White and Williams LLP

Focus on Construction *Summer 2010*

OSHA RAMPS UP PENALTIES WITH ITS SEVERE VIOLATOR ENFORCEMENT PROGRAM

by David R. Bronstein, Esq., and John K. Baker, Esq.

Last year the Occupational Safety and Health Administration announced plans to replace its existing Enhanced Enforcement Program (EEP) with a new program aimed at employers that have committed repeated and severe OSHA violations. Details for the new program, known as the Severe Violator Enforcement Program (SVEP), were announced in mid-April. SVEP will result in increased, multi-worksite inspections and higher civil penalties for these employers.

"For many employers, investing in job safety happens only when they have adequate incentives to comply with OSHA's requirements," said Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health in a press release issued by the U.S. Department of Labor. "Higher penalties and more aggressive, targeted enforcement will provide a greater deterrent and further encourage these employers to furnish safe and healthy workplaces for their employees." OSHA predicts the increase in fines and targeted enforcement efforts will raise safety awareness in workplaces and, as a result, protect workers.

The new SVEP will focus OSHA's enforcement resources on what it considers "recalcitrant" or "indifferent" employers with citations for repeated and serious safety violations. The program includes not only more rigorous follow-up inspections at the specific worksite where the safety citation was issued, but also inspections of other worksites of the employer where there may be a potential for similar hazards and deficiencies. Further, for individual violations for specific hazards identified in the SVEP, OSHA area directors will be required to consider the adequacy of the proposed penalty and may, as appropriate, limit adjustments of the penalty for good faith, history, or size when necessary to achieve the appropriate deterrent effect. The SVEP directive went into effect in June 2010.

As part of SVEP, the average penalty for a serious violation will increase from about $1,000 to an average of $3,000 to $4,000. Currently, the maximum fine for a serious safety violation is $7,000, an amount which has not increased since 1990. While under SVEP this limit will not change, OSHA is calling for an increase in the maximum fine to $12,000 as part of the Protecting America's Workers Act presently pending before Congress.

continued on page 2...

IN THIS ISSUE...

OSHA RAMPS UP CONTINUED

An employer will be considered as a candidate for SVEP when it has willful, repeated, or failure-to-abate violations in any one of the following four areas:

- fatality or catastrophe situations (one or more willful or repeated citations or failure-to-abate notices based on a serious violation related to the death of an employee or three or more employee hospitalizations);
- employee exposure to "high-emphasis hazards" (two or more willful or repeated violations or failure-to-abate notices based upon fall hazards, amputation hazards, crystalline silica hazards, combustible dust hazards, lead hazards, excavation and trenching hazards, and ship-breaking hazards);
- employee exposure to the potential release of highly hazardous chemicals (three or more willful or repeated violations or failure-to-abate notices based upon petroleum and highly hazardous chemical releases); and
- egregious violations (employer liable for egregious enforcement actions).

Any employer, regardless of size, can be made subject to the Severe Violator Enforcement Program.

