



Your Best Defense

Lawyers Solving Problems

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Our Spring 2006 edition of *Your Best Defense* includes careful analysis of new court decisions and a new trend, as well as the latest status on an aging attempt to solve the asbestos litigation nightmare.

Jeffrey Kubay examines in his article a recent Pennsylvania Supreme Court decision which further clarifies the current status of the requirements of a plaintiff to make a good faith effort to notify a defendant of the commencement of a lawsuit. In the *McCreesh* case, the Supreme Court revisits its landmark *Lamp v. Heyman* decision and concludes that, even if efforts to serve a defendant within the statute of limitations are defective under the rules, the defects will be excused if the defendant has actual notice of the suit and is not otherwise prejudiced by the delay. Thus, even defective service within the statute of limitations may now toll the statute and allow claims to proceed.

Two recently-decided Supreme Court decisions in the UM/UIM arena are discussed by Marla Presley in this edition as well. The *Holland* and *Swords* opinions are carefully analyzed, the former holding that children of a mother who allowed her auto insurance to lapse were not bound by the limited tort option and the latter announcing with finality that an owner of a registered automobile would not be entitled to first party benefits under any applicable policy where the owner did not meet all of the requirements of financial



responsibility under the MVFRL. Both cases have major implications for those who practice automobile litigation.

Richard McMillan takes a look at the increasing trend toward and, perhaps, expectation of commonly available Automatic External Defibrillation Devices. Mr. McMillan examines not only the benefits of having these devices in readily accessible locations in public arenas, but also the potential liability exposure risks to those who have the devices on their premises, those who do not have the devices and, perhaps more in the future, those who use them to try to save a life. This is must reading for anyone who owns or insures any public space.

Finally, where do the efforts to enact some type of legislation to address the quagmire of asbestos litigation now stand? Everyone, including the Supreme Court, seems to agree that legislation is needed, but nothing has yet been accomplished in this regard. Scott Stephan takes a fresh look at the history of the FAIR Act, the competing interests that have thus far prevented its enactment, and the possible future for this or similar legislation.

We hope you enjoy the Spring 2006 edition of Your Best Defense. Please contact Dale Forsythe at dforsythe@waymanlaw.com or any of our contributors for more information on the topics discussed or on any of the areas of our practice described at www.waymanlaw.com.



COURT EXCUSES IMPROPER SERVICE OF LAWSUIT ABSENT PREJUDICE

By: Jeffrey A. Kubay, Esq.

The Supreme Court of Pennsylvania recently revisited its landmark decision in *Lamp v. Heyman* to clarify what

constitutes a good-faith effort to notify a defendant of the commencement of a lawsuit. *McCreesh v. City of Philadelphia*, 888 A.2d 664 (Pa. 2005). In *Lamp*, our state supreme court had endeavored to prevent plaintiffs' abuses of the legal process by tolling the statute of limitations by filing a Writ of Summons, repeatedly reissuing the Writ, and failing to notify the defendant of the pending lawsuit. The Supreme Court reasoned that, although this dilatory practice complied with procedural rules, the purpose of the statute of limitations - to protect defendants from stale claims - was defeated. The *Lamp* Court held that a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from the course of conduct which serves to stop in its tracks the legal machinery he has just set in motion. *Lamp*, 366 A.2d 882, 889 (Pa. 1976). That is, *Lamp* and its progeny required plaintiffs to make a good-faith effort to effectuate notice of the commencement of a lawsuit.

In *McCreesh*, the plaintiff Charles McCreesh claimed

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that he was seriously injured when a tree, located on property owned by the City of Philadelphia, fell on his truck while he was traveling on a city street. Mr. McCreesh commenced a lawsuit against the City by filing a Praecipe to Issue a Writ of Summons just within the applicable two-year statute of limitations. Mr. McCreesh attempted to serve the City with the Writ by sending it to the City Law Department by certified mail. The parties agreed that the City received the Writ. Approximately three months later and after the expiration of the statute of limitations, Mr. McCreesh requested the Writ's reissuance, and then he served the re-issued Writ along with a Complaint on the City Law Department through a competent adult's hand delivery, the method of service required by the Rules of Civil Procedure. The City filed Preliminary Objections to dismiss the lawsuit, arguing that the first Writ was not properly served and that the Complaint filed as part of the issuance of the second Writ was not timely filed. The trial court found the first Writ, though defectively served, was served in good-faith upon the City and that any defective service could be excused since the City had actual notice of the litigation.

