither of which would have occurred absent arbitration. Compare *Hartman v. Cooper*, 59 Md. App. 154, 169, 474 A.2d 959, 967 (1984) (use of award which should have been vacated "clearly prejudicial") with *Paige v. Manuzak*, 57

health care provider is unsuccessful at arbitration, the burden of proof shifts, and the health care provider is confronted with the reverse of the usual burden of proof.²⁴²

Claimants have argued²⁴³ that the Act provides an even greater advantage to a successful claimant by permitting the claimant to use the award as a substitute for a prima facie case, thereby circumventing the usual standard of proof.²⁴⁴ This issue involves interpretation of the

Md. App. 621, 641, 471 A.2d 758, 768 (1984) (claimants not prejudiced by failure of trial court to vacate award).

242. Prior to the adoption of the Act, Maryland law provided that the plaintiff bore the burden of proving each element of a medical negligence case. *Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 620, 258 A.2d 595, 597-98 (1969); *Suburban Hosp. Ass'n v. Mewhinney*, 230 Md. 480, 484-85, 187 A.2d 671, 673 (1963).
243. *See Brown v. Meda*, 74 Md. App. 331, 334-35, 537 A.2d 635, 637-38, *cert. granted*, 313 Md. 9, 542 A.2d 845 (1988).
244. Since the award may not be vacated and thus stripped of its presumptive effect solely on the basis of legal and factual errors, this could permit a plaintiff to escape a defendant's motion for judgment by relying solely on evidence presented to an arbitration panel, which, if presented to a court outside the context of the Act, would not survive a motion for judgment. *See also infra* notes 316-326 and accompanying text (discussing motion to vacate). *Compare* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988) (grounds for vacation of award) *and id.* § 3-2A-06(d) (grounds for presumptive effect) *with id.* § 3-224(b) *and* *O-S Corp. v. Samuel A. Kroll, Inc.*, 29 Md. App. 406, 408-10, 348 A.2d 870, 872 (1975) (standard for vacating award under MD. CTS. & JUD. PROC. CODE ANN. § 3-224 (1984 & Supp. 1988)). It is not uncommon for arbitration panel awards to be erroneously based, both on fact and law; thus, the results in arbitration are not the same as those that would follow a circuit court trial. There are a number of reasons for this, not the least of which is the existence of a regulation which states that the arbitration panel is not bound by the technical rules of evidence. COMAR tit. 1, § 03.01.11D; *see also* M. SHAR, *supra* note 224, at D-1 to D-3 (letter from Director discussing relaxed rules of evidence in arbitration proceedings governed by the Act).

Obviously, the presentation of only the award in support of the claimant's case would be an infrequent occurrence, because trial strategy would dictate a more complete exposition of evidence in favor of the claim. There are instances, however, in which sole presentation of the award could occur or in which the claimant would desire to substitute the award for a critical element of the claimant's case, such as expert testimony. *See Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 258 A.2d 595 (1969).

For example, if the Act shifted the burden of production and a panel utilized the relaxed rules of evidence permissible in arbitration, as set out in COMAR tit. 1, § 03.01.11D, and rendered an award even though the claimant presented no expert testimony or proceeded on a theory of *res ipsa loquitur*, the Act would permit the claimant to have the case considered by the jury notwithstanding the insufficiency of the evidence. *See Genda*, 255 Md. 616, 625-26, 258 A.2d 595, 600 (1969) (expert testimony required in medical malpractice cases); *Lane v. Calvert*, 215 Md. 457, 463, 138 A.2d 902, 905 (1958) (*res ipsa loquitur* does not apply in medical malpractice cases); *but cf. Brown v. Meda*, 74 Md. App. 331, 537 A.2d 635, *cert. granted*, 313 Md. 9, 542 A.2d 845 (1988) (*res ipsa loquitur* applicable to medical malpractice actions).

Whether this result would make the Act unconstitutional is beyond the scope of this article. Despite the decision in *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978), which upheld a challenge to the Act by a claimant, the Act's constitutionality has not been attacked by a health care provider. *See id.* at 293 n.18, 385 A.2d at 68 n.18 (discussing challenge by claim-

meaning of the terms "presumption" and "burden of proof" in the Act. The legislature's use of those terms in section 3-2A-06(d) is unfortunate, since their interpretation is particularly difficult.²⁴⁵ For example, in this context, the term burden of proof is imprecise because it actually may refer to three separate burdens—the burden of pleading, the burden of production, and the burden of persuasion.²⁴⁶ A determination of whether the Act is referring to the burden of production or the burden of persuasion is critical under certain circumstances.²⁴⁷

If the Act shifts the burden of production, a prevailing plaintiff at arbitration could defeat a defendant's motion for judgment at trial merely by introducing the award into evidence.²⁴⁸ On the other hand, if section 3-2A-06(d) of the Act shifts the burden of persuasion, the plaintiff still would have to present a prima facie case notwithstanding the award in order to survive a defendant's motion for judgment.²⁴⁹

ant). There is little rational basis, however, for exposing a defendant in a medical malpractice case to a jury verdict based solely upon an award which may contain errors of both fact and law, when any other defendant could have the case dismissed prior to consideration by the jury. This might rise to the level of a constitutional deprivation of due process. *Cf.* *Big Savage Refractories Corp. v. Geary*, 209 Md. 362, 369-70, 121 A.2d 212, 216 (1956) (findings of Workmen's Compensation Commission must be supported by evidence or the action denies due process of law).

245. "One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin 'burden of proof.'" C. MCCORMICK, *MCCORMICK ON EVIDENCE*, § 342, at 965 (3d ed. 1984); *see also* Note, *Presumptions in Civil Cases: Procedural Effects Under Maryland Law in State and Federal Forums*, 5 U. BALT. L. REV. 301 (1976). The difficulties inherent in deciphering the appropriate meaning of these terms are augmented by the use of the terms as substitutes for each other. *See* L. MCLAIN, *supra* note 51, § 301.1, at 184. *See generally id.* §§ 300.1 to 301.5, at 132-232 (discussing the use of the terms "presumption" and "burden of proof" under Maryland law).

246. L. MCLAIN, *supra* note 51, § 300.1, at 132 & n.1.

247. It is readily apparent that the Act is not referring to the burden of pleading. *See id.* § 300.3, at 142-43 (discussion of burden of pleading). Both the Act and the BY Rules clearly delineate the allocation of the burden of pleading. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a), (b) (1984 & Supp. 1988); MD. R. BY2, BY4. Putting aside any minimal burden of pleading imposed by the requirement of filing a notice of action to nullify, the burden generally falls on the claimant to plead properly a cause of action in the complaint. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984 & Supp. 1988); MD. R. BY2. If a claimant fails to plead a prima facie case in the complaint, the case should be dismissed, notwithstanding the award.

248. Technically, this would not constitute a shifting of the burden of production, because a true shift of that burden would require the health care provider to go forward with evidence in the absence of any action by the claimant. Because the claimant may easily introduce the award into evidence, the effect would be similar. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984 & Supp. 1988) (award admissible in evidence).

Analyzed another way, proceeding in this fashion would give the award the status of a true evidentiary presumption. *Cf.* L. MCLAIN, *supra* note 51, § 301.3, at 204 (discussion of true evidentiary presumptions). Proof of the basic fact, *i.e.*, arbitration with an award in favor of the claimant, would shift the burden of proving the non-existence of the presumed fact, *i.e.*, negligence, to the health care provider.

