White and Williams LLP

Executive Newsletter *Winter 2009-2010*

SUPREME COURT EXPECTED TO RULE ON THE SINGLE-MOST IMPORTANT PENDING MATTER IN INTELLECTUAL PROPERTY LAW

by: Randy M. Friedberg, Esq.

In re Bilski is the single most important pending matter in the world of intellectual property at the moment. At stake is the very definition and scope of what is patentable.

In October 2008, the Federal Circuit's decision effectively erased 10 years of patentable subject matter jurisprudence, and called into question the patentability of software. It rejected prior rulings that software need only produce a "useful, concrete, and tangible result" in order to be patentable subject matter. Instead, the majority ruled on the patentability of processes where the process steps are not necessarily performed on a computer, and set forth a single test for determining the patentability of processes. This test holds that a process is patentable if "(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." Since then, the state of the law concerning subject matter eligibility of patents has been in flux pending the Supreme Court's decision in *Bilski v. Kappos;* expected in the spring of 2010. In response to patent seekers' uncertainty, the U.S. Patent and Trademark Office (PTO) issued Interim Examination Instructions for Evaluating Subject Matter Eligibility in August 2009.

An oral argument was held at the Supreme Court on November 9, 2009. From all accounts, the Court was quite skeptical as to Bilski's right to a patent, and many members of the Court questioned business method patents in general. Others questioned what the proper test for a patentable business method should be. It is likely the Court will rewrite the landscape on business method patents, but just how it will do so is anyone's guess.

For more information, please contact Randy Friedberg at 212.714.3079 or friedbergr@whiteandwilliams.com.

IN THIS ISSUE...

FROM THE CHAIR...

GEORGE J. HARTNETT
Chair, Executive Committee

Happy new year! We hope you enjoyed a safe and happy holiday season with your families. We at White and Williams are proud of the accomplishments we have achieved in 2009, some of which I touch upon below, and look forward to a successful 2010 with all of you.

CLIENT SERVICE

In 2009, the firm improved our reach and ability to service our clients. Among other things, the firm opened an office in Boston and welcomed David Chaffin and Sarianna Honkola to the firm.

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COURT UPHOLDS USE OF PROJECT LABOR AGREEMENT AT THE SCI-GRATERFORD CONSTRUCTION PROJECT

by: Jerrold P. Anders, Esq., John K. Baker, Esq. and Gaetano P. Piccirilli, Esq.

The construction industry has been hit hard over the last two years by the nation's recession. When the Pennsylvania Department of General Services (DGS) announced the $400 million State Correctional Institution-Graterford (SCI-Graterford) construction project, many local and regional contractors rejoiced at the thought of getting a piece of the action. As the project has moved forward, however, some have been frustrated and mounted an important legal challenge to the project.

BACKGROUND OF THE SCI-GRATERFORD PROJECT

In 2008, the General Assembly passed Act 41, which authorized DGS to enter into design/build contracts, rather than multi-prime contracts, for certain prison construction projects. Act 41 required the selected design/build contractor to comply with the Pennsylvania Separations Act[1] by entering into separate trade contracts with various prime contractors on the project. In order to pass Act 41, a measure initially opposed by organized labor, DGS entered into a "Letter of Commitment" with the Philadelphia Building Trades Council[2] (PBTC) that required DGS to retain the Keystone Research Center[3] (Keystone) to study whether a Project Labor Agreement[4] (PLA) was necessary for the construction of a prison housing facility exceeding $15 million.

On the SCI-Graterford project, DGS followed Act 41 and requested sealed proposals from design/build contractors for the project. Per the bid specifications, the design/build contractor would then let separate trade subcontracts for the work per the Separations Act. Pursuant to its use of Act 41 for the SCI-Graterford project and its letter of commitment, DGS requested that Keystone study whether a PLA was necessary for the project. Keystone subsequently determined that a PLA was necessary, because it would ensure "labor peace and harmony through a no-strike, no lock out commitment by all involved personnel in order to meet the construction deadline." The Keystone report referenced the urgency of the prison project and cited statistics showing that Pennsylvania's prison system is currently at 8 percent overcapacity, with expected growth in the prison population by another 21 percent by 2012. In short, Keystone reported that the "timely completion of the [SCI-Graterford] project is critical to meeting the state's prison capacity needs."[5]

Acting upon Keystone's recommendation, DGS entered into a PLA with the PBTC. This project labor agreement requires any

contractor or subcontractor working at SCI-Graterford to hire all tradesmen through the local unions. The PLA does not preclude non-union "merit-based" contractors from bidding on the project, but it does require them to secure their labor from the local union halls. The PLA at SCI-Graterford has been controversial, with Pennsylvania's "merit-based" contractors taking exception to it.

THE *HAWBAKER* CASE

In *Hawbaker, Inc. v. Commw. of Pennsylvania, Dep't of Gen. Servs.,* a multitude of "merit-based" contractors and trade organizations (Petitioners), including the Associated Builders and Contractors, sought to enjoin DGS' use of the bid specifications for SCI-Graterford, including the PLA. The Petitioners sought a determination that the PLA was illegal and unfairly hindered their competitive advantage when bidding for subcontracts because they would be required to hire unknown employees from the union hall. Generally, "merit-based" contractors oppose PLAs because they are almost always awarded to unionized contractors.[6]

In considering whether the SCI-Graterford PLA and bid specifications were legal, Judge Pellegrini of the Commonwealth Court had to consider: (1) whether the PLA unlawfully discriminated against "merit-based" contractors in bidding for work at SCI-Graterford; (2) whether DGS abused its discretion by requiring a PLA for SCI-Graterford; (3) whether DGS could delegate its obligations under the Separations Act to a design/build contractor; and (4) whether the PLA injured the public interest. On each of these items, Judge Pellegrini agreed with DGS and dismissed the Petitioner's motion for an injunction.