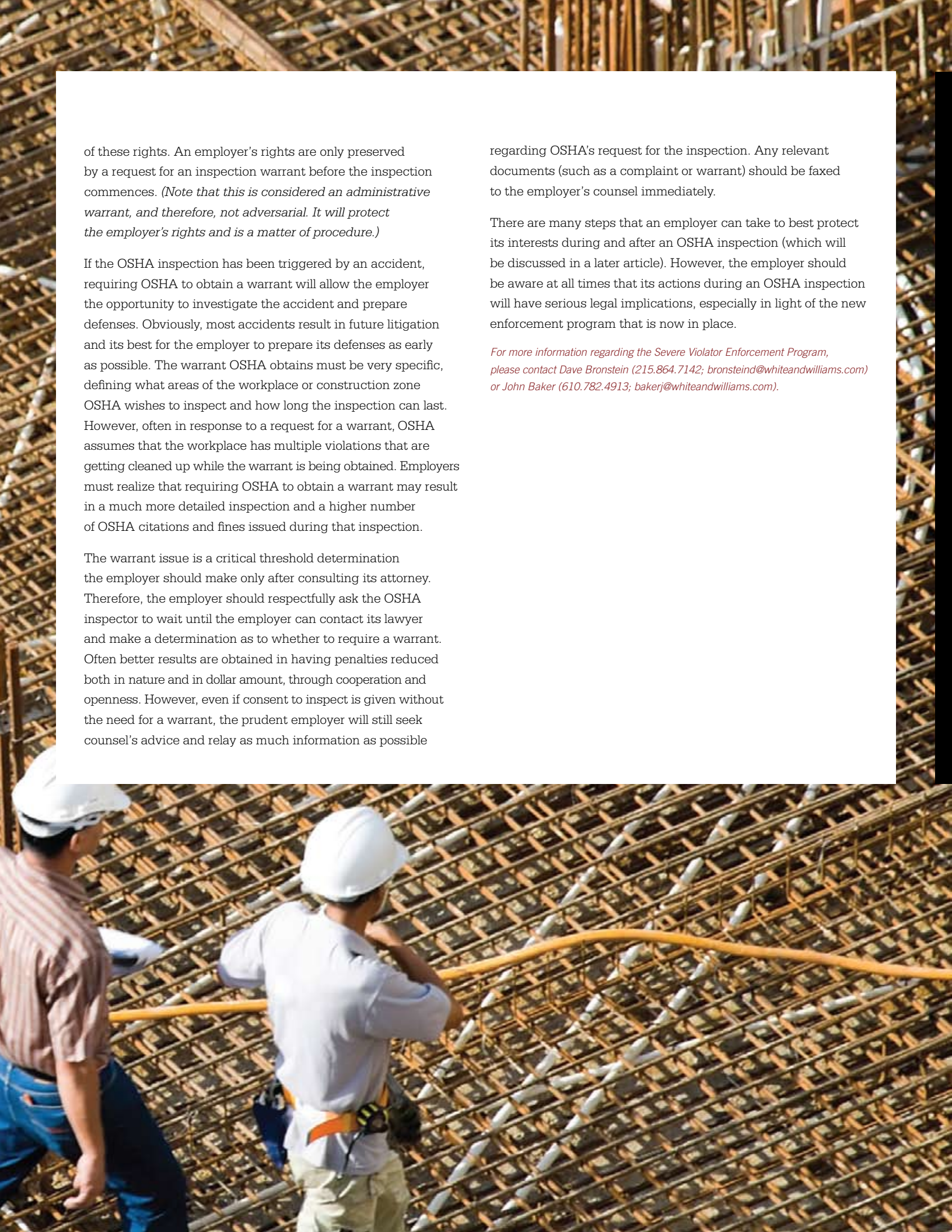
With this new enforcement program in place, there has never been a better time for companies to revisit their OSHA compliance procedures. Most employers know that OSHA will inspect a worksite after there has been an industrial accident. However, the majority of OSHA citations are issued following surprise OSHA inspections that are not related to any particular accident.

THE EMPLOYER'S RIGHTS DURING AN OSHA INSPECTION

Regardless of whether an OSHA inspection is a surprise or follows an accident, an employer should be aware of it rights and responsibilities before the OSHA inspector arrives on site. These rights include the following:

- the employer can request a copy of the complaint filed with OSHA;
- the employer can limit the scope of the investigation to the area of the workplace at issue;
- the employer can delay the inspection without prejudice while legal counsel is contacted;
- the employer has the right to participate in non-private employee interviews, and if the OSHA investigator refuses, the employer can require that the interviews occur on non-paid work time;
- the employer can prevent the inspector from interviewing supervisory employees in private;
- the employer has the right to stop interviews that become disruptive, confrontational, or unreasonably interfere with ongoing work; and
- the employer can demand a search warrant from OSHA.