249. The award would still be admissible in evidence. MD. CTS. & JUD. PROC. CODE

Although not distinguishing between the various components of the burden of proof, in *Brown v. Meda*,²⁵⁰ the court of special appeals decided that a claimant could not defeat a motion for judgment or a motion for judgment notwithstanding the verdict solely on the basis of an arbitration award in favor of the claimant.²⁵¹ *Brown* involved judicial review of an arbitration panel award against a sole health care provider.²⁵² After a jury verdict in favor of the claimants, the circuit court granted the health care provider's motion for judgment notwithstanding the verdict on the ground that the claimants' case was based on *res ipsa loquitor*.²⁵³ On appeal, the claimants argued that such a motion could never be granted against a claimant who prevailed at arbitration and who did not reject the award.²⁵⁴

As courts in earlier decisions have done,²⁵⁵ the *Brown* court analogized the effect of section 3-2A-06(d) to the operation of section 56(c) of the Workmen's Compensation Act.²⁵⁶ The court of special appeals con-

ANN. § 3-2A-06(d) (1984 & Supp. 1988); cf. *Su v. Weaver*, 313 Md. 370, 545 A.2d 692 (1988) (admissibility of award).

250. 74 Md. App. 331, 537 A.2d 635, cert. granted, 313 Md. 9, 542 A.2d 845 (1988).

251. *Id.* at 335, 537 A.2d at 637.

252. *Id.* at 333-34, 537 A.2d at 636-37.

253. *Id.* at 334, 537 A.2d at 637. But cf. *Hans v. Franklin Square Hosp.*, 29 Md. App. 329, 347 A.2d 905 (1975), cert. denied, 276 Md. 744 (1976) (*res ipsa loquitor* not available in medical malpractice actions).

254. *Id.*

255. *Attorney Gen. v. Johnson*, 282 Md. 274, 293, 385 A.2d 57, 68, appeal dismissed, 439 U.S. 805 (1978); *Hahn v. Surburban Hosp. Ass'n*, 54 Md. App. 685, 692-93, 461 A.2d 7, 12 (1983).

256. *Brown*, 74 Md. App. at 334, 537 A.2d at 637. Although instructive, a comparison of section 3-2A-06(d) of the Act with section 56(c) of the Workmen's Compensation Act, MD. ANN. CODE art. 101, § 56(c) (1985), reveals an imperfect match. See *Bailey v. Woel*, 302 Md. 38, 43 n.4, 485 A.2d 265, 267 n.4 (1984). Thus, there may be reasons for a court to interpret the two sections differently.

First, the language of the sections is different. Compare MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984 & Supp. 1988) ("presumed to be correct") with MD. ANN. CODE art. 101, § 56(c) (1985) ("prima facie correct").

Second, the Act merely creates a condition precedent to the exercise of a common law action, see *supra* note 218, whereas the Workmen's Compensation Act establishes a comprehensive scheme of strict liability, largely abrogating the common law in the area and severely limiting the issues for decision. See generally M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 1-1, at 1-2 (1977).

Third, the administration panels established by the Act are not administrative agencies created to develop an expertise in a particular area, *Attorney Gen. v. Johnson*, 282 Md. 274, 285, 385 A.2d 57, 63, appeal dismissed, 439 U.S. 805 (1978), whereas the Workmen's Compensation Commission most assuredly is.

Next, the Act makes no provision for the admission of any portion of the record of the arbitration proceeding into evidence, other than the award, absent compliance with the usual rules of evidence. See MD. CTS. & JUD. PROC. ANN. § 3-2A-06(d) (1984 & Supp. 1988); cf. *id.* § 3-2A-06(e) (use of discovery materials). The record of the hearing before the Workmen's Compensation Commission, however, is admissible in evidence on an appeal from that body. See, e.g., *Yellow Cab Co. v. Bisasky*, 11 Md. App. 491, 503, 275 A.2d 193, 200, cert. denied, 262 Md. 751 (1971).

Finally, except for the operation of section 3-2A-06(d) of the Act, an action

cluded that a circuit court is not prohibited from deciding a case as a matter of law in favor of the health care provider, even in the face of an arbitration award in favor of a claimant.²⁵⁷ Application of interpretations of the analogous provision of the Workmen's Compensation Act establishes both that section 3-2A-06(d) operates to shift the burden of persuasion, not the burden of production,²⁵⁸ and that a circuit court should not permit an otherwise insufficient case to be submitted to the jury upon the production of evidence consisting solely of a favorable arbitration award.

Moreover, decisions interpreting the Workmen's Compensation Act consistently have upheld the trial court's power to determine questions of law by granting motions for summary judgment²⁵⁹ and motions for judgment.²⁶⁰ Only the commission's factual determinations are accorded the

commenced after arbitration proceeds like any other tort action, whereas an appeal from a decision of the Workmen's Compensation Commission is "informal and summary." MD. ANN. CODE art. 101, § 56(a) (1985).

Despite these differences, both the court of appeals and the court of special appeals have made clear that the two sections are to be interpreted in the same fashion. *Johnson*, 282 Md. at 293, 385 A.2d at 68; *Hahn*, 54 Md. App. at 692-93, 461 A.2d at 12; *see also Bailey*, 302 Md. at 43 n.4, 485 A.2d at 267 n.4 (1984) (comparison of Act to Workmen's Compensation Act for other purposes). *See generally* M. PRESSMAN, *supra*, §§ 4-22 to 4-26, at 385-441 (1977 & Supp. 1980) (compilation of cases dealing with the operation of section 56(c) of the Workmen's Compensation Act).

257. 74 Md. App. at 335-36, 537 A.2d at 637-38 (citing *Moore v. Clarke*, 171 Md. 39, 45, 187 A. 887, 890 (1936) (decision under Workmen's Compensation Act)). The *Brown* court went on, however, to reverse the circuit court's holding that the claimants' case rested on the kind of *res ipsa loquitur* evidence barred by *Hans v. Franklin Square Hosp.*, 29 Md. App. 329, 347 A.2d 905 (1975), *cert. denied*, 276 Md. 744 (1976). *Brown*, 74 Md. App. at 346, 537 A.2d at 642-43. The court noted that to the extent its decision was inconsistent with the holding in *Hans*, the holding in *Hans* is overruled. *Id.*
258. The court of appeals has long upheld the presumption of correctness of decisions of the Workmen's Compensation Commission and has placed the burden of persuasion on the party attacking the decision. *See, e.g.,* *Abell v. Albert F. Goetze, Inc.*, 245 Md. 433, 437-38, 226 A.2d 253, 256 (1967); *Krell v. Maryland Drydock Co.*, 184 Md. 428, 435, 41 A.2d 502, 505 (1945); *Stewart & Co. v. Howell*, 136 Md. 423, 434, 110 A. 899, 902 (1920); *see also, e.g.,* *Community Realty Co. v. Siskos*, 31 Md. App. 99, 105-06, 354 A.2d 181, 184-85 (1976); *Dent v. Cahill*, 18 Md. App. 117, 123-24, 305 A.2d 233, 237 (1973); *Carling Brewing Co. v. Belzner*, 15 Md. App. 406, 410-11, 291 A.2d 175, 178 (1972); M. PRESSMAN, *supra* note 256, § 4-25, at 433-41. The court of appeals and the court of special appeals have specifically labelled this burden the "burden of persuasion." *See, e.g.,* *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 140, 265 A.2d 256, 259 (1970) (citing *Williams Const. Co. v. Bohlen*, 189 Md. 576, 580, 56 A.2d 694, 696 (1948)); *Abell*, 245 Md. at 437-38, 226 A.2d at 265; *Rose v. State*, 26 Md. App. 358, 363, 338 A.2d 311, 314 (1975); *Carling Brewing Co.*, 15 Md. App. at 410-11, 291 A.2d at 178; *see also* M. PRESSMAN, *supra* note 256, § 4-25(2), at 437-40.
259. *Dawson's Charter Service v. Chin*, 68 Md. App. 433, 440, 511 A.2d 1138, 1142 (1986); *Maloney v. Carling Nat'l Breweries, Inc.*, 52 Md. App. 556, 560, 451 A.2d 343, 345 (1982); *Egypt Farms, Inc. v. Lopley*, 49 Md. App. 171, 176, 430 A.2d 122, 125 (1981).
260. *See, e.g.,* *Knoche v. Cox*, 282 Md. 447, 457-58, 385 A.2d 1179, 1184 (1978); *Jewel Tea Co. v. Blamble*, 227 Md. 1, 4, 174 A.2d 764, 765-66 (1961); *Albright v. Penn-*