The City appealed to the Commonwealth Court of Pennsylvania, which then reversed the trial court's decision excusing the improper service. The Commonwealth Court held that Mr. McCreesh's delivery of the first Writ by certified mail to the City did not constitute a good-faith effort to serve the defendant under *Lamp* because said attempt did not comply with the applicable local rule relating to service of legal process. Mr. McCreesh then appealed to the Supreme Court of Pennsylvania which granted review limited to the good-faith *Lamp* issue.

In reversing the decision of the Commonwealth Court, Pennsylvania's highest court held that a plaintiff's initial procedurally defective service is excused where a defendant has actual notice of the commencement of litigation and is not otherwise prejudiced. The Supreme Court noted Pennsylvania's intermediary appellate courts' inconsistent application of the *Lamp* rule. That is, some courts had concluded that a good-faith effort requires plaintiffs to strictly comply with procedural rules related to service of legal process, while other courts had excused procedural defects in service where defendant has actual notice and is not prejudiced.

The *McCreesh* court adopted the latter more flexible approach, concluding that such an approach "sufficiently protects defendants from defending against stale claims without the draconian action of dismissing

claims based on technical failings that do not prejudice the defendant." In reaching its conclusion, the Supreme Court considered the well-settled purpose of any statute of limitations which is to prevent delay in stale claims that may prejudice the defense of such claims. The Court further reasoned that neither case law nor the Pennsylvania Rules of Civil Procedure contemplate penalizing a plaintiff for technical missteps where he or she has met the purpose of the statute of limitations by providing a defendant with actual notice. Accordingly, the Court held that dismissal of a case is required only where a plaintiff has demonstrated an intent to stall the legal process or where a plaintiff's failure to comply with the Rules of Civil Procedure has prejudiced a defendant. In so holding, the *McCreesh* Court rejected the prior appellate decisions that concluded that a good-faith effort requirement is met only by strict compliance with procedural rules. Here, the Court reversed the Commonwealth Court because Mr. McCreesh provided the City with actual notice. However, because the trial court did not address the issue of prejudice, the *McCreesh* Court directed the Commonwealth Court to remand the case to the trial court to determine whether the *City* was prejudiced as a result of the delay of proper service.

The Pennsylvania Supreme Court's adoption of a flexible approach to service of legal process in *McCreesh* reduces the likelihood that litigation will be dismissed on purely technical grounds. Where a defendant has received timely actual notification of the commencement of a lawsuit, a plaintiff's failure to comply with the applicable rules related to service will likely be excused. However, if a defendant can identify actual prejudice resulting from improper service, the defendant still may be able to have the case dismissed. For example, should a defendant fail to receive notice of a lawsuit because of a plaintiff's failure to properly serve the same, and a witness becomes unavailable (e.g. dies), such unavailability may constitute prejudice thereby justifying dismissal of the litigation. Notice of a lawsuit typically results in a defendant or his/her/its attorney conducting investigation and if necessary preserving testimony for use at trial. Notwithstanding a good-faith effort on the part of plaintiff to serve legal process, such prejudice will likely require dismissal of the lawsuit under *Lamp* and its progeny, including *McCreesh v. City of Philadelphia*.

Attorney Kubay will be happy to discuss these or related issues further if you would like. Please contact him at jkubay@waymanlaw.com.



UM/UIM UPDATE

By: Marla N. Presley, Esq.

Two decisions handed down by the Pennsylvania Supreme Court, just one day apart, are certain to have a substantial impact on future claims made by underinsured motorists.

In the first, *Holland v. Marcy*, 883 A.2d 449 (Pa. 2005), decided on September 28, 2005, the majority of the Supreme Court held that ownership of an uninsured vehicle by a parent does not confer limited tort status upon the uninsured parent's child, thereby allowing children of uninsured motorists to sue tortfeasors for both economic and non-economic damages. The following day, September 29, 2005, the Supreme Court in *Swords v. Harleysville Insurance Companies*, 883 A.2d 562 (Pa. 2005), held that owners of uninsured registered vehicles are unable to recover first-party benefits under insurance policies which might otherwise be applicable.