OSHA inspectors are not required to inform employers of their rights during an OSHA inspection. If the employer allows an OSHA inspector onto its facility or worksite and acts cooperatively, the inspection will be considered "voluntary" and the employer will be deemed to have waived a number



of these rights. An employer's rights are only preserved by a request for an inspection warrant before the inspection commences. *(Note that this is considered an administrative warrant, and therefore, not adversarial. It will protect the employer's rights and is a matter of procedure.)*

If the OSHA inspection has been triggered by an accident, requiring OSHA to obtain a warrant will allow the employer the opportunity to investigate the accident and prepare defenses. Obviously, most accidents result in future litigation and its best for the employer to prepare its defenses as early as possible. The warrant OSHA obtains must be very specific, defining what areas of the workplace or construction zone OSHA wishes to inspect and how long the inspection can last. However, often in response to a request for a warrant, OSHA assumes that the workplace has multiple violations that are getting cleaned up while the warrant is being obtained. Employers must realize that requiring OSHA to obtain a warrant may result in a much more detailed inspection and a higher number of OSHA citations and fines issued during that inspection.

The warrant issue is a critical threshold determination the employer should make only after consulting its attorney. Therefore, the employer should respectfully ask the OSHA inspector to wait until the employer can contact its lawyer and make a determination as to whether to require a warrant. Often better results are obtained in having penalties reduced both in nature and in dollar amount, through cooperation and openness. However, even if consent to inspect is given without the need for a warrant, the prudent employer will still seek counsel's advice and relay as much information as possible regarding OSHA's request for the inspection. Any relevant documents (such as a complaint or warrant) should be faxed to the employer's counsel immediately.

There are many steps that an employer can take to best protect its interests during and after an OSHA inspection (which will be discussed in a later article). However, the employer should be aware at all times that its actions during an OSHA inspection will have serious legal implications, especially in light of the new enforcement program that is now in place.

For more information regarding the Severe Violator Enforcement Program, please contact Dave Bronstein (215.864.7142; bronsteind@whiteandwilliams.com) or John Baker (610.782.4913; bakerj@whiteandwilliams.com).

PENNSYLVANIA ONE CALL APPROVES A NEW VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION PROCESS FOR UTILITY OWNERS AND DEMOLITION/EXCAVATION CONTRACTORS

by Gaetano P. Piccirilli, Esq., and William J. Taylor, Esq.

Frustrated by lengthy and expensive court proceedings related to utility property lines damaged during excavation and demolition work, utility owners, contractors and design professionals asked the Pennsylvania One Call System (One Call)[1] to create a voluntary alternative dispute resolution process to streamline the resolution of disputes related to damaged utility properties.[2] One Call recently responded by developing the Voluntary Payment Dispute Resolution Process (VPDRP), which is available to parties[3] who have used the One Call system with respect to the construction work which forms the basis of the dispute.[4]

The VPDRP process is aimed at streamlining the resolution of disputes arising out of excavation and demolition work conducted in accordance with the Pennsylvania One Call Statute. For contractors (and utility owners and designers), the benefits of the VPDRP system are simple: (1) a streamlined forum to resolve monetary disputes related to damaged utility properties; (2) an opportunity to have the matter heard by professionals in the industry, and not by a lay jury; and (3) an opportunity to save on court costs and expensive litigation. Questions remain, however, as to how the VPDRP system will work and what factors participants should consider in utilizing the VPDRP.

In developing the VPDRP, One Call looked to what other states were doing with ADR programs, specifically Colorado[5] and Virginia.[6] Like the ADR systems in these states, One Call's new ADR process had to be voluntary (as required by the One Call statute). Beyond that, One Call had to consider whether the system should be binding (like the system in Colorado), non-binding (as with the system in Virginia), or a hybrid. After studying the alternatives, One Call decided on a hybrid system where the parties themselves can decide the type of ADR they want—either binding or non-binding. In addition, One Call rejected any type of jurisdictional limit, empowering parties to choose ADR wherever they see fit.

