Volume 14, No. 2

Civil Litigation Section

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Civil Litigation Update

Spring 2009

The Consumer Product Safety Improvement Act of 2008: The Next Big Wave of Litigation

By *Steven F. Baicker-McKee*

Steven F. Baicker-McKee

The Consumer Product Safety Improvement Act of 2008 (CPSIA), Pub. L. 110-314, a sweeping revision of the Consumer Product Safety Act of 1972, prompted by numerous recalls of imported toys in 2007 for high lead content, went into effect on Feb. 10, 2009, and sets the stage for a tremendous wave of litigation related to the manufacture and distribution of children's products. The new law, which passed nearly unanimously in both houses of Congress in July 2008, and was signed into law by President Bush in August 2008, enjoyed strong support from several groups with interest in the litigation implications of the act, including the National Employment Lawyers Association, which was interested in whistleblower provisions, and Public Citizen, a consumer product safety lobbying and litigation organization. CPSIA sets stringent limits on lead and phthalates in children's products while greatly expanding: the scope of regulated products; the definitions of "manufacturer" and "distributor"; manufacturers' duties for testing, certifying, labeling and tracking products; self-reporting of possible violations; and civil and criminal penalties for violations. In addition, the CPSIA deputizes states' attorneys general as well as the federal Consumer Product Safety Commission (CPSC) to investigate and prosecute cases. The law provides whistleblower protections and mandates the establishment of a publicly searchable database of alleged violations. Importantly for purposes of the Civil Litigation Section, it also for the first time allows private citizens to file complaints of safety violations.

The CPSIA is expected to spur a variety of types of litigation.

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Steven Baicker-McKee is a shareholder at Babst, Calland, Clements & Zomnir, and also an author of the Federal Civil Rules Handbook*, an annual publication by Thomson/West that provides a practical, answer-oriented guide to practicing in federal court. The 2008 edition of the* Handbook *contains extensive commentary and guidance about the 2007 amendments to the Federal Rules of Civil Procedure.*

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The CPSIA is expected to spur a variety of types of litigation. First, the lower lead and phthalates, coupled with the testing and certifying procedures, will likely support new toxic tort and products liability lawsuits. Second, the CPSIA contains citizen suit provisions, which provide for the recovery of attorneys' fees and will thus likely result in new claims being filed. Finally, the complexity of the regulations, coupled with fast-tracked implementation and considerable confusion among manufacturers and sellers, are expected to create unprecedented levels of noncompliance and result in enforcement actions being filed, with the need to defend those actions.

Overview of Key Components and Timetable for Implementation

The two major components of CPSIA, Section 101, which lowers the permissible levels of lead in children's products, and Section 108, which bans certain phthalates (softeners used in plastics and personal care products) in childcare products for children under three and children's toys, went into effect on Feb. 10, 2009, despite a last-minute one-year stay on the testing and certification provisions. [Federal Register Notice, Feb. 9, 2009] The new limits on lead and phthalates are retroactive, applying to inventory as well as items sold by resellers. Permissible levels of lead will decrease from the current limit of 600 parts per million (ppm) to 300 ppm on Aug. 14, 2009, and then to 100 ppm on Aug. 14, 2011, with possible additional decreases in the future. There are additional even more stringent limits on lead in paint.

Beginning Feb. 10, 2010, manufacturers and importers are required to obtain third-party testing for lead and phthalates for every batch of every covered product and must include General Certificates of Conformity with each product shipment (Section 102). Additionally, beginning on Aug. 14, 2009, under Section 103, all manufacturers must affix permanent labels to products and packaging that contain specified information to aid recall efforts. The law also adds new advertising regulations (Section 105), primarily in the form of mandatory warnings, and increases requirements for use of product registration cards.

The law presumes all materials and children's products to be hazardous substances unless proven otherwise and Congress has set an extremely high bar for exemptions from the law ...

The law presumes all materials and children's products to be hazardous substances unless proven otherwise and Congress has set an extremely high bar for exemptions from the law, putting the onus on manufacturers to show "by the best available, objective, peer-reviewed, scientific evidence showing that lead in such product or material will not result in the absorption of any lead into the body, taking into account normal and reasonable foreseeable use and abuse by a child, nor have any other adverse impact on health or safety." Accordingly, the CPSC has thus far issued relatively few exemptions to the testing and certification requirements, mostly for materials and products that are inherently lead-free. These include most unadorned textiles, items made from certain untreated natural materials like wood and many precious metals and gemstones, "ordinary books" published since 1985, and certain electronics with lead in inaccessible components. The CPSC has advised they will not prosecute unknowing violations of the lead and phthalate limits in these products. The agency also indicated that, although retailers and resellers are not technically responsible for either testing or certifying their goods, they must be certain they are not selling noncompliant items, including any children's products that have been recalled, or they can still be held liable whether or not an item they offer for sale results in harm.

... although retailers and resellers are not technically responsible for either testing or certifying their goods, they must be certain they are not selling noncompliant items ... or they can still be held liable whether or not an item they offer for sale results in harm.

The act also contains additional regulations, some of which went into effect prior to Feb. 10, such as decreased limits on lead in paint, extra-stringent limits on lead in children's jewelry, and increased regulation of durable goods such as cribs and car safety seats. In addition, CPSIA contains many provisions related to enforcement of the law, such as increased funding for the CPSC, broad whistleblower protection, mandatory self-reporting of identified or possible violations, and the development of an Internet-searchable database of complaints about products from consumers; local, state or federal government agencies; health care professionals; child service providers and public safety entities. Companies have five business days to respond to any complaints and can choose whether to have their comments included in the database.

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Factors Likely to Result in Litigation

CPSIA contains many elements that raise the risk of accidental or intentional noncompliance and that also increase scrutiny and ease prosecution, while raising the consequences for violations, leading many observers to forecast a tremendous increase in toxic tort, product liability, whistleblower and defamation litigation.

The act covers **all** *products primarily intended for children 12 and under ...*

- **The Scope of Products Covered**

The act covers *all* products primarily intended for children 12 and under (except for a small number explicitly exempted), including apparel and jewelry; books printed before 1985 or including metal, plastic or electronic parts; educational supplies; bicycles and motorbikes; adaptive devices for children with special needs; furnishings and wall décor, as well as toys. It applies to small-batch and one-of-a-kind items, as well as to mass-produced ones. Because the law is retroactive, it addresses items in inventory on Feb. 10, 2009, as well as used items. (Vintage and antique collectibles that because of their age and value would not be given to children are not considered children's products.) [CPSC "Guidance on the Consumer Product Safety Improvement Act (CPSIA) for Small Businesses, Resellers, Crafters, and Charities" March 3, 2009] This range of children's products greatly exceeds what was covered by previous laws, increasing many-fold the number of items that could wind up in violation of some section of the law.

... the agency includes people or organizations donating items to charities or individuals, in the U.S. or abroad, in their definition of sellers and distributors, as well as thrift and consignment store operators, people holding yard sales, or selling through Internet markets ...

- **Expanded Definitions of "Manufacturer" and "Distributor"**

According to the CPSC, a manufacturer is anyone "who makes, produces, or assembles an item" and their guide for the public notes this could include people who perform simple acts like adding a ribbon to a hair clip or knitting a sweater. *Id.* Similarly, the agency includes people or organizations donating items to charities or individuals, in the U.S. or abroad, in their definition of sellers and distributors, as well as thrift and consignment store operators, people holding yard sales, or selling through Internet markets like ebay or Amazon Marketplace. *Id*. This unprecedented broadening of the categories of "manufacturers" and "distributors" means that many people and even nonprofit organizations will not realize their actions are covered by the law, leaving them vulnerable to violating it. Other unusual groups included under the definitions include importers, who are considered manufacturers under the law and are thus liable for the testing, certification and tracking of label requirements, and possibly libraries and schools (although CPSC has not yet formally issued guidance about these institutions). CPSC has advised that they intend to work with small businesses, but some states' attorneys general have indicated they intend to enforce the law rigorously and the attorneys general are not bound by the CPSC's interpretations and guidance. Pennsylvania's current attorney general, Tom Corbett, has not yet released any statements about how he intends to enforce the law.

- **Third Party Testing Issues**

The testing for lead and phthalates mandated by CPSIA is both stringent and expensive, especially for smaller manufacturers. For the "wet" or destructive testing that had been scheduled to go into effect on Aug. 14, 2009, manufacturers must submit one or more samples of each batch of their finished products (depending on the number and complexity of components) to an approved third-party lab to have each component and the whole tested for lead. A batch is strictly defined: for example, changes in the placement of buttons, size, color, etc. constitute different batches. Toys and child care products for children under three must also be tested separately for phthalates. The testing results in the loss of the samples and most manufacturers are reporting high quotes at approved labs, in the range of several hundred dollars or more *per component.* These burdens can be absorbed by larger manufacturers, but may be prohibitive for many small businesses and niche marketers, like those who make products for the educational, high-end, or special needs markets and operate on a slim profit-margin, and for individuals producing goods for charities. In addition, although resellers and donors of used goods are not required to test their items, they can be held liable for distributing items in violation of the limits and there is no way to be certain most items are safe without testing them. Finally, there is currently a severe shortage of approved testing labs, especially for phthalates (for which CPSC has not yet issued guidance on testing procedures nor provided a list of approved labs). Manufacturers are reporting that many of the lead testing labs are so overwhelmed

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with orders that they will not even issue quotes to smaller businesses.

In light of these concerns, days before the testing provisions were scheduled to be implemented on Feb. 10, 2009, and despite opposition from Congress and many consumer groups, the CPSC announced a one-year stay of the testing and certification components of the law. The hope is that many of the problems listed above will be resolved by then; however, it seems likely that even after that date many small businesses and crafters will fail to comply either from ignorance or inability to meet the required standards and others will rush products to market ahead of testing completion, leading to increased risk of liability and litigation.

Many of the testing labs are located overseas, in the countries that exported the problem toys that prompted CPSIA. These products were in violation of existing laws in both the U.S. and their home countries and had been submitted with falsified documents ...

Another potential source of litigation is falsified testing results. Many of the testing labs are located overseas, in the countries that exported the problem toys that prompted CPSIA. These products were in violation of existing laws in both the U.S. and their home countries and had been submitted with falsified documents; consequently, there is concern among manufacturers that testing companies in these countries may be similarly lax or unscrupulous.

- **Certification Issues**

Record-keeping requirements are greatly increased under the law and less-sophisticated small businesses may well have trouble properly creating and producing General Certificates of Conformity as required by law, which again exposes them to liability. Retailers, though not required to do their own testing, are responsible for checking General Certificates of Conformity and risk liability if they fail to be diligent in monitoring certificates and documenting their compliance.

- **Tracking Label Issues**

Section 103 is currently in the inquiry process and many details remain unresolved. It is likely though, that this piece of the law too will pose difficulties, especially for small and micro manufacturers who are unused to creating and using systems to track materials and products, putting them at risk of accidental noncompliance. Additionally, the labels themselves become a must-be-tested component that increases costs for small lines, leading to increased likelihood of deliberate noncompliance. Finally, labels themselves have occasionally been a source of liability in children's apparel, leading CPSC and the manufacturers to issue consumer alerts and provoking a class action lawsuit.

- **Uncertainty and Misinformation**

A complex new law like CPSIA takes time to generate sufficient regulatory guidance and legal precedents, and during this period of uncertainty the likelihood of noncompliance rises. In the case of CPSIA, this tendency is exacerbated by the short timeframes for passage and implementation; the understaffing of the agency in charge (currently only two of the five Commission seats are filled and many staff positions are just being created); the antagonism between the agency, Congress and the private groups that lobbied for the law; a shift from previously voluntary safety standards to mandatory ones; and the combination of lack of information and misinformation in the media. So far, most mainstream media outlets, like the major networks and national news magazines and papers, have provided scant coverage of the act, and coverage has often included misleading or incorrect information. For example, after the CPSC stayed the testing provisions, many outlets reported wrongly that the whole law was delayed for a year based on a misleading release by staffers at the agency; similarly, news outlets have reported incorrectly that thrift stores are exempt from the law (but they are only exempt from testing and certification, not overall compliance) based on another ambiguous agency document. These problems have left many smaller manufacturers and distributors unaware of how or whether the regulations apply to them, thus making them more likely to violate the law. Flux in the interpretation of sections is also causing significant compliance issues for businesses. For example, the CPSC ruled in early December 2008, that the phthalates ban did not apply to inventory but their ruling was overturned just days before the law was scheduled to take effect following a suit by several consumer groups [www.cpsc.gov/ABOUT/Cpsia/nrdcopinion.pdf], leaving many manufacturers and sellers with stranded inventory and an inability to fulfill promised orders. Sellers' attempts to return products now deemed unsafe are likely to produce additional lawsuits.

Expansion of Scrutiny and Enforcement

- **Increased Budget for CPSC**

The agency has been severely understaffed and underfunded for years, and Congress has greatly increased their budget under Sections 201 and 202 to provide improved enforcement of the law. CPSC spokesman Arlene Flecha announced

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the agency's intention to hire stealth investigators who will visit retailers around the country and monitor Internet marketplaces for items in violation of the new standards [*Augusta Chronicle,* March 2, 2009]. In addition, it is expected that the Obama administration will move quickly to fill the three vacant positions on the Commission and may install a new chair with a stronger litigation orientation than the current chair's.

- **Whistleblower Provisions**

Under Section 219, CPSIA grants job protection to whistleblowers who make reports to CPSC, state attorneys general or a court of law. This provision increases the likelihood that violations will be reported, which in turn is likely to produce additional litigation.

- **Database Issues**

There are already concerns among manufacturers and distributors that the comprehensive, readily searchable database mandated by Congress will generate both increased opportunities for class action and individual suits, as well as more instances of abuses that lead to other litigation, such as false accusations of harm by competitors (which targeted businesses may want to pursue as defamation claims) or inadvertent release of protected trade secrets through database entries.

- **Reporting Requirements**

Under Section 15(b), manufacturers, importers, distributors and retailers must notify the Commission immediately if they obtain information that a product distributed in commerce: (1) fails to meet a consumer product safety standard or banning regulation; (2) contains a defect that could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death or (4) fails to comply with a voluntary standard upon which the Commission has relied under the CPSIA. Thus a violation does not necessarily have to have resulted in harm; it merely has to contain the possibility of harm, which obviously increases the risk of liability.

- **Deputizing of States' Attorneys General**

Under Section 218, state attorneys general are authorized to sue companies for violations of CPSIA, including recordkeeping lapses, provided they first notify the CPSC. Historically, state attorneys general have been more aggressive than the federal agencies in pursuing violators of safety rules, and several states' attorneys general have already announced their intent to investigate and prosecute vigorously. State attorneys general are not required to follow the CPSC's interpretations or exemptions (such as the one-year testing stay), and it is not yet clear whether most will do so.

- **Suits by Private Citizens**

In addition to reporting violations through the searchable database, private citizens can file suits for injunctive relief, for which they can be compensated for attorneys' and expert witness fees (Section 218). In addition, in the event of product harm and knowing or willful violations, they can recover damages.

- **Preemption**

Under Section 231, the CPSC can preempt stricter state rules if they unduly hamper interstate commerce, but they cannot preempt consumers' claims under state statutes or common law.

- **Recall Expansions**

The CPSC and state attorneys general have been granted increased authority to mandate product recalls or other corrective actions under Section 214, an ability that is facilitated by the new tracking, certification and database provisions. In addition, Section 216 prohibits the manufacture, importation or sale of recalled products, setting up liability issues throughout the product chain.

- **Greatly Increased Penalties**

The consequences for violations, even inadvertent, are increased to $100,000 per violation with a cap of $15 million under Section 217. Criminal penalties, including prison time and forfeiture of assets, are also allowed. The CPSC has yet to issue guidance on how penalties will be administered, as directed by Congress.