presumption of correctness, whereas the trial court retains the right to consider the legal issues and the sufficiency of the evidence.²⁶¹ The decision in *Brown* merely follows these well-established principles.

Thus, the presumption of correctness of the arbitration award shifts the burden of *persuasion* to the party seeking judicial review.²⁶² Nevertheless, this presumption does not obviate the plaintiff's burden of presenting a *prima facie* case in the circuit court. In all circuit court cases brought after arbitration pursuant to the Act, regardless of whether the claimant or the health care provider prevailed before the panel, the usual order of proof should apply.²⁶³ The plaintiff should submit, in addition to the award,²⁶⁴ evidence that establishes a *prima facie* case. Absent such evidence, the circuit court should dismiss the case.²⁶⁵ The jury would hear evidence in a manner similar to other tort cases and would be instructed about how the Act operates. Section 3-2A-06(d) would have no effect on the proceedings until the jury is instructed²⁶⁶ and argument

sylvania R.R., 183 Md. 421, 435-36, 37 A.2d 870, 876-77, *cert. denied*, 323 U.S. 735 (1944); *Montgomery County v. Lake*, 68 Md. App. 269, 273, 511 A.2d 541, 543 (1986); *see also* M. PRESSMAN, *supra* note 256, § 4-24(5), at 432.

261. Decisions of the Workmen's Compensation Commission may not be upheld if they are based upon an erroneous construction of law. *Trotta v. County Car Center, Inc.*, 292 Md. 660, 662, 441 A.2d 343, 344 (1982); *Montgomery County Police Dept. v. Jennings*, 49 Md. App. 246, 251, 431 A.2d 721, 724 (1981); *cf. infra* notes 316-326 and accompanying text (discussing standard for vacating award). Similarly, the operation of section 56(c) of the Workmen's Compensation Act, in allocating the burden of proof has no application where there is a question of law instead of fact. *Greenwalt v. Brauns Bldg. Specialties Corp.*, 203 Md. 313, 100 A.2d 804 (1953); *Moore v. Clarke*, 171 Md. 39, 187 A. 887 (1936) (cited in *Brown v. Meda*, 74 Md. App. 331, 335, 537 A.2d 635, 637, *cert. granted*, 313 Md. 9, 542 A.2d 845 (1988)); *Symons v. R.D. Grier & Sons Co.*, 10 Md. App. 498, 500-01, 271 A.2d 398, 399-400 (1970).
262. This is also the view of one of the leading scholars on the law of evidence in Maryland. L. MCLAIN, *supra* note 51, § 301.1, at 184-85 & n.15. The author provides another reason why the Act shifts the burden of persuasion instead of the burden of production: although presumptions, which restate the allocation of the burden of persuasion, are rarely mentioned to the jury, statements to the jury concerning the burden of production are "never appropriate." *Id.* at 188-89 & nn.36-37. Since the award is admissible in evidence, *see supra* note 222, only by interpreting the Act to shift the burden of persuasion can the Act abide by the general rule stated by Professor McLain.
263. *See* L. MCLAIN, *supra* note 51, at § 300.2, at 135-36 (discussing the usual order of proof).
264. The award admitted into evidence should include the decision of the panel on separate and distinct issues of liability, and these decisions should be made known to the jury. *Su v. Weaver*, 313 Md. 370, 382, 545 A.2d 692, 698 (1988). However, any explanation of the findings may not be presented to the jury. *Id.* In order to achieve this result, counsel should request an award from the panel which identifies those separate findings. *Id.*
265. MD. R. 2-519; *Brown v. Meda*, 74 Md. App. 331, 343, 537 A.2d 635, 641, *cert. granted*, 313 Md. 9, 542 A.2d 845 (1988); *cf. Wyndham v. Haines*, 305 Md. 269, 277 & n.6, 503 A.2d 719, 723 & n.6 (1986) (implicitly approving circuit court use of motions to dismiss or motions for judgment to dispose of cases brought after arbitration under the Act).
266. The Maryland Civil Pattern Jury Instruction 27:2 provides:

takes place.²⁶⁷

H. *Motions to Modify, Correct or Vacate*

The only way to avoid the operation of section 3-2A-06(d) of the Act is to have the award modified, corrected or vacated.²⁶⁸ Motions to modify, correct or vacate are governed not only by section 3-2A-06(c) of the Act, but also by provisions of the Maryland Uniform Arbitration Act²⁶⁹ incorporated by reference into the Act.²⁷⁰ Therefore, examination

BURDEN OF PROOF A Maryland statute requires a medical malpractice claim to be submitted to arbitration before the matter may be tried by this court. Either party may appeal the arbitrator's decision to this court and if such appeal is made, the matter is tried all over. The claim in this case was submitted to arbitration and it was decided that (*describe the arbitrator's decision*) [injured party] [*insert the identity of the health care provider*] has appealed from that decision. You are not bound by the arbitrator's decision. However, under the law that decision is presumed to be correct and the [injured party] [*insert the identity of the health care provider*] has the burden of proving by a preponderance of the evidence that the decision is wrong. In meeting this burden, the [injured party] [*insert the name of the health care provider*] may rely on the same, less or more evidence than was presented to the arbitrator.

PATTERN JURY INSTRUCTIONS, *supra* note 51, MPJI 27:2. Except for the use throughout the instruction of the improper and potentially confusing word "appeal," the instruction is a correct exposition of the Act's provisions. A variation of this instruction was used by the United States District Court for the District of Maryland and approved by the Fourth Circuit. *Lipscomb v. Memorial Hosp.*, 733 F.2d 332, 338 (4th Cir. 1984). The pattern instruction is similar to the one for appeals from decisions of the Workmen's Compensation Commission. **PATTERN JURY INSTRUCTIONS**, *supra* note 51, MPJI 30:3.