Judge Pellegrini found that a project labor agreement is a valid component of a project's bid specifications, as a PLA provides "access to skilled labor on public jobs and completion of the work is done in a timely manner."[7] Moreover, the court found that the use of the PLA was a valid exercise of the DGS' discretion in awarding the contract to the lowest responsive and responsible bidder, which "included a decision of financial responsibility, integrity, efficiency, industry experience, promptness and ability to successfully carry out the job."[8] Judge Pellegrini found that the use of a PLA was especially appropriate where a project had a construction deadline that had to be met "without disruption or stoppage," as opposed to "other settings where timely, uninterrupted completion was not as critical."[9] In addition, Judge Pellegrini noted that "merit-based" contractors could still bid on the project, but that their workforce would have to be union members or they would have to join the union. In addition, Judge Pellegrini found that the PLA did not violate the National Labor Relations Act as DGS was acting not as an employer or state regulator, but rather as a construction industry purchaser.[10]

The Petitioners further argued that DGS abused its discretion in determining that a PLA was warranted at SCI-Graterford. Specifically, the Petitioners argued that Keystone was "union dominated" and that the result of its study was a "foregone conclusion." In finding that DGS had not abused its discretion in relying upon the Keystone report, Judge Pellegrini found that the Petitioners had to provide evidence that Keystone, as a consultant, was neither credible nor competent, or in the absence of such evidence, that the report was fundamentally flawed. In addition, the court stated that DGS had to be "on notice of such a lack of competence in the consultant or of such flaws in the report."[11] In *Hawbaker,* Judge Pellegrini found that notwithstanding Keystone's union domination, the Petitioners had not presented sufficient evidence to find that DGS abused its discretion in accepting Keystone's recommendation.

The Petitioners also challenged DGS' delegation of its obligations under the Separations Act to the design/build subcontractor. Relying upon *Mechanical Contractors Ass'n of Eastern Pa, Inc. v. Southeastern Pennsylvania Transp. Auth.,*[12] the Petitioners argued that DGS had not complied with the Separations Act by simply requiring the design/build contractor to award separate trade contracts for the project. DGS' response was that, unlike in *Mechanical Contractors,* Act 41 required DGS to comply with the Separations Act by entering into a design/build contract with a contractor who in turn would comply with the act. Judge Pellegrini agreed with DGS, finding that Act 41 validly altered DGS' obligations under the Separations Act and allowed DGS to delegate its duty to let separate contracts for plumbing, heating, ventilating and electrical work.

Finally, Judge Pellegrini considered whether the PLA at SCI-Graterford would injure the public interest in obtaining the lowest price for the anticipated $400 million SCI-Graterford project. Citing the Keystone report's statistics regarding the urgency of the project, as well as the testimony of the Deputy Secretary for the Department of Corrections,[13] Judge Pellegrini reasoned that the "crowded conditions at SCI call for immediate attention in the reconstruction of that prison" and that an injunction would harm the public interest.[14] In addition, Judge Pellegrini cited the testimony of James Creedon, Secretary of the Department of General Services, concerning numerous other construction projects ongoing in southeastern Pennsylvania and the "real concern over having sufficient trained labor available."[15]

GOING FORWARD IN LIGHT OF *HAWBAKER*

There are two overriding themes in Judge Pellegrini's *Hawbaker* decision. First, the Commonwealth may legally enter into a project labor agreement for a public construction project based upon a relatively low threshold, namely the need for timely completion of the project without interruption (including a labor interruption).[16] To overcome this supposed need, the standard for challenging the use of a PLA and the Commonwealth's discretion in its bid specifications is very high — the opponent must produce evidence that the consultant the Commonwealth

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RECENT DEVELOPMENTS IN THE LAW

THIRD CIRCUIT PREDICTS DRAMATIC CHANGE IN PENNSYLVANIA PRODUCTS LIABILITY LAW

by: Thomas M. Goutman, Esq.

In what could signal the most dramatic shift in Pennsylvania products liability law in decades, the U.S. Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court will change the Pennsylvania law that has stood for more than 40 years. The Third Circuit predicted that the Pennsylvania Supreme Court will adopt the Restatement (Third) of Torts: Products Liability, thereby allowing a child bystander to recover for injuries sustained by a riding lawnmower even though she was not the intended user of the product.

On June 16, 2009, however, the Pennsylvania Supreme Court dismissed an appeal as improvidently granted in a case in which it was specifically asked to consider whether to adopt the Restatement (Third) of Torts.

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***BERRIER V. SIMPLICITY MANUFACTURING, INC.*, 563 F.3D 38 (3D CIR. 2009)**

Four-year-old Ashley Berrier was seriously injured when her grandfather, Melvin Shoff, who was operating a Simplicity riding lawnmower, inadvertently backed up over Ashley's left foot, which was subsequently amputated. Ashley had gone into her grandfather's yard to give him a flower while he was mowing. Shoff disengaged the mower blades and told her to go inside. Believing that Ashley had done as he instructed, Shoff then re-engaged the blades and placed the mower in reverse to turn around. As he was backing up with the blades engaged, he backed over Ashley's left leg.

Ashley's parents filed suit against Simplicity, asserting claims in both strict liability and negligence. Plaintiffs argued that the lawnmower was defective because it did not have any backover protection, such as roller barriers or a "no mow in reverse" feature, which would have prevented the blades from operating when the mower was moving in reverse. The District Court granted summary judgment in favor of Simplicity on both claims, holding that Pennsylvania strict products liability law does not permit recovery for injuries to anyone other than the intended user of a product. Because Ashley was a bystander, and not the intended user of the riding mower, she could not recover against Simplicity.