Implications for Litigators

The CPSIA will greatly increase instances of noncompliance by manufacturers, importers and distributors of children's products, which raise the possibility of tremendous increases in product liability litigation. In addition, the citizen suit provisions, coupled with attorneys' fee recovery, may prompt considerable litigation. Moreover, the next several years will likely be a period of considerable flux in the regulations and their application as CPSC, states' attorneys general and the courts interpret the law and provide guidance, and this uncertainty only increases the likelihood of noncompliance. Plaintiffs' attorneys will likely see a flood of opportunities for claims. Attorneys should also advise clients with children's product exposure to monitor the regulations at the CPSC Web site and to set up effective systems for compliance, recordkeeping and company communication procedures, as well as diligent monitoring of possible hazards. Increased risks of liability and the severe penalties for violations should also prompt re-evaluation of insurance coverage. ■

From the Chair

A Call to Bar Association Work

By David R. Fine

David R. Fine

The fact that you are holding in your hands this edition of the Civil Litigation Section's newsletter demonstrates that, at least to some degree, you believe in the benefits of belonging to a bar association (unless, that is, you are a client who is sitting in your lawyer's waiting room, in which case, allow me to thank you for your patronage).

In my past two columns, I've offered up some of my ideas about how we might go about keeping our profession, well, professional. I shared my ideas about mentoring and pro bono work, and I'd like here to consider bar association work.

You'll note that I refer to bar-association "work" rather than "membership." They are different. A great many lawyers belong to one or more bar associations. They receive the publications, perhaps occasionally attend a meeting, but they don't really become involved actively in the association's work. Bar associations appreciate such members and, truth be told, they likely make up a majority. But I'd like to focus on the "active" members — those who join committees and sections, regularly attend meetings, debate issues and try to set the agenda for the profession — and try to persuade you to ratchet up your engagement in this and other bar associations.

"Surely you jest," I hear you cry. "The economy's lousy; I have to devote ever more energy to making my practice profitable and, since reading Fine's last two columns, I've already spent countless hours as a mentor and a pro-bono lawyer." I understand, but my point is not that you have to devote maximum effort to each of these things to be a professional. As with anything, you have to strike a balance that works for you, your life, your family and your practice.

As you make those choices, bar association work should be on the menu. There are many reasons. For me, probably the most significant incentive has been the chance to meet lawyers who practice across Pennsylvania in litigation areas far different than I, to learn from them and, I hope, to earn their friendship. Ours is an adversarial profession, and the opportunity to enjoy the company of other lawyers, to build respect and to share laughter can keep the profession from becoming intolerably antagonistic.

Consider the Civil Litigation Council. Its members include lawyers from Erie to Philadelphia, lawyers who generally represent plaintiffs, those who are more often on the defense and lawyers who are diverse with respect to their gender and ethnic backgrounds. We discuss a lot of issues, we occasionally have strong disagreements and, yet, we retain our friendship and mutual respect. I'm usually on the defense side, but I have learned from my colleagues who are customarily on the other side of the "v." That has broadened my perspective and made me a better lawyer. Among other things, when it comes to finding creative ways to resolve lawsuits, it helps to understand why the other side thinks as it does.

Our collective efforts advance important professional goals. The Pennsylvania Bar Association (PBA) has an impressive pro bono program that has done a great deal to match lawyers with clients who might not otherwise have good counsel. The association speaks out on important issues that affect the legal profession and the administration of justice.

Consider the last statewide judicial election. An advocacy group that claims to want an improved government mounted a campaign urging Pennsylvanians to vote "No" on every judicial retention ballot. The PBA moved quickly, and it promptly issued a press release that explained in cogent terms why a universal "No" vote would have been unwise and potentially destructive. (I should acknowledge that I sometimes disagree with the PBA's decisions to comment on various issues. I think that "general-purpose" bar associations should generally shy away from taking positions that could be seen to favor plaintiffs or defendants since, almost always, the bar cannot speak with one voice on those issues. I had no quarrel with the retention position because sound judicial administration is in the interests of all members of the bar.) The PBA became an important voice of reason on that issue, and I think the bar helped the public appreciate that each candidate should be considered on individual merit.

There are pecuniary benefits to active bar involvement as well. If your experience is like mine, you

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From the Chair:

A Call to Bar Association Work

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occasionally come upon business opportunities that you cannot take because your firm has a conflict, the case is outside your firm's areas of practice or the case is geographically beyond your ability to provide cost-effective assistance. I often suggest other counsel to help, and I take seriously the need to refer clients or potential clients to lawyers I know will serve them well. I often think first of lawyers I've come to know through bar association work because I've usually had the chance to get to know them and to learn of their abilities and diligence. As the occasional recipient of such a referral, I know my approach is common.

Finally, bar association involvement can very simply be great fun. It offers the opportunity to plan and participate in novel programs with people who share your enthusiasm. Consider the Civil Litigation Section's annual retreat each spring. I've attended for a lot of years now, and I remember each retreat as an opportunity to learn new things, enjoy the company of "old" friends and meet new ones.

Our next retreat, May 1-3, 2009, promises to be a wonderful balance of fun and learning. We'll be at the Omni Bedford Springs Resort, itself an historic and beautiful location. Throughout the weekend, we'll revisit key parts of the 1935 trial of Bruno Richard Hauptmann for kidnapping Charles A. Lindbergh Jr. Our counsel will wear period costume as they examine and cross-examine some of the many remarkable trial witnesses. Pennsylvania Supreme Court Justice J. Michael Eakin (himself a steadfast supporter of bar association work) will preside as trial judge, and retreat reg-

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PBA Civil Litigation Section ANNUAL RETREAT

May 1-3, 2009 • Omni Bedford Springs Resort

ON REMAND:
A Retrial of the Lindbergh Case from *Voir Dire* to Verdict

WANTED

INFORMATION AS TO THE WHEREABOUTS OF

CHAS. A. LINDBERGH, JR.

OF HOPEWELL, N. J.

SON OF COL. CHAS. A. LINDBERGH

World-Famous Aviator

This child was kidnaped from his home in Hopewell, N. J., between 8 and 10 p. m. on Tuesday, March 1, 1932.

DESCRIPTION:

Age, 20 months — Hair, blond, curly
Weight, 27 to 30 lbs. — Eyes, dark blue
Height, 29 inches — Complexion, light
Deep dimple in center of chin
Dressed in one-piece coverall night suit

ADDRESS ALL COMMUNICATIONS TO
COL. H. N. SCHWARZKOPF, TRENTON, N. J., or
COL. CHAS. A. LINDBERGH, HOPEWELL, N. J.

ALL COMMUNICATIONS WILL BE TREATED IN CONFIDENCE

March 11, 1932

COL. H. NORMAN SCHWARZKOPF
Supt. New Jersey State Police, Trenton, N. J.

Our retreat will offer current and informative advocacy advice set against the backdrop of the 1935 trial of Bruno Richard Hauptmann for the kidnapping and murder of the Lindbergh baby. Throughout the weekend, you will watch and participate as our seasoned lawyers (dressed in period costume) choose a jury from our audience, give opening statements, examine and cross-examine witnesses based on real trial participants and offer closing arguments. Pennsylvania Supreme Court Justice J. Michael Eakin will preside and offer his insightful comments.

Special Bonus — Our dinner speaker will be A. Scott Berg, who won the Pulitzer Prize for his detailed, candid book, *The Trial of the Century: The Lindbergh Kidnapping Case.*

Come and relive one of the most important trials in American history, learn new skills, serve on our jury, visit with friends new and old, and enjoy the accommodations of the Omni Bedford Springs Resort.

The Omni Bedford Springs Resort is an historic destination in the Laurel Mountains of Pennsylvania. Please bring the family! For as low as $350 for the weekend (less than what it would usually cost for just one night), you will enjoy the bucolic charm of our historic destination and gain 8 CLE credits. Visit the spa or enjoy a round of golf. We have many other treats in store. In addition, spouses and kids will be charged only $125 for the entire weekend.

Low Rates! Meals Included!

Registrations are still being accepted on a space-available basis, and space was still available at the time of printing. A registration form is included on Page 35.

Join us as we look back on 1935 through the lens of 2009 litigation techniques!

More information at www.pabar.org/public/sections/civlitco/meetings/meetings.asp or call the PBA at (800) 932-0311.

Section Members and Federal Judges Participate in Engaging Dialogue at Section's Regional Dinner

By Amy L. Groff

The PBA Civil Litigation Section hosted a successful regional dinner in Harrisburg on Jan. 26. The dinner featured an informal and insightful discussion with Chief Judge Kane; Judges Conner, Jones, Rambo and Vanaskie; and Magistrate Judge Arbuckle. The event was well attended, with almost 60 guests traveling from as far as Pittsburgh, State College and Philadelphia. Five students from Widener University School of Law and Penn State Dickinson School of Law also attended. Civil Litigation Section Chair David Fine moderated the discussion.

Chief Judge Kane began by recognizing David Fine as the recipient of the Outstanding Service Award. She described the work of the federal civil jury task force and the successful bench and bar conference held in the Poconos last fall. Chief Judge Kane also noted that there will be a new magistrate judge in the Middle District in August.

Judge Conner discussed the federal courthouse project in Harrisburg. When asked why the judges seemed to oppose Mayor Reed's preferred location for the courthouse at Sixth and Reilly Streets, he responded that the judges initially had concerns for their constituents — i.e., jurors, litigants and lawyers — based on a lack of adequate parking and amenities such as restaurants. However, the judges are getting past some of the hurdles initially identified with that location.

Amy L. Groff

Judge Jones provided an update on federal judicial pay. He began his remarks by noting that the judiciary is mindful of the dreadful economy and related difficulties in the practice of law. He explained that efforts to increase judicial salaries began years ago. Since 1989, there have been significant, automatic increases in COLAs, but Congress is able to override those COLAs for the judiciary from year to year. Currently, federal judges lag behind federal employees who receive automatic COLAs by 35 percent. This past fall, Congress gave itself, but not the judiciary, a COLA. Needless to say, this is not good for inter-branch relations. Federal judges would prefer a system under which there are automatic COLAs, not left to the discretion of Congress each year. The current system affects judicial independence and, over the long term, could affect the quality of judges.

The subject then turned to the decline of civil jury trials, which the federal civil jury task force studied in its recent report. Judge Rambo offered her reflections after 30 years as a federal judge. When she first came on the bench, she found it a joy to have so many types of civil trials. She recalled one year in which she had non-stop trials from January through November. She noticed a difference in the number of jury trials after the mandatory disclosures of Federal Rule of Civil Procedure 26 went into effect. She wondered whether some defendants facing product-liability suits or other tort claims avoided defending litigation because they did not want to disclose certain information. She also observed that there are now more frivolous cases filed that do not make it to trial. In her opinion, lawyers filing frivolous cases, Rule 26, and the expense of commercial litigation have all contributed to the decrease in the number of jury trials. She also noted that she will not push to settle frivolous cases before trial because she does not want to see someone have to pay nuisance value for a frivolous claim. David Fine commented that there had been debate about whether mandatory initial disclosures were an impediment to the adversarial process and asked for Judge Rambo's thought about that. She responded that it is an issue of fairness, and it is not fair to force litigation if disclosures can end a case, although that has not been her experience.

Judge Vanaskie then fielded a question about electronic discovery. He has found that electronic discovery has not changed much of what judges do because they do not see those issues often in dispute. However, he acknowledged the burden and expense of electronic discovery and the difficulty of assuring everything responsive is produced, given the extensive volume of electronic information that exists. Even the Rule 37, safe harbor from sanc-

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Amy Groff works in the Harrisburg office of K&L Gates and practices in the areas of employment law and general civil and commercial litigation. She is treasurer of the PBA's Civil Litigation Section.

Section Members and Federal Judges Participate in Engaging Dialogue at Section's Regional Dinner

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tions if a party fails to preserve electronic data in good faith, is unclear and may not provide much of a safe harbor in some cases. While these issues have not been resolved, groups trying to address them are moving forward. He added that Federal Rule of Evidence 502, which took effect in September 2008, should give counsel some comfort with respect to privilege review. He suggested that counsel confer with each other at an early stage of the case to work out issues and secure a court order providing that inadvertent disclosures will not constitute a waiver of privilege.

A plaintiff's lawyer in practice for 40 years commented on the changes he has seen and the different role of judges in the past decade. He observed that an increase in summary judgment has affected the number of cases going to trial, which he perceived as contrary to our founding fathers' desire that cases be decided by a jury of one's peers. Judge Rambo noted that she recalled a time when one could not get summary judgment in the Third Circuit. Judge Conner added that, from his perspective in his seventh year on the bench, alternate forms of dispute resolution also contribute to the decrease in our number of civil jury trials. He pointed out that the lawyers' advisory committee wanted more mediation, and that is why there is a mandatory mediation program in the Middle District of Pennsylvania. The plaintiffs' bar was in favor of mandatory mediation because it allows them to engage in settlement discussions without having to be the ones to raise the issue of settlement with opposing counsel. The mediation program in the Middle District has been a strong program, in that about 50 percent of the mediations are successful and, even if a case does not settle, the parties are more informed at the time of trial.

From the perspective of defense counsel, the judges were asked about situations in which there is no evidence of negligence or wrongdoing by a defendant, but the defendant is nevertheless required to participate in mediation. Judge Jones responded that judges understand that these situations arise and that sometimes a client gives no authority to settle. The judges do not view counsel or the parties as obstreperous, but realize there are a certain percentage of cases that have no real chance of settlement. In fact, the trial judge is simply told whether the case settled and is not given details of the mediation. Judge Conner added that the Middle District mediation program is different from other programs because it allows for some pre-mediation discovery so settlement discussions are not premature. Overall, the program seems to work well.

Those in attendance at the dinner enjoyed the opportunity to have a candid dialogue with federal judges and to hear their perspectives on issues affecting the practice of law. The Civil Litigation Section hosts these regional dinners three times a year in different parts of the commonwealth. The Section's last regional dinner was held in September in Philadelphia, and Judge Pratter gave an interesting and entertaining presentation on the public's perception of lawyers based on lawyers portrayed on television and in movies and books. The Section's next dinner will be held in the Pittsburgh area. ■

From the Chair: A Call to Bar Association Work

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istrants will have a chance to serve on the jury. We'll use that historic and fascinating backdrop to demonstrate modern litigation techniques, so the sessions will be relevant to your everyday practice. (By the way, we realize that ours is the Civil Litigation Section and this is a criminal trial, but good advocacy techniques are universal, and the drama of the Lindbergh case was compelling.) Our retreat's keynote speaker will be Pulitzer Prize-winning Lindbergh biographer A. Scott Berg, who will share with us the inside story (and some film clips) from the real trial. We hope you'll attend. By the time you read this, you'll have received an e-mail invitation, but you can also find registration materials at www.pabar.org/public/sections/civlitco/meetings/meetings.asp.

In these several columns, I've urged you to consider the various facets of professionalism. There are certainly more than I've written about here, and you may disagree with some (or a great deal) of what I've written. But I hope you'll agree with the core idea: it is in all of our interests to ensure that our shared occupation never loses the attributes that have made it not only a business but also a profession. ■

From the Editor

Communicating in Plain Language

By Bridget M. Gillespie

Recently, I had two conversations in less than a 24-hour period with non-lawyers that reminded me that we need to keep in mind that clients and other laypeople do not speak legalese. The first conversation was with a caterer who briefly worked for a judge. She remarked that attorneys would frequently ask her for forms or updates on motions using legal jargon that she did not understand and that they always wanted immediate action. The second conversation was with a client representative who had a question regarding a course of action that her husband's lawyer wanted to take with respect to a dispute he was having with his first wife. She was wondering if I could explain what a tax intercept is and why the attorney would want to file one. Both of these conversations serve as a reminder that we should attempt to talk in plain English, particularly when dealing with non-lawyers, to make sure we get our point across.

The latter conversation also highlights that we should explain our strategies to clients in a manner that they will understand. Rule of Professional Conduct 1.4(b) provides that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Implicit in this directive is that the explanation should be given in a manner that the client will understand. Effective communication with clients will also foster the relationship.