In *Holland v. Marcy*, Justice Baer, writing for the majority of the Court, held that children of parents who elected limited tort auto insurance option may nonetheless recover full tort damages, directly reversing *Hamez v. P.H.A.*, 696 A.2d 880 (Pa. Cmwlth. 1997). In *Holland*, two minor passengers were riding in a vehicle owned by their mother, operated by their father. Although the mother had previously purchased two insurance policies on the subject automobile, electing the limited tort option, at the time of the accident, both policies had expired and the mother was uninsured.

The Hollands thereafter filed suit against the tortfeasor to recover both economic and non-economic damages. The trial court held that since the Hollands' vehicle was uninsured, by operation of the Pennsylvania Motor Vehicle Responsibility Law, the owner and occupants were deemed to have elected the limited tort option and therefore were precluded from recovering non-economic damages for injuries not considered serious. The trial court therefore granted Marcy's Motion for Summary Judgment. The Hollands appealed to the Superior Court, which reversed the trial court, concluding that full remedies were available to the children. Section 1705(a)(5) of the Motor Vehicle Financial Responsibility Law bound only the mother, as the owner of a registered but uninsured vehicle, to the limited tort option.

The Supreme Court held that the children were not bound by their mother's selection of the limited tort option. The Court concluded that Section 1705(b)(2) states that the tort action selected by a named insured applied to those who are considered the named insured's children. However, under Section 1705(b)(3), an individual who is neither an owner of a vehicle nor an insured under a private passenger motor vehicle policy may seek both economic and non-economic damages if they are injured in a motor vehicle accident as the result of another tortfeasor's fault. The Supreme Court concluded that the minor-passengers were not owners of any registered motor vehicle and further that they were not insureds under any private passenger motor vehicle policies because the mother did not hold any insurance policy on the vehicle. Therefore, the children were given full rights to pursue both economic and non-economic damages.

The *Holland* decision essentially permits children of uninsured drivers to recover damages which children of insured, limited tort-drivers, could not. The children of insured drivers who have selected the limited tort option in insurance policies may only recover economic damages under the Pennsylvania Motor Vehicle Financial Responsibility Law, where children of uninsured drivers may recover both economic and non-economic damages.

The following day, September 29, 2005, the Supreme Court, in *Swords v. Harleysville Insurance Companies* held that owners of uninsured, registered vehicles are ineligible to collect first-party benefits, such as medical and wage loss benefits under any insurance policy which would otherwise cover the vehicle in which the uninsured person is riding. In *Swords*, Bernell Swords loaned his pickup truck to his son, Wayne, who was subsequently injured in an accident while driving the vehicle. Bernell Swords' truck was insured by Harleysville at the time of the accident while Wayne Swords owned a registered, but uninsured vehicle. Following the accident, Wayne Swords filed an application seeking first-party benefits which was ultimately denied by Harleysville Insurance Companies.

Father and son then filed suit against Harleysville Insurance Companies in the Court of Common Pleas of Lancaster County, Pennsylvania. In their Complaint, the Swords asserted that Harleysville Insurance Companies was statutorily mandated to cover first-party benefits pursuant to various provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law. The Swords moved for summary judgment, arguing that Harleysville Insurance Companies' denial of coverage

was contrary to precedent established in *Heinrich v. Harleysville Insurance Companies*, 620 A.2d 1132 (Pa. 1993), and *Kasando v. State Farm Mutual Automobile Insurance Company*, 704 A.2d 675 (Pa. Super. 1998). The Swords asserted that these decisions hold that any limit on first-party benefits contained in Section 1714 of the Motor Vehicle Financial Responsibility Law do not apply to a driver who is not operating his or her uninsured vehicle at the time of the accident. Relying on this authority, the trial court granted the Swords' Motion for Summary Judgment. On appeal, the Superior Court of Pennsylvania reversed and remanded, concluding that the language of Section 1714 usually requires that "in order to be eligible to receive first-party benefits, a person must have the required insurance on any and every vehicle currently registered in that person's name in Pennsylvania at the time of the accident in question." *Id.* at 645. In reaching its conclusion, the Superior Court necessarily overruled its decision in *Kasando*, determining that the *Kasando* court misinterpreted the Supreme Court's decision in *Heinrich*. *Swords*, 831 A.2d at 643.