Federal courts in Pennsylvania are obligated to apply the substantive law of the Commonwealth. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). However, the Pennsylvania Supreme Court has never expressly determined whether one who is merely a bystander, and not a user of a product, can bring a products

liability claim against the manufacturer. In the absence of a controlling decision by the Pennsylvania Supreme Court, a federal court applying Pennsylvania law must predict how the state's highest court would decide the issue. *Nationwide Mutual Ins. Co. v. Buffetta,* 230 F.3d 634, 637 (3d Cir. 2000). In *Berrier,* the Third Circuit "predicted" that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts: Products Liability §§ 1 and 2, thereby supplanting the Restatement (Second) of Torts § 402A.

SECTION 402A AND THE INTENDED USE/INTENDED USER DOCTRINE

The Restatement (Second) of Torts, § 402A was adopted by the Pennsylvania Supreme Court more than 40 years ago in *Webb v. Zern,* 422 Pa. 424, 220 A.2d 853 (1966). Under Section 402A, a manufacturer or seller of a product "in a defective condition unreasonably dangerous to the user or consumer" is liable for physical injuries caused by the product even if it "has exercised all possible care in the preparation and sale of the product." The Supreme Court subsequently held that a jury in a products liability case must consider whether the product "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Azzarello v. Black Bros. Co., Inc.,* 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978).

Although *Azzarello* stands for the proposition that a product must be safe for its "intended use," it did not answer the question of whether it should be safe only for its "intended user." The Court addressed that issue in *Mackowick v. Westinghouse Electric Corp.,* 525 Pa. 52, 575 A.2d 100 (1990), where it held that in a failure-to-warn case, a product need only be safe for its intended user. In *Mackowick,* the plaintiff was injured when electricity arced from an electrical capacitor which was allegedly defective because of the lack of a warning regarding the dangers of live, exposed electrical wires. The Court rejected that argument, holding that a capacitor was intended to be used only by a qualified electrician, who would be aware of such dangers, and not by a member of the general public.

The Court subsequently applied the intended use doctrine to a design defect case in *Phillips v. Cricket Lighters,* 576 Pa. 644, 841 A.2d 1000 (2003), in which a two-year-old boy used a disposable butane cigarette lighter to start a fire that killed himself, his mother, and his brother. Because a two-year-old child is not an intended user of a cigarette lighter, the Supreme Court affirmed summary judgment on the strict liability claim against the lighter's manufacturer, holding that a plaintiff must establish that a product was unsafe for its intended user. Though it may be foreseeable that young children may be inclined to play with cigarette lighters, the Supreme Court expressly stated that a manufacturer will not be held liable for failing to design a product that was safe for use by "any reasonably foreseeable user" because "such a standard would improperly import negligence concepts into strict liability law."

THE RESTATEMENT (THIRD) OF TORTS, §§ 1 AND 2

Under § 1 of the Third Restatement, a manufacturer, seller, or distributor of a defective product "is subject to liability to harm to persons or property caused by the defect." Section 2 defines the three categories of product defects. For manufacturing defects, § 2 retains strict liability, stating that a product is defective when it departs from its intended design despite the exercise of all possible care. For design and warning defects, however, § 2 adopts a reasonableness standard. A product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design." Similarly, a product is defective because of inadequate instructions or warnings "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions."

The Third Restatement does not limit a strict liability cause of action to the "user or consumer" of a product, and broadly permits any person harmed by a defective product to recover in strict liability.

POTENTIAL RAMIFICATIONS OF THE THIRD RESTATEMENT

For manufacturers, distributors, and sellers, the Third Restatement presents several significant changes to current products liability law in Pennsylvania. It sets forth a common-sense, rational approach to products liability that takes into account a manufacturer's conduct. Under current Pennsylvania law, "strict liability examines the product itself, and sternly eschews considerations of the reasonableness of the conduct of the manufacturer." *Phillips,* 576 Pa. at 658, 841 A.2d at 1008.

The Third Restatement does away with the distinction between strict liability and negligence, a distinction that Pennsylvania courts have struggled to maintain. "The Third Restatement therefore eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims." *Berrier,* 563 F.3d at 55.

The Third Restatement will also allow for the introduction of evidence that is currently excluded, including a manufacturer's compliance with industry standards, other evidence regarding a manufacturer's conduct, and evidence of a plaintiff's comparative negligence. Due to the strict liability/negligence distinction, evidence of a product user's negligence is currently inadmissible to excuse a defective product, and negligence may not be used to reduce recovery by comparing fault. *Madonna v. Harley Davidson, Inc.,* 708 A.2d 507, 508 (Pa. Super. 1998). The only exception to this rule is where such evidence is introduced by the defense to establish that the accident was caused *solely* by the user's conduct, and not in any way by a product defect.

While the Third Restatement may confer obvious benefits to manufacturers, there may be some disadvantages as well. Arguably, the Third Restatement might eliminate the intended use/intended user doctrine, meaning that manufacturers would not escape liability because their products were being put to an unintended use or were being used by an unintended user. So long as the unintended use or user was "foreseeable."

In *Pa. Dept. of General Services v. U.S. Mineral Products,* 587 Pa. 236, 898 A.2d 590 (2006), a Commonwealth office building caught fire, during which PCBs were released into the building. As a result, the Commonwealth demolished the building, and thereafter

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THE DEMISE OF THE ATTORNEY-CLIENT PRIVILEGE IN "BAD FAITH" INSURANCE LITIGATION IN NEW JERSEY HAS BEEN GREATLY EXAGGERATED

by: Michael J. Kozoriz, Esq.

In a May 2009 article published by the Defense Research Institute (DRI), entitled "A Bad Omen: Erosion of Privilege in Bad-Faith Litigation," the authors all but eulogized the attorney-client privilege in New Jersey in civil actions involving "bad faith" litigation against an insurer. Citing *Allstate New Jersey Insurance Company v. Humphrey,* 2008 WL 382666 (N.J. Super. App. Div. 2008), the authors asserted that the New Jersey Appellate Division adopted a "quite astounding, 'piercing' approach" in which the court held that all documents relating to the insured's alleged bad faith claim, including counsel's evaluation of discovery, liability, settlement/verdict values, and insurance coverage, were discoverable. With all due respect to the authors, their well-intentioned article overlooked two key aspects of the *Humphrey* decision, discussed below.

