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PATRICK W. FLAVIN*

Costa Brava Partnership III v. Telos Corp.: Striking an Inconsistent Balance in Plaintiff Shareholder Suits

IN *COSTA BRAVA PARTNERSHIP III V. TELOS CORP.*,[1] THE CIRCUIT Court for Baltimore City considered whether the Telos corporation and its directors could be subject to personal jurisdiction in the State of Maryland when the corporation's only connection to the state was that it was incorporated under Maryland law.[2] The circuit court also considered whether Costa Brava's shareholder's claim was precluded by Maryland's statute of limitations if the partnership had been a shareholder for less than the statutory period, even though the alleged fraudulent conduct occurred beyond that period and could be ascertained from the corporation's public records.[3] Further, the court considered whether a shareholder who brings a claim of fraudulent conveyance by the corporation and its directors can obtain as a remedy a court-appointed receiver to take charge of the corporation's assets and a court-mandated dissolution of the corporation.[4] The Circuit Court for Baltimore City held that incorporation in Maryland is sufficient contact to warrant personal jurisdiction,[5] and that Costa Brava's claim was not barred by the statute of limitations even though the alleged fraudulent corporate conduct occurred beyond the statutory period because that period did not begin to run until Costa Brava had reason to know of the misconduct.[6] The court further held that Costa Brava cannot obtain as a remedy for alleged fraudulent conveyance a court-appointed receiver.[7] In so holding, the circuit court inconsistently provided the plaintiff shareholders with substantial ability to bring suits against corporations for alleged fraudulent

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1. No. 24-C-05-009296, 2006 WL 1313985 (Md. Cir. Ct. Mar. 30, 2006).
2. *Id.* at *3. The corporation's principal place of business was Ashburn, Virginia. *Id.* at *4.
3. *Id.* at *1.
4. *Id.* at *5–6.
5. *Id.* at *4.
6. *Id.* at *7.
7. *Id.* at *6.

conduct[8] while simultaneously denying an effective remedy to redress the current alleged fraudulent conduct or, more importantly, to deter the same in the future.[9]

I. THE CASE

The defendant, Telos Corporation, was a public company incorporated in the State of Maryland, with its headquarters and principal place of business in Virginia.[10] Telos had securities offerings that included Class A and Class B Common Stock.[11] The Exchangeable Redeemable Preferred Stock (ERPS), the shares giving rise to Costa Brava's claim in this case, was issued by Telos in 1989 and was the only publicly traded preferred class of stock.[12] Under the ERPS registration statement, ERPS holders were entitled to semi-annual fixed dividend payments, mandatory redemption as fixed-termed securities, and in some cases the right to elect "Class D" directors.[13] As of June 1, 2005, 3,185,586 shares of ERPS were outstanding, with Costa Brava holding 506,811 of those shares, all of which were purchased by the partnership between January and June of 2005.[14]

In December of 1991, Telos ceased making dividend payments to ERPS shareholders due to what Telos claimed were "insufficient legally available funds."[15] The outstanding unpaid accrual at the time of the suit brought by Costa Brava totaled $39.7 million.[16] Telos, as required under the registration statement, was to begin redeeming 20 percent of the outstanding ERPS stock in 2005, but had not begun to do so due to Telos' "legally insufficient funds" claim.[17] Events occurred between 1995 and 2004 that further added to Telos' inability to pay the required dividends and comply with the redemption schedule. For example, between 1998 and 2004, Telos paid cash bonuses to its officers totaling over $4.5 million, even though throughout this time the company claimed to be insolvent.[18] Also, between 2000 and 2004, Telos granted many of these same officers stock options totaling 4,468,000 shares.[19] Further, in 1995, Telos entered into a loan agreement with a 75 percent shareholder of its Class A Stock, Director John Porter.[20] The loan agreement extended the loan through 2008 at a 17 percent interest rate when the prime rate at the time was only 8.8 percent.[21]

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8. *See infra* Part IV.B.
9. *See infra* Part IV.C.
10. *Costa Brava P'ship*, 2006 WL 1313985, at *1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *2.
19. *Id.*
20. *Id.*
21. *Id.*

After purchasing ERPS stock in January 2005, the plaintiff soon realized that the defendant corporation was not complying with the dividend payments and redemption schedule set forth in the registration statement.[22] In March 2005, the plaintiff notified the defendant corporation of its concern.[23] In reaction the defendant Telos formed an independent committee to investigate ways to rectify the corporation's capital structure insolvency and to finance the scheduled ERPS redemption.[24] In response to the independent committee's letter, Costa Brava secured alternative financing plans, but Telos did not respond to the partnership's suggestions.[25] Instead, Telos decided to reclassify the ERPS in its 2005 Securities and Exchange Commission (SEC) filings as a long-term liability, and to exchange the ERPS for exchange debentures instead of following the mandatory redemption schedule.[26]