267. Although the usual order of proof shall always apply, the order of argument should follow the burden of persuasion. See *L. McLain*, *supra* note 51, § 300.2, at 136; see also *American Ice Co. v. Fitzhugh*, 128 Md. 382, 384-86, 97 A. 999, 1000 (1916) (decision under analogous Workmen's Compensation Act). If the health care provider was unsuccessful in the arbitration proceeding, he should have the opportunity to argue first, with rebuttal, rather than the plaintiff. This somewhat unusual procedure is necessitated by the burden-shifting provisions of the Act.
268. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988). Section 3-2A-06(d) of the Act provides that its provisions are applicable to an award "[u]nless vacated by the court pursuant to subsection (c) . . ." *Id.* § 3-2A-06(d).
269. *Id.* §§ 3-201 to 3-234.
270. Section 3-2A-06(c) of the Act states:

Modification, correction or vacation of award by court — An allegation that an award is improper because of any ground stated in § 3-223(b) or § 3-224(b)(1), (2), (3), or (4) or § 3-2A-05(h) of this article shall be made by preliminary motion, and shall be determined by the court without a jury prior to trial. Failure to raise such a defense by pretrial preliminary motion shall constitute a waiver of it. If the court finds that a condition stated in § 3-223(b) exists, or that the award was not appropriately modified in accordance with § 3-2A-05(h) of this subtitle, it shall modify or correct the award. If the rejecting party still desires to proceed with judicial review, the modified or corrected award shall be substituted for the original award. If the court finds that a condition stated in § 3-224(b)(1), (2), (3), or (4) exists, it shall vacate the award, and trial of the case shall proceed as if there had been no award.

Id. § 3-2A-06(c).

of both acts is required.

The first question raised by section 3-2A-06(c) is that of timing. In order for a circuit court to modify, correct or vacate an award, a party must file a "preliminary motion."²⁷¹ Failure to raise by "pretrial preliminary motion" any of the grounds for modifying, correcting or vacating an award is a waiver of those grounds.²⁷² Unfortunately, the Act uses descriptive terms—"preliminary motion" and "pretrial preliminary motion"—which have no reference in either the BY Rules or the balance of the Maryland Rules of Procedure.²⁷³ None of the cases discussing section 3-2A-06(c) interprets the term "preliminary." Since the Act was adopted before the wholesale amendment of the Maryland Rules of Procedure, the Act may be referring to the now obsolete motion raising preliminary objection.²⁷⁴ If so, a motion to modify, correct or vacate an award now would have to be a component of a motion to dismiss, and the grounds would be comparable to those other defenses which are waived if not presented in that pleading.²⁷⁵ Although careful counsel may use this approach, there seems to be little justification for it. Rather, a common sense approach would allow the motion to be filed anytime prior to trial or the grounds therefor to be raised in the answer, permitting the court to determine the effect of the award properly at trial.²⁷⁶

Under the Maryland Uniform Arbitration Act, a court may modify an award upon any of the following grounds: (1) the award contains an evident miscalculation or mistake;²⁷⁷ (2) the arbitrators have awarded upon a matter not submitted to them;²⁷⁸ or (3) the award is otherwise imperfect in form.²⁷⁹ If the circuit court makes the determination that

271. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988). The circuit court may partially vacate the award, permitting the Act's presumption to apply to some, but not all, of the health care providers. *Paige v. Manuzak*, 57 Md. App. 621, 640-41, 471 A.2d 758, 768, *cert. denied*, 300 Md. 154, 476 A.2d 772 (1984).

272. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988).

273. Since the BY Rules were adopted to implement the provisions of the Act, one logically would expect the procedure for filing the motions required by section 3-2A-06(c) to be contained therein.

274. MD. R. 323, *superseded by*, MD. R. 2-322. The Maryland Rules of Procedure were substantially revised effective July 1, 1984. 11 Md. Reg. 9, at S-1 (1984).

275. MD. R. 2-322(a) (defenses of lack of jurisdiction over the person, improper venue, insufficiency of process and insufficiency of service of process must be made by preliminary motion or they are waived).

276. *See also supra* notes 218-267 and accompanying text (discussing effect of award); *cf.* MD. R. 2-322(b), 2-323(a) (defenses which may be raised in either preliminary motion or answer).

277. MD. CTS. & JUD. PROC. CODE ANN. § 3-223(b)(1) (1984 & Supp. 1988).

278. *Id.* § 3-223(b)(2). This occurrence is unlikely in a proceeding under the Act, where, in contrast to contractual arbitration proceedings, the issues are fairly standardized. *See id.* § 3-2A-05(e); COMAR tit. 1, § 03.01.12 (list of determinations to be made by arbitration panel).

279. MD. CTS. & JUD. PROC. CODE ANN. § 3-223(b)(3) (1984). Again, this is unlikely in health claims arbitration proceedings. *See supra* note 278. Furthermore, the Director provides the panel with a form to use. *But cf.* *Su v. Weaver*, 313 Md. 370, 545 A.2d 692 (1988) (award should contain decision on separate and distinct issues of

one of these conditions is met, it must modify or correct the award, and the modified or corrected award is substituted for the original award if the rejecting party still desires to proceed.²⁸⁰

In 1987, the General Assembly added the panel's failure to modify the award in accordance with section 3-2A-05(h) to the grounds for modification or correction of an award.²⁸¹ Section 3-2A-05(h) authorizes the panel to reduce damages to the extent that a claimant is compensated by collateral sources.²⁸² The circuit court may review the panel's determination for purposes of evaluating the award's presumptive effect²⁸³ and has similar authority to reduce a jury verdict or grant a new trial.²⁸⁴

The grounds for vacating an award are located in the Maryland Uniform Arbitration Act. An arbitration award may be vacated upon any of the following grounds: (1) the award was procured by fraud, corruption or undue means;²⁸⁵ (2) there was evident partiality by an arbitrator;²⁸⁶ (3) the arbitrators exceeded their powers;²⁸⁷ or (4) the arbitrators conducted the hearing so as to prejudice substantially the rights of a party.²⁸⁸ This last ground includes failure by the arbitrators to postpone the hearing in appropriate circumstances and their refusal to hear material evidence.²⁸⁹ If the award is vacated, the case proceeds as if no award had been made.²⁹⁰

The Maryland appellate courts have not considered the standards for modifying an award. They have interpreted substantively the various statutory provisions for vacating an award on three occasions.²⁹¹ Two of

liability). According to the court of special appeals, the Director has the authority to return an imperfect award to the panel for correction. *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 526-28, 490 A.2d 720, 724, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985). *But see* *Attorney Gen. v. Johnson*, 282 Md. 274, 286, 385 A.2d 57, 64, *appeal dismissed*, 439 U.S. 805 (1978) (director exercises no judicial function).

280. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988).

281. 1987 Md. Laws 2721 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988)). This amendment only applies to actions arising from events occurring on or after July 1, 1987. 1987 Md. Laws 2721, 2732.

282. *See generally* P. CULLEN, J. EYLER, G. HOLTZ, W. KITZES, A. ROISMAN, G. SHADOAN, M. TRAINER & I. WEISS, *MARYLAND TORT DAMAGES* 14-15 (rev. ed. 1985) (collateral source rule).

283. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(h) (1984 & Supp. 1988); *see also id.* § 3-2A-06(c).