THE "PIERCING APPROACH" THAT WAS "ADOPTED" IN *HUMPHREY* IS NEITHER NEW TO NEW JERSEY NOR IS IT "QUITE ASTOUNDING"

The "piercing approach" applied by the Appellate Division in *Humphrey* is not an approach to the attorney-client privilege that is new in New Jersey. In 1979, the New Jersey Supreme Court applied such approach in *Matter of Kozlov,* 79 N.J. 232 (1979). *Kozlov* did not involve insurance litigation, but rather contempt proceedings against an attorney who refused to reveal the identity of his client. In short, while in the course of his representation of the unnamed client in an entirely unrelated matter, the client reported information to Kozlov that a juror on a highly publicized criminal case, which resulted in a conviction, had a bias and personal vendetta against the defendant. Kozlov relayed the information to the criminal defendant's attorney, but he refused to reveal his client's name even as Kozlov became more and more embroiled in the criminal case's post-conviction hearings. When Kozlov refused to obey an order by the trial judge to disclose the identity of his client who revealed to him the information pertaining to the biased juror, Kozlov was held in contempt of court. The Appellate Division affirmed the contempt finding.

On appeal, the New Jersey Supreme Court reversed, finding that Kozlov's dilemma was within the realm of the attorney-client privilege. Reverently referring to the attorney-client privilege as an "ancient rule," "exceedingly important," and deserving "the continued protection of the courts," the Supreme Court held that the privilege is nevertheless not "sacrosanct." Discussing the criteria necessary for the "piercing" of the privilege, the Court held that there must "be a legitimate need of the party to reach the evidence sought to be shielded…be a showing of relevance and materiality of that evidence to the issue before the court… [and] be shown…'by a fair preponderance of the evidence including all reasonable inferences, that…the information…[c]ould not be secured from any less intrusive source.'" Ultimately, the Supreme Court held that the less intrusive source of summoning the alleged biased juror to answer questions in a hearing before the court would have been the appropriate action to take by the trial court.

Thus, despite the implications of *Humphrey,* discussed below, *Kozlov* is still "good law" in New Jersey regarding the attorney-client privilege. Echoing the principles of the Supreme Court's 1979 decision in Kozlov, New Jersey Court Rule 4:10-2(c), pertaining to work product, provides that: a party may obtain discovery of documents…prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney…) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Thus, the reported demise of the attorney-client privilege in New Jersey has been quite exaggerated.

THE UNREPORTED AND NON-PRECEDENTIAL DECISION BY THE APPELLATE DIVISION IN *HUMPHREY* SHOULD NOT APPLY TO BAD FAITH LITIGATION INVOLVING "FIRST-PARTY" INSURANCE POLICIES

Significant to the holding in *Humphrey* was the fact that the case involved a liability policy where the insured, in a separate declaratory judgment action, was found to be capable of waiving the attorney-client privilege asserted by the insurer. Where a declaratory judgment or breach of contract action does not involve a liability policy but rather a claim for first-party benefits, the insured will have no right to waive the insurer's assertion of the attorney-client or work product privileges.

Humphrey involved an underlying personal injury case in which several defendants were found liable in connection with an assault. Allstate provided a defense to several of the defendants under a reservation of rights in the underlying action. While the underlying action was pending, Allstate commenced a declaratory judgment action against its insureds, and the plaintiff in the underlying action as an interested party, seeking a declaration that it had no duty to indemnify the insureds as a result of the intentional conduct exclusion in the subject homeowners policy. After a judgment was rendered in the underlying action in excess of the Allstate policy limits, the insureds and the plaintiff in the underlying action counter-claimed against Allstate in the declaratory judgment action, seeking bad faith damages for Allstate's failure to settle the underlying action within the policy limits.

Despite the fact that the underlying plaintiff was not a named insured nor an assignee of the insureds' rights against Allstate, he took the lead with respect to prosecuting the insureds' bad faith claims. He demanded that Allstate produce the files that it maintained in connection with the defense of the insureds and the file maintained by Allstate in connection with the ongoing declaratory judgment action. When Allstate refused, asserting attorney-client and work product privileges, both the underlying plaintiff and the insureds moved against Allstate to compel their production, and importantly, the insureds expressed their intention to waive the attorney-client privilege as to the Allstate files pertaining to them.

The Appellate Division affirmed the trial court's decision that Allstate was required to produce those portions of its files relevant to the insureds' bad faith claims. Notably, however, the Appellate Division reigned in the trial court's ruling and held that Allstate was not required to produce its file pertaining to one of the insureds, who was exonerated in the underlying action and who did not consent to the waiver of the attorney-client privilege. Thus, one can reasonably interpret this decision as placing significant weight on the express waiver of the privilege when considering whether to order production of otherwise privileged materials.

Valid case law continues to exist in New Jersey protecting the attorney-client privilege. *See Rivard v. American Home Products, Inc.,* 391 N.J. Super. 129, 154 (App. Div. 2007) (holding that the attorney-client privilege is not restricted to legal advice, though the privilege is limited to those situations in which lawful legal advice is the object of the relationship, and that the privilege survives termination of the attorney-client relationship); *LaPorta v. Gloucester County Board of Chosen Freeholders,* 340 N.J. Super. 254, 262 (App. Div. 2001) ("It is not necessary for actual litigation to have commenced at the time of the transmittal of information for the privilege to be applicable"); *Macey v. Rollins Environmental Services (N.J.), Inc.,* 179 N.J. Super. 535, 540 (App. Div. 1981) ("The necessity for full and open disclosure between corporate employees and in-house counsel…demands that all confidential communications be exempt from discovery").