In September of 2005, Costa Brava made demand on the Telos Corporation for full accounting of Telos' bonus payments.[27] The partnership demanded that Telos recover bonus payments paid to the officers beginning in 1998, and that Telos devise a payment plan for the ERPS dividends.[28] Having heard no response to its demand, Costa Brava filed suit in October 2005.[29] The partnership sought to establish jurisdiction over Telos[30] in the Circuit Court for Baltimore City[31] to have the

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* Costa Brava's assertion of personal jurisdiction over one of the directors, Director Stewart, was dismissed because Stewart was not a director when the first demand letter was made and because Stewart was named to Telos' Board of Directors only twelve days before the partnership filed its complaint. *Id.* at *2–3. Costa Brava argued that Stewart should not be dismissed because he also failed to address the partnership's initial demand on the corporation, and in so doing he breached the fiduciary duty he owed to the corporation. *Id.* The court granted Stewart's motion to dismiss because he was not a member of Telos' board at the time when the alleged fraudulent conduct occurred and he had no firsthand knowledge of the events that occurred. *Id.* The court had an opportunity to address in more detail a fairly significant legal issue—to what extent a director can be held liable for conduct of the corporation that occurred before that person became a director or even simultaneously with their arrival. By not allowing the issue to proceed beyond Stewart's motion to dismiss, the court overlooked important factual events, such as Stewart's possible interaction with the corporation and possible knowledge of the corporation's financial status before actually becoming a director, that may have made Stewart a proper defendant in this case. Though it may seem unfair to hold Stewart potentially liable when he was only on the board for twelve days, directors in other contexts have otherwise been held liable. *See* Escott v. BarChris Constr. Co., 283 F. Supp. 643, 688 (S.D.N.Y. 1968) ("Section 11 imposes liability in the first instance upon a director, no matter how new he is. He is presumed to know his responsibility when he becomes a director.").
31. *Costa Brava P'ship*, 2006 WL 1313985, at *3, *5. Telos raised the jurisdictional defense of forum non conveniens for being subjected to litigation in Baltimore City. *Id.* at *3. Under the Maryland Code, "[i]f a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers just." MD. CODE ANN., CTS. & JUD. PROC. § 6-104 (LexisNexis 2006). Under *Jones v. Prince George's County*, in making this determination the court is to "balance the convenience of witnesses and those public-interest factors of systemic integrity and

court appoint a receiver to take over Telos' assets and management and devise a plan to pay off Telos' debts.[32]

II. LEGAL BACKGROUND

A. *Asserting Personal Jurisdiction in Maryland over Corporations and their Directors Based Solely on the Corporation's State of Incorporation*

To determine whether a court can exercise personal jurisdiction over a non-resident defendant in Maryland, it must first be determined "whether jurisdiction is established under Maryland's long-arm statute," and, if so, then it must be determined "whether the exercise of jurisdiction comports with the Fourteenth Amendment Due Process Clause."[33] Maryland's long-arm statute has been interpreted, however, to extend to the fullest limits of the Fourteenth Amendment, so that the statutory inquiry merges with the constitutional examination.[34] Therefore, in Maryland the reach of the long-arm statute depends largely upon whether in personam jurisdiction may be asserted and maintained under the Fourteenth Amendment.[35]

The United States Supreme Court has established that the Due Process Clause imposes many fundamental limits on exercising personal jurisdiction over out-of-state defendants.[36] In order for there to be jurisdiction consistent with due process, a non-resident defendant must have sufficient minimum contacts with the forum

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fairness . . . ." 835 A.2d 632, 645–46 (Md. 2003) (citing Leung v. Nunes, 729 A.2d 956 (Md. 1999)). The court found that because Telos was incorporated in Maryland, it had agreed to subject itself to jurisdiction. *See infra* Part III.A. More specifically, the court also found that given the geographic proximity of Telos' headquarters in Ashburn, Virginia, to Baltimore, Maryland, Telos was not materially inconvenienced such that the case should be heard in another forum. *Costa Brava P'ship*, 2006 WL 1313985, at *3.