284. *Id.* § 3-2A-06(f).

285. *Id.* § 3-224(b)(1).

286. *Id.* § 3-224(b)(2).

287. *Id.* § 3-224(b)(3).

288. *Id.* § 3-224(b)(4). *See generally id.* § 3-213 (outlining procedural due process requirements).

289. *Id.* § 3-224(b)(4) (1984 & Supp. 1988).

290. *Id.* § 3-2A-06(c). *But cf. infra* notes 327-358 and accompanying text (discussing return of case to arbitration).

291. In addition, in *Brown v. Meda*, 74 Md. App. 331, 336 n.1, 537 A.2d 635, 638 n.1, *cert. granted*, 313 Md. 9, 542 A.2d 845 (1988), the court of special appeals decided that a challenge to the sufficiency of evidence before an arbitration panel may *not* be raised to vacate the award.

the cases dealt with the question of partiality by an arbitrator,²⁹² and the other case dealt with a claim that the panel failed to hear relevant evidence.²⁹³

Section 3-224(b)(2) of the Maryland Uniform Arbitration Act provides that an award should be vacated if an arbitrator exhibits "evident partiality."²⁹⁴ In *Hartman v. Cooper*,²⁹⁵ a health care provider acting as a panel member failed to disclose information from which bias might have been inferred.²⁹⁶ Although the health care provider submitted an affidavit in which he asserted that he was not biased,²⁹⁷ and although the decision against the claimant was a unanimous one,²⁹⁸ the court of special appeals reversed the decision of the trial court, which had refused to vacate the award.²⁹⁹ The court of special appeals held that "a showing of actual bias or proof of improper conduct is not necessary; all that is required is an appearance of possible bias."³⁰⁰

The court of appeals in *Wyndham v. Haines*³⁰¹ questioned the standard applied by the court of special appeals in *Hartman*. In *Wyndham*, the claimant attacked the impartiality of a panel chairperson, alleging that the chairperson's representation of two medical malpractice claimants in cases in which defense counsel was the same as in *Wyndham* might create bias on his part.³⁰² A motion to recuse the chairperson was filed but never decided, and the panel rendered a unanimous decision in favor of the health care provider.³⁰³ The circuit court denied the petition to vacate, deciding that there was no basis for concluding that the arbi-

292. *Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719 (1986); *Hartman v. Cooper*, 59 Md. App. 154, 474 A.2d 959, cert. denied, 301 Md. 41, 481 A.2d 801 (1984) (disapproved to the extent inconsistent with the court's opinion in *Wyndham*, 305 Md. at 279, 503 A.2d at 725); see also MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(2) (1984 & Supp. 1988).

293. *Golub v. Spivey*, 70 Md. App. 147, 520 A.2d 394, cert. denied, 310 Md. 2, 526 A.2d 954 (1987); see also MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(4) (1984 & Supp. 1988).

294. MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(2) (1984 & Supp. 1988). Section 3-224(b)(2) of the Maryland Uniform Arbitration Act is made applicable to proceedings under the Act by section 3-2A-06(c). *Id.* § 3-2A-06(c); see *Attorney Gen. v. Johnson*, 282 Md. 274, 297, 385 A.2d 57, 70, appeal dismissed, 439 U.S. 805 (1978).

295. 59 Md. App. 154, 474 A.2d 959 (1983), cert. denied, 301 Md. 41, 481 A.2d 801 (1984).

296. Specifically, the health care provider failed to disclose that he had been sued previously for malpractice and that he had testified as a medical witness. *Id.* at 158-59, 474 A.2d at 960. The health care provider offered an innocent explanation for his failure to disclose this information. *Id.* at 159-60, 474 A.2d at 962-63.

297. *Id.* at 160, 474 A.2d at 962.

298. *Id.* at 158, 474 A.2d at 962.

299. *Id.* at 169, 474 A.2d at 967. The jury was instructed that the panel's decision was presumed correct and rendered a verdict against the claimant. *Id.* at 162, 474 A.2d at 963.

300. *Id.* at 168, 474 A.2d at 967; see also *McKinney Drilling Co. v. Mach I. Ltd. Partnership*, 32 Md. App. 205, 359 A.2d 100 (1976).

301. 305 Md. 269, 503 A.2d 719 (1986).

302. *Id.* at 277-78, 503 A.2d at 724.

303. *Id.* at 278, 503 A.2d at 724.

trator was biased.³⁰⁴

The court of appeals affirmed the trial court's decision not to vacate the award,³⁰⁵ finding that the claimants "failed to adduce the required proof of 'evident partiality' . . . [which] requires more than speculation and bald allegations of bias."³⁰⁶ Rather, a party seeking to vacate an award "must prove facts sufficient to permit an inference that there was indeed partiality by an arbitrator."³⁰⁷ Although not specifically rejecting the standard of proof applied in *Hartman*, the court of appeals criticized the decision in that case.³⁰⁸

*Golub v. Spivey*³⁰⁹ addressed a circuit court's denial of a motion to vacate based on claims that the panel refused to hear evidence material to the controversy³¹⁰ and failed to postpone a case for good cause.³¹¹ These claims arose out of a discovery dispute, as a result of which the panel chairperson granted a motion *in limine* filed by the claimant on the eve of the hearing and precluded the health care provider from presenting expert testimony.³¹² The chairperson also denied the health care provider's motion for a continuance.³¹³ The circuit court ultimately denied the mo-

304. *Id.* at 279, 503 A.2d at 724-25.

305. *Id.* at 279, 503 A.2d at 725.

306. *Id.* at 279, 503 A.2d at 724-25.

307. *Id.* In *Wyndham*, the court of appeals almost mandated the use of affidavits, or even testimony, to prove partiality. *Id.* at 279 nn. 10-11, 503 A.2d at 725 nn. 10-11. Of course, in *Hartman*, the claimants presented testimony, and the health care provider panel member provided an affidavit. *Hartman v. Cooper*, 59 Md. App. 154, 159-60, 474 A.2d 959, 962 (1983), *cert. denied*, 301 Md. 41, 481 A.2d 801 (1984). How *Hartman* would have been decided under the standard employed by the *Wyndham* court is unclear, since the trial court in *Hartman* required bias to be proven by clear and convincing evidence, the incorrect standard under either decision. *Id.* at 161, 474 A.2d at 963.

308. The court of appeals stated that "[i]n reaching this conclusion we are aware of *Hartman v. Cooper*. To the extent that *Hartman* is inconsistent with this opinion, it is disapproved." 305 Md. at 279, n.9, 503 A.2d at 725 n.9 (citation omitted).

309. 70 Md. App. 147, 520 A.2d 394 (1987).

310. See also *Paige v. Manuzak*, 57 Md. App. 621, 471 A.2d 758, *cert. denied*, 300 Md. 154, 476 A.2d 722 (1984). In *Paige*, an arbitration panel permitted a physician expert witness to testify against one health care provider but not against another, presumably on the ground that the expert's specialty did not qualify him to testify against the second health care provider. 57 Md. App. at 640, 471 A.2d at 767-68. *But cf.* *Wolfinger v. Frey*, 223 Md. 184, 188-90, 162 A.2d 745, 747-48 (1960) (physician testifying as medical expert not necessarily limited to any area of specialization). The circuit court vacated the award in favor of the health care provider against whom testimony was excluded, and the court of special appeals affirmed. 57 Md. App. at 640-41, 471 A.2d at 768; see also *supra* note 270. Apparently, no one raised the issue whether the panel chairperson's action was appropriate, and the court of special appeals never addressed the issue.