Effective communication is also required in consumer contracts. Tired

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of the complex legal jargon contained in contracts, the Pennsylvania Legislature passed the Plain Language Consumer Contract Act in 1993. 73 P.S. §§ 2201 *et seq.* A consumer contract is defined as a contract primarily for personal or household purposes to borrow money, buy or lease property or services, or to obtain credit. 73 P.S. § 2203. However, the act does not apply to several types of agreements, for example, securities, insurance, marital agreements and financial institutions subject to federal or state regulation. 73 P.S. § 2204(b). The statute requires consumer contracts to be written so that they are easy to read. Some of its "language guidelines" include using short words and sentences, using active verbs and avoiding "technical legal terms." 73 P.S. § 2205(b). A violation of the act constitutes a violation of the Unfair Trade Practices and Consumer Protection Law and subjects the creditor, lessor or seller to liability. Remedies to the consumer include statutory damages, court costs and attorney's fees. 73 P.S. § 2207. Limitations on liability also exist. *See* 73 P.S. § 2208.

Of course, confusing jargon is not limited to the legal community. We've all had to learn the jargon of a client's business at one time or another. The comments of the caterer also reminded me of my frustration during my first few months in the Army Judge Advocate General's Corps. The military (and the government as a whole) has a jargon of its own that I thought I would never master. As a direct commissionee, not only was I struggling to remember which level of sergeant was represented by the various configurations of chevrons, but I was also trying to learn what the alphabet soup of acronyms meant.[1] The federal government apparently recognized the potential problems created by its special language around the same time that the Pennsylvania Legislature mandated plain language in consumer contracts. Believe it or not, the government has dedicated a Web site to the use of plain language — plainlanguage.gov. That Web site indicates that a group of employees in the mid-1990s sought to foster the use of plain language and in 1998, President Clinton signed "an executive memo requiring agencies to write in plain language."

The moral of these stories is that the art of communication can be as simple as remembering to speak and write plainly.

[1] Ironically, I may have just violated the plain language philosophy. For those wondering, the term "direct commissionee" was used to describe a person commissioned as an officer directly into the JAG Corps without prior military training or service. (For example, the majority of attorneys who joined the JAG Corps in my same basic class had been through the Reserve Officers' Training Corps (ROTC) in college, had prior enlisted service or had served as an officer prior to attending law school.) And, a chevron is the v-shaped or inverted v-shaped stripe indicating rank. ■

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Opinions from the Pennsylvania Courts

Amy L. Groff, Pennsylvania Case Notes Editor

SUPREME COURT

Zoning Ordinance Limiting Size of Billboards Ruled Unconstitutional

In *Township of Exeter v. Zoning Hearing Board of Exeter Township,* 962 A.2d 653 (Pa. Jan. 22, 2009) (Opinion by Castille, C.J.), the Pennsylvania Supreme Court held that a zoning ordinance's prohibition of signs larger than 25 square feet constitutes a de facto exclusion of billboards in violation of Article I, Section 1 of the Pennsylvania Constitution.

Between 2003 and 2005, Land Displays, Inc. applied to the Exeter Township Zoning Board for permits to erect billboards measuring 300 or 672 square feet along Route 422 in Exeter Township. The board denied the applications on the basis of a 1996 ordinance that prohibited advertising signs with an area larger than 25 square feet. Land Displays appealed to the Zoning Hearing Board, arguing that the ordinance constituted a de facto exclusion of billboards and thus deprived Land Displays of its due process right to engage in the legitimate business of billboard advertising. Exeter Township defended its ordinance by supplying photographs of existing 25-square-foot advertising signs in the township. Land Displays introduced testimony that the industry standard minimum billboard size for effective billboard advertising along roads and highways is 300 square feet.

Amy L. Groff

The board credited the evidence of industry standards and sided with Land Displays, holding that the ordinance constituted a de facto exclusion of billboards. The township appealed to the Court of Common Pleas, which upheld the board, and then appealed to the Commonwealth Court.

The Commonwealth Court overturned the board's decision, reasoning that industry standards do not control local zoning matters, and noting that the township's photographs of 25-square-foot billboards demonstrated that the ordinance did not exclude billboard advertising. Land Displays appealed to the Supreme Court, arguing that the Commonwealth Court failed to distinguish between the general category of outdoor advertising and the specific category of billboards.

The Supreme Court sided with Land Displays. It noted that its standard of review was limited to determining whether the board abused its discretion by making findings "not supported by substantial evidence." It then analyzed the de facto exclusion question in two parts: first, whether the challenging party has overcome the presumed constitutionality by showing an exclusion of a use, and second, whether the municipality has shown that the exclusionary regulation bears a substantial relationship to public health, safety, morality or welfare. The Court noted that under *Norate Corp. v. Zoning Board of Adjustment of Upper Moreland Township,* 207 A.2d 890, 895 n.8 (Pa. 1965), "[a]esthetic reasons may not furnish the sole basis for [billboard] regulation."

Reviewing the evidence Land Displays presented to the board, the Court found that Land Displays provided substantial evidence establishing that (1) a billboard is a legitimate means of communicating an advertising message to drivers on roads and highways and (2) a 25-square-foot sign is not large enough to communicate an advertising message to drivers, but a 300-square-foot sign is. Evidence of the existence of 25-square-foot signs on Exeter Township roadways, the Court found, did not prove that those signs effectively communicated an advertising message. Thus, the ordinance constituted a de facto exclusion because it "appears to permit billboards as a use, but under such conditions that the use cannot in fact be accomplished." The Court agreed with the Commonwealth Court that ordinances need not comply with industry standards in order to be constitutional, but found that the evidence of industry standards was probative on the issue of exclusion.

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On the second question of whether the township supported the validity of the exclusionary ordinance, the Court found that the issue was not before the Court because the board did not address the question of whether aesthetic and traffic safety concerns justified the ordinance, and the township did not preserve the issue for appeal.

In a brief dissent, Justice Eakin argued that "alleged national standards of an industry where profits and sign square-footage are directly proportional" does not constitute substantial evidence that would overcome the presumption of constitutionality.

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General § 512 MCARE Objection Does Not Preserve Objections Under Specific Subsections Pertaining to Requirements for Testifying Experts in Medical Malpractice Cases

In *Gbur v. Golio,* 963 A.2d 443 (Pa. Jan. 28, 2009) (Opinion by Saylor, J.), the Supreme Court of Pennsylvania affirmed the Superior Court's decision upholding a trial court's ruling that allowed a radiation oncologist to testify to the standard of care for a urologist in a medical malpractice case. The plaintiff in the medical malpractice case died during the course of the legal proceedings through no fault of the defendant, Dr. Golio. The plaintiff's expert, a radiation oncologist, testified that Golio's failure to properly evaluate, report and discuss the findings of a bone scan violated the standard of care for urologists and led to unnecessary surgical interventions. The alleged failures also delayed palliative treatment. Golio claimed the radiation oncologist was not competent to testify under Section 512 of the MCARE Act.

MCARE provides, among other things, requirements for experts testifying as to a physician's standard of care. 40 P.S. § 1303.512(c). One requirement at issue in this case is that the testifying expert must "[p]ractice in the same subspecialty as the defendant or in a subspecialty which has a substantially similar standard of care for the specific care at issue ...." *Id.* at § 512(c)(2). Another requirement at issue is that the testifying expert must be certified by the same or similar board as that which certified the defendant physician if the defendant is board certified. *Id.* at § 512(c)(3). The MCARE Act does, however, contain waiver provisions for the same subspecialty and board certification requirements. Both requirements may be waived where the testifying expert "possesses sufficient training, experience, and knowledge to provide the testimony as a result of active involvement ... in the applicable subspecialty or related field." *Id.* at § 512(e). Courts may also waive the subspecialty requirement where the expert is trained in the diagnosis or treatment of the condition in question and the defendant physician provided such care not within his or her specialty or competence. *Id.* at § 512(d).

Before trial, Golio raised Section 512 of MCARE in a motion to dismiss and a motion *in limine*. His counsel orally renewed his objection at trial. Golio repeatedly raised the point that the testifying expert was a radiation oncologist and had no training in urology, Golio's subspecialty. The trial court overruled all objections and allowed the radiation oncologist to testify. The Superior Court upheld this ruling relying on the waiver provision of Section 512(d) of MCARE.

The Supreme Court acknowledged that the trial court made no finding as to the testifying expert meeting the subspecialty requirements. Further, neither the trial court nor the Superior Court addressed the testifying expert's lack of board certification. Although the Superior Court applied a waiver under Subsection (d), that waiver is clearly inapplicable to the board requirement. Ultimately, however, the Supreme Court declined to resolve the issue of whether the testifying expert qualified under Section 512 of MCARE.

The Supreme Court relied on *National Union Fire Ins. Co. v. Gateway Motels, Inc.,* 710 A.2d 1127, 1128 (Pa. 1998) for the proposition that "trial counsel is required to make a timely, specific objection during trial" to preserve the objection for review. Golio's counsel failed to specifically raise Subsection (c)(3) and did not mention Golio's board certification. Nor did Golio's counsel specifically mention Subsection (c)(2) or that it may be satisfied by a testifying expert who practices in a subspecialty having a substantially similar standard of care. The Court, therefore, concluded that Golio failed to preserve the objections under Subsection (c)(2) and (c)(3), and affirmed the Superior Court's ruling upholding the trial court's decision.

A concurring opinion by Justice Greenspan, joined by Chief Justice Castille and Justice Baer, likewise concluded that the Superior Court's judgment should be affirmed, but on the basis that the testifying expert qualified for the waiver under Subsection (e). Golio raised an objection, specifically citing Section 512 of MCARE. Further, Golio explained

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that the testifying expert had no specialization in urology. The appellee's counsel specifically addressed Subsection (c) in response to Golio's objection. As such, Justice Greenspan concluded that the objection was sufficient to, and in fact did, put the trial court and opposing counsel on notice of the specific objection.

The concurring opinion also raised concerns that the Court's holding so elevates form over substance as to invite a "broad array of malpractice actions and ineffective assistance claims" even where counsel and the trial court were all aware of the objections raised. Ultimately, Justice Greenspan concurred with the majority's holding on the basis that the testifying expert qualified for a subsection (e) waiver as a result of his active involvement in the diagnosis and treatment of the illness in question.

— Contributed by Philip K. Miles III, Esq., McQuaide, Blasko, Fleming & Faulkner, Inc., State College; pkmiles@mqblaw.com.

Autopsy Report Is an "Official Record" Under Coroner's Act

In *Penn Jersey Advance, Inc. v. Grimm,* 962 A.2d 632 (Pa. Jan. 22, 2009) (Opinion by McCaffery, J.), any argument that an autopsy report is not an "official record" subject to public disclosure pursuant to the Coroner's Act, 16 P.S. §§ 1214 and 1231-1260, was laid to rest. In defining an autopsy report as an "official record or paper," the Pennsylvania Supreme Court held that an autopsy report must be publicly disclosed pursuant to Section 1251 of the Coroner's Act.

The *Allentown Morning Call* and *Easton Express Times* filed appeals from the Commonwealth Court with respect to the disclosure of a police officer's autopsy report, where the police officer was shot in the Easton police headquarters on March 25, 2005. Scott Grimm, the coroner of Lehigh County, declined the newspapers' request for the autopsy on the ground that it was not one of the "official records and papers" that Section 1251 requires coroners to deposit in the office of the prothonotary.

The Supreme Court rejected the Commonwealth Court's conclusion that an autopsy report was not considered an official record. In acknowledging that the Coroner's Act does not define the terms "autopsy report" or "official records or papers," Judge McCaffery wrote that he was guided by the rules of statutory interpretation in examining the Coroner's Act. Because it was clear from the Coroner's Act that conducting autopsies is one of the official duties of a coroner, it logically follows that the resulting reports constitute official records within the meaning of Section 1251 and must be disclosed as a public record. Judge McCaffery also indicated that if information subject to a claim of privilege is included as a part of an autopsy report, anyone seeking to protect an interest in that information can seek appropriate relief from the trial court in the form of a protective order.

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Spouse's Testimony in Medical Malpractice Action May Be Sufficient to Establish Substantial Factor Element of Informed Consent Claim

In *Fitzpatrick v. Natter,* 961 A.2d 1229 (Pa. Dec. 17, 2008) (Opinion by Castille, C.J.), Carol Fitzpatrick and her husband, Thomas, brought a medical malpractice action against Carol's medical providers, alleging lack of informed consent with respect to the surgical implantation of a subcutaneous drug pump to treat and slow the progression of Carol's multiple sclerosis (MS). Dr. Natter, Carol's physician, suggested the implantation surgery and gave Carol and Thomas information provided by the pump's manufacturer, including a videotape and pamphlet that outlined the use of the pump, as well as the benefits and risks associated with it. Natter referred Carol to Dr. Munz, a neurosurgeon, who examined her and discussed the risks and benefits of the implantation with Carol and Thomas. After again reviewing the information they had received from the pump manufacturer and discussing the risks and benefits of surgery, Carol and Thomas decided that they had "nothing to lose and everything to gain" from the procedure. At the time of the surgery, Carol was 46 years old and had been diagnosed with MS at the age of 19. Following the procedure, Carol underwent physical therapy and her condition improved for a period of time. Within a few months, however, her condition deteriorated to the point where she became paraplegic, incontinent and wholly dependent upon her husband for caretaking.

In 2004, a jury trial commenced on plaintiffs' limited claims of lack of informed consent and loss of consortium. Thomas testified that he and

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Carol made all medical decisions jointly and that, had the risks of the surgery been fully disclosed, Carol would not have undergone the procedure. Specifically, Thomas stated that he had questioned Munz about potential risks and side effects of the pump implantation and that Munz had told him that it was an "extremely simple procedure." Thomas also testified that, prior to the procedure, Munz did not inform him and Carol that the pump implantation might not be successful in controlling Carol's spasticity, that it might cause weakness or that it might exacerbate her incontinence. Carol was present in the courtroom for most of the proceedings but did not testify.

As part of its jury charge, the trial court submitted a verdict sheet that contained questions to the jury. Question Three asked, "Do you find that Dr. Munz failed to obtain the informed consent of Carol Fitzpatrick for the operative procedure which he performed?" Question Four asked, "Do you find that the failure of Dr. Munz to obtain Carol's informed consent was a substantial factor in her decision to undergo the implantation procedure?" The jury answered yes to these questions and found that Munz failed to obtain Carol's informed consent before performing the pump implantation surgery and that the missing information would have been a substantial factor in her decision whether to undergo the surgery. The jury awarded damages in the amount of $1.5 million on the informed consent claim, and $1.7 million on the loss of consortium claim. Both awards were against Munz only. The jury found that Natter was not negligent in the care he rendered to Carol.

Munz filed post-trial motions for a new trial and judgment *N.O.V.* The trial court granted the motion for judgment *N.O.V.* and, in its opinion, found that the informed consent claim failed. First, the court opined that the claim failed as a matter of law because the informed consent statute, 40 P.S. § 1301.811-A, required the patient herself to testify that the allegedly undisclosed information would have been a substantial factor in her decision to undergo the procedure. The court noted that Carol was present throughout the trial and capable of testifying, yet appellants instead strategically chose to rely solely on Thomas's testimony to establish the lack of informed consent. Without Carol's testimony, the court reasoned, the jury could only speculate what her thought process was and whether she had provided her informed consent to the surgery. The trial court concluded that, as a matter of law, Carol's failure to testify rendered the jury's verdict "improper." Second, the trial court determined that defendants had failed to prove that the allegedly undisclosed information would have been significant to Carol's decision because the evidence showed that other factors — such as her frequent bouts of incontinence, falls, difficulty ambulating and confinement to a scooter — had completely dominated her election to go forward with the procedure.