32. *Costa Brava P'ship*, 2006 WL 1313985, at *5–6. Costa Brava also sought to join the directors, officers, and the corporation as defendants, to hold the interested directors and officers personally liable, and to hold the corporation derivatively liable as a shareholder. *Id.* at *5–9. With respect to the partnership's direct claim against the corporation, the court cited *Bennett Heating & Air Conditioning, Inc. v. Nations Bank*, 654 A.2d 949 (Md. Ct. Spec. App. 1995), *rev'd in part on other grounds*, 674 A.2d 534 (Md. 1996) (holding that a court must assume the truth of all relevant material facts that are well-pleaded and all inferences that can be reasonably drawn from the pleadings). *Id.* at *3. Drawing all reasonable inferences from the plaintiff's alleged facts, the court denied Telos' motion to dismiss the direct claims against both the corporation and its directors and officers. *Id.* at *4, *8. With regards to the partnership's derivative claims, the issue that arose was whether Costa Brava had given Telos sufficient time in which to respond to pre-suit demand before bringing suit. *Id.* at *8. Section 7.42 of the Model Business Corporation Act states that ninety days is an appropriate period in which to respond to pre-suit demand, while section 7.03(d) of the American Law Institute's Principles of Corporate Governance states that thirty days is an appropriate period. *Id.* The court declined to adopt either specific period as the appropriate time period, and instead adopted a totality of the circumstances approach in this case. *Id.* The court found that Costa Brava had made demand sufficiently prior to bringing suit, and that Telos had failed to respond to the original demand. *Id.* So regardless of the timing of the second demand, Costa Brava had given Telos an appropriate amount of time under either guideline to respond. *Id.*

33. McGann v. Wilson, 701 A.2d 873, 876 (Md. Ct. Spec. App. 1997) (citing Bahn v. Chi. Motor Club Ins. Co., 634 A.2d 63 (Md. Ct. Spec. App. 1993)).

34. Beyond Sys., Inc. v. Realtime Gaming Holding Co., 878 A.2d 567, 580 (Md. 2005).

35. Bond v. Messerman, 895 A.2d 990, 999–1000 (Md. 2006).

36. Int'l Shoe Co. v. Washington, 326 U.S. 310, 311–22 (1945).

state such that "traditional notions of fair play and substantial justice" are not offended.[37] Also, the defendant's contacts with the state must be sufficient enough that he could "reasonably anticipate being haled into court" there.[38]

In *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*,[39] the United States Court of Appeals for the Fourth Circuit, applying the constitutional framework set forth by the Supreme Court, addressed the issue of whether mere acceptance of a directorship in a corporation of the forum state constitutes minimum contacts.[40] The directors being sued by the plaintiffs in *Pittsburgh Terminal* were residents of the State of Virginia and their principal place of employment was in Richmond.[41] The directors were being sued in West Virginia, and the connection the plaintiffs alleged as a basis for in personam jurisdiction in the state was that the defendants had recently become directors of a West Virginia corporation whose principal place of business was in West Virginia.[42] Despite the court finding that "[n]either of the non-resident directors was ever physically present in West Virginia,"[43] the court held that the defendants' acceptance of directorships in a West Virginia corporation established sufficient minimum contacts to subject the defendants to personal jurisdiction there.[44] The Court of Appeals reasoned that because directors reap the advantages and protections available to them under the forum state's law, it is not unfair to require them to answer for any alleged misconduct in or affecting the forum state. Thus, being a director of a corporation incorporated in the forum state is sufficient to subject the director to personal jurisdiction.[45]

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37. *Id.* at 316 (citing Milliken v. Meyer, 311 U.S. 547 (1940)).
38. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
39. 831 F.2d 522 (4th Cir. 1987).
40. *Id.* at 525.
41. *Id.* at 524.
42. *Id.* The Court of Appeals for the Fourth Circuit specifically found that the two directors being sued, Directors Hawk and Griffith, had

> at least the following contacts with the State of West Virginia: (1) they acted as directors of a West Virginia corporation [Mid Allegheny Corp.] which did business in West Virginia, (2) as directors of Western Maryland [Western Maryland is a Maryland corporation doing business in Maryland and West Virginia], they participated in the solicitation of the proxy of Mid Allegheny in favor of the merger, (3) as the directors of Mid Allegheny, they participated in voting the corporation's stock in favor of the challenged transaction, and (4) they approved the transaction through a telephone call to West Virginia with Mid Allegheny's director and president, a citizen of West Virginia.