On appeal, the Supreme Court of Pennsylvania held that Section 1714 of the Motor Vehicle Financial Responsibility Law clearly and unambiguously renders an owner of a current registered motor vehicle ineligible to recover first-party benefits when the owner fails to meet the requirements of the financial responsibility as detailed in the MVFRL. Furthermore, the Court held that Section 1714 requires every owner of a currently registered vehicle to have his or her own financial responsibility in order to be eligible to receive first-party benefits. The Pennsylvania Superior Court therefore affirmed the Superior Court's Order reversing the trial court's entry of partial summary judgment in favor of the Swords, as the son was the owner of a registered vehicle at the time of his accident and because he failed to meet the requirements of the financial responsibility as detailed in the MVFRL at the time of the accident. Section 1714 rendered the son ineligible to recover first-party benefits.

Attorney Presley will be happy to discuss these issues further if you would like. Please contact her at mpresley@waymanlaw.com.



AED'S AND RISK CONTROL

By: *Richard L. McMillan, Esq.*

If one of your co-workers or one of your fellow members at an athletic club collapsed from a sudden cardiac arrest (SCA), would there be an Automatic Early Defibrillation Device (AED) located close by so that a life could be saved? Dolores LaManna of Baldwin Borough, Pennsylvania is happy there was one. So is Mitsy McGee of Dormont, Pennsylvania. Sean Morley of Deerfield, Illinois, has probably graduated from high school by now after having been saved by the use of an AED at a baseball field when he was thirteen years old. Sadly, the overall rate of survival from SCAs in the United States is only 7%. The good news is that when there is ready access to an AED, the survival rate is startlingly better. For instance, the Chicago O'Hare Airport public access defibrillation program has resulted in a 64% survival rate for victims of sudden cardiac arrest! A study at several gambling casinos has reported a 59% survival rate where the security guards have access to AED devices and appropriate training. Immediate delivery of electrical shocks with a defibrillator is the ideal treatment for SCAs. For every one minute that elapses after an SCA, the chances of survival diminish by almost 10%. If a victim is not treated until ten minutes after the collapse, the chances for survival approach zero according to the National Center for Early Defibrillation. By contrast, the chances for survival are close to 90% if the victim can be treated with a defibrillator right away.

Over one thousand lives are lost each day in the United States to sudden cardiac arrest. The National Center for Early Defibrillation is currently trying to raise public awareness of this widespread health threat and to promote the widespread availability of Automated External Defibrillators (AED's). There can be no doubt that this is a laudable effort; however, it is important to know the legal responsibilities associated with AED's.

At a recent meeting of the Risk and Insurance Management Society in Pittsburgh, speakers addressed both the advantages of widespread availability of AED's and the liability risks associated with them. None of the speakers questioned the value of the widespread availability of AED's, certainly not the SCA survivor whose life was saved by the fact that an AED was available at a building near the tennis courts where the man had collapsed. It is not enough, though, to simply

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purchase an AED and then forget about it. While the equipment is easy to operate and needs minimal maintenance, the entity which acquires an AED undertakes ongoing duties. It is important to periodically check the batteries of the equipment and to have a system to assure that both the battery and the component parts of the equipment have been checked pursuant to the appropriate schedule. The AED should be located in an easily accessible and obvious location. Appropriate staff members, such as security personnel, should have up-to-date training by a certified organization such as the American Heart Association, Red Cross, or a local hospital. Employees on the site should all know where the AED is located, who is trained to utilize it, and that the utilization of an AED is not a substitute for promptly calling 911 to summon an emergency medical team to provide emergency treatment and transportation to the victim.