The Superior Court affirmed the grant of judgment *N.O.V.* in an unpublished, 2-1 panel opinion. The panel majority stated that the "essential issue" concerned the substantial factor element and determined that Thomas's testimony was insufficient to prove that the allegedly undisclosed information would have been a substantial factor in Carol's decision-making. The majority reasoned that, while Thomas could testify as to what he understood the risks to be, or what he suggested to Carol regarding the potential risks, he could not testify about the significance Carol may have placed upon the information as compared to other factors playing into her decision. The majority concluded that plaintiffs had failed to adduce sufficient evidence as a matter of law to sustain the jury verdict in their favor.

The Supreme Court of Pennsylvania addressed the primary question of whether, in establishing an informed consent claim, the testimony of a person other than the patient may be sufficient to prove the substantial factor element. The Court noted, at the outset, that Pennsylvania's informed consent statute does not purport to address how to prove the substantial factor question, and the case law provides little guidance as to the evidentiary means by which a patient may, or must, prove that element. The Court nonetheless held that circumstantial or indirect evidence may suffice for an informed consent patient to prove the elements of her claim — and thus, a patient's decision to refrain from testifying at trial is not fatal to the claim. First, the Court noted that circumstantial evidence generally is competent to prove factual issues, and that because the informed consent statute did not purport to provide otherwise, it would not create an evidentiary exception for informed consent claims. Thus, the Court stated, assuming the evidence is not merely speculative, the strength or usefulness of the circumstantial evidence is then a question for the jury. Accordingly, the Court found that the lower courts erred in holding that the substantial factor element of an informed consent claim could not be established by circumstantial evidence.

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Non-Breaching Party May Immediately Terminate Franchise Agreement When Material Breach Goes Directly to Essence of the Contract and Renders the Breach Incurable

In *LJL Transportation, Inc. v. Pilot Air Freight Corp.,* 962 A.2d 639 (Pa. Jan. 29, 2009) (Opinion by Todd, J.), appellants LJL Transportation Inc. and its owners (LJL) appealed the order of the Superior Court of Pennsylvania, which upheld the order of the Court of Common Pleas of Northampton County granting summary judgment in favor of appellee Pilot Air Freight Corporation (Pilot) on its counterclaim for breach of contract. Pilot, an air freight company, engaged in business that required it to move heavy-duty freight shipments throughout the country on an expedited basis. In conducting its business, Pilot used a network of both company-owned and company-franchised freight stations located at airports and other sites around the country. Each franchisee entered into a standard franchise agreement with Pilot that granted the franchisee certain rights. The agreement required the franchisee to place all freight shipments with Pilot's Air Freight system, and specifically forbade the franchisee from conducting any other business from the franchised location unless given written authorization to do so by Pilot. The franchisee also was barred from delivering any freight under Pilot's name that originated with another freight forwarder, and was prohibited from delivering under another carrier's name any freight that originated in the Pilot system. The agreement also contained a provision that permitted a breaching party to cure its breaches.

LJL became a franchisee of Pilot after it was assigned all contractual rights and duties of another Pilot franchisee, R & D Air Freight. The Pilot-LJL franchise agreement was for a 10-year period and assigned LJL two Pennsylvania territories, one in Allentown and one in Harrisburg.

In early 2001, Pilot learned from employees of LJL that since 1999, LJL had been deliberately and systematically diverting freight shipments to Northeast Transportation (Northeast), a separate trucking company and direct competitor of Pilot. Moreover, LJL failed to report certain shipments in order to make more money on the shipments and avoid paying Pilot's franchise fees. Upon learning of LJL's conduct, Pilot immediately sent a letter to LJL indicating that it was terminating the franchise agreement. LJL responded by filing a complaint against Pilot, asserting breach of contract and related causes of action. Pilot filed an answer and counterclaim, an amended answer and amended counterclaim, and, finally, a third amended counterclaim. In the third amended counterclaim, Pilot sought legal and equitable relief and raised a breach of contract claim against LJL, as well as additional causes of action. LJL subsequently moved for partial summary judgment on their breach of contact claim, contending that Pilot breached the franchise agreement by wrongfully terminating it without giving them a chance to cure its breaches since, in their view, the terms of the franchise agreement gave them an unqualified right to cure the breach. Pilot moved for summary judgment on their breach of contract claim as well, arguing that LJL had no right to cure. Pilot argued that cure would be impossible under the circumstances due to the fact that LJL had engaged in dishonest and improper conduct, and the resulting breach of trust from that conduct frustrated the essential purpose of the agreement by rendering it "meaningless and worthless."

The trial court denied LJL's motion for partial summary judgment and granted Pilot's cross-motion for summary judgment. LJL appealed and the Superior Court affirmed.

The Supreme Court of Pennsylvania held that LJL's conduct in diverting business to Pilot's competitor to avoid reporting revenue and paying royalties justified Pilot's immediate termination of the franchise agreement, even though the agreement included an express provision granting LJL the opportunity to cure a default within 90 days of written notice of default. In rendering its opinion, the Court looked to other jurisdictions for guidance, noting that other courts have concluded that, in the event of an incurable breach, the non-breaching party may immediately terminate the agreement without following its notice and cure provisions. The Court noted that under general contract law principles, in most jurisdictions, a contractual provision requiring an opportunity to cure prior to termination does not bar immediate termination based on a breach that goes to the essence of the contract. The Court concluded that the same principles applied to the franchise context, noting that most franchise agreements provide a notice-and-cure period for ordinary breaches, but permit immediate termination for serious and incurable breaches. The Court further noted that in many cases, an incurable material breach would frustrate the purpose of the franchise agreement. Accordingly, the Court affirmed the order of the Superior Court and held that Pennsylvania law does not

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require a non-breaching party to prolong a contractual relationship under such circumstances.

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SUPERIOR COURT

Divided Superior Court Finds Plaintiffs Lack Standing to Assert Constitutional Challenges to Asbestos Statute

In three consolidated appeals, the Pennsylvania Superior Court *en banc* rejected, based on lack of standing, constitutional challenges to a Pennsylvania statute that limits the liability of successor corporations in asbestos cases. *Johnson v. American Standard,* Nos. 2954, 2955 and 2956 EDA 2006, 2009 PA Super. 22 (Pa. Super. Feb. 6, 2009) (*en banc*) (Opinion by Lally-Green, J.). The appellants were executors of the estates of three individuals who died of asbestos-related mesothelioma. They sued Crown Cork & Seal Co. (Crown), together with numerous other defendants, all of whom settled except Crown. Crown filed motions for summary judgment in each of the three cases asserting protection of liability by 15 Pa.C.S. § 1929.1, which limits the asbestos-related liabilities of Pennsylvania successor corporations to the fair market value of the prior company at the time of the merger or consolidation. The trial court granted Crown summary judgment on the basis that it was insulated from liability pursuant to Section 1929.1, and the appellants appealed, arguing that the statute violates the Commerce Clause of the U.S. Constitution, the Equal Protection Clause of the U.S. and Pennsylvania Constitutions, and various enactment provisions of the Pennsylvania Constitution. The Superior Court, in a 5-4 decision, ruled that the appellants did not have standing to raise their constitutional claims.

In November 1963, Crown purchased Mundet Cork Corporation, which operated a division that manufactured asbestos products. Crown never operated that division and sold it within 90 days of acquiring Mundet Cork. The majority opinion recounted that Crown, nonetheless, has paid "hundreds of millions of dollars in asbestos-related claims" far exceeding the fair market value of Mundet Cork. Therefore, pursuant to Section 1929.1, Crown would be insulated from liability, assuming the statute is constitutional.

The majority of the Superior Court, however, found that the appellants lacked standing to assert their constitutional challenges. The court, relying on its recent decision in *Commonwealth v. Rose,* 960 A.2d 149 (Pa. Super. 2008), noted that "a person must have a 'substantial, direct, and immediate interest' in the outcome of the litigation" to have sufficient standing; a "direct interest" in the outcome of the litigation does not exist if the person "has not been harmed by the specific constitutional concern at issue." 960 A.2d at 153 (quoting *Soc'y Hill Civil Ass'n v. Pa. Gaming Control Bd.,* 928 A.2d 175, 184 (Pa. 2007)). To evaluate the link between the harm and the constitutional concern at issue, the court noted that Pennsylvania courts have followed the concept of "prudential standing" and the "zone of interests" test established in federal decisions. Under the prudential standing concept and zone of interests test, the party making a constitutional challenge to a statute must demonstrate how he or she falls within the "zone of interests intended to be protected by the statute, rule, or constitutional provision on which the claim is based."

The Commerce Clause "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors." The appellants claimed that Section 1929.1 was a prohibited form of economic protectionism because it benefited Pennsylvania corporations at the expense of out-of-state corporations. However, the Superior Court held that the appellants fell outside the zone of interests protected by the Commerce Clause because, not only may they recover all of their damages from the remaining defendants by operation of the defendants' joint tortfeasor relationship, but any preferential treatment of in-state corporations had a minimal effect, if any, on the executors of individual estates.

The Superior Court also rejected the appellants' argument that standing exists because the Pennsylvania Supreme Court previously entertained a constitutional challenge to Section 1929.1 in *Ieropoli v. AC&S Corp.,* 842 A.2d 919 (Pa. 2004). In distinguishing *Ieropoli*, the Superior Court noted that the Pennsylvania Supreme Court heard that case "through an unusual, discretionary exercise of its extraordinary jurisdiction" under its King's Bench authority. Moreover, the *Ieropoli* Court did not address standing, and the plaintiffs in that case were more aggrieved by the particular constitutional violation at issue there, a violation of the Remedies Clause of the Pennsylvania Constitution, because Section 1929.1 unconstitutionally extinguished an accrued cause of action. By contrast, the enactment of Section 1929.1 pre-dated the accrual of the *Johnson* Plaintiffs' causes of action.

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The Superior Court similarly rejected the appellants' equal protection and enactment claims. Although the appellants asserted that Section 1929.1 violated the Equal Protection Clause inasmuch as it discriminated against out-of-state corporations, the Superior Court held that the individual appellants fell outside the zone of interests protected by the Equal Protection Clause. Similarly, the Superior Court held that they lacked standing to assert the claimed unconstitutionality of the enactment of Section 1929.1 because they failed to demonstrate that they had a "substantial, direct, and immediate interest in a challenge to the enactment of the statute."

Judge Klein, joined by Judges Musmanno, Panella and Donohue, dissented from the majority's opinion and found not only that the appellants had standing, but also that the statute violates the Commerce Clause of the U.S. Constitution and denies equal protection rights. In his dissent, Judge Klein concluded that the appellants had standing to assert a violation of the Commerce Clause because they had been denied their right to tort damages by a statute that benefited Pennsylvania corporations but not out-of-state corporations. He believed that the majority was "putting the cart before the horse" in relying on the ability of the appellants to recover the full amount of their loss from the remaining co-defendants based upon joint tortfeasor principles because there has been no showing or determination of which companies are responsible to which plaintiffs. The denial of an ability to recover fully from Crown, according to Judge Klein, constitutes "real, concrete damages because of the protectionism given to the Pennsylvania corporation," and the appellants therefore raise no hypothetical questions or controversies. The dissenting opinion explained that the statute violates the Commerce Clause because "[i]t is hard to dispute" that it benefits Pennsylvania corporations that acquired asbestos companies while not giving the same benefit to out-of-state corporations that made similar acquisitions.

Judge Klein similarly concluded that the appellants have standing to assert their equal protection claims because the conflict and denial of equal protection is real rather than hypothetical. He noted that "[t]he essence of equal protection is simply that persons of a class cannot be denied the protection of the laws that other persons of the same class enjoy." Judge Klein determined that Section 1929.1 denied equal protection for two reasons. First, it treated all corporations subject to the payment of damages through successor liability differently than those successor corporations subject to the payment of asbestos-related damages. Second, Section 1929.1 arbitrarily precluded the appellants from seeking a remedy based solely on the fact that the decedents' injuries manifested after the enactment of the statute whereas those individuals whose asbestos-related injuries manifested prior to the enactment of the statute were able to obtain a full recovery.

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Discovery Sanction Leading to Dismissal of Action Constitutes an Abuse of Discretion if Equities Not Balanced and Oral Argument Not Granted

In *Cove Centre, Inc. v. Westhafer Construction, Inc.,* No. 1463 MDA 2007, 2009 PA Super. 10 (Jan. 26, 2009) (Opinion by Bender, J.), the Superior Court found that it is an abuse of the trial court's discretion to impose discovery sanctions leading to termination of an action without balancing the equities of the parties and considering oral argument. The Superior Court held that a court must consider multiple factors balanced together with the necessity of the sanction prior to imposing a discovery sanction that either directly terminates an action or does so by operation of law. Moreover, the court held that Pennsylvania Rule of Civil Procedure 208.3 requires an opportunity for oral argument prior to the entry of an order granting a contested motion.

After counsel for Westhafer withdrew from the action, Cove Centre issued expert witness interrogatories and requests for admission. Westhafer did not respond and, approximately three months after serving the discovery, Cove Centre filed a motion for sanctions. Three days after Cove Centre filed its motion for sanctions, the trial court entered an order deeming the requests for admissions admitted, precluding Westhafer from presenting expert testimony, and entering judgment against Westhafer for the total $293,701 in dispute without a motion to compel, oral argument or an evidentiary hearing. Westhafer thereafter retained new counsel, who learned of the discovery sanction, sought a stay of execution on the judgment, and filed a motion for reconsideration and notice of appeal to preserve rights to appellate review. The trial court stayed the execution on the judgment and, following a hearing on Westhafer's motion for reconsideration, issued memorandum opinions and an order granting reconsideration to the extent that it remained vested with such authority pending appeal and conceding that "the Order should not have [been]

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entered at the time it [was] entered and under the circumstances it [was] entered. It should have been the subject of further inquiry…."

Relying in part on *Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating,* 698 A.2d 625, 629 (Pa. Super. 1997), the Superior Court explained that sanctions resulting in termination of an action are the most severe and that the trial court must, therefore, consider the following balanced with the necessity of the sanction: (1) the nature and severity of the discovery violation, (2) the defaulting party's willfulness or bad faith, (3) prejudice to the opposing party, (4) the ability to cure the prejudice and (5) the importance of the precluded evidence in light of the failure to comply. The Superior Court focused on the lack of willful conduct and prejudice to Cove Centre in reversing the trial court. In the absence of an evidentiary record, the court could not conclude that Westhafer's failure to respond amounted to "willfulness or bad faith," particularly where Westhafer was unrepresented. With regard to any prejudice to Cove Centre, the Superior Court concluded that even if Westhafer complied with the discovery requests as of the date of the court's decision, Cove Centre could still "proceed to a full and fair resolution," whereas Westhafer suffered extraordinary prejudice by the trial court's sanction order terminating the action.

The Superior Court also addressed the entry of sanctions without oral argument. Pennsylvania Rule of Civil Procedure 208.3(a) permits a court to grant relief to the moving party only if the motion before it is uncontested or the other parties to the proceeding are given an opportunity for an argument. The trial court in this case had a similar local rule. Although Cove Centre argued that the Superior Court has allowed the imposition of sanctions without oral argument in the past, such as in *Sahutsky v. Mychak, Geckle & Welker, P.C.,* 900 A.2d 866, 871 (Pa. Super. 2006), the Superior Court found Cove Centre's position meritless because *Sahutsky* involved sanctions imposed before the enactment of Rule 208.3(a). Moreover, the court found the note to Rule 4019 (pertaining to discovery sanctions) persuasive inasmuch as it indicates that "[m]otions for sanctions are governed by the motion rules, Rule 208.1 *et seq.*" Accordingly, the Superior Court held that the requirements of Rule 208.3 are fully applicable to discovery sanctions and that the trial court erred in granting Cove Centre's motion for sanctions without first entertaining oral argument or an evidentiary hearing.

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Superior Court Decision Affects Causation Requirement for Negligent Infliction of Emotional Distress

In *Toney v. Chester County Hospital,* 961 A.2d 192 (Pa. Super. Nov. 12 2008) (*en banc*) (Opinion by Panella, J.), the Pennsylvania Superior Court diminished the causation requirement in a negligent infliction of emotional distress (NIED) case by eliminating the need for a contemporaneous observance of negligence. By merely pleading that the plaintiff suffered harm without the necessity of some type of physical impact at the time of the negligence, a NIED claim may proceed if the bystander plaintiff has reasonably foreseeable injuries.