Id. It is not clear from the court's opinion whether these facts were argued or alleged by the plaintiffs or whether the court was assuming these facts based on Hawk and Griffith's acceptance of their directorships. *Id.*

43. *Id.*
44. *Id.* at 529.
45. *See id.* ("Certainly, a director of a corporation has created a continuing obligation between himself and the corporation, one which inures significantly to the director's benefit, not to mention that of the corporation. Directors reap the advantages and protections available to them under state law, and it is not unfair to require them to answer for any alleged breaches of trust as a director in the forum that has bestowed those protections. No one forced or tricked the defendants into assuming their positions, and it seems clear that Hawk and Griffith have purposefully availed themselves of the privilege of doing business as directors under West Virginia's laws.").

B. Running of Maryland's Statute of Limitations for Civil Causes of Action

Under the Maryland Code, there is a general three-year limitation on civil lawsuits.[46] The statute specifically states that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."[47] In *Poffenberger v. Risser*,[48] the Maryland Court of Appeals held that the point at which a civil action "accrues" is based on the discovery rule, meaning that the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.[49] The Court of Appeals noted in this holding that the general rule up to this point had been that the running of the limitations against a right or cause of action is triggered upon occurrence of the alleged wrong, and not when it is discovered, so the court adopted the new standard to alleviate the harshness and unfairness the former standard placed upon plaintiffs.[50]

The Court of Appeals had previously, in *Herring v. Offutt*,[51] addressed situations in which the plaintiff was unable to discover the defendant's misconduct because of the defendant's attempts to conceal the misconduct.[52] In *Herring*, the Court of Appeals held that in all actions where a party has been kept in ignorance of their cause of action "by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall or with usual or ordinary diligence might have been known or discovered."[53] In this ruling, however, the court noted that "the running of the Statute of Limitations will not be postponed if the defrauded person may discover the fraud from the public records," but that such a rule "does not apply to a person while a fiduciary relationship exists and where nothing occurred to indicate the necessity for investigation."[54] Thus, in the

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46. MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (LexisNexis 2006).
47. *Id.*
48. 431 A.2d 677 (Md. 1981).
49. *Id.* at 680.
50. *Id.* at 679.
51. 295 A.2d 876 (Md. 1972).
52. *Id.* at 880.
53. *Id.* at 881 (citing MD. ANN. CODE art. 57, § 14 (1957)).
54. *Id.* at 881. The Court stated here

> [w]here a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to have failed to use due diligence in detecting the fraud. This is for the reason that a confidential relationship by its nature gives the confiding party the right to relax his vigilance to a certain extent and rely on the good faith of the other party and his duty to disclose all material facts, and therefore the confiding party has no duty to make inquiries until something occurs to make him suspicious.

Id. at 880–81 (quoting Vail v. Vail, 63 S.E.2d 202 (N.C. 1951)). Costa Brava could have made the argument that they were engaged, as shareholders, in a confidential relationship with the directors, whom they were suing, and the corporation, to try to avoid the running of the statute of limitations. However, since the alleged misconduct in the partnership's claim could still have been ascertained from Telos' SEC filings, the confidential relationship argument would probably have been moot since the information was nevertheless publicly available. *See infra* Part IV.B. Perhaps Costa Brava could then have raised the issue that as minority shareholders of corporate context, shareholders generally have notice as a matter of law regarding any information contained in public records, including SEC filings, because such information is public and accessible.[55] Therefore, the statute of limitations begins to run on shareholders if the corporate misconduct could be ascertained from public records.[56]

C. *Maryland Law Protects Creditors against Bad Faith Debtors by Providing a Cause of Action for Fraudulent Conveyances*

Under Maryland law, "[e]very conveyance made and every obligation incurred by a person who is or will be rendered insolvent by it is fraudulent as to *creditors* without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."[57] In addition, "[e]very conveyance made and every obligation incurred without fair consideration when the person who makes the conveyance or who enters into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."[58] Such a claim of fraudulent conveyance can arise from misconduct or negligent action on the part of a corporation or business.[59] Maryland law further provides that "[i]f a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have pro-

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preferred stock with limited voting rights, the partners were truly dependent upon the good faith (i.e. fiduciary duties) of the directors because in practice they had no say over who the directors of the corporation were. Costa Brava thus could have asserted that a confidential relationship existed between the plaintiff shareholders and the directors because of this dependence.