One might ask if there is a legal duty to keep an AED on one's premises. The answer is, 'not yet.' However, resourceful plaintiffs' attorneys can be expected to go after particular types of businesses or clubs where sudden cardiac arrests can reasonably be expected. For instance, a racquetball club in New York was sued for not having an AED readily available. In that case, the court ruled that there was no duty to have an AED on site and that the plaintiff had assumed the risks associated with the vigorous sport of racquetball. In Florida, Busch Gardens was held liable for the death of a young girl who suffered an SCA and died. The verdict was based partially on the park's failure to have an AED available. No doubt, future cases will be brought in various states attempting to establish such a duty in limited circumstances. The cases will probably point to the more widespread acceptability of AEDs, the increasing safety and effectiveness of modern AED equipment, the decreasing cost of such equipment, and a resulting change in what can reasonably be expected. The reasoning that will be asserted will be similar to that used in premises liability cases where property owners have been held to a duty to protect those on their property from criminal behavior that could reasonably be anticipated. For instance, a legal duty to provide security guards has been found in cases where patrons have been criminally accosted in parking lots where there have been previous criminal incidents to put the property owner on notice of the risk. Similarly, health spas, tennis clubs, or gambling casinos can be said to be on notice of the likelihood of sudden cardiac arrest incidents due to the high physical activity or high stress associated with the endeavors on their premises.

In Pennsylvania, a tennis club has already been sued

(albeit unsuccessfully) when a player suffered a fatal incident while playing tennis. The court held that there was no duty for the club to have an AED available, *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 812 A.2d 1218 (Pa. Supreme Court, December 20, 2002). In a very recent case involving a patron who was choking at a restaurant, the Pennsylvania Superior Court held that "the prompt summoning of medical assistance satisfies a restaurant's duty to a patron who is choking," *Campbell v. Eitak, Inc.*, 2006 Pa. Super. 26, 2006 Pa. Super. Lexis 85 (decided February 10, 2006). This evidences a continuing reluctance on the part of the Pennsylvania judiciary to impose new or greater duties on business owners.

So far, lawsuits have been directed at those in charge of the premises for the failure to have an AED for use on the victim rather than being directed at the bystander who attempts to utilize an AED. All fifty states have enacted Good Samaritan laws aimed at protecting those who volunteer to aid fellow citizens in need of some type of emergency help. The federal Cardiac Arrest Survival Act (CASA), enacted in 2000, contains its own Good Samaritan provision providing conditional immunity to non-medical personnel who attempt to aid a victim by using an AED. Pennsylvania's statute, 42 Pa. C.S.A. §8331.2, protects the layperson who uses an AED so long as he does so 'reasonably.' Case law in Pennsylvania has not yet developed the limits of what is a reasonable use of an AED by untrained persons, but one would expect that any good faith effort to follow the directions that come with the AED unit would be found to be 'reasonable.'

It is important to remember that typical Good Samaritan provisions in AED legislation only protect the person who acquires the AED device in cases where the harm to the victim was not due to a failure of the acquirer to: (1) notify local emergency response personnel as to the most recent placement of the device; (2) to properly maintain and test the device; or (3) to provide appropriate training in the use of the device. If your business establishment does not already have an AED device readily available, you would be well advised to reach the National Center for Early Defibrillation at www.early-defib.org or call its toll free telephone number (1-866-AED-INFO) for advice on selecting an AED device, developing a response plan, conducting appropriate training, determining the appropriate placement of the device(s), and setting up an ongoing maintenance and training program.

Feel free to contact Richard McMillan at rmmillan@waymanlaw.com with any questions you may have in this or related areas of law.



A POTENTIAL SOLUTION TO THE ENORMOUS MORASS OF ASBESTOS LITIGATION?

By: Scott W. Stephan, Esq.

A. Dissatisfaction with the State of Asbestos Litigation

Asbestos product liability lawsuits emerged almost thirty years ago in this country. However, for some time there has been dissatisfaction with the state of asbestos litigation. In fact, there has been a mutually shared unhappiness with the system among asbestos plaintiffs, defendants and the courts.