Because the Pennsylvania Uniform Arbitration Act (Arbitration Act)[7] requires that arbitration agreements be in writing, parties looking to use the VPDRP must first execute the standard One Call ADR Agreement. This standard agreement requires the parties to identify themselves, to identify the matters in dispute, and to indicate whether they desire binding

or non-binding ADR.[8] By selecting binding ADR,the parties agree that their dispute will be resolved entirely by the One Call VPDRP. In addition, the parties agree to bind themselves to the rules governing common law arbitration under the Arbitration Act, which generally detail how an arbitration award becomes a judgment[9] and how a party may appeal or modify an award.[10] If the parties instead choose the non-binding option for their ADR, the parties may either resolve the dispute with the help of the mediator, or pursue other legal remedies.

By entering into the standard One Call ADR Agreement, the parties agree to be bound by the procedures and timelines established by One Call. To initiate the use of the VPDRP system after a claim arises, an eligible party must contact One Call within 30 days of notification of a claim and request the use of the VPDRP to resolve the dispute. One Call will then contact the adverse party (or parties) within three business days to offer the use of the VPDRP system. The adverse parties must respond to One Call within seven business days as to whether they wish to enter into the standard ADR Agreement—selecting either binding or non-binding ADR.[11] The One Call procedures then generally proscribe the number of arbitrators (1 or 3), the scheduling of a hearing date (within 60 days of contact), and the conduct of the arbitration (including the advance production of materials and disclosure of witnesses). In addition, the arbitrator or arbitrators are required to render their decisions within 10 business days of the hearing—promoting an expeditious resolution.

Most importantly, the new VPDRP system requires that individuals who serve as arbitrators be either project owners, utility owners, excavators, design professionals or industry regulators.[12] The panel members must be volunteers, be properly screened, and complete an arbitrator/mediator training program acceptable to One Call. In addition, One Call will take efforts to ensure there are no conflicts of interests in any given dispute. The VPDRP is very much an industry-centered process.

Litigators involved in damaged utility claims have long been concerned with the costs of litigation and the perils of presenting technical construction issues to a lay jury. The new VPDRP system is aimed at efficiently resolving disputes between utility owners, design professionals and demolition and excavation contractors related to damaged utility properties where the One Call System notification process was used, and should provide a valuable, quick and efficient forum for dispute resolution. The need for an attorney, however, has not changed. Owners, utilities, demolition and excavation contractors and design professionals who enter into the One Call ADR Agreement are entering into a legal relationship and, by doing so, limit their rights to a trial by jury. While the ADR process may be worthwhile, companies should engage counsel to help make this decision. In addition, insurance implications and the need to join additional parties not subject to or not willing to participate in the VPDRP system may also be important factors in determining whether to use the new system. Simply put, the new One Call VPDRP system is something every participant involved in demolition and excavation work should consider, but doing so without legal counsel is fraught with peril.

The lead author, Gaetano P. Piccirilli, served on Pennsylvania One Call's ADR Task Force, analyzing similar ADR systems used in other states, helping craft the VPDRP process, and drafting the standard ADR Agreement and timeline and procedure protocols.

For more information regarding the One Call System and its new ADR process, please contact Bill Taylor (215.864.6305; taylorw@whiteandwilliams.com).