55. *See* Raab v. Gen. Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993) ("Omitting the contract slowdown from the Annual Report is not actionable because the contemporaneous press release of March 30, 1992 informed the market of a slowdown in DOE contracting awards. Plaintiffs rely on fraud on the market to establish reliance in this case; unfortunately for them, the presumption that the market price has internalized all publicly available information cuts both ways. The information available to the market included not only the Annual Report, but also the March 30 press release. 'In a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources.'") (quoting *In re* Apple Computer Sec. Litig., 886 F.2d 1109 (9th Cir. 1989)).

56. *Id.*

57. MD. CODE ANN., COM. LAW § 15-204 (LexisNexis 2006) (emphasis added).

58. *Id.* § 206.

59. *See* F. S. Bowen Elec. Co. v. U.S. Fid. & Guar. Co., 256 F.2d 46, 49–50 (4th Cir. 1958) ("While the Bowen company denies that it was the transferee of the disputed items, the record is quite sufficient to support the finding of the District Judge that it was. One of the items, a check for $20,100 was made payable to F. S. Bowen, the controlling, or sole, stockholder of the Bowen company, and was immediately endorsed by him and deposited to the credit of the Bowen company. The fact that, on the books of the company, it was entered as a credit to the personal account of Mr. and Mrs. Bowen does not give the company the status of a bona fide purchaser. If it was not intended, from the outset, to be the recipient of the funds, it did receive them and it took them charged with knowledge of all of the circumstances."). The plaintiffs in the present case could have analogized from this case to argue that the directors and officers who were accepting large bonuses, even though the corporation was reporting as insolvent, accepted the money with knowledge of all of the circumstances, and as such the conveyance of the bonuses was fraudulent.

ceeded had his claim matured."[60] In this proceeding the court can, among other remedies, set aside the conveyance or appoint a receiver to take charge of the property.[61]

Maryland law only provides for a claim of fraudulent conveyance to persons or entities recognized as creditors of any debt assumed.[62] A relationship of creditor/debtor with regards to shareholders and their relationship to the corporation can only arise under certain circumstances, as recognized by the Maryland Court of Appeals in *Heyn v. Fidelity Trust Co.*[63] In this case, the court stated that "there is no relation of debtor and creditor between the corporation and preferred stockholders or cumulative preferred stockholders until the declaration of the dividend, when, in consequence of the declaration, the obligation of debtor and creditor does arise."[64]

As a remedy for a fraudulent conveyance, under certain pressing circumstances Maryland law provides for a court-appointed receiver of the property to take charge of the assets and control their eventual distribution.[65] This remedy, however, is seldom (if ever) used because Maryland courts are reluctant to exercise such broad authority unless the plaintiffs can overcome the substantial burden of proving both imminent necessity and the lack of an adequate alternative remedy.[66]

III. THE COURT'S REASONING

A. *Personal Jurisdiction in Maryland can be Asserted over a Corporation and its Directors Based Solely on the Corporation Incorporating in Maryland*

In *Costa Brava*, the Circuit Court for Baltimore City held that Telos' directors and the corporation were subject to personal jurisdiction in Maryland.[67] The circuit

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60. Md. Code Ann., Com. Law § 15-210.

61. *Id.*

62. *See supra* notes 57, 58, 60 and accompanying texts.

63. 197 A. 292 (Md. 1938).

64. *Id.* at 296.

65. Blondheim v. Moore, 11 Md. 365, 374 (1857). The extreme circumstances, as cited by the Maryland Court of Appeals, include:

> 1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2nd. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit, that a receiver is necessary to preserve the property. 3rd. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That "fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved;" and 5thly. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application.

Id.

66. *See* Baker v. Baker, 70 A. 418, 420 (Md. 1908) ("In the leading, and well known, case of *Blondheim v. Moore*, 11 Md. 365, CHIEF JUDGE LEGRAND announced certain rules for the government of Courts in appointing receivers, which have often since been repeated and followed. After saying that the power of appointment must be exercised with great circumspection, that it must appear the claimant has a title to the property and the Court must be satisfied by affidavit that a receiver is necessary to preserve it, that in no case should the Court make an appointment merely because it could do no harm . . . .").