The number of asbestos cases pending nationwide doubled during the 1990s, and 90,000 new cases were filed in 2001 alone. Given the large volume of cases, plaintiffs commonly wait years for their respective claims to be adjudicated only to find little, if any, satisfaction. Often, their claims are settled for pennies on the dollar, leading to the enrichment of the plaintiff lawyers at the expense of those allegedly injured by the asbestos exposure. Also, verdicts are frequently rendered against judgment-proof defendant businesses. Worse still, far too often validly aggrieved parties die before their cases can be resolved.

Meanwhile, defendant businesses are faced with the daunting tasks of assessing their liability, all the while attempting to assure that they have a sufficient revenue pool to cover both the costs of liability and litigation. The resultant administrative and financial burdens have forced many such companies into bankruptcy. To date, asbestos litigation has bankrupted at least seventy-eight companies, such as “traditional” defendants Armstrong World Industries, Babcock & Wilcox, Federal Mogul, Johns Manville, Owens Corning, U.S. Gypsum and W. R. Grace. However, when these so-called traditional defendants were forced into bankruptcy, this only served to whet the appetite of the asbestos personal injury bar. In response thereto, it expanded its focus, suing more “peripheral” defendants. Now, more than 8,400 entities have been named in asbestos cases, a drastic increase from the 300 that had been sued in 1982. Alarming, some of these peripheral defendants have already suffered dire financial circumstances as a result of the burgeoning costs of asbestos litigation.

The economic effects of the asbestos litigation extend beyond bankruptcy. For solvent asbestos defendants, any money expended in defense and/or liability serves to reduce earnings such that there is a corresponding

reduction in available money to finance investment and job growth. It has been estimated that asbestos litigation alone may have caused a loss of at least 400,000 jobs.

With respect to the courts, already overcrowded dockets have been bogged down by the huge volume of asbestos cases. This result has been worsened by tactics such as mass screening, which has become a standard practice of the personal injury bar in its desire to ever expand the volume of claims. The resultant situation has been termed by the U.S. Supreme Court as an “asbestos-litigation crisis”.

Regardless, the search for solutions has largely been left to the courts and the parties themselves. One innovative approach has been the Manville Trust system. Less successful, however, have been the parties’ attempts to fashion “global” settlements. Two prominent asbestos settlements were taken up to the U.S. Supreme Court and overturned there. See *Amchem Products v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). Justice Ruth Bader Ginsberg recognized the need for a solution beyond the current system when she authored her opinion in *Amchem*, stating: “The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” 521 U.S. at 628-29. Additionally, Justice David Souter also cited a need for a legislative solution beyond the courts when he stated in his opinion in *Ortiz*: “Like *Amchem* ..., this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.” 527 U.S. at 821.

B. A Proposed Legislative Solution

In 2003, it seemed that Congress finally began to heed the advice of the Supreme Court when it attempted to fashion a legislative solution to the asbestos litigation nightmare. On February 14, 2003, Senator Don Nickles (R-Okla.) introduced the Asbestos Claims Criteria and Compensation Act of 2003. However, when that Act failed to gain support in the Senate Judiciary Committee, a new bill quickly emerged.

On May 22, 2003, Sen. Orrin Hatch (R-Utah) introduced the Fairness in Asbestos Injury Resolution Act of 2003, or the FAIR Act. The Act would eliminate the current asbestos litigation system altogether. Rather than litigate asbestos claims in the courts, the Act would have all existing asbestos actions and future claims administered on a no fault basis with a newly established U.S. Court of Federal Claims through the Office of a Special Asbestos Master. Asbestos claims could no

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longer be filed or pursued under state law, except for the enforcement of existing judgments that are no longer subject to appeal or judicial review before the date of enactment of the Act.

The ability of the mechanism's of the FAIR Act to function is reliant upon the creation of the finite trust fund to pay for asbestos liability claims. The Act would "create a privately funded, publicly administered fund ... that will provide compensation for legitimate present and future claimants of asbestos exposure". The fund would be called the "Asbestos Injury Claims Resolution Fund", and would function in two ways. First, it would collect and manage contributions received from defendant businesses and their insurers and from other already existing asbestos compensation trusts. Second, the fund would use the contributions to compensate claimants who can demonstrate eligibility according to standardized medical criteria.