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1. *The One Call System, created by the Pennsylvania One Call Statute, 73 P.S. § 176 et seq., is a communication system established within Pennsylvania to provide a single, toll-free telephone number to contractors and designers or any other person covered by the Act to call utility owners and notify them of their intent to perform excavation, demolition or similar work in the area of the utility, and to determine the location of any underground or unseen utilities.*
2. *The One Call Statute authorized One Call to create and administer an ADR process, with the only requirement that the process be voluntary.*
3. *Specifically, the VPDRP is available to One Call members and related third parties, including non-member excavators, designers and project owners.*
4. *The VPDRP is not available where the incident in question arises from construction work that did not utilize the One Call notification process. The VPDRP is also not available to personal injury, property damage or economic claims made by unrelated third parties.*
5. *In Colorado, the ADR process is administered by the Utility Notification Center of Colorado, is voluntary, and involves disputes between $350 and $5,000. The Colorado process is binding upon the participants.*
6. *The Virginia system, the Damage Cost Recovery Mediation Pilot Program, is a voluntary, non-binding system.*
7. *42 Pa. Cons. Stat. Ann. § 7303.*
8. *The parties may, however, amend the ADR agreement to transform their non-binding ADR into binding ADR during the proceedings.*
9. *42 Pa. Cons. Stat. Ann. § 7342 provides that a party must confirm a common law arbitration award in court.*
10. *There are limited grounds to disturb an arbitrator's award in common law arbitration. See 42 Pa. Cons. Stat. Ann. § 7341 (codifying standard by which common law arbitration award may be modified or vacated). Specifically, the arbitrator's award is "binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct or corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award." Id.*
11. *If the parties cannot agree, the default option is non-binding ADR.*
12. *Generally, regulators could potentially include representatives from local governments, as well as employees of the Pennsylvania Department of Labor and Industry.*

RESIDENTIAL FIRE SPRINKLERS: PUTTING A DAMPER ON A NEW BUILDING CODE PROVISION

by Eileen Monaghan Ficaro, Esq., and William J. Taylor, Esq.

Pennsylvania stepped to the forefront of a debate that has galvanized members of the construction industry, the fire sprinkler industry, and fire safety and prevention groups across the country when it became the first state to require fire sprinkler systems in new residential construction. In December 2009, the Commonwealth of Pennsylvania, Department of Labor & Industry (L&I) promulgated regulations adopting the 2009 versions of the International Code Council's International Building Code (IBC) and International One and Two Family Dwelling Code (IRC).[1] Among other things, the 2009 Pennsylvania Uniform Construction Code requires all newly constructed townhouses in Pennsylvania built after January 1, 2010 and all newly constructed one and two family homes built after January 1, 2011 to contain a residential fire sprinkler system.

Fire safety and prevention groups are thrilled by this new code requirement, claiming that it will reduce the amount of deaths, injuries, and damage resulting from residential fires. However, the Pennsylvania Builders Association (PBA), the trade association for Pennsylvania's home building industry, warns that this requirement will increase the cost of new homes at a time when home sales are at an alarmingly low level.

THE ROAD TO THE ADOPTION OF THE 2009 BUILDING CODES

The Pennsylvania General Assembly enacted the Pennsylvania Construction Code Act (PCCA) in 1999.[2] The PCCA applies to construction, alteration, repair and occupancy of all buildings in Pennsylvania. The statute mandated that L&I was to promulgate regulations within 180 days after its passage that would establish the 1999 International Building Code (then known as the BOCA National Building Code[3]) as Pennsylvania's Uniform Construction Code, and that would adopt the IRC as an alternative available code.[4] Looking forward, the PCCA further provides that L&I must issue regulations adopting the triennial IBC and IRC revisions by December 31 of each year that the model codes are modified.[5] These sections of the Pennsylvania Construction Code Act are at the heart of the current debate in Pennsylvania.

The 2009 ICC codes were revised at a September 2008 meeting. Controversy surrounded the voting on the fire sprinkler provisions at this meeting. The ICC is a private entity that develops model codes and standards for use in residential and commercial building construction throughout the world. Unelected ICC members vote on the model code provisions. For the September 2008 ICC meeting, the International Residential Code Fire Sprinkler Coalition flew supporters of the fire sprinkler requirement to the meeting, paid for their hotels and assisted them in becoming voting members of the ICC. As a result, while approximately only 200 to 300 ICC members voted on proposed building code changes immediately before and after the September 2008 meeting, nearly 2,000 people voted on the proposed sprinkler change at the 2008 meeting. Critics charge that the Fire Sprinkler Coalition "railroaded" the sprinkler requirements into the 2009 revised code by packing the September 2008 meeting with members in their favor.