67. Costa Brava P'ship III v. Telos Corp., No. 24-C-05-009296, 2006 WL 1313985, at *3–4 (Md. Cir. Ct. Mar. 30, 2006).

court adopted the reasoning of the United States Court of Appeals for the Fourth Circuit in *Pittsburgh Terminal Corp.*, finding that because Telos was incorporated under Maryland law, "[a]ny action taken by the Directors and Officers with respect to the management of Telos can only be given effect in Maryland by virtue of Maryland law."[68] Therefore, the defendant transacted business in Maryland through the alleged fraudulent transfers of bonuses and stock options and the decisions of whether to pay the expected dividends.[69] Because Maryland's long-arm statute extends to the fullest extent allowed under the Due Process Clause, the court held that this "transacting business" in Maryland amounted to sufficient contacts with and purposeful availment of the laws of Maryland to thereby subject the defendants to personal jurisdiction.[70]

B. The Statute of Limitations in Maryland does not Run against Plaintiff Shareholders who cannot Demand the Payment of Dividends

The circuit court also held that Costa Brava's claims were not barred by the three year statute of limitations.[71] The court found that pursuant to the discovery rule, Costa Brava's claim for fraudulent conveyance could not have accrued until the partnership knew or had reason to know that Telos did not intend, in good faith, to make efforts to adhere to the ERPS redemption schedule or to pay the expected dividends.[72] Costa Brava, according to the court, did not have reason to know that Telos was insolvent and was not going to fulfill its obligations under the ERPS registration statement until Telos formed the independent committee to review its own financial status.[73] Before the formation of the committee and throughout the period in which Telos failed to adhere to its obligations, the partners had no right to demand the payment of ERPS dividends because the dividend payments were to be paid at the discretion of Telos' directors.[74] Thus, the partners did not have notice of Telos' insolvency until it became clear, within the last two years, that the corporation was financially unable to fulfill its mandatory obligations.[75] Therefore, the plaintiffs' claim accrued within the statute of limitations.[76]

68. *Id.* at *4.
69. *Id.*
70. *Id.*
71. *Id.* at *7.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

C. The Claim of Fraudulent Conveyance only Protects Creditors under Maryland Law and only Provides for a Receiver of the Property Subject to the Conveyance Itself

The circuit court further held that Costa Brava could not assert a claim of fraudulent conveyance because the partnership is not a creditor for the purposes of Maryland law.[77] In addressing this part of Costa Brava's claim, the court at first attempted to classify the attributes of the plaintiff's ERPS stock as equity, rather than debt, by highlighting how ERPS holders retained part ownership in Telos, maintained the right to vote, were entitled to dividend payments but had no right to have a dividend declared, and had a right to a pro rata distribution of any remaining assets in the case of a solvent dissolution of Telos.[78] The court concluded that, although it is doubtful that the plaintiff could be considered a creditor under the authority of *Heyn*, the plaintiff was entitled to further discovery on this issue.[79]

However, in considering the remedies available to Costa Brava for this claim, the court held that the remedy of a court-appointed receiver of a corporation is not authorized under Maryland law.[80] The court reached this holding by asserting that "given the plain meaning of Md. Code Ann., Comm. Law § 15-210, and the absence of case law interpreting said section, the Court is convinced that Maryland law does not provide for the appointment of a receiver for Telos as a remedy for a fraudulent conveyance claim."[81]

IV. ANALYSIS

A. The Circuit Court Properly Forced the Defendants to be Accountable in Maryland by Holding that Incorporating in Maryland is Sufficient for Personal Jurisdiction

By adopting the broad minimum standard of personal jurisdiction set forth in the Fourth Circuit's opinion in *Pittsburgh Terminal*, the Circuit Court for Baltimore City adequately provided the plaintiff Costa Brava, and potential future plaintiffs, with the convenience of litigating in their own home state. Providing plaintiffs with this opportunity is consistent with at least three of the four personal jurisdiction considerations the Supreme Court set forth in *World-Wide Volkswagen Corp. v.*

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77. *Id.* at *5–6.
78. *Id.* at *5.
79. *Id.*
80. *Id.* at *6.
81. *Id.* The plain language the court relied upon to deny the appointment of a receiver to take charge of Telos states that as a remedy for a claim of fraudulent conveyance, the court may "[a]ppoint a receiver to take charge of *the property*." Md. Code Ann., Com. Law § 15-210 (LexisNexis 2006) (emphasis added). By relying on this language, the court essentially held that this section only allows the appointment of a receiver for the property that is the subject of the fraudulent transaction. This holding seems to contradict the legislative intent of the title 15, subtitle 2, section 210 remedies for fraudulent conveyances. *See infra* note 87 and accompanying text.