Jeanelle Toney brought a NIED claim against a number of healthcare providers following the delivery of her severely deformed child. During her pregnancy, Toney underwent an ultrasound and was informed that her child did not have any fetal abnormalities. However, when her child was born three months later, he lacked arms below the elbows and legs below the knee joints. Toney was awake and conscious during the delivery and observed her son's abnormalities first-hand immediately following his birth. Given the assurances she had received by the ultrasound, she alleged she suffered grief, rage, nausea, hysteria, nervousness, sleeplessness, nightmares and anxiety after her son was born. Toney filed suit two years later and preliminary objections dismissing the NIED claim were granted, resulting in an immediate appeal to the Pennsylvania Superior Court. In overturning the trial court's decision, the Superior Court focused on the "reasonable foreseeability" of the injuries suffered in evaluating the claim.

"To state a cause of action for negligent infliction of emotional distress, the plaintiff must demonstrate that she is a foreseeable plaintiff and she suffered a physical injury as a result of the defendant's negligence." The court indicated the test for negligence is one of reasonable foreseeability. In finding that the plaintiff's claim met both requirements, the court pointed out that without the benefit of a prior warning as to the child's physical disabilities, the mother did not have an opportunity to brace herself for the shock she received upon delivery of her son. Under these circumstances, the court held that it was entirely foreseeable that the mother would suffer traumat-

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ic emotional distress following the delivery.

In a dissenting opinion, Judge Melvin found the decision to be contrary to the court's holding in *Brown v. Philadelphia College of Osteopathic Medicine,* 760 A.2d 893 (Pa. Super. 2000). Because Toney did not plead NIED consistent with the *Brown* decision, Judge Melvin held the complaint failed to establish a substantial factor in causing the injuries. Judge Melvin stated that the claim for NIED should fail because it was premised solely upon the shock of observing her newborn son's significant physical disabilities at the time of his birth, rather than anything the healthcare providers did or failed to do months prior to the delivery, during the ultrasound.

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Plenary Guardians May Not Deny Life-Preserving Treatment on Behalf of a Lifelong Incompetent Individual Without Proving that Death Is in the Individual's Best Interest

In *In re D.L.H.,* No. 336 MDA 2008, 2009 PA Super. 25 (Pa. Super. Feb. 10, 2009) (Opinion by Allen, J.), the Superior Court affirmed the trial court's denial of a petition to decline life-preserving medical treatment filed on behalf of D.L.H., an incompetent person, by his parents and plenary guardians. The case presented a matter of first impression regarding the rights of incompetent persons to refuse medical treatment and the ability of legal guardians to refuse life-sustaining treatment on the incompetent person's behalf.

D.L.H. was born profoundly mentally retarded and remained so for the 50 years of his life up to trial. D.LH. never executed any legal instruments evincing his desires regarding potential life-sustaining medical treatment. In 2002, the trial court appointed the appellants plenary guardians of D.L.H. Then, in 2007, D.L.H. swallowed a hairpin and vomited, resulting in his contracting aspiration pneumonia. D.L.H. was taken to Memorial Hospital in Johnstown where he was placed on a mechanical ventilator to assist his breathing. The plenary guardians attempted to decline medical treatment on D.L.H.'s behalf, but the hospital nevertheless proceeded to place him on the ventilator. The guardians then filed a "Petition to Grant the Guardians Authority to Exercise the Powers of a Health Care Agent on Behalf of the Incapacitated." D.L.H recovered and was removed from the ventilator prior to the trial court assessing the petition. Despite the issue's technical mootness, the trial court heard the matter and subsequently denied the petition.

As D.L.H. was no longer on the ventilator, the Superior Court first addressed the issue of mootness. In a previous case, *In re Fiori,* 673 A.2d 905 (Pa. 1996), the Pennsylvania Supreme Court proceeded to rule on an issue involving the decision to remove an adult patient from life support despite the patient dying before the appeal. The Supreme Court held that the matter was a question of public importance and was capable of repetition yet evading appellate review. *Id.* at 909 n.4. In the instant matter, relying on *In re Fiori,* the Superior Court proceeded to determine this case on the merits.

The court first addressed appellants' argument that their authority as plenary guardians under 20 Pa.C.S. § 5521(a) was not substantively different from the authority of "health care agents" under the Health Care Agents and Representatives Act, 20 Pa.C.S. §§ 5451-5471 (the Act). The court differentiated agents from guardians, explaining that agents act pursuant to the principal's expressed wishes, whereas guardians are officers of the court acting "in the best interest of the incapacitated person." Pursuant to the act, health care agents are vested with the express authority to make health care decisions on behalf of the principal. By comparison, appellants' status as plenary guardians alone does not confer upon them "the unprecedented power to unilaterally end life." The court explained that granting such great authority to plenary guardians created the opportunity for great abuse. Further, such abuse could have permanent, indeed life-ending, effects without prior judicial review.

As such, the court held the plenary guardians did not have unfettered discretion to decline life-preserving medical treatment on D.L.H.'s behalf.

The court then addressed the appellants' argument that the trial court could have specially granted them the authority to decline treatment on D.L.H.'s behalf under the facts of this case. The Superior Court assumed, without deciding, that an orphan's court acting as *parens patriae* could grant the appellants such power. Relying on *In re Terwilliger,* 450 A.2d 1376 (Pa. Super. 1982), the Superior Court found that prior judicial approval is necessary before withholding "extraordinary medical treatment." Further relying on *Terwilliger,* the court held that such an extraordinary medical decision must be proven by "clear and convincing evidence that death is in the incompetent's best interest."

The court noted the extraordinary burden of proving that death in this instance furthered the best interest of the incompetent. Applying the clear and convincing standard to the facts

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before it, the court explained that D.L.H. never showed any objection to the mechanical ventilation, and never expressed a prior intent to decline life-preserving medical treatment. Additionally, there was no evidence that D.L.H. even experienced any pain. The court, therefore, concluded that the evidence was "clearly inadequate" to show that refusing ventilation was in D.L.H.'s best interest.

Finally, the court briefly addressed appellants' argument that D.L.H.'s right to refuse medical treatment was violated. The court reiterated that death was not shown to be in D.L.H.'s best interest. Referring again to *In re Fiori,* the court cited the state's interest in preserving life and protecting the "ethical integrity of the medical community." As such, the state's interest outweighed D.L.H.'s right to refuse medical treatment.

The Superior Court ended with a cautionary note that its holding was extremely narrow, applying only to plenary guardians seeking to decline medical treatment on behalf of a life-long incompetent adult in neither an end-stage medical illness nor in a permanent vegetative state where the guardians fail to establish by clear and convincing evidence that death is in the incompetent individual's best interest.

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COMMONWEALTH COURT

Substantial Evidence Supported Demotion of City Worker

In *City of Philadelphia v. Civil Service Commission,* No. 2096 C.D. 2007, 2009 Pa. Commw. LEXIS 54 (Pa. Cmwlth. Feb. 9, 2009) (*en banc*) (Opinion by Leavitt, J.), the Commonwealth Court upheld the trial court's ruling that substantial evidence supported the City of Philadelphia's decision to demote a water department employee for repeatedly failing to complete an assigned task in the manner directed by her supervisor.

Laureen Boles was a 19-year employee of Philadelphia's water department and held the position of Sanitary Engineer III. In June 2004, upon her return from a one-year medical leave, she was assigned the single task of planning the Watershed Technology Center, which was being established to provide technical watershed information to developers and regulators. Her supervisor, Christopher Crockett, believed that this assignment was within the capabilities of a Sanitary Engineer III. However, Boles failed to meet set deadlines and never interviewed staff members, which was the critical first step of the project as identified by Crockett. The deadlines were repeatedly moved back, but Boles failed to complete the project.

In August 2004, Crockett issued a "special performance report" that gave Boles an unsatisfactory performance rating. The report accused her of missing critical project deadlines, failing to show initiative and failing to engage staff as had been directed by Crockett. Boles did not appeal this unsatisfactory rating. In October 2004, when Boles continued to miss deadlines, the project was reassigned to an outside consultant who then completed all of the work in less than half of the hours that had already been expended by Boles. Upon the recommendation of the personnel officer, Boles was demoted.

In her defense, Boles testified that she had performed most of the tasks assigned to her. Although admitting that she had not interviewed staff as directed by Crockett, she believed that she obtained the needed information by talking with people from outside the office. The Civil Service Commission ruled that the city did not have just cause to demote Boles because she had performed her job duties "even if in a manner different than what Crockett would have liked." The Commission stated that Boles had discretion as to how to complete her assigned tasks and that her demotion was the result of being "micro-managed."

The trial court reversed the Commission's ruling and affirmed the demotion. The court found that the Commission's ruling was not supported by substantial evidence and that there was just cause for the demotion. The court found that although Boles had discretion as to the manner of completing her job duties, that did "not negate the fact that she worked under the direction of a higher-level manager and she repeatedly failed to meet performance standards."

On appeal, the Commonwealth Court affirmed the trial court. The Commonwealth Court stated that the Commission had erred in holding that the city did not have good cause to demote Boles, as the uncontroverted evidence showed that Boles had failed to complete her job assignment. The Commission had not rejected Crockett's testimony that Boles missed critical deadlines and that her work was inadequate. On the issue of Boles' failure to meet with staff as directed, the court found that there was no substantial evidence that

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Boles had the discretion to do her job in a manner contrary to Crockett's directives. Failing to follow the directives amounted to insubordination. When combined with Boles' failure to complete a job that she should have easily been able to complete, this provided just cause for demotion.

Judge McGinley, joined by Judge Pellegrini, filed a dissenting opinion based upon the conclusion that the Commission's ruling was supported by substantial evidence. Judge McGinley pointed to Boles' testimony that she had completed her assignments. Although she did not meet with staff, she indicated that this was the result of a failed e-mail transmission beyond her control and that she went through alternative means to get the information she would have obtained in a staff meeting. In the dissent's view, this evidence was sufficient to uphold the Commission's ruling.

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Posted Tax Sale Notice Need Not Be Legible From Road

In *In re: Upset Sale Tax Claim Bureau of McKean County (Appeal of Miller),* No. 680 C.D. 2008, 2009 Pa. Commw. LEXIS 18 (Pa. Cmwlth. Jan 28, 2009) (Opinion by Cohn Jubelirer, J.), the county tax assessment office posted a notice of a tax sale to the front door of a hunting camp situated on a private road. The building sat back from the private road such a distance that the notice could not be read from the road. The Commonwealth Court ruled that such a posting satisfied the requirements of Section 602 of the Tax Sale Law, 72 P.S. § 5860.602(e)(3).

The Haskins owned the hunting camp that fronted on a private road and was about one-quarter of a mile from the nearest public road. As such, the camp could not be seen from the public road. The camp building was about 50 yards from the private road, and could be seen from that road. There were no apparent restrictions on those who were using this private road, which also provided access to at least one neighboring parcel.

The Haskins fell delinquent on their real estate taxes, and there was no dispute that they personally received notice of the impending tax sale or that notice was properly published. Tax assessment workers had taped the notice to the front door of the camp building. The notice consisted of standard size paper (8-½" x 11"), with 10-point font printing that covered an area of 6-½" x 7". At the tax sale, the property was purchased by Rebecca Miller. The Haskins then filed objections to the sale based on the claim that the posting was inadequate under Section 602 of the Tax Sale Law.

The trial court set aside the sale and ruled that the posting was "not conspicuous such that it will be seen by the public" because the building was not visible from a public road. The trial court also found that since the building sat back 50 yards from the private road, the notice could not be read from the vantage point of that road. In support of the objections, Haskins' neighbor testified that he passed the camp 10 to 12 times after the posting and he did not see the notice.

On appeal, the Commonwealth Court reversed. The court noted that Section 602 has been interpreted to require a posting method that is reasonable and likely to inform the taxpayer, as well as the public. "The posting must be so conspicuous that the property owner and the general public will see it." Measured against this standard, the court ruled that it is not necessary that the posting be visible from a public road. It is sufficient that the notice is visible from the Haskins' private road, which was "part of the system of public road." The road allowed "general public access to the property because it was used by neighbors, garbage and delivery trucks, mail carriers [and] visitors." The public versus private road distinction is not determinative here, as the issue is the visibility of the notice to "members of the general public who use the road or are interested in purchasing the property."

The court also ruled that it is not necessary that the notice be so close to, or so large as to be readable from, the private road. All that is required is that the notice be conspicuous, i.e., "reasonably likely to inform the taxpayer and public of the sale." The court found the following factors established that the notice was conspicuous: (1) the notice was affixed to the front door, which faced the private road, (2) the Haskins had neighbors, (3) other houses fronted the road, (4) there was no evidence that the surrounding property was uninhabited, (5) there was no evidence that access to the property was restricted and (6) the font size of the notice satisfied Section 602 requirements.

Finally, the court ruled that the fact that Haskins' neighbor did not see the notice did not support the trial court's ruling. The issue is not whether the notice was actually viewed by the public, but whether the notice was placed in a location where it reasonably could be viewed be the public.

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Commonwealth Court Reverses Award of Unemployment Benefits to Employee Who Claimed Disparate Treatment

In *Geisinger Health Plan v. Unemployment Compensation Board of Review,* No. 2029 C.D. 2007, 2009 Pa. Commw. LEXIS 27 (Pa. Cmwlth. Feb. 5, 2009) (*en banc*) (Opinion by Cohn Jubelirer, J.), the Pennsylvania Commonwealth Court overturned the Unemployment Compensation Board of Review's award of unemployment benefits to an employee who was fired for sending pornographic e-mail using his employer's e-mail system.

Geisinger Health Plan hired John D. Buckeye as a Medicare sales representative in 2005. Geisinger terminated his employment in 2007, claiming that Buckeye violated Geisinger's electronic communications policy. Buckeye filed an application for unemployment benefits, which the Unemployment Compensation Service Center denied on the grounds that his termination was the result of willful misconduct. Buckeye appealed to the Unemployment Compensation Board of Review.

At the evidentiary hearing before the referee, the employer's witness testified that Buckeye had sent 25 e-mail messages containing pornographic or sexual content, in violation of Geisinger's electronic communications policy. That policy provided that "[a]ny access to pornography is strictly prohibited on Geisinger time or using Geisinger resources and is grounds for termination." The employee did not deny violating the policy, but testified that Geisinger applied the policy inconsistently. The employer's witness conceded that some of the e-mail messages Buckeye sent had been sent to Buckeye by other employees, and those employees had not been terminated, although Geisinger was continuing to investigate those employees and taking into account the "severity and the inappropriateness of the e-mails." The witness further testified that Buckeye was terminated "because of the high frequency of the e-mails … and also because of the severity [of] the pornographic images that were forwarded on."

The board found that Buckeye was entitled to benefits because he was "disciplined in a disparate manner from other similarly-situated employees." The board disregarded Geisinger's argument that the difference in discipline resulted from differences in the severity of the offenses because it considered the electronic communications policy to be a "zero tolerance" policy. Geisinger petitioned the Commonwealth Court for review of the board's order.

The Commonwealth Court reversed. It noted that "disparate treatment" is an affirmative defense by which a claimant who engaged in willful misconduct may still receive unemployment benefits if he can show that: (1) the employer discharged the claimant but did not discharge other employees who engaged in similar conduct, (2) the claimant was similarly situated to the other employees who were not discharged and (3) the employer discharged the claimant based on an improper criterion. *Dep't of Transp. v. Unemployment Compensation Bd. of Review,* 755 A.2d 744, 748 (Pa. Cmwlth. 2000). Once this initial showing is made, the burden shifts to the employer to show it had a proper purpose for discharging the claimant.