CONCLUSION

In New Jersey, the long-standing rule remains that in order to validly "pierce" the attorney-client privilege, (1) the seeker of the privileged information must have a legitimate need to reach the evidence or information sought to be shielded, (2) there must be a showing by the seeking party of relevance and materiality of that evidence or information to the issue before court, and (3) it must be shown that the information could not be secured from any less intrusive source. See *Matter of Kozlov,* 79 N.J. 232, 243-44 (1979). As recent as 2007, the Appellate Division cited the three-part test of *Kozlov* favorably in a reported decision. *See Rivard,* 391 N.J. Super. at 155.

For more information, please contact Michael Kozoriz at 201.368.7212 or kozorizm@whiteandwilliams.com.

FROM THE CHAIR CONTINUED…

We also promoted Charles Eppolito, David Huberman and William Hussey as partners and named Michael Raush as counsel. We selected David Zaslow as Managing Partner of the firm's Berwyn office following the retirement of one of our partners. Additionally, we expanded our Intellectual Property group by welcoming Randy Friedberg as counsel to our New York office.

We ended the year with the relocation of our Lehigh Valley office. For the past 20 years, White and Williams has been serving clients in the Lehigh Valley from an office in Allentown. We recently moved into a new office space in Center Valley, Pa. The new building, which is LEED Silver certified, features "green" capabilities which help cut down on use of water, electricity, and waste. The 10-attorney office, along with support staff, officially opened doors from the new location on December 21.

THE NEW MAILING ADDRESS IS:

Lehigh Valley Office, 3701 Corporate Parkway, Suite 300, Center Valley, PA 18034
Main Phone: 610.435.8414, Main Fax: 610.435.8420

All attorney and staff phone numbers remain the same.

EDUCATIONAL AND NETWORKING OPPORTUNITIES

The firm participated in and offered a number of educational and networking opportunities through industry events including the Healthcare Summit (Healthcare), Coverage College® (Insurance), and — among a variety of topics for business owners and managers — "Business Threats: Take Action to Protect your Company," a breakfast event co-sponsored with KYW Newsradio 1060.

On May 21, 2009, nearly 200 healthcare professionals from about 100 area companies, joined healthcare and appellate attorneys from White and Williams LLP, as well as guest speakers from Tsoules, Sweeney, Martin, and Orr, LLC, Geisinger Health System, the Commonwealth of Pennsylvania MCARE Fund, Temple University School of Medicine, Ringler Associates, Forensic Resolutions, Inc., and TrialGraphix, for an in-depth look at issues and developing trends in the healthcare industry.

On October 7, 2009, over 450 insurance professionals from 140 companies and 19 states received their diplomas and completed another year at the White and Williams Coverage College®. The annual, daylong symposium offered "students" an opportunity to engage in intensive study of a diverse insurance coverage curriculum.

On November 13, 2009, over 100 small business owners joined White and Williams and KYW Newsradio 1060 for a breakfast seminar titled, "Business Threats: Take Action to Protect Your Company." John Pauciulo, partner and Chair of the Corporate Practice Group, joined Brian J. Gallagher, MT, CPA, Schalleur, Devine and Surgent, LLC and Dean J. Vagnozzi, Delaware Valley Financial Group to serve as panelists. They addressed issues including taking proactive measures to protect interests, managing risks, understanding what happens to the business if something happens to the owner and more. Lynn Doyle, host and executive producer of "It's Your Call with Lynn Doyle," moderated the event.

ACHIEVEMENTS AND AWARDS

In 2009, White and Williams was named to the prestigious "Honor Roll of Legal Organizations Welcoming Women Professionals" by the Pennsylvania Bar Association's Commission on Women in the Profession for the firm's commitment to the advancement of women in law. On the heels of the award, the firm also entered into a partnership with the Greater Philadelphia Chapter of the National Association of Women Business Owners (NAWBO) to offer additional resources to its female attorneys.

These events are just a few of the stories that made 2009 a great year for White and Williams. On behalf of the firm, thank you again for your continued support and trust in our legal services.

Best regards,
George Hartnett

DELAWARE SUPREME COURT LIMITS LIABILITY FOR ASBESTOS BYSTANDER EXPOSURE

by: Christian J. Singewald, Esq. and William L. Doerler, Esq.

Distinguishing between a company's affirmative act of negligence and its purported failure to act, the Delaware Supreme Court recently clarified the duty owed by employers to employees' spouses who are secondarily exposed to asbestos. In *Riedel v. ICI Americas, Inc.,* 2009 WL 536540 (Del. Mar. 4, 2009), the Court addressed a claim brought by the wife of an employee of ICI Americas, Inc. (ICI) based upon injuries purportedly caused by asbestos fibers brought home from ICI on her husband's clothes. Relying on traditional duty principles set forth in the Restatement (Second) of Torts, the Court held that where the allegations in a complaint are based upon a purported failure to act, an employer cannot be held liable for alleged secondary household exposures absent the existence of a special relationship between the employer and its employee's spouse.

THE QUESTION OF DUTY, GENERALLY

To establish negligence, a plaintiff must prove (1) that the defendant owed her a duty, (2) that the defendant breached the duty owed, and (3) that the breach was a proximate cause of the plaintiff's harm. Thus, in order to impose liability on a defendant, the court must determine, among other things, whether the defendant owed the plaintiff a duty. The question of whether a duty is owed requires courts to consider whether the relationship between the parties is such that the community will impose a legal obligation upon one for the benefit of the other. In Delaware, the question of whether a duty is owed has traditionally been answered relying on principles set forth in the Restatement (Second) of Torts. Recently, however, other states have relied upon the principles set forth in the Restatement (Third) of Torts. *See Satterfield v. Breeding Insulation Co.,* 266 S.W.3d 347 (Tenn. 2008). The question of whether a duty exists involves a question of law for the court to decide.