311. See MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(4) (1984 & Supp. 1988).

312. 70 Md. App. at 160, 520 A.2d at 400-01. In *Spivey*, the panel chairperson had established a deadline for naming experts. Although the health care provider did not designate any experts on his behalf, he intended to utilize experts designated by other parties as his own. *Id.* at 151, 160-61 n.4, 520 A.2d at 396, 400-01 n.4. Nevertheless, the panel chairperson granted claimant's motion in limine. *Id.* at 160, 520 A.2d at 400.

313. *Id.* at 151, 520 A.2d at 396.

tion to vacate,³¹⁴ and the court of special appeals affirmed, holding that the chairperson's action was appropriate as a discovery sanction.³¹⁵ Thus, at least under the holding in *Spivey*, attacks on awards arising under section 3-224(b)(4) are fairly circumscribed, affording the panel a large amount of discretion.

An important ground for vacating an award contained in the Maryland Uniform Arbitration Act that has not been addressed by an appellate tribunal in the context of health claims arbitration is that the members of the arbitration panel "exceeded their powers."³¹⁶ Although at first blush this provision seems to provide a broad basis for vacating an award, the court of special appeals has interpreted its scope narrowly, at least in the area of consensual arbitration.³¹⁷ An arbitration award may not be vacated under section 3-224(b)(3) unless it is "completely irrational."³¹⁸ A circuit court properly applying this standard must defer to the decision of the arbitrators and may not vacate an award even if it contains errors of law, failures to understand or apply the law properly, or arbitrary interpretations of documents.³¹⁹

The cases adopting the "completely irrational" standard arose in the context of agreements to arbitrate,³²⁰ and the standard is designed to further the goal of private, rather than judicial, dispute resolution.³²¹ In that context, the standard seeks to limit parties to their contractually agreed remedy of arbitration. By contrast, the Act legislatively imposes arbitration on the parties³²² and specifically provides for continuation of the dispute in the judicial arena.³²³ Moreover, because the Act gives the award presumptive effect,³²⁴ application of the "completely irrational" standard may operate to allow shifting of the burden of proof based upon an award that contains errors of fact or law or both³²⁵—a particularly harsh result. Although the Act incorporates by reference section 3-

314. *Id.* at 153, 520 A.2d at 397; *see also supra* note 170 (discussing procedural history of *Spivey*).

315. 70 Md. App. at 160-61, 520 A.2d at 400-01. *See generally* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(c) (1984 & Supp. 1988) (giving panel chairperson authority to decide all prehearing procedural issues).

316. MD. CTS. & JUD. PROC. CODE ANN. § 3-224(b)(3) (1984 & Supp. 1988); *see also id.* at § 3-2A-06(c) (incorporating § 3-224(b)(3) into the Act).

317. *Southern Md. Hosp. Center v. Edward M. Crough, Inc.*, 48 Md. App. 401, 407-09, 427 A.2d 1051, 1055-56, *cert. denied*, 290 Md. 721 (1981); *O-S Corp. v. Samuel A. Kroll, Inc.*, 29 Md. App. 406, 408-10, 348 A.2d 870, 872-73 (1975).

318. *Southern Md. Hosp. Center*, 48 Md. App. at 408, 427 A.2d at 1055; *O-S Corp.*, 29 Md. App. at 408-09, 348 A.2d at 872-73.

319. *Southern Md. Hosp. Center*, 48 Md. App. at 407-08, 427 A.2d at 1055. This deference does not apply to questions affecting the jurisdiction of the arbitration panel to hear the dispute. *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assoc.*, 313 Md. 652, 547 A.2d 1048 (1988).

320. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-202 (1984).

321. *See Southern Md. Hosp. Center*, 48 Md. App. at 406, 427 A.2d at 1054.

322. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (1984 & Supp. 1988).

323. *Id.* § 3-2A-06.

324. *Id.* § 3-2A-06(d); *see supra* notes 218-267 and accompanying text.

325. *See supra* note 244 (discussing relaxed rules of evidence in arbitration).

224(b)(3) of the Maryland Uniform Arbitration Act, the "completely irrational" standard is not legislatively mandated, and appellate courts are free to fashion a different standard applicable to proceedings under the Act.³²⁶

I. Return to the Arbitration Panel

The question frequently arises whether a circuit court may remand a case to the arbitration panel in the event of an error in the arbitration process. The Act makes no provision for remand from the circuit court. Under the Act, once the arbitration process has been concluded, the parties' recourse is the judicial system.³²⁷ If an error has occurred in the arbitration process, the appropriate remedy under the Act is for the circuit court to vacate the award and proceed as if arbitration had never taken place.³²⁸ This remedy is consistent with the policy of the Act, which provides for a trial *de novo* in the circuit court and not a review of the record of the arbitration proceeding.³²⁹ The court of special appeals and the court of appeals both have considered the question of remand.³³⁰

In *Schwartz v. Lilly*,³³¹ the plaintiffs filed an action in circuit court for alleged malpractice which occurred in 1978.³³² The defendant filed a preliminary motion seeking dismissal of the case on the ground that the plaintiffs failed to comply with the arbitration provisions of the Act.³³³ The circuit court denied the motion and transferred the case to the HCAO for arbitration.³³⁴ The court of special appeals reversed the decision of the circuit court, holding that arbitration was a prerequisite to circuit court action and that, absent arbitration, a circuit court must dismiss rather than transfer the case.³³⁵ Thus, at least in the case where arbitration has never been initiated, remand is not an appropriate cure

326. The General Assembly should seriously consider permitting an award to be vacated based upon errors of law. On the other hand, the disadvantage of allowing a circuit court to review the arbitration proceedings for errors of law is that this might impose a significant burden on the court and an expense on the parties for transcripts. Whether the courts and the parties already bear these expenses in attempts to have the award vacated under the present grounds is a matter for the legislature to consider.

327. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988).

328. *Id.* § 3-2A-06(c); see *supra* notes 268-326 and accompanying text (explaining difficulties inherent in this proposition).

329. Attorney Gen. v. Johnson, 282 Md. 274, 296, 385 A.2d 57, 70, *appeal dismissed*, 439 U.S. 805 (1978).

330. See *Munzer v. Ramsey*, 63 Md. App. 350, 362, 492 A.2d 946, 952 (1985) (citing cases discussing remand).

331. 53 Md. App. 318, 452 A.2d 1302 (1982).

332. *Id.* at 319, 452 A.2d at 1303.

333. *Id.* at 320, 452 A.2d at 1303; see also *supra* notes 204-217 and accompanying text (discussing necessity of arbitration).

334. 53 Md. App. at 320, 452 A.2d at 1303.

335. *Id.* at 320-24, 452 A.2d at 1304-06. The court cited and followed the holding in *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982), in making its decision.

for defective filing.³³⁶ *Schwartz*, however, did not address remand in the traditional sense, i.e., return of a proceeding to a lower tribunal to correct an error made below.