The court's analysis focused on the "similarly situated" factor. The court rejected the board's characterization of the electronic communications policy as "zero tolerance," noting that the policy, which stated that accessing pornography "is grounds" for termination, does not require Geisinger to fire every employee who accesses pornography. The court found that Buckeye failed to meet his burden of showing that he was similarly situated to the employees who were not discharged because he "neither testified nor presented evidence that either of the other employees forwarded as many inappropriate e-mails as he did, or that their e-mails were as inappropriate as some of the e-mails that claimant sent." Thus, the court concluded that Buckeye failed to make an initial showing of disparate treatment.

In his dissent, Judge Pellegrini argued that the majority's analysis of the "disparate treatment" standard confuses "burden of production" with "burden of persuasion." Once an employee establishes that other employees engaged in the same type of conduct and were covered by the same work rule, he argued, the initial showing should be considered met and the burden of production should shift to the employer to show that it had valid reasons for treating the employees differently. He noted that this shift in the burden of production makes sense because only the employer is in a position to provide details regarding the infractions of other employees.

Judge Friedman, joined by Judge Smith-Ribner, filed a dissent proposing that "we abandon our struggle over questions concerning ever-shifting burdens, decline to characterize 'disparate treatment' as an 'affirmative defense' and clarify that the law is not intended as a legal remedy to generic unfairness." The

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Business Litigation Update

Pennsylvania Federal Business Decisions

Bridget M. Gillespie and Henry M. Sneath, Business Decisions Editors

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Third Circuit Addresses When a Creditor Qualifies as an Insider to Avoid a Preference Payment Under the U.S. Bankruptcy Code

In *In re: Winstar Communications, Inc.,* 554 F.3d 382 (3d Cir. 2009) (opinion by J. Sloviter), the Third Circuit affirmed the bankruptcy court's finding of an avoidable preference payment and breach of contract but modified the judgment with respect to equitable subordination. Winstar Communications, Inc. (Winstar) and its wholly-owned subsidiary Winstar Wireless, Inc. (Wireless) filed voluntary petitions under Chapter 11 of the Bankruptcy Code. The cases were eventually converted to Chapter 7 and a trustee was appointed. The bankruptcy court reviewed a considerable amount of facts in its determination and it analyzed the breach of contract claim under New York law. Accordingly, an abbreviated version of the facts is presented below and the breach of contract analysis has been omitted.

Prior to its bankruptcy proceedings, Winstar constructed global broadband telecommunications networks and Wireless designed the construction of the network. Winstar often purchased goods from Lucent Technologies, Inc. (Lucent) as part of Lucent's vendor-creditor relationship with Winstar. Eventually, Lucent and Winstar entered into a secured credit agreement where Lucent provided a $2 billion line of credit to be used for the purchase of products and services in exchange for a lien on substantially all of Winstar's assets. Lucent and Winstar also entered into a supply agreement where Winstar agreed to purchase 65-70 percent of its equipment and services from Lucent. If Winstar did not meet these requirements, it would incur escalating surcharges of up to $3 million per year.

Winstar subsequently obtained a revolving credit and term loan from a consortium of bank lenders (the bank facility), secured by Winstar's assets. Winstar paid off its loan with Lucent, which, in exchange, released its lien on Winstar's assets. Lucent, however, desired to continue its relationship with Winstar. The parties entered into a second credit agreement where Lucent lent Winstar a $2 billion line of credit with the ability to borrow up to $1 billion at any one time. Lucent received security interests in the assets of two of Winstar's subsidiaries, which Winstar established to borrow the money. The second credit agreement also contained certain financial covenants. It limited Winstar's total annual capital cash expenditures to $1.3 billion and entitled Lucent to serve a "refinance notice" on Winstar if the outstanding loans exceeded $500 million. Eventually the strategic relationship between Winstar and Lucent degenerated. In its review of the facts before it, the bankruptcy court found that Lucent bullied Winstar into actions that benefited Lucent. For example, Lucent used Winstar to inflate Lucent's revenues, it forced Winstar to purchase equipment that it did not need, it controlled Winstar's decisions building its network and it required Winstar to repay Lucent with any increases in the bank facility loan.

In November 2000, Siemens, a manufacturer of telecommunications equipment, joined the bank facility and lent $200 million to Winstar. The loan documents stated that the loan was to be used for "general corporate purposes." However, the second credit agreement obligated Winstar to pay an increase in the bank facility to Lucent or result in a default. On Dec. 7, 2000, Winstar not only closed on a $200 million increase in its bank facility loan, but it also paid $188.2 million toward its loan with Lucent.

Winstar filed for bankruptcy in 2002, and initiated an adversary proceeding against Lucent alleging that Lucent breached their contract causing Winstar to file bankruptcy. Lucent filed several proofs of claims for secured and unsecured claims under their agreement. Based upon the facts presented above, the bankruptcy court found that Winstar's payment to

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Lucent in the amount of $188.2 million on Dec. 7, 2000, was an avoidable preference payment that the trustee was able to recover.

Upon review, the Third Circuit agreed that the payment at issue was an avoidable preference payment. Under the Bankruptcy Code, a trustee can recover property transferred to or for the benefit of the creditor for any antecedent debt owed prior to the transfer that was made while the debtor was insolvent and within 90 days before filing of the petition (or within one year if the creditor was an insider at the time of the transfer). As the Siemens transaction occurred outside of the 90 days prior to the petition, the issue turned upon whether Lucent was an insider.

A creditor can qualify as an insider by satisfying one of the categories enumerated by Congress under Section 101 of the Bankruptcy Code, or by qualifying as a "non-statutory insider" if it falls within the definition of an insider but outside of the enumerated categories. The court reviewed whether the bankruptcy court correctly identified Lucent as a "person in control" under Section 101 and as a non-statutory insider. The court found that "actual control" is necessary for an entity to constitute an insider under the "person in control" language; however, "actual control" is not necessary to support a non-statutory insider. Instead, the determination of a non-statutory insider is dependent upon a close relationship between the creditor and debtor and transactions that were not conducted at arm's length. The court held that notwithstanding whether or not Lucent demonstrated actual control to constitute a "person in control," sufficient facts existed to support the bankruptcy court's decision that Lucent was a non-statutory insider. The facts revealed that Winstar and Lucent had a close relationship and that the transactions were not conducted at arm's length.

Lucent asserted two defenses to the preference action, both of which the court rejected. Lucent first argued that Winstar's payment to Lucent was earmarked and was therefore not a transfer of Winstar's property. Under the court-made "earmarking doctrine," payments are not considered a voidable preference when: (1) an agreement exists between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt, (2) the parties perform according to the agreement's terms and (3) the transaction does not diminish debtor's estate. The court found that Lucent failed to demonstrate to the bankruptcy court that there was an agreement between Siemens and Winstar that satisfied the "earmark doctrine." Instead, the court found the facts supported just the opposite. The Siemens' representative testified that Winstar could use its loan for any corporate purposes and Winstar's memorandum to the bank facility lenders did not indicate that it intended to use the loan specifically to repay Lucent. Further, the evidence did not reveal that Siemens conditioned its loan upon Winstar's payment to Lucent. Therefore, Lucent's defense of earmarking failed.

Similarly, Lucent's defense of new value also failed. A trustee may not avoid a transfer to a creditor if after such transfer the creditor gave new value to the debtor that was not secured. The Third Circuit has imposed three requirements on new value defenses: "(1) the creditor must have received a transfer that is otherwise voidable as a preference; (2) after receiving the preferential transfer, the preferred creditor must advance 'new value' to the debtor on an unsecured basis and (3) the debtor must not have fully compensated the creditor for the 'new value' as of the date of the bankruptcy petition." Even though the court agreed that Lucent was involved in two transactions with Winstar after the date of the preference payment, it found that neither transaction constituted new value. The evidence before the bankruptcy court, such as the bankruptcy proceedings, security agreements, proofs of claims and parties' stipulations revealed that the transactions were secured and therefore, did not satisfy the second element of the new value defense.

The court also addressed the bankruptcy court's decision to grant the trustee's request to equitably subordinate Lucent's claims. The Bankruptcy Code provides that a court may subordinate all or part of an allowed claim to another allowed claim or all or part of an allowed interest to another interest. Courts have held that in order to equitably subordinate a claim, the claimant must have engaged in inequitable conduct, which resulted in an injury to the bankrupt's creditors and the equitable subordination must not be inconsistent with the Bankruptcy Code.

The court found that the facts presented to the bankruptcy court supported its finding that Lucent's conduct was "egregious." Lucent used threats of non-payment under the subcontract to force Winstar to purchase unneeded equipment from Lucent, which triggered Lucent's ability to issue the refinancing notice because Winstar was over the borrowing limit. Lucent also deliberately delayed issuing the refinancing notice to prevent public disclosure of Winstar's poor credit and to induce other creditors to provide funds to Winstar. Further, Lucent's actions harmed Winstar and its other creditors. The unneeded equipment eventually sold for pennies on the dollar and Lucent's intentional

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withholding of the refinancing notice induced the Siemens loan and additional private equity financing.

Even though the court found that Lucent's actions satisfied the first two prongs of equitable subordination, it found that the bankruptcy court's holding was inconsistent with the code because the code does not permit the subordination of debt to equity. A proof of interest that may be filed by an equity security holder is distinguishable from a proof of claim that is filed by a creditor. Therefore, the court modified the bankruptcy court's equitable subordination so that Lucent's claims were only subordinated to claims of other creditors as opposed to equity interests.

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12(b)(6) Motion Prompts the Court to Analyze the Sufficiency of a Dragonetti Claim

In *A.G. Cullen Construction, Inc. v. Travelers Cas. & Sur. Co.,* Civil Action No. 08-1238, 2009 U.S. Dist. LEXIS 11683 (W.D. Pa. Feb. 13, 2009) (opinion by J. Fischer), the court denied without prejudice defendants' motion to dismiss plaintiffs' claims under 42 Pa. C.S.A. § 8351 for malicious use of civil proceedings allowing plaintiffs to proceed through discovery. Plaintiffs claimed that defendants wrongfully and maliciously filed an Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction (the underlying motion) in the related case of *Travelers Cas. & Sur. Co. v. A.G. Cullen Construction*, Civ. A. No. 07-765, 2007 U.S. Dist. LEXIS 55997 (W.D. Pa. 2007) (the underlying action).

The underlying action arose after Travelers and plaintiffs entered into a General Agreement of Indemnity (GAI) wherein Travelers was the surety on performance and payment bonds issued to plaintiffs in connection with general construction contracts between plaintiffs and Butler County. Pursuant to the GAI, Arlene and Paul Cullen were the individual indemnitors under the terms of the bonds and A.G. Cullen Construction stood as Travelers' principal. On Jan. 25, 2006, plaintiffs were awarded a construction contract with Butler County. A dispute between plaintiffs and Butler County eventually arose as a result of Butler County refusing to grant plaintiffs an extension of time to complete the project and, as a result of the dispute, Butler County filed a claim against the performance bond with Travelers.

On June 6, 2007, Travelers commenced the underlying action against plaintiffs claiming, *inter alia,* that plaintiffs' refusal to deposit funds into a trust account was in violation of the GAI. Travelers then filed the underlying motion and sought to have the court order plaintiffs, *inter alia,* (1) to deposit funds collected or received in connection with the project into a trust fund account and (2) to provide Travelers with access to plaintiffs' books, papers, records, documents, contracts, reports, financial information and accounts. Following an evidentiary hearing, the court denied the underlying motion, without prejudice, and ordered the parties to proceed to mediation. Subsequently, as a result of the mediation, the parties then reached an agreement regarding the day-to-day operation and procedures of the trust fund account.

In evaluating plaintiffs' claim that Travelers and its attorneys violated 42 Pa. C.S.A. § 8351 by filing the underlying motion, the court set forth the elements for a Dragonetti Claim: (1) the defendant has initiated, procured or continued a civil proceeding against the plaintiff, (2) the proceeding was terminated in plaintiff's favor, (3) there was an absence of probable cause to bring the proceeding, (4) the proceeding was brought for an improper purpose and (5) plaintiff has suffered damages as a result. First, the court analyzed the term "proceeding" to determine whether the underlying motion fell within the definition of the term under the Dragonetti Act. The court took into consideration case law interpreting the meaning of "proceedings" and ultimately concluded that a motion for a preliminary injunction is a proceeding for purposes of the Dragonetti Act and may serve as a basis for a malicious use of civil proceedings claim.

Next, the court determined whether the underlying motion could be classified as a termination of a civil proceeding in plaintiffs' favor. Defendants' first argument on this issue was that plaintiffs' claims were premature because the underlying action remained pending when the underlying motion was denied. The court determined that the order denying the underlying motion adjudicated the merits of the motion as to the remaining issues not resolved by the mediation and thus considered the order a final order for purposes of plaintiffs' claims. Also, defendants raised the argument that the motion was not terminated in plaintiffs' favor because Travelers obtained relief with respect to two of its three claims as a result of the mediation. Here, the court concluded that the issues were not clear whether the proceeding was completely terminated in plaintiffs' favor. The underlying motion was partly terminated in plaintiffs' favor because at least one request for relief was denied, but the issues surrounding the operation and management of the trust fund account were not terminated in plaintiffs' favor.

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With respect to the third element above, the court analyzed whether defendants lacked probable cause or were grossly negligent in their investigation of the motion and publication of alleged rumors to the court. Plaintiffs contended that defendants lacked probable cause because the underlying motion was based on unfounded accusations. Because this issue was a mixed question of law and fact, and to determine whether probable cause existed or if defendants acted with gross negligence, the court reviewed the surrounding circumstances relating to the underlying motion and analyzed those circumstances under the substantive law pertaining to emergency injunctive relief and the standard for awarding such relief. The court considered Travelers' knowledge at the time the underlying motion was filed and also the court's decision to decline awarding the relief sought by Travelers. The court ultimately determined that it was unable to conclude whether probable cause existed or whether Travelers and its attorneys were not grossly negligent. For this element of the claim, the court held that plaintiffs included sufficient allegations in the amended complaint for the claim to proceed through discovery.

Next, the court analyzed the fourth element above to determine whether defendants acted primarily for an improper purpose. Defendants contended that their primary purpose for bringing the emergency motion was to have plaintiffs abide by the terms of the GAI, and plaintiffs argued that defendants lacked any evidence to support their position that plaintiffs would not fulfill their payments to the subcontractors. Again, the court allowed the claim to proceed through discovery. Finally, the court reviewed the allegations set forth in the amended complaint in accordance with the Dragonetti Act and concluded that potentially recoverable damages were sufficiently pled.

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Dueling Experts Render Motion for Summary Judgment Inappropriate in Patent Infringement

In *Arlington Industries, Inc. v. Bridgeport Fittings, Inc.,* Civil Action No. 3:01-CV-0485 (consolidated), 2009 U.S. Dist. LEXIS 7911 (M.D. Pa. Feb. 4, 2009) (opinion by J. Conner), Bridgeport Fittings, Incorporated (Bridgeport) and Arlington Industries, Incorporated (Arlington) were involved in a patent dispute regarding U.S. Patent Number 5,266,050 (the '050 patent) held by Arlington. The '050 patent was a continuation patent of U.S. Patent Number 5,171,164 (the '164 patent) and involved an electrical conduit fitting developed by Arlington in 1992 that allowed a user to quickly connect the device to a junction box using one hand instead of two. In 1999, Bridgeport created its own version of a quick-connect fitting that used nearly identical design features to those used in Arlington's products. Arlington filed suit against Bridgeport in 2001, alleging patent infringement, and the parties later entered into a settlement agreement in which Bridgeport agreed to discontinue making its allegedly infringing products, as well as "any colorable imitation, thereof."

In September 2005, Bridgeport created a new design for a quick-connect electrical fitting that was similar to the design described in the '050 patent. However, Bridgeport's new design incorporated a feature involving four tensioning tangs and two anchoring tabs, which it contended distinguished it from the '050 patent. After Arlington informed Bridgeport that its products utilizing the new design infringed Claim 8 of the '050 patent, Bridgeport filed a complaint seeking a declaration that the products do not infringe the '050 patent, either literally or under the doctrine of equivalents. Arlington filed a counterclaim claiming that the 15 products that incorporated the new design literally infringe Claim 8 of the '050 patent and that the manufacture, use and sale of the new products constituted a breach of the settlement agreement previously entered between the parties.