Woodson,[82] to include "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies."[83]

The circuit court's holding provides adequately for Maryland's interest in adjudicating the dispute. The Telos Corporation opted to incorporate in Maryland, and despite the fact that the directors were acting outside of the state, their actions have the greatest legal effect in Maryland. Because Maryland provides the directors and the corporation with the requisite corporate legal protection and benefits, it is only fair and reasonable for the directors and corporation to be subject to suit in Maryland. Also, because the partners of Costa Brava are citizens of the state, it would be most convenient and effective for the partners to litigate in Maryland against another Maryland citizen. Further, the interstate judicial system's interest would dictate that this case be litigated in Maryland because Maryland courts should resolve issues of corporate governance for Maryland corporations to provide as much consistency as possible. Because Telos was incorporated under Maryland law, requiring the corporation to defend suits in the state puts corporations and their directors on notice that it is more than a mere formality to incorporate under Maryland law. Asserting personal jurisdiction thus avoids the inequitable contradiction of providing protection for corporations and their directors yet not holding them accountable as corporate actors were they only subject to personal jurisdiction in the state of the corporation's principal place of business.

B. The Circuit Court Erred by Allowing Plaintiff Shareholders to Overlook Publicly Available Corporate Information to Avoid the Statute of Limitations

Though the circuit court correctly provided plaintiffs with an important means of litigating their claims in their own state, the court on the other hand provided plaintiffs with far too much latitude for avoiding the statute of limitations. In this case the circuit court erred in siding with Costa Brava's characterization of the claim against Telos. Costa Brava used its lack of ownership prior to 2005 as a means to act as though it had no reason to know of Telos' financial insolvency—even though it was public record that Telos had ceased making dividend payments since 1991.[84] Because this information was public and accessible, it should have put both present and future shareholders on notice that Telos was either engaging in questionable corporate conduct or potentially insolvent. Even if the exact cause of the lengthy nonpayment of dividends was not readily apparent, the publicly-available information should have been considered sufficient enough to put shareholders or

82. 444 U.S. 286 (1980).
83. *Id.* at 292.
84. *See supra* Part I.

potential purchasers on "inquiry notice," requiring them to conduct some minimally reasonable inquiry into Telos' status.[85]

Rather than requiring current and potential shareholders to, at a minimum, inquire into the corporation's financial status, the court in effect allowed plaintiffs to purchase into questionable corporate securities practices and retain actionable rights. Costa Brava's claims regarding the redemption schedule and unpaid dividends that arose within the three year statute of limitations should have been sustained, but those that occurred beyond the three years should have been dismissed. In order to avoid allowing plaintiff shareholders to overlook the financial realities of corporations in which they intend to purchase stock, the court should have held that unless the shareholder conducts a minimally reasonable investigation, any claims beyond the statute of limitations should be dismissed.

C. The Circuit Court Erred by Holding that the Appointment of a Receiver is not an Available Remedy in a Claim for Fraudulent Conveyances Against a Corporation

After erring on the side of plaintiff shareholders with regards to the statute of limitations issue, the circuit court then performed an about-face and erred on the side of the corporation with regards to its holding on the fraudulent conveyance claim. The court correctly found for the first half of this issue that discovery should continue regarding the issue of whether the plaintiffs could be considered creditors under Maryland law. The statutory definition of creditor is "a person who has any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent."[86] Though Costa Brava did not seem to allege that *Heyn*'s requirement that the corporation have declared dividends was satisfied, the circuit court

85. *See* Lumsden v. Design Tech Builders, Inc., 749 A.2d 796, 802 (Md. 2000) ("[A] plaintiff is only on inquiry notice, and thus the statute of limitations will begin to run, when the plaintiff [ ] has 'knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [action].' [(citation omitted)] In such a situation, should the plaintiff fail to seek out the facts supporting a cause of action, it can fairly be said that the plaintiff has inexcusably slept on his rights."). Given that Costa Brava purchased 506,811 shares of the Telos Corporation in a six month time span, the circuit court should have at least considered whether a reasonable person in the position of the partnership, and making such substantial purchases, would have researched the corporation's publicly-filed SEC disclosures before buying the shares. Such an investigation could be considered "minimally reasonable" for a purchaser because of the ease with which publicly filed disclosures are available. Whether or not such an investigation would provide plaintiffs with sufficient knowledge to discover possible misconduct would ultimately depend on the facts of each case, with emphasis on the sophistication of the purchaser and the number of shares purchased. In the present case, the fact that Costa Brava was a limited partnership that purchased a substantial number of shares in a short time period suggests that the partnership purchased for investment purposes, indicating that Costa Brava was potentially a more sophisticated purchaser. A reasonable person in the position of Costa Brava perhaps would have looked into Telos' financial status before buying and have been able to discover the corporation's poor financial shape.