The Office of Asbestos Injury Claims Resolution would be created under the FAIR Act in order to provide for the necessary administrative services. An Administrator appointed by the president would head the Office and would serve a 5-year term. As previously mentioned, an Office of Special Asbestos Master within the U.S. Court of Federal Claims would be created to award damages to asbestos claimants. The Special Master in turn would be appointed by the chief judge of the Court of Federal Claims, upon concurrence of the majority of active judges of the court. Claim examiners under the Special Master would initially determine whether a claim was eligible for resolution by utilizing standardized medical criteria. If determined to be eligible, the claim would be paid with proceeds from the trust fund.

C. Benefits

If enacted into law, the FAIR Act may provide several benefits which could alleviate much of the dissatisfaction that each of the participants have with the current system. The fund would take existing claims from the present tort system, eliminating much backlog from the courts, all the while providing a forum for more expedient claim resolution, which would benefit the claimants, especially since they would no longer have to establish causation. Defendants and insurers will likely pay less over the long haul under an administrative settlement process, which would eliminate recurrent litigation costs. Additionally, those same entities will get to trade the unpredictable whims of a jury for a budget-friendly structured payment plan. In short, the Act seems to bring a finality and certainty to all the interested parties.

D. Criticisms

For all its intended benefits, from the outset, the FAIR Act was met with criticism. Issues arose concerning the Act's constitutionality as well as its tax implications. However, the biggest impediment to the bill's enactment is the amount and the means of the Act's funding.

Whereas early versions of the Act called for mandatory contributions of \$45 billion from businesses and insurers to the fund, when the Act was still in Senate Judiciary Committee, the amount of mandatory contributions to be made by the defendant businesses and insurers was increased by \$7 billion each. As a result of this funding increase, support from the fund's primary contributors waned.

E. Current Status

Unfortunately, the funding issues related to the Act have not been resolved to date. A relatively recent attempt to pass a budget of \$140 billion for the fund crashed on the Senate floor. Supporters of the Fairness in Asbestos Injury Resolution Act of 2005 needed 60 votes to overcome a budget-related objection brought by Sen. John Ensign (R-Nev). It only received 58 votes. However, because Senate Majority Leader Bill Frist (R-Tenn) changed his vote, in a procedural move that will allow him to return the bill to the floor at a later date. Regardless, it is not likely that the bill will be revisited during this election year, given the budgetary concerns of both parties.

F. Conclusion

It is clear that the current asbestos litigation system is irrevocably broken. In fact, it is akin to a runaway train that is continually gaining momentum all the while eclipsing the track ahead. If left unchecked, the question of whether the current system will wreck is no longer at issue, rather it is a matter of certainty. As the Supreme Court prophesied there is a need for a legislatively created settlement process. The FAIR Act as currently comprised may never be enacted. However, it is a harbinger of some legislative measure to come.

Attorney Stephan will be happy to discuss these and related issues further if you would like. Please contact him at sstephan@waymanlaw.com.



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Wayman Watch...

- *Congratulations to Gail McTiernan, pictured with Mayor O'Conner, who finished 1st in Overall Female Masters Division in the 2006 Komen Pittsburgh Race for the Cure.*
- *Congratulations to Warren Siegfried, who has recently been afforded Martindale Hubbel's AV rating, the highest rating available.*
- *Additional congratulations are due Warren, who this season coached his son's travel basketball team to a 24-8 record while winning the Upper St. Clair tournament championship.*
- *Further kudos to James Creenan, who was named the 2006 Outstanding Young Lawyer by the Allegheny County Bar Association.*
- *The firm has recently joined as an Associate Member the Pennsylvania Association of Mutual Insurance Companies and is looking forward to active involvement in this fine organization.*
- *The firm welcomes back Krista Kochosky-Orashan, who has re-joined the firm as a member. Krista's practice is strongly focused in the area of insurance bad faith litigation defense.*
- *Michael Somerhalder, our office manager, assumes the position of President of the Pittsburgh Legal Administrators Association, effective April 1, 2006. Also, congratulations to Mike's daughter, who makes her First Holy Communion this May.*
- *Congratulations to Jeffrey Kubay and his wife, who recently welcomed a new baby girl, Katelyn Elizabeth. Mother and baby are doing well.*