Nevertheless, L&I subsequently published regulations adopting the 2009 versions of the ICC codes. The 2009 IBC and IRC are thus currently in effect as Pennsylvania's Uniform Construction Code, including the requirements for sprinklers in new construction.

A HOT TOPIC

In 2008 alone, there were 403,000 residential fires, 2,780 residential fire deaths, 13,560 residential fire injuries, and $8.5 billion in residential property damage in the United States.[6] It comes as no surprise then that the United States Fire Administration, the National Fire Protection Association (NFPA), the Pennsylvania Fire and Emergency Services Institution, and other national and statewide fire service organizations support the residential sprinkler system requirement in the revised state building code. The NFPA touts residential fire sprinkler systems as "highly effective elements of total system designs for fire protection in buildings."[7] A recent study published by the NFPA indicates that residential sprinkler systems lower the death rate in residential fires by 83 percent and lower the average loss per fire by 74 percent.[8]

Nonetheless, mandating residential fire sprinkler systems raises some concerns. First and foremost is cost. The Pennsylvania Building Association contends that mandatory residential sprinkler systems will tack thousands of dollars onto a new home's price tag. However, the amount of the extra cost is up for debate. A 2008 study by the Fire Protection Research Foundation estimates that the increase in a new home's cost as a result of mandatory fire sprinklers is, on average, $1.61 per square foot.[9] By contrast, a survey of PBA members places the cost at closer to $3.30 per square foot. The PBA warns that the additional costs for homes that access wells instead of public water supplies will be even higher due to the need for additional building components such as storage tanks and larger pumps. Builders fear that this increase in new home costs will further stifle home sales in Pennsylvania.

The PBA also argues that sprinklers are unnecessary because the IRC already addresses the public's health, safety and welfare, and that smoke detectors sufficiently protect against residential fire fatalities. In a letter to the General Assembly entitled "Mandatory Sprinklers: Cost vs. Benefit," the PBA asserted that statistics from the Fire Analysis and Research Division of the National Fire Protection Association reveal a fire survival rate of 94.45 percent for individuals whose homes are equipped with hard-wired smoke detectors. Yet the United States Fire Administration (USFA) disagrees. It points out that while smoke alarms can alert people to fires, they can do nothing to extinguish them. According to the

USFA, while the percentage of American homes with smoke alarms has increased, the number of fire deaths in homes has not significantly decreased.[10]

The PBA also contends that the real threat of home fires stems from older homes built under less stringent building codes or built under no codes at all. Others disagree, arguing that cheaper materials in new homes increase the risk of fires and the spread rate of fires, thus increasing the need for residential sprinkler systems.

THE LEGAL BATTLE

Alarmed by the potential impact of the fire sprinkler system requirement in the revised state construction code, the PBA took its concerns to court. On January 19, 2010, the PBA filed a petition for a preliminary injunction in the Commonwealth Court of Pennsylvania, in which it asked the court to stop the Department of Labor & Industry from enforcing the regulations that adopted the 2009 IRC code revisions, and instead revert back to the 2006 version of the IRC code pending the court's determination of the underlying case. The PBA's legal argument is not that Pennsylvania should not adopt the 2009 IRC code revisions. Instead, it opposes the process by which the Commonwealth did so. According to the PBA, the regulations that led to the adoption of the 2009 IRC are unconstitutional because they cede the legislative authority of the Commonwealth of Pennsylvania to a private entity, the International Code Council. The PBA argues that the ICC's unelected voting members, rather than the Pennsylvania General Assembly, are making important public policy decisions – in this case, deciding whether the safety benefits of fire sprinklers outweigh their cost, especially during these tough economic times. According to the PBA, the Legislature should have adopted the uniform construction codes by affirmative legislative action, and should not have delegated the authority to establish the Commonwealth's building construction codes to a private entity.