86. Md. Code Ann., Com. Law § 15-201.

properly denied Telos' motion to dismiss on this part of the claim and allowed for further discovery to more accurately resolve this issue.

However, the court effectively rendered the issue moot by holding that the appointment of a receiver for a corporation is not available as a remedy under Maryland law, whether or not the claim is successful on the substantive merits.[87] By so holding, the court missed an opportunity to extend the reach and authority of appointments of receivers to cases such as this, where there were allegations of serious misrepresentations and corporate misconduct, to both curb misleading corporate actions and to provide adequate remedies to shareholders and creditors.[88] The plaintiffs sufficiently alleged that Telos engaged in fraudulent conveyances and that the most appropriate remedy to protect shareholders from losing their shares to bankruptcy would be a court-appointed receiver. By eliminating a receiver as a possible remedy, the court closed the door on the most powerful means of checking corporate abuse available under Maryland law—a court mandated removal of the corporation's officers and directors and the appointment of a receiver to redistribute the remaining corporate assets.[89] The mere possibility of such a remedy would make many corporations such as Telos reconsider the extent to which they wish to depart from the duties and responsibilities that they owe shareholders.

87. *See supra* Part III.C. The court's holding seems to have contradicted the legislative intent of title 15, section 210 remedies by relying exclusively on section 210(b)(2)'s language providing for the appointment of a receiver "to take charge of *the property*." MD. CODE ANN., COM. LAW § 15-210 (emphasis added). For section 210(b)(1) provides that as a remedy the court may "[r]estrain the defendant from disposing of *his property*." *Id.* (emphasis added). The difference in the language is significant, as the latter, which is listed first, indicates an intent on the part of the legislature to restrain the defendant beyond just the contested transaction. Moreover, section 210(b)(4) provides that as a remedy the court may "[e]nter any order which the circumstances of the case require." *Id.* Granting such broad authority to the courts indicates a further intent to provide the courts with the full gamut of remedies necessary to cure the wrong done, and even yet to be done, to the plaintiff. Given that the court relied on the plain language of one section alone and even cited the absence of case law interpreting title 15, subtitle 2, section 210 as the basis for its holding, the court failed to adequately fulfill the legislature's intent in providing the necessary remedies for plaintiffs in fraudulent conveyance claims under title 15, subtitle 2, section 210.

88. *See* Knighton v. Young, 22 Md. 359, 372 (1864) ("[W]e think there is nothing in the bill to require the issuing of an injunction or appointment of a receiver. . . . There is no allegation that the rents, issues and profits of the real estate supposed to be subject to dower, will be *lost irretrievably*, by reason of the insolvency of those receiving them, or that the complainant *has not adequate remedy at law*, for such of the rents as he may be entitled to: it is not sufficient to allege they are in jeopardy, but it must be shown how they are jeopardized.") (emphasis added). The court should have allowed the plaintiffs to try to assert on the merits that, because Telos had been put into insolvency, the shareholders' interests would be irretrievably lost without the remedy of a court-appointed receiver to redress the corporation's financial troubles. The plaintiffs could also have asserted that appointing a receiver as an independent outside check on the corporation's financial decisions would furnish the only adequate remedy at law to protect their interests.

89. *See supra* notes 65, 66 and accompanying texts. The plaintiffs were seeking a redistribution of the corporation's remaining assets in one of two ways—either the appointment of a receiver to take charge of the company's assets and actually operate the corporation, or the appointment of a receiver to manage the judicially granted dissolution of the corporation. Costa Brava P'ship III v. Telos Corp., No. 24-C-05-009296, 2006 WL 1313985, at *1 (Md. Cir. Ct. Mar. 30, 2006).

V. CONCLUSION

In *Costa Brava,*[90] the Circuit Court for Baltimore City struck an inconsistent balance on important issues relating to corporations and shareholder suits. The court correctly found that corporations are to be subject to personal jurisdiction in the state under which they are incorporated. However, the court erred on the side of shareholders in holding that plaintiffs can successfully plead lack of notice of corporate misconduct up until they bring suit and make demand on the board. Conversely, the court erred on the side of corporations in holding that the appointment of a receiver is not an available remedy for a shareholders' fraudulent conveyance claim against the corporation. In so ruling, the circuit court in one instance too freely broadened shareholders' access to seek the usual available remedies despite accessible public records, yet in the other instance eliminated the bite of that access for shareholders and others in the very few cases where it is the effective and powerful remedy, rather than the access, that is far more needed.

90. No. 24-C-05-009296, 2006 WL 1313985.