In *Stifler v. Weiner*,³³⁷ the panel chairperson, acting alone, entered summary judgment against the claimants.³³⁸ On appeal from circuit court review, in dicta, the court of special appeals criticized the chairperson's practice of granting summary judgment without the participation of the other panel members.³³⁹ Despite this defect³⁴⁰ in the arbitration process, the court stated that "[i]t would, at this stage of the proceeding, be silly to remand the case all the way to the panel so that it could perfunctorily do what, as a matter of law, must be done."³⁴¹ By this language, the *Stifler* decision seems to grant an *imprimatur* to remanding a case to arbitration.³⁴²

The court of appeals was faced with a comparable situation in *McClurkin v. Maldonado*.³⁴³ As in *Stifler*, the *McClurkin* court considered a panel chairperson's unilateral dismissal of a case³⁴⁴ at a time when he

336. Nor is the converse true. The Act makes no provision for "transfer" of an improperly filed arbitration proceeding to the circuit court. Although failure to initiate arbitration proceedings is unlikely now that the Act has been in existence for over ten years, it still may occur. Compare MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984 & Supp. 1988) and *Hahn v. Claybrook*, 130 Md. 179, 100 A. 83 (1917) (discovery rule) with MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984 & Supp. 1988) (absolute five-year limitation on medical malpractice claims).

Such a case should be dismissed by the arbitration panel, just as the circuit court should dismiss any attempts by the claimant to seek judicial review under the Act. The claimant's proper remedy under those circumstances is to file a complaint in the circuit court. Although a proper filing under the Act tolls the statute of limitations, the filing of an arbitration claim in a case not governed by the Act should not accomplish this goal. *Id.* § 5-109; see *Feldman v. Granger*, 255 Md. 288, 257 A.2d 421 (1969) (filing in wrong forum does not toll limitations); *Barnhart v. Western Md. Ry.*, 41 F. Supp. 898 (D. Md. 1941) (same).

337. 62 Md. App. 19, 488 A.2d 192 (1985).

338. *Id.* at 21-22, 488 A.2d at 193. Whether the motion was based on the claimants' indication that no expert witness would be called on their behalf, and thus that they could not present a prima facie case or whether the motion was based on the statute of limitations is not clear. *Id.* at 22, 488 A.2d at 193-94 (discussing *Johns Hopkins Hosp. v. Genda*, 255 Md. 616, 258 A.2d 595 (1969)); cf. *Baysinger v. Schmid Prods. Co.*, 307 Md. 361, 514 A.2d 1 (1986); *O'Hara v. Kovens*, 305 Md. 280, 503 A.2d 1313 (1986) (limiting the availability of summary judgment when the defense is statute of limitations).

339. 62 Md. App. at 23-25, 488 A.2d 194-95.

340. The Act has since been amended to permit the practice criticized by the court of special appeals. See *supra* note 62.

341. 62 Md. App. at 25, 488 A.2d at 195. The court of special appeals assumed in its statement that the arbitration process scrupulously follows such rules of law or that they may be easily corrected if the arbitration process does not. Cf. *supra* notes 244 (discussing relaxed rules of evidence), 316-326 and accompanying text (discussing principle that awards may not be vacated for errors of law).

342. See *Munzer v. Ramsey*, 63 Md. App. 337, 362, 492 A.2d 946, 952 (1985).

343. 304 Md. 225, 498 A.2d 626 (1985).

344. *Id.* at 226, 498 A.2d at 627. The dismissal in *McClurkin* was for failure to provide discovery. *Id.*

did not have the power to do so on his own.³⁴⁵ Although the case otherwise may have been moot,³⁴⁶ the court of appeals determined that it was not, because the chairperson had denied a motion for reconsideration of the dismissal, apparently on the ground that he had no authority to entertain such a motion.³⁴⁷ Consequently, the court of appeals decided that the circuit court should have dismissed the case without prejudice, returning the case to arbitration.³⁴⁸

Stifler and *McClurkin* should offer little persuasive authority for a remand to arbitration. Neither decision offers an analysis for concluding that a failure in the arbitration process of a kind warranting that the award be vacated³⁴⁹ constitutes a failure to render an award under the Act, requiring a return to arbitration.³⁵⁰ Future appellate consideration of this issue hopefully will limit the *Stifler* and *McClurkin* decisions to their facts and will offer only the remedy of vacating the award, as the Act mandates.³⁵¹

There is one situation in which a case should be returned to arbitration, albeit not by remand—when a party has prematurely sought judicial review. This situation occurred in *Munzer v. Ramsey*,³⁵² a case in which the arbitration panel failed to forward its decision to the HCAO and failed to assess costs.³⁵³ Nevertheless, the claimants sought judicial review by filing a declaration and notice of rejection.³⁵⁴ The circuit court found that no award had been entered and remanded the case to arbitration.³⁵⁵

345. *Id.* at 234, 498 A.2d at 631.

346. *Id.*

347. *Id.* at 235-36, 498 A.2d at 631-32. The court of appeals implicitly decided that the panel chair did have the power to reconsider his dismissal. *Id.* at 236, 498 A.2d at 632. The decision does not address whether the motion to reconsider was an application for modification or correction or some other procedural mechanism. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988); *id.* § 3-222.

348. 304 Md. at 236, 498 A.2d at 632. The court of appeals cited *Munzer v. Ramsey*, 63 Md. App. 350, 492 A.2d 946 (1985), a case in which return to arbitration was appropriate. See *infra* notes 352-358 and accompanying text.

349. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1984 & Supp. 1988); *id.* § 3-224(b)(3); see also *supra* notes 316-326 and accompanying text (discussing motions to vacate).

350. Cf. *infra* notes 352-358 and accompanying text (discussing *Munzer v. Ramsey*, 63 Md. App. 350, 492 A.2d 946 (1985)).

351. This view is in accord with other commentators discussing *Stifler* and the ability to remand. See MacAlister & Scanlan, *supra* note 4, at 499 & nn. 122-23.

352. 63 Md. App. 350, 492 A.2d 946.

353. *Id.* at 354, 492 A.2d at 950.

354. *Id.*; see also *supra* notes 57-70 and accompanying text (discussing time for seeking judicial review).

355. 63 Md. App. at 355, 492 A.2d at 948. The circuit court and the claimant differed over whether the case should be remanded to the panel originally convened to hear the case or whether a new panel should be convened. The claimant sought a new panel, while the circuit court, in its remand, ordered the original panel to reconvene. The court of special appeals did not decide this issue, since it had decided that dismissal of the judicial review action would "return the matter to the arbitration process." *Id.* at 362, 492 A.2d at 952. Although the parties could seek removal of

The court of special appeals agreed that no award had been rendered and thus held that a condition precedent to circuit court action had not been met.³⁵⁶ Consequently, the court of special appeals dismissed the judicial review action³⁵⁷ but ordered that the dismissal be without prejudice, thereby returning the case to arbitration.³⁵⁸

Thus, despite limited decisions that seemingly approve remand, the language of the Act indicates that remand is not available. Only when an award is not rendered and a case prematurely arrives in circuit court should the case return to arbitration upon dismissal of the circuit court case.