Claim 8 required that the quick connect fitting contain "at least two outwardly sprung members" attached to its metal adapter. The court had previously construed "outwardly sprung members" to mean "members bent outward at an angle relative to the normal plane of the adapter." Whether the new design infringed upon this claim required a determination of whether the tensioning tangs constituted members "bent outward at an angle relative to the normal plane of the adapter."

The parties filed cross-motions for summary judgment. Arlington's motion sought a judgment that the products literally infringed Claim 8 of the '050 patent. Bridgeport's motion sought summary judgment that the products did not infringe, either literally or according to the doctrine of equivalents. Bridgeport's motion also sought summary judgment that the manufacture and sale of the products did not constitute a breach of the settlement agreement and that Bridgeport was not liable for willful infringement of Claim 8 nor any infringement damages prior to Dec. 6, 2005.

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Both parties' motions with respect to literal infringement relied upon highly technical arguments regarding the angle of the tensioning tangs to the plane of the adapter, with each party's expert witness construing the evidence to be in favor of his client. The court denied both motions with respect to literal infringement, citing a factual dispute and insufficient evidence to render summary judgment on behalf of either.

Bridgeport asserted the presumption of prosecution history estoppel set forth in *Honeywell Int'l v. Hamilton Sundstrand Corp.,* 370 F.3d 1131, 1134 (Fed. Cir. 2004), in support of its request for summary judgment on the doctrine of equivalents. Under this presumption, a party who rewrites a dependent claim into independent form and at the same time cancels an independent claim cannot invoke the doctrine of equivalents on those claims. Bridgeport argued that Arlington was subject to this presumption because Independent Claim 1 and Dependent Claim 2 of the '164 patent were combined in response to a patent agent's rejection of Claim 1 based upon prior art, and Claim 8 of '050 at issue was later formed on this combination. However, the court disagreed, stating that Arlington did not rewrite Dependent Claim 2 in independent form nor combine Dependent Claim 2 with Independent Claim 1. Rather, Arlington merely amended Claim 1 in order to distinguish it from the prior art, rather than substituting Claim 2 for Claim 1 as required by *Honeywell*.

Bridgeport conceded that the products at issue did perform substantially the same function but argued that they did not do so in substantially the same way to obtain substantially the same result and therefore could not infringe by the equivalents. Once again, the court noted that the parties' experts reached opposite conclusions regarding the substantiality of the differences between the manner that the products maintained electrical continuity. Accordingly, the court ruled that the factual dispute was properly suited for the trier of fact and denied summary judgment on infringement by the doctrine of equivalents. The court also found that material facts were in dispute regarding Bridgeport's request for summary judgment on the breach of the settlement agreement and willful infringement, and denied the motion on those issues as well.

The court did grant Bridgeport's motion for summary judgment regarding the limitation of the period for which Arlington could claim damages. In order to claim damages for infringement, Arlington must have provided either actual notice of infringement to Bridgeport or constructive notice of infringement by marking its products with a "patented" mark. Because Arlington did not mark its products, it was forced to rely upon actual notice. Arlington argued that the settlement agreement put Bridgeport on continuing notice of its duty to refrain from infringing the '050 patent. The court rejected this argument, however, and held that Bridgeport did not receive actual notice of infringement until the Dec. 6, 2005 meeting of the parties. Therefore, the court granted Bridgeport's motion and precluded Arlington from collecting patent infringement damages prior to Dec. 6, 2005.

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Plaintiffs Adequately Pled Claim for Copyright Infringement and Claim for Breach of Contract But Failed to Set Forth Claim for Misappropriation of Trade Secrets

In *Mainardi v. Prudential Ins. Co. of America,* Civil Action No. 08-3605, 2009 U.S. Dist. LEXIS 6935 (E.D. Pa. Jan. 30, 2009) (opinion by J. Pratter), plaintiffs alleged, *inter alia,* that Prudential Insurance Company violated their copyrights, breached their software license agreements, misappropriated trade secrets and engaged in unfair competition. Prudential, on the other hand, moved to dismiss all claims pursuant to F. R. Civ. P. 12(b)(6).

In 1995, the Mainardis formed Lighthouse Strategic Projects Group, and after a period of time, they developed the following products: (1) "businessKillers" — designed to educate and motivate customers via audiovisual vignettes; (2) "businessKillers Extended Market" — designed and targeted specifically at women and (3) "Family Matters" — designed as an interactive CD-ROM with written materials for marketing insurance and financial services products to closely-held business owners. Eventually, the Mainardis copyrighted all three products in accordance with the federal copyright law as either text and audiovisual material or audiovisual material. From June 2005 through 2006, the Mainardis marketed the businessKillers package, which was the software for businessKillers and Family Matters, to Prudential employees and officers of Prudential's affiliates. The software package contained license agreements that each user had to accept upon installation, and Prudential further agreed to keep confidential all information received

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from the Mainardis during their explanation and instruction sessions.

By February 2006, Prudential expressed an interest in entering into a license agreement for the distribution of the businessKillers package, and after lengthy negotiations, a draft of the distribution license agreement was reduced to writing for review by the parties. Eventually, after communicating to Lighthouse that minor problems existed with the agreement, Prudential presented a revised contract to Lighthouse in June 2006, that did not include plaintiffs' requested changes. As a result of Prudential's failure to incorporate the requested changes, a final agreement was never reached between the parties, yet copies of the businessKillers package remained with Prudential and were never returned to plaintiffs. Subseuently, in June 2007, Prudential released a substantially similar copy of the businessKillers package entitled "Prudential's Tipping Points."

In this case, plaintiffs' first claim asserted against Prudential was for copyright infringement. The court set forth the elements necessary to prove copyright infringement: (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. Pursuant to 17 U.S.C. § 102(a), the Copyright Act protects original works of authorship fixed in any tangible medium or expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. In relying on the court's position that a copyright does not protect ideas, but only expression of ideas, Prudential argued that plaintiffs sought protection for marketing approaches that are not entitled to protection. The court determined that there was a substantial similarity between plaintiffs' verbiage used to describe the program and the dialogue contained in the businessKillers package with the verbiage and dialogue contained in Prudential's "Tipping Points" vignettes. Thus, the court concluded that plaintiffs stated a claim for copyright infringement. Also, Prudential argued that plaintiffs merely recited the elements of the cause of action. The court held, however, that the complaint provided a basis for their assertion of an entitlement to relief.

Plaintiffs also asserted a claim against Prudential for breach of contract based on the software license agreements contained in the businessKillers package. Prudential first challenged the claim by arguing that the state law claim was preempted by federal law. In relying on decisions from district courts within the circuit, wherein the courts agreed that an extra element exists in a breach of contract claim, i.e. a promise by the defendant, which is not present in a claim for copyright infringement, the court in the present case concluded that plaintiffs' breach of contract claim was not automatically preempted. Prudential also challenged the breach of contract claim by arguing that the complaint did not allege acceptance of the license agreements by Prudential and supported its argument with the technicality that the Mainardis, and not Prudential's employees or agents, opened the computer programs and accepted the terms during the demonstration of the package. However, the court concluded that the existence of a valid contract was sufficiently pled by plaintiffs.

The third cause of action asserted by plaintiffs against Prudential was for misappropriation of trade secrets, which according to the court, requires: (1) the existence of a trade secret; (2) communication of the trade secret pursuant to a confidential relationship; (3) use of the trade secret, in violation of that confidence and (4) harm to the plaintiff. Because the courts have held that a product cannot constitute a trade secret when it provides its creator with economic value only when disseminated, the court in the present case concluded that the package did not constitute a trade secret because plaintiffs sought economic benefit through the sale of the businessKillers package and failed to assert that they derived any independent economic value from the package.

The last argument raised by Prudential in its motion to dismiss was that plaintiffs' claim for unfair competition was preempted by federal law. Prudential argued that plaintiffs' claim was premised solely on the fact that Prudential copied their work and passed it off as its own. Plaintiffs, in turn, conceded that they based their claim solely on Prudential's intent to deceive them, and not the public, but argued that Prudential's intent to gain access to and copy the businessKillers package presented additional elements of proof excluding the claim from federal preemption. After analyzing the common law definition of unfair competition found in the Restatement (Third) of Unfair Competition and its application by other judges of the Eastern District, the court denied the motion without prejudice with the hope that more guidance would be provided by the Pennsylvania courts, which have not yet applied the Restatement (Third) to the common law tort, in the near future on this issue.

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Consumers Adequately Pled Statutory Violations Arising from Purchase of Vehicle

In *Molley v. Five Town Chrysler, Inc.,* Civil Action No. 07-cv-5415, 2009 U.S. Dist. LEXIS 13765 (E.D. Pa. Feb. 20, 2009) (opinion by J. Joyner), the court denied defendant Wells Fargo Bank's motion to dismiss the plaintiffs' claims for Unfair Trade Practices and Consumer Protection Law (UTPCPL), Truth-in-Lending Act (TILA) and Equal Credit Opportunity Act (ECOA). The relevant facts revealed that plaintiff Norfeh Molley contacted a Chrysler and Mitsubishi dealer to inquire about purchasing a 2006 Nissan Murano advertised on the Internet. In response to Norfeh's submittal of her credit application, a representative from the dealer informed her that she was approved for financing and that the purchase price of the vehicle was $15,495, excluding all taxes, fees and tags. Norfeh subsequently traveled to New York to purchase the vehicle; however, when she arrived, a second representative from the dealer informed her that the total cost of the vehicle was actually $21,500 because the lender, J.P. Morgan Chase (Chase) required a separate $2,000 deposit and a warranty in the amount of $2,500 as a result of Norfeh's "light" credit history. The dealer determined that Norfeh would qualify for a better rate if she had a co-signer, so a third representative from the dealer drove to Philadelphia and presented Norfeh's sister, Martha Molley, with blank loan documents for her signature as co-signer. Martha signed the blank documents based upon the third representative's statements that the final documents would reflect the cost discussed (apparently $19,000 as provided later in the court's decision) and would be immediately forwarded to her. One month later, Martha received the documents, which incorrectly disregarded the total cash deposit and prior price quotes and indicated that a total of $23,816.15 was financed. The documents also incorrectly named Martha Molley as the holder of the car's title as opposed to Norfeh.

Plaintiffs filed an action against Chrysler, Mitsubishi and Chase. Plaintiffs subsequently amended their complaint to reflect acquisitions of certain defendants that occurred either prior to or during the litigation. Ultimately, plaintiffs filed a second amended complaint adding Wells Fargo as a defendant after learning that Wells Fargo was responsible for the original financing. Plaintiffs also agreed to dismiss Chase. Wells Fargo filed the motion to dismiss, and plaintiffs eventually withdrew all claims against Wells Fargo except their claims for UTPCPL, TILA and ECOA.

First, the court found that in construing all of the factual allegations in plaintiffs' favor, plaintiffs had plead sufficient facts to support their claim for UTPCPL. Wells Fargo argued that to support a claim for UTPCPL, a plaintiff must allege the elements of common law fraud. On the contrary, plaintiffs argued that a claim for UTPCPL can be established by demonstrating "conduct having a tendency to confuse." The court cited several Pennsylvania federal court decisions and found that since the 1996 amendments to the statute, these courts have been divided as to whether the elements of common law fraud are necessary to plead a claim for UTPCPL. However, the court relied upon a Pennsylvania Superior Court decision from 2000, finding that a plaintiff must still plead the elements of common law fraud despite the 1996 amendments. This court also found that plaintiffs alleged sufficient facts to support such a claim.

The elements for common law fraud include: (1) a material misrepresentation of an existing fact, (2) *scienter*, (3) justifiable reliance on the misrepresentation and (4) damages. *Scienter* can be plead by alleging facts "establishing a motive and an opportunity to commit fraud" or by alleging facts that "constitute circumstantial evidence of either reckless or conscious behavior." According to plaintiffs' allegations, Martha acted in reliance on the misrepresentation that the vehicle would require $19,000 in financing and that the loan and vehicle would be in Norfeh's name; the financing amount increased without their consent; the car and loan were only in Martha's name; and damages included financial injury, loss of creditworthiness and emotional distress. Therefore, the court denied Wells Fargo's motion to dismiss the UTPCPL claim.

Next, the court denied Wells Fargo's motion to dismiss plaintiffs' TILA claim. TILA was created to ensure a disclosure of credit terms, so that the consumer is able to compare all credit terms available and avoid inaccurate and unfair credit billing and credit card practices. Pursuant to the statute, the creditor is required to make disclosures in writing and provide a copy for the consumer to maintain for his records. To support a TILA claim, a plaintiff must allege that the defendant was the creditor, that it did not make the required disclosures and that the plaintiff incurred damages. The court found that plaintiffs alleged sufficient facts to support a claim for TILA because, as stated in relevant statutes, Wells Fargo was a creditor even though it was an assignee of the loan and plaintiffs claimed that Martha signed blank documents at the direction of Wells Fargo's agents. The court held that blank documents presented to a con-

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sumer lacked the requisite TILA disclosure.

Finally, the court denied Wells Fargo's motion to dismiss plaintiffs' ECOA claim. A creditor can trigger a notice requirement to the potential borrower by an approval, a counteroffer or an adverse action. The court held that plaintiffs sufficiently plead the ECOA claim because they alleged that the original financing offer had increased from $19,000 to $23,816.15 without any notice and that the misrepresentations were made by intermediaries from Chrysler and Mitsubishi at Wells Fargo's direction.

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Posting Copyrighted Material on Internet Sufficient to Establish Access of Alleged Infringer

In *R. Bradley Maule v. Philadelphia Media Holdings, LLC,* Civil Action No. 08-3357, 2009 U.S. Dist. LEXIS 6795 (E.D. Pa. Jan. 30, 2009) (opinion by J. Kelly), R. Bradley Maule, a photographer in Philadelphia, filed a copyright infringement action against Gyro Advertising, Inc. (Gyro); Steven Grasse, the CEO and sole shareholder of Gyro; and Philadelphia Media Holdings, LLC (PMH), the publisher of two major newspapers in the Philadelphia area.

In May 2005, Maule allegedly photographed the Philadelphia skyline from the 18th floor of a hotel located in West Philadelphia. Maule also alleged that he modified the photograph by inserting artistic renderings of the Comcast Center and Mandeville Place in the locations where they were to be constructed. Maule had also modified one of the billboards in the photo to contain the text "Visit Philly Skyline Dot Com." He then posted the resulting picture on his Web site to show how the Philadelphia skyline would appear in 2008 (the projected skyline photograph). Maule registered this picture with the U.S. Copyright Office on May 13, 2008.

In 2007, PMH used a picture in an advertising campaign distributed in its newspapers that Maule contended was a copy of the projected skyline photograph. The picture depicted a pig flying across the Philadelphia skyline (the pig glossy). Maule contended that the pig glossy was a cropped copy of the projected skyline photograph with the text "Visit Philly Skyline Dot Com" digitally removed from the pig glossy prior to print in PMH's newspapers.

Maule filed suit against PMH, Gyro and Grasse asserting 10 causes of action related to the use of the pig glossy and another picture allegedly copied from his Web site. The defendants filed a motion to dismiss several counts pursuant to Fed. R. Civ. P. 12(b)(6). Maule conceded some of the counts, and the remaining issues decided by the court were whether to dismiss Counts I – III. Count I asserted a claim for copyright infringement against all of the defendants for use of the pig glossy. Count II requested injunctive relief pursuant to 17 U.S.C. § 502. Count III sought declaratory relief against all of the defendants asking the court to invalidate the defendants' copyright in the pig glossy.