THE *RIEDEL* CASE

In *Riedel,* the plaintiff, Lillian Riedel, alleged that her husband's employer, ICI, failed to prevent her husband from taking asbestos fibers home on his clothes, and failed to warn her of the dangers of asbestos exposure. Before the trial court, the plaintiff argued that ICI owed her a duty because she was a foreseeable victim of its negligence. The trial court, however, found that foreseeability is not the only factor courts should consider when determining whether a defendant owed a duty to the plaintiff. In addition to considering whether the plaintiff was a foreseeable victim, the trial court held that courts have to determine whether there was a sufficient relationship between the parties to impose a duty. The trial court held that the plaintiff in *Riedel* failed to establish that there was a sufficient relationship between the parties to impose a duty on ICI. After concluding that ICI owed no duty to the plaintiff, the court granted summary judgment in ICI's favor.

On appeal, the plaintiff argued that the trial court erred by focusing on her relationship with ICI, rather than the foreseeability of harm to her. The Supreme Court relied upon principles set forth in the Restatement (Second) of Torts, and distinguished between claims based upon affirmative acts (misfeasance), and those based upon a failure to act (nonfeasance). As explained by the Court, quoting the Restatement (Second) of Torts: "'anyone who

FIRM ANNOUNCEMENTS

HEALTHCARE PRACTICE GROUP OBTAINS A "HAT TRICK" OF DEFENSE VERDICTS IN ONE WEEK

In a one-week time span, three White and Williams healthcare attorneys received defense verdicts for their clients. **Anna Bryan** received a defense verdict in Montour County, Pa., in a three-week trial regarding the care and treatment of a 48-year-old woman who died in the hospital following uncomplicated surgery for breast cancer which had been diagnosed about four months earlier. **Platte Moring,** Managing Partner of the Lehigh Valley office, received a defense verdict in Northampton County, Pa., in a case involving an orthopedic surgeon who performed an open reduction, internal fixation of a trimalleolar fracture of the left ankle, requiring a revision surgery due to non-compliance with doctor's orders. **Kevin Cottone** obtained a defense verdict in Montgomery County, Pa., in a medical malpractice case after a two-week trial.

For more information about the Healthcare Group, please visit www.whiteandwilliams.com.

SUBROGATION DEPARTMENT PARTNER CHRIS KONZELMANN OBTAINS A SETTLEMENT WORTH NEARLY $27.2 MILLION

During the summer of 2008, a fire originating at the Stables at Millennium construction site in Conshohocken, Pa., destroyed two apartment buildings at the adjoining Riverwalk at Millennium apartment complex. The market insurers for the Riverwalk at Millennium complex retained White and Williams LLP to investigate the facts and circumstances surrounding the fire and pursue subrogation claims against the culpable parties. The investigation disclosed that several entities were responsible for causing the fire. Subrogation Department partner Chris Konzelmann brought claims against those parties and with the assistance of a mediator resolved the matter for nearly $27.2 million within 14 months of the fire.

For more information about the Subrogation Department, please visit www.whiteandwilliams.com.

does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.'" On the other hand, "'one who merely omits to act' generally has no duty to act, unless 'there is a special relationship between the actor and the other which gives rise to the duty.'"

The Court held that the plaintiff's claims, based upon a purported failure to act, were based upon nonfeasance. Thus, in order to establish that ICI owed her a duty, the plaintiff had to establish a special relationship between herself and ICI which would warrant imposing a duty on ICI to act. Although the plaintiff's husband was an employee of ICI and ICI issued newsletters which purportedly discussed "off-the-job safety," the Court held that the relationship between the plaintiff and ICI was not significant enough to warrant imposing a duty on ICI to take action to protect the plaintiff. Thus, ICI did not owe the plaintiff a duty of care.

The Court's decision in *Riedel* has added significance because in addition to discussing traditional tort concepts regarding duty, as set forth in the Restatement (Second) of Torts, the Court considered, and rejected, the duty-related principles set forth in Restatement (Third) of Torts. The Court found that the Restatement (Third) of Torts creates duties in areas where the Court has deferred the question of whether a duty is owed to the legislature. Given the Court's history of deferring to the legislature, the Court held that it would be "too wide a leap" to adopt the principles set forth in the Restatement (Third) of Torts. Thus, the Court instructed Delaware courts to continue to follow the principles set forth in the Restatement (Second) of Torts when considering whether there are duties owed in a particular situation.

In discussing the *Riedel* decision, it is also important to note what the Court did not decide. On appeal, in addition to relying on arguments based upon nonfeasance, the plaintiff raised new arguments, based upon misfeasance, by asserting that ICI affirmatively released asbestos into the environment. Although the Court recognized that the duty owed based upon purported misfeasance may be different, the Court did not answer the question of whether ICI owed a duty to the plaintiff based upon asserted misfeasance because the plaintiff failed to raise the argument before the trial court.

THE IMPACT OF *RIEDEL*

Pursuant to the *Riedel* decision, claims by plaintiff-spouses based upon an employer's failure to warn of household, bystander asbestos exposure should be dismissed. Absent a special relationship, an employer does not owe a duty to household bystanders. Plaintiff-spouses in asbestos cases who seek to recover for their own injuries will need to pursue arguments based upon affirmative acts, rather than on the employer's purported failure to act. Whether the employer owes a duty to the plaintiff-spouse will depend not only upon the foreseeability of the harm to the plaintiff-spouse, but also upon whether the risk of harm was an unreasonable risk, and whether a reasonable employer would have taken steps to protect the spouses of their employees. In a broader context, plaintiffs seeking to establish a duty will need to carefully identify whether the act at issue is based upon misfeasance or nonfeasance, and frame their allegations and arguments accordingly. Where a plaintiff asserts a claim based upon nonfeasance, a defendant should seek dismissal if the parties do not have a sufficient special relationship to impose a duty to act on the defendant.