IV. A PROPOSAL FOR CHANGE

The procedure for obtaining judicial review contained in section 3-2A-06 of the Act is overly complicated, contains many traps for the unwary, and, as is evidenced by the various approaches taken by the appellate courts, is not susceptible to easy interpretation. The purpose for the notice of rejection evidently is merely to advise the parties and the Director of the status of the award.³⁵⁹ Although a notice of action to nullify is the mechanism for instituting a medical malpractice action in circuit court,³⁶⁰ the sole purpose of such notice is to prompt a complaint by a claimant seeking further relief. Modification of these judicial review procedures so that parties may easily comply with them and so that appellate courts can easily apply them if they are not complied with furthers the Act's goals and is in everyone's best interests.

The solution to this currently cumbersome procedure is to revive the notion that medical malpractice litigation in the circuit court is not a continuation of arbitration, but rather a case with a condition precedent.³⁶¹ Instead of the three pleadings required to be filed now—notice of rejection, notice of action to nullify, and complaint—one pleading, a complaint, could easily be substituted when a claimant seeks to reject the award.³⁶² In addition to containing sufficient allegations to survive a mo-

the existing panel members, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03(b)(4), the mere fact that a panel chairperson already has evidenced an intention to rule against one party by unsuccessfully attempting to enter a determination should not represent good cause to remove him under that provision of the Act, since the panel chairperson may reconsider the action. *See McClurkin v. Maldonado*, 304 Md. 225, 236, 498 A.2d 626, 632 (1985).

356. 63 Md. App. at 360, 492 A.2d at 950-51.

357. *Id.*

358. *Id.* at 362, 492 A.2d at 952. In so doing, the court specifically did not consider the validity of a remand to arbitration, although it cited both *Stifler v. Weiner*, 62 Md. App. 19, 488 A.2d 192 (1985), and *Schwartz v. Lilly*, 53 Md. App. 318, 452 A.2d 1302 (1982). *See* 63 Md. App. at 362, 492 A.2d at 950-52.

359. *See Tranen v. Aziz*, 304 Md. 605, 612-13, 500 A.2d 636, 639-40 (1985).

360. *Id.* at 612, 500 A.2d at 639.

361. *See supra* note 218.

362. Although the Act may presently be interpreted to permit this procedure, there is no reason to perpetuate a statutory scheme that requires the uncertainty of judicial

tion to dismiss,³⁶³ the complaint should contain a reference to the arbitration proceeding and thereby will show that the plaintiff complied with the statutory condition precedent.³⁶⁴ Furthermore, the complaint should contain a statement that the plaintiff rejects the award. In order to avoid allegations of lack of notice, original process should issue from the circuit court to be served on the defendant in accordance with the applicable rules,³⁶⁵ and a copy of the complaint should be mailed to the HCAO to complete its records.

This proposed procedure has many benefits. First, it reduces the number of pleadings to be filed and the chances for error. Second, it makes medical malpractice litigation much more similar to other forms of tort litigation.³⁶⁶ Third, it permits the plaintiff to select venue and avoids the circuitous method now in place under the Act.³⁶⁷

The procedure for defendants also could be simplified by requiring that the defendant file only a notice of rejection, thus avoiding the notice of action to nullify. The claimant would then be required to file a complaint in court within thirty days thereafter.

In order to reduce the parties' uncertainty, the claimant should file the complaint within thirty days after service of the award or filing of the notice of rejection. Failure to do so should be an absolute bar to further proceedings and should permit the health care provider to submit to a circuit court a favorable award for confirmation.³⁶⁸ Only under these circumstances would a petition for confirmation need to be filed and considered by the circuit court.

Once the complaint is filed, further proceedings in the circuit court would be governed entirely by the Maryland Rules of Procedure. Thus, the circuit court would determine sanctions for a plaintiff's or a defendant's failure to file an appropriate complaint or other motion as it would for any other violation of the rules.³⁶⁹ This procedure would simplify the present process and provide the parties with a more certain outcome,

interpretation to achieve this goal. 304 Md. at 615, 500 A.2d at 641 (McAuliffe, J., concurring).

363. For practical discussion of the elements of the variations of a medical negligence case, see M. SHAR, *supra* note 224.

364. See *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 656, 526 A.2d 46, 54 (1987) (McAuliffe, J., dissenting) (allegation of compliance with arbitration could easily be included in complaint).

365. MD. R. 2-112 to -114, 2-121 to -126.

366. MD. R. 2-101 (case commenced by complaint).

367. MD. R. BY4(a)(2); see *Teimourian v. Spence*, 59 Md. App. 74, 474 A.2d 919 (1984); see also *supra* notes 81-92 and accompanying text (discussion of operation of Rule BY4(a)(2)).

368. Cf. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(i) (1984 & Supp. 1988) (current provision permitting confirmation).

369. MD. R. 1-201(a); cf. *Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 526 A.2d 46 (1987); *Golub v. Spivey*, 70 Md. App. 147, 520 A.2d 394, cert. denied, 310 Md. 2, 526 A.2d 954 (1987); *Brothers v. Sinai Hosp.*, 63 Md. App. 235, 492 A.2d 656 (1985), *aff'd sub nom.*, *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986); *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 490 A.2d 720, cert.

In addition to the procedure for seeking judicial review, the section of the Act dealing with the effect of the award also should be amended to establish clearly that the award merely shifts the burden of persuasion but does not displace the requirement that a plaintiff establish a prima facie case and does not take away a circuit court's authority to grant motions to dismiss,³⁷⁰ motions for summary judgment,³⁷¹ and motions for judgment³⁷² under appropriate circumstances.

By reviewing the Act and the BY Rules and making these and other proposed changes,³⁷³ the General Assembly and the court of appeals³⁷⁴ could achieve considerable progress toward reducing the complexity and expense of compliance with the Act's procedures.³⁷⁵

V. CONCLUSION

This article's review of the operation of the Act and discussion of the various interpretations of the Act's provisions by the court of appeals and the court of special appeals reveal that there is considerable room for improvement. Although many would prefer to achieve that improvement by abolishing the Act, their inability to do so does not obviate the necessity for a statutory scheme which is understandable and which does not place undue hardships on litigants who strive to operate within the guidelines established by the legislature. This article is intended to serve both as a guide for the practitioner where guidelines are ascertainable and to serve as a catalyst for change where either the Act or judicial interpretation of it make guidelines impossible.

denied, 304 Md. 163, 498 A.2d 269 (1985) (cases considering violations of BY Rules under current provisions of Act).

370. MD. R. 2-322.

371. MD. R. 2-501.

372. MD. R. 2-519, 2-532.

373. The Special Committee Report, *supra* note 4, contained many suggestions for amending the Act to permit it to function in a more efficient manner. Similarly, this article presents other suggestions for change. *See supra* notes 6, 22, 23, 46, 48, and 326.

374. Only the General Assembly could modify the Act so as to do away with the notice of rejection and clarify the effect of the award's presumption, since both of those provisions are found in the Act itself. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (1984 & Supp. 1988). The court of appeals, however, could implement the other suggested changes on its own, through modifications of the BY Rules. Such a modification is authorized by section 3-2A-06(b) of the Act. *Id.* § 3-2A-06(b). As of the date of publication of this article, the Court of Appeals Standing Committee on Rules of Practice and Procedure was considering changes to the BY Rules.

375. *Cf.* Special Committee Report, *supra* note 4, app. A, at 143 (suggests abolition of Act instead of procedural change).