The PBA's petition has been denied by the court. Commonwealth Court Judge Johnny J. Butler wrote that in order for the court to enjoin L&I from enforcing these regulations, the PBA had to establish that the relief it requested was "reasonably suited to abate the offending activity." The court identified the General Assembly's mandate that L&I adopt, sight unseen, the ICC's triennial codes as Pennsylvania's uniform construction code as the "offending activity." However, the court pointed out that the Pennsylvania Construction Code Act had also mandated that L&I adopt ICC's 2006 codes sight unseen. Thus, an order stopping L&I from enforcing the regulations that adopted the 2009 version of the ICC codes, and instead enforcing the regulations that adopted the 2006 version of the ICC codes, would not "abate the offending activity," because it would not remedy the process by which the PCCA adopts the Pennsylvania uniform building code from the ICC model codes. The PBA continues to wage its legal battle and is scheduled to argue its Application for Summary Relief to the Commonwealth Court of Pennsylvania in late June, 2010.

There are strong arguments both in favor of and in opposition to the residential sprinkler system requirement. At this time, it is impossible to predict whether the PBA will prevail in its lawsuit. However, Pennsylvania's Uniform Construction Code currently in effect requires fire sprinkler systems in new townhouses built after January 1, 2010.

For more information regarding Pennsylvania's Uniform Construction Code, please contact Eileen Monaghan Ficaro (215.864.6268; ficaroe@whiteandwilliams.com) or Bill Taylor (215.864.6305; taylorw@whiteandwilliams.com).

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1. *Pennsylvania's Uniform Construction Code (UCC) includes the IBC, the IRC, and multiple more specific codes. The International Code Council developed all of these building codes.*
2. *Act of November 10, 1999, P.L. 491, as amended, 35 P.S. §§ 7210.101-7210.1103.*
3. *The International Code Council is a successor to the Building Officials and Code Administrators organization (BOCA), and its International Codes are the result of a cooperative effort between BOCA and the other model code organizations to bring international uniformity to all codes.*
4. *35 P.S. § 7210.301(a).*
5. *35 P.S. § 7210.304(a).*
6. *National Fire Protection Association Fire Loss in the U.S. during 2008.*
7. *Hall, John R., Jr., "U.S. Fire Experience with Sprinklers and Other Automatic Fire Extinguishing Equipment," National Fire Protection Association Fire Analysis and Research Division, February 2010.*
8. *Hall, John R., Jr., "U.S. Fire Experience with Sprinklers and Other Automatic Fire Extinguishing Equipment," National Fire Protection Association Fire Analysis and Research Division, February 2010.*
9. *Newport Partners, "Home Sprinkler Cost Assessment," The Fire Protection Research Foundation, 2008.*
10. *"Residential Sprinkler Myths and Facts," U.S. Fire Administration.*

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COURT WATCH

WILLIAM J. TAYLOR, ESQ.
Partner, Philadelphia Office

Bill Taylor, Co-Chair of the Construction Practices Group, recently obtained partial summary judgment for a surety client on the surety's indemnity and equitable subrogation claims against the surety's principal and the principal's secured lender. The federal district court for the Middle District of Pennsylvania rejected the affirmative defense of the principal and lender that the surety's right of equitable subrogation was limited to the "amount actually owed" by the principal on an underlying payment bond claim, and ruled instead that the surety was equitably subrogated to the full amount that it paid to settle the bond claim.

For more information regarding the Construction Practices Group of White and Williams LLP, please contact one of the group's co-chairs, William J. Taylor, Esq. (215.864.6305; taylorw@whiteandwilliams.com) or Jerrold P. Anders, Esq. (215.864.7003; andersj@whiteandwilliams.com).

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