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FIRM'S COMMITMENT TO WOMEN'S INITIATIVE EXPANDS AND RECEIVES HIGH HONORS

White and Williams LLP was named to the prestigious "Honor Roll of Legal Organizations Welcoming Women Professionals" by the Pennsylvania Bar Association's Commission on Women in the Profession.

Through its Honor Roll, the Commission on Women in the Profession recognizes law firms, corporate legal departments and other lawyer organizations that demonstrate a commitment to the advancement of women in law. White and Williams was joined on the Honor Roll by seven other law firms and the Women's Bar Association of Western Pennsylvania.

In selecting White and Williams for the recognition, the Commission cited the many ways the firm demonstrates its support for women in the profession, from its Inspiring the Future mentoring program to flexible work schedules. Also, the firm established the Virginia Barton Wallace Award in honor of the firm's first female partner. At an annual luncheon, the award is given to a woman who embodies the qualities of leadership, drive and inspiration to others. The event is acclaimed as one of the premier women's events in the Philadelphia legal community.

White and Williams is also proud of the representation of women on essential firm leadership committees including the Executive Committee, Compensation Committee, Marketing Committee, Associate Evaluation Committee, Diversity Committee, Long-Range Planning Committee and Pro Bono Committee.

On the heels of winning the award, White and Williams became a sponsor of the Greater Philadelphia Chapter of the National association of Women Business Owners (NAWBO). The sponsorship not only allows the firm to support an essential regional organization, but also contributes to its ongoing commitment to women's initiatives. White and Williams is the only law firm sponsor of the chapter.

The firm and NAWBO share common goals in offering female professionals a network of peers for support, resources and referrals, both professionally and personally.

LEGACY ASSET TASK FORCE

White and Williams LLP attorneys practicing in real estate finance, securities, workouts and financial restructuring formed a Legacy Asset Task Force to inform and assist companies and investors interested in opportunities presented by the federal government's Public-Private Investment Program (PPIP). We invite you to contact us with questions regarding recent developments to this program.

For more information about the Legacy Asset Task Force, please contact one of our Task Force representatives, Anthony Krol (215.864.7041; krola@whiteandwilliams.com) or Joan Rosoff (215.864.7192; rosoffj@whiteandwilliams.com).

2009 COVERAGE COLLEGE®

On October 7, 2009, over 450 insurance professionals from 140 companies and 19 states received their diplomas and completed another year at the White and Williams Coverage College®. This annual, daylong symposium offered "students" an opportunity to engage in intensive study of a diverse insurance coverage curriculum.

Sixteen Masters Classes, taught by a "faculty" of over 30 experienced White and Williams attorneys, covered topics such as coverage litigation, the subprime mortgage meltdown, underwriting in the claims process, construction defect claims, releases and liens.

Students also had an opportunity to meet and network with a dozen exhibiting companies who signed on as sponsors for this year's College.

The students' day concluded with a graduation and awards ceremony followed by a cocktail reception.

THIRD CIRCUIT PREDICTS CONTINUED...

sought damages against Monsanto, the manufacturer of the PCBs. After a $90 million verdict against Monsanto, the Pennsylvania Supreme Court reversed, holding that trial court's charge to jury did not distinguish between PCBs that were "off gassed" from HVAC ductboard and PCBs (an intended use) that were released when the PCB-laden ductboard was consumed by fire, and that being consumed by a fire (an unintended use) was not an "intended use" of a product. 587 Pa. at 259, 898 A.2d at 604. The Court conceded that while it may have been foreseeable that a product may be consumed by a fire, foreseeability could not be considered in a strict liability case. 587 Pa. at 255, 898 A.2d at 602. After a retrial, Monsanto, which was represented by White and Williams LLP, obtained a defense verdict.

The Monsanto case illustrates the potential danger of adopting the Third Restatement's approach, where judges and juries may too easily conflate uses that are truly "foreseeable" with those that are merely "conceivable." For example, while it is conceivable that a motor vehicle might leave the road and go into a lake, it surely cannot be a "foreseeable use" that would require car manufacturers to make floating cars. Thus, while the incineration and destruction of any product, such as HVAC ductboard, is conceivable, under no sensible policy construct can it be said to be a "foreseeable use" justifying the imposition of civil liability.

BUGOSH V. I.U. NORTH AMERICA, INC., 2009 WL 1668509 (PA. JUN. 16, 2009)

The accuracy of the Third Circuit's prediction that the Pennsylvania Supreme Court would adopt the Third Restatement has already been tested. The *Berrier* decision was issued while the Supreme Court was considering *Bugosh v. I.U. North America, Inc.,* 7 WAP 2008, a case in which it was asked to consider whether to apply § 2 of the Restatement (Third) of Torts: Products Liability in place of § 402A of the Restatement (Second) of Torts. Rather than deciding the issue on the merits, however, the Supreme Court dismissed the appeal "as improvidently granted." *Bugosh v. I.U. North America, Inc.,* 2009 WL 1668509 (Pa. Jun. 16, 2009). The Court's one-sentence *per curiam* opinion gave no reason for the decision.

Justice Thomas G. Saylor issued a lengthy and passionate dissenting statement, in which he was joined by Chief Justice Ronald D. Castille. In his dissent, Justice Saylor reiterated his belief that Pennsylvania products liability law, based as it is on *Azzarello,* is "severely deficient" and that "necessary adjustments are long overdue." Justice Saylor did not want to let another opportunity to make those adjustments "go by the wayside." Justice Saylor further stated that he would overrule *Azzarello* prospectively and adopt Sections 1 and 2 of the Restatement (Third) of Torts: Products Liability.

CONCLUSION

On balance, the Third Restatement provides a unitary, common-sense standard that will more readily allow manufacturers to conform their conduct and their products to it, thereby promoting safer products. It will also allow courts and juries to more easily and uniformly interpret and apply the law, thereby promoting greater fairness in our judicial system.