Regarding the motion to dismiss Maule's copyright infringement claims, the court stated that Maule would be required to establish that (1) he had ownership of a valid copyright in the projected skyline photograph and (2) that the defendants copied, displayed or distributed protected elements of the copyrighted work. The court found that the first element was satisfied because Maule had obtained a valid copyright certificate within five years of the first publication of the photograph. The court held that the second element could be proven by showing defendant's access to the work and substantial similarity between the projected skyline photograph and the pig glossy. Citing to Maule's allegations that the projected skyline photograph had been posted on his Web site for almost two years before the alleged infringing use, as well as the parties' relative proximity to Philadelphia and other allegations of infringement, the court found that Maule had sufficiently established access. The court also found that Maule's allegations regarding the common features of the photographs were sufficient to establish the last remaining requirement of substantial similarity. Therefore, the court denied the defendants' motion to dismiss.

The defendants also asserted that the claims against Grasse in his individual capacity should be dismissed because Maule was not entitled to pierce the corporate veil of Gyro. However, the court noted that Maule had alleged that Gyro was the alter ego of Grasse and was merely a sham for his personal operations. Furthermore, the court noted that Grasse could also possibly be found liable as a contributory infringer due to his alleged level of control over the corporation and its employees. Accordingly, the court denied this request for dismissal as well.

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Legislative Update

By Steven Loux

The PBA Legislative Department seeks to inform Section members about adopted or pending legislation that affect our practice areas. The Section encourages members to express opinions regarding any pending legislation's importance or impact by contacting appropriate legislators, the PBA Legislative Department or the leaders of the Section. To obtain copies of any bill cited below, please e-mail me at steven.loux@pabar.org, call 1-800-932-0311, Ext. 2246, or directly access bills and other legislative information online at www.legis.state.pa.us.

LEGISLATION

Below find bills by topic. Unless otherwise noted, reference to a committee means a House committee for House bills, a Senate committee for Senate bills. Bills supported by the PBA are so noted; otherwise the PBA has no position on the listed legislation and is providing each bill summary for informational purposes only. All dates refer to 2009 unless otherwise specified.

Medical Malpractice and Professional Liability

HB 84 and SB 443, similar bills sponsored, respectively, by Rep. Anthony DeLuca (D-Allegheny) and Sen. Don White (R-Indiana), the Preventable Serious Adverse Events Act, provide that health care providers may not knowingly seek payment from health payors or patients for a preventable serious adverse event or services required to correct or treat the problem created by such an event when the event occurred under their care or control. The legislation provides for refunds, notification, liability, the publishing of updates and the responsibilities and duties of the Departments of Health and State. Rules governing applicability, contracts and reporting, as well as Medicare payment are outlined. HB 84 was reported from the Insurance Committee and received first consideration in the House on Feb. 4, and was then re-referred to the Appropriations Committee. SB 443 passed the Senate 50-0 on March 25.

Steven Loux

HB 530, sponsored by Rep. Mike Turzai (R-Allegheny), amends Title 42 (Judiciary and Judicial Procedure) by providing that no cause of action asserting a professional liability claim may be filed with the court unless a certificate of merit is included. When filing, the plaintiff shall include with the complaint a certificate of merit containing a written and signed statement from an appropriate licensed professional, identified by name and professional designation. A person must meet certain criteria to execute a certificate of merit or offer an expert opinion in a professional liability action. The bill has been referred to the Judiciary Committee.

SB 208, sponsored by Sen. Patricia Vance (R-Cumberland), amends Title 42 adding that a benevolent gesture or admission by health care provider or assisted living residence or personal care home prior to the commencement of a medical professional liability action shall be inadmissible as evidence of liability or as evidence of an admission against interest. **SB 626,** sponsored by Sen. Stewart Greenleaf (R-Montgomery), amends Title 42 in rules of evidence, providing for expression of empathy by adding that in a medical professional liability action, an expression of empathy made by a health care provider to a patient prior to the commencement of the action shall be inadmissible, regardless of which party seeks to introduce the statement. Both bills have been referred to the Judiciary Committee.

SB 509, sponsored by Sen. Mike Folmer (R-Lebanon), amends the Medical Care Availability and Reduction of Error (MCARE) Act further providing for medical professional liability insurance basic coverage limits, for the Medical Care Availability and Reduction of Error Fund ceasing assessments in 2012 and creating a new funding method; and establishing the Health Care Provider Rate Stabilization Fund for payments of obligations, payment of claims against any participating providers for losses or damages awarded in medical liability actions against them, payment of premiums and assessments for insurance coverage to the degree that such premiums and assessments are greater than 110 percent of the premiums and assessments in effect during the previous calendar year, and payment of the patient safety discount. Monies in the Health Care Provider Retention Program are transferred to the fund. The bill provides for duties of the Insurance Commissioner and requirements of health care providers. The bill has been referred to the Banking and Insurance Committee.

Product Liability

HB 515, sponsored by Rep. Dave Reed (R-Indiana), amends Title 42 providing for liability rules applica-

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ble to product sellers and manufacturers. No product liability action based on the doctrine of strict liability in tort may be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless the seller is also the manufacturer of the product or the manufacturer of the part thereof claimed to be defective giving rise to the product liability action. The legislation provides for exceptions, presumptions and definitions. The bill has been referred to the Judiciary Committee.

HB 616 and **SB 372,** almost identical bills sponsored, respectively, by Rep. Scott Boyd (R-Lancaster) and Sen. Lisa Baker (R-Luzerne), amend Title 42. In a product liability action, a product seller other than a manufacturer shall not be liable for damages resulting in death, injury to person or property or economic loss unless the plaintiff establishes at least one of the following: (1) the product that allegedly caused the harm was sold by the product seller, the seller failed to exercise reasonable care with respect to the product before placing it in the stream of commerce and the failure to exercise reasonable care was a proximate cause of the harm. A product seller shall not be considered to have failed to exercise reasonable care based upon an alleged failure to inspect a product where there was no reasonable opportunity to inspect the product in a manner that, in the exercise of reasonable care, would have revealed the aspect of the product that allegedly caused the harm; (2) the product seller made an express warranty applicable to the product that allegedly caused the harm independent of an express warranty made by a manufacturer as to the same product, the product failed to conform to the seller's express warranty and the failure of the product to so conform caused the harm; (3) the product seller, before placing the product in the stream of commerce, exercised significant control over the design, manufacture, packaging or labeling of the product related to its alleged defect that caused the harm; (4) the product seller, before placing the product in the stream of commerce, knew or reasonably should have known of the defect in the product that caused the harm or the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product that caused the harm; (5) the product seller engaged in intentional wrongdoing that was a proximate cause of the harm; (6) the product seller, before placing the product in the stream of commerce, held itself out as the manufacturer to the user of the product, in which case the product seller shall be liable as though the product seller were the manufacturer. In a product liability action against a product seller, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the injury, death or damage; and shall exercise due diligence in providing the plaintiff with the correct identity of the manufacturer. The bills have been referred to the respective Judiciary Committees.

Real Property Oil and Gas

HB 473, sponsored by Rep. Mike Hanna (D-Clinton), amends the Oil and Gas Act, in preliminary provisions, establishing and outlining the procedure for securing compensation for damage to surface landowner's property caused by oil or gas drilling or exploration. The bill describes recourse for surface landowners and drill owners, providing for the submission of claims to the Department of Environmental Protection (DEP), and also for the duties of DEP in such cases. The bill has been referred to the Environmental Resources and Energy Committee.

HB 539 and **SB 275,** similar bills sponsored, respectively, by Rep. Reed and Sen. Don White, the Coal Bed Methane Well Dispute Resolution Act, provide for the establishment of the Coal Bed Methane Review Board to resolve disputes between property owners over the location of coal bed methane wells and access roads. The bills specify that nothing in the act precludes a person from seeking other remedies allowed by statute, common law, deed or contract, nor does the act diminish or alter rights previously established or granted by statute, common law, deed or contract. HB 539 has been referred to the Environmental Resources and Energy Committee. SB 275 was reported from the Environmental Resources and Energy Committee and received first consideration in the Senate on March 17, and was then re-referred to the Appropriations Committee.

Taxing Legal Services

SB 70, sponsored by Sen. Jeffrey Piccola (R-Dauphin), amends the Tax Reform Code, in sales and use tax, by making technical changes, providing definitions, and removing certain provisions for exceptions for certain services rendered. The bill requires that any service other than a medical service, when the primary objective of the purchaser is the receipt of any benefit of the service performed, as distinguished from the receipt of property, and for exclusions from the tax. Any service performed shall be subject to the tax imposed unless specifically exempted. Additionally, the bill provides for exemptions from the sales and use tax by removing current exemptions from several items including disposable diapers and

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other related products; steam, natural and manufactured and bottled gas, fuel oil, electricity or intrastate subscriber line charges, basic local telephone service or telegraph service; wrapping paper and related items; and vessels designed for commercial use of registered tonnage of 50 tons or more when produced by the builders thereof upon special order of the purchaser. Exemptions are added for medical goods or services by a hospital; medical, dental or hospice services; goods or services involving Medicare Part B transactions; and the sale or rental of real property. The bill has been referred to the Finance Committee. **The PBA opposes this bill in so far as it imposes a tax on legal services.**

Tort and Damage Immunity

HB 182, sponsored by Rep. Robert Godshall (R-Montgomery), amends Title 42 by adding a section regarding personal injuries sustained by the perpetrator of criminal conduct, providing for the assumption of risk, immunity, attorney fees and stay of civil action. A perpetrator shall be deemed to have assumed the risk of loss, injury or death resulting from or arising out of a course of criminal conduct committed by the perpetrator or accomplice as defined in 18 Pa.C.S. § 306(c) (relating to liability for conduct of another; complicity). The victim shall be immune from civil liability for any personal injuries sustained by a perpetrator of criminal conduct and caused by the acts or omissions of the victim during the course of the criminal conduct, except where the victim failed to use reasonable force during the course of the criminal conduct. The bill has been referred to the Judiciary Committee.

HB 593, sponsored by Rep. John Siptroth (D-Monroe), amends Title 42, Chapter 83 (relating to particular rights and immunities), providing for immunity of humane society police officers. Such officers shall be treated as if they were public employees as defined under § 8501 (relating to definitions) in performance of their duties of investigation and enforcement of 18 Pa.C.S. § 5511(i) (relating to cruelty to animals) as delegated by the laws of this commonwealth. The bill has been referred to the Judiciary Committee.

SB 84, sponsored by Sen. Greenleaf, amends the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act. The bill adds "any nonprofit corporation created and controlled by a redevelopment authority" to the definition of "economic development agency"; extends limited environmental liability to economic development agencies that secure public funding for environmental investigation, remediation or redevelopment of or implementation of infrastructure improvements as part of postrehabilitation transfer of title to a third party; and clarifies that economic development agencies, its officers, directors, and others acting on the agency's behalf are not liable unless they directly cause an immediate release or exacerbate a release of a regulated substance on or from the property. The bill was reported from the Environmental Resources and Energy Committee and received first consideration in the Senate on March 17, and received second consideration in the Senate on March 24.

SB 216, sponsored by Sen. Greenleaf, amends Title 42 by adding a section providing that a hospital is not subject to civil liability arising from the nature or condition of medicine, medical supplies and equipment that were reasonably believed to be in good condition and donated by the hospital in good faith for humanitarian assistance. The section does not apply to an injury or death to a person that results from an act or omission of a hospital constituting gross negligence, recklessness or intentional misconduct, and shall not be construed as establishing any liability. The bill has been referred to the Judiciary Committee.

SB 232, sponsored by Sen. John Wozniak (D-Cambria), authorizes the Cambria County Transit Authority and the Departments of Conservation and Natural Resources, Transportation, Environmental Protection, acting for and in the name of the commonwealth, to agree to hold and save the U.S. Army Corps of Engineers free from certain damages arising from construction, operation and maintenance of a collapsible dam in the Conemaugh River in Cambria County and other related projects, involving cooperative agreements between the commonwealth and the Corps of Engineers, except for any damages due to the fault or negligence of the Corps of Engineers. The bill was reported from the Environmental Resources and Energy Committee and received first consideration in the Senate on March 17, and was then re-referred to the Appropriations Committee.

Venue

HB 850, sponsored by Rep. Douglas Reichley (R-Lehigh), amends Title 42, providing for venue in personal injury actions. A tort action for damages that alleges a personal injury may be filed only in the county in which the cause of action arose and judgment upon that action may be entered only within the same county. The bill has been referred to the Judiciary Committee. **The PBA opposes this legislation.**

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Pa. Cases of Note

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real question, she wrote, is simply whether "the actual reason for a claimant's discharge is something other than willful misconduct." Evidence of inconsistent discipline would thus be relevant to the question of what the employer's actual standards of conduct were and what the "actual reason" for the claimant's discharge was.

— Contributed by Jonathan Pyle, Esq., Philadelphia; jhpyle@gmail.com. ■

Pennsylvania Federal Business Decisions

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Court Recognizes Cause of Action for Breach of Duty to Negotiate in Good Faith

In *W.P. 851 Associates, L.P. v. Wachovia Bank,* Civil Action No. 07-2374, 2009 U.S. Dist. LEXIS 1395 (E.D. Pa. Jan. 8, 2009) (opinion by Judge C. Darnell Jones II), the court was asked to decide whether to reinstate a count for breach of a duty to negotiate in good faith. The question of whether such a claim exists has not been decided by the Pennsylvania Supreme Court. However, the court explained that the Third Circuit has predicted that the Pennsylvania Supreme Court would find that an agreement to negotiate in good faith is enforceable if it meets the requisite elements of a contract. Nevertheless, the court refused to reinstate the count for breach of duty to negotiate in good faith.

Applying Third Circuit precedent, the court looked to whether: 1) both parties manifested an intention to be bound by the agreement; 2) the terms of the agreement were sufficiently definite to be enforced and 3) there was consideration. Additionally, the court explained that the Third Circuit requires the parties to manifest a specific intent to negotiate in good faith before a court can enforce an agreement to negotiate in good faith.

The court found no evidence of an agreement to negotiate in good faith. Plaintiff's entire motion for reinstatement was based upon one fact witness's opinion elicited during a deposition: "Q: Did you believe the bank had an obligation to negotiate the terms of the written lease in good faith? A: Yes." According to the court, this evidence alone did not support an unequivocal agreement to negotiate in good faith. Missing from the record was any unequivocal promise, any person who made a promise or any person to whom a promise was made. It followed then that plaintiff failed to satisfy the requirement that the agreed-upon terms be sufficiently definite. Plaintiff also failed to identify the extent of defendant's alleged duty. Finally, the court found that the plaintiff failed to meet the consideration element. Accordingly, the court found no basis for reinstating plaintiff's count for breach of duty to negotiate in good faith.

— Contributed by Kelly A. Williams, Esq., Picadio Sneath Miller & Norton, P.C., Pittsburgh; kwilliams@psmn.com. ■

Legislative Update

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Miscellaneous

HB 546, sponsored by Rep. John Payne (R-Dauphin), amends Title 42, further providing for the attachment of wages by judgment creditors. Added to the list of action or proceeding exceptions to the provision that wages, salaries and commissions of individuals shall, while in the hands of the employer, be exempt from any attachment, execution or other process is the following: For debts owed to a judgment creditor which debts shall include unpaid obligations arising from the judgment creditor's extension of credit, unpaid obligations arising from the settlement of claims by parties to litigation and final judgments determined by decision of the court. The bill has been referred to the Judiciary Committee.

SB 25, sponsored by Sen. Shirley Kitchen (D-Philadelphia), amends Title 42, Chapter 81 (relating to judgments and other liens), providing for exemption from certain money judgments of hospitals by adding that in the case of a judgment arising out of services provided at a hospital in which the judgment creditor is the hospital, the aggregate value of the judgment debtor's homestead property shall be exempt from execution under Subchapter B (relating to exemptions from execution). The bill has been referred to the Judiciary Committee.

SB 434, sponsored by Sen. Greenleaf, amends Title 23 (Domestic Relations) in liability for tortious acts of children by increasing the monetary limits of liability. The bill passed the Senate 48-0 on March 16, and was then referred to the House Judiciary Committee. ■

(Updated March 27, 2009)

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☐ Saturday Reception and Dinner

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