While the Third Circuit's decision in *Berrier* suggests that a sweeping change in Pennsylvania products liability law may occur in the not-too-distant future, the Pennsylvania Supreme Court apparently felt that *Bugosh* was not the appropriate case to adopt such a change at this time. Or, it may simply be that there are currently not enough votes on the Court to support the adoption of the Third Restatement. At present, only Chief Justice Castille and Justices Saylor and Eakin are on record as supporting the Third Restatement, leaving them one vote short on the seven-justice Supreme Court.

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COURT UPHOLDS USE OF PROJECT LABOR AGREEMENT CONTINUED...

is relying upon is neither credible nor competent, or in the absence of such evidence, that the report of the consultant is fundamentally flawed. In addition, the challenger must show that the Commonwealth was on notice of the lack of competence or credibility or of the flaws in the report. It is clear that the Commonwealth has wide discretion with regard to the use of PLAs on construction projects. This does not mean that all challenges to PLAs will be rejected. For example, an employer's claim that a union fraudulently misrepresents the scope of the PLA to induce its execution is actionable under the NLRA.[17]

Second, the Commonwealth's discretion in regard to public project specifications increases when there is an urgent need for project completion. In *Hawbaker,* the Commonwealth's evidence as to its overcrowded prisons and the urgency of completing SCI-Graterford were enough to balance out the competitive advantage provided to union contractors vis-à-vis "merit shops." In the future, urgent transportation, utility and school construction projects may also be areas where the Commonwealth may balance urgency for completion with the objectives of fair competition. More importantly, Judge Pellegrini associated the inclusion of the PLA within the project specifications as being within DGS' discretion in determining bidder responsiveness and responsibility. Moreover, the passage of Act 41, which allows the Commonwealth to engage a design/build contractor, diverging from the Separations Act, further indicates that in some areas of state procurement, the Commonwealth continues to move towards a procurement process that varies from the standard multi-prime contracting.

The *Hawbaker* case was filed pursuant to the Commonwealth Court's original jurisdiction. The Petitioners may press forward with the matter, seek reconsideration or appeal Judge Pellegrini's decision. As a result, White and Williams LLP will continue to monitor the case.

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1 *Generally, the Separations Act provides that for the erection, construction or alteration of a "public building" the contracting agency must prepare separate specifications for the various trade works, including "plumbing, heating, ventilation, and electrical work" and requires that separate bids be received for these "branches of work." 71 P.S. § 1618.*

2 *The PBTC is an organization comprised of local labor organizations.*

3 *Keystone is comprised of board members affiliated with various unions.*

4 *In this context, a PLA is an agreement between DGS and a collective bargaining unit that would require contractors awarded contracts for the project to use union labor.*

5 *Hawbaker, Inc. v. Commw. of Pennsylvania, Dep't of Gen. Servs., et al., Pa. Commw. Ct. no.: 405 M.D. 2009 (December 1, 2009 Order and Opinion) (Pellegrini, J.) at 28-30.*

6 *Even when a non-unionized contractor is awarded a bid, most PLAs require the non-union companies to pay their workers' health and welfare benefits to union trust funds, even if they have their own company-sponsored benefit plans.*

7 *Hawbaker, December 1, 2009 Order and Opinion) at 9-11.*

8 *Id. at 10.*

9 *Id.*

10 *Per Judge Pellegrini, in passing the National Labor Relations Act (NLRA), Congress did not intend to deny a public owner the same options available to private owners on construction projects. In analyzing whether the PLA violated the NLRA, the Hawbaker court considered the case of Building and Constr. Trades Council of the Metro Dist. v. Ass'n. Builders & Contractors of Massachusetts/Rhode Island, 507 U.S. 218 (1993).*

11 *Id. at 17-9.*

12 *654 A.2d 119 (Pa. Commw. 1995).*

13 *The Deputy Secretary testified that Graterford would be a "net gain" of 4,000 beds in the prison system. Hawbaker, December 1, 2009 Order and Opinion) at 28-30.*

14 *Id. at 28-30.*

15 *Id. at 29.*

16 *Ironically, most Commonwealth Projects provide that "time is of the essence" in the contract documents.*

17 *See Northwestern Ohio Admin'rs v Walcher & Fox, Inc., 270 F.3d 1018 (6th Cir. 2001), cert denied, 535 U.S. 1017 (2002).*

WHITE AND WILLIAMS SPONSORS PRIVATE RECEPTION FOR CHINESE JUDGES

Twenty-five prominent Chinese judges from all across China joined White and Williams attorneys and others at a private reception co-presented by the World Trade Center of Greater Philadelphia and the Temple University Beasley School of Law. The event served as one stop in the judges' tour of the U.S. where they learned about the role of the judiciary in America's legal system. The tour was intended to allow them to exercise greater influence in their home courts, and guide their colleagues who must resolve issues currently unsettled under Chinese law, but may have common practice in the United States.

The reception, held on September 16, 2009, was sponsored by White and Williams and allowed a select group of attendees to not only interact with the judges, but also hear more about the Chinese judicial system via a Q&A session following the reception.

The opportunity to sponsor was brought to the firm from the World Trade Center of Greater Philadelphia CEOs' China Operations Club. Gary Biehn, Chair of the International Practice Group, serves on the CEOs' China Operations Club board of directors.

For more information about the firm's China Practice, please visit www.whiteandwilliams.com.

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CONGRATULATIONS 2009 SUPER LAWYERS

Each year, the publishers of *Law and Politics* Magazine conduct a rigorous selection process, taking into consideration, peer recognition and professional achievement for the distinction of Super Lawyer®. Twenty-six attorneys of White and Williams have been recognized as a Pennsylvania, New Jersey or New York Super Lawyer 2009. Please join us in congratulating our Super Lawyers.

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