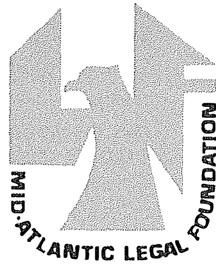

Report

MID-ATLANTIC LEGAL FOUNDATION

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MAY 1987

Wyer Elected Chairman of Mid-Atlantic

James I. Wyer

At its annual meeting in Philadelphia in March, MAtLF's Board of Directors elected James I. Wyer as its new Chairman. He succeeds outgoing Chairman Richard B. McGlynn, who served for three years and remains as a member of the Board.

Mr. Wyer recently retired as General Counsel of American Cyanamid Co., a post he held from 1973 through 1986, and is now counsel to the Newark, New Jersey, law firm of Robinson, Wayne, Levin, Riccio & La Sala. He is a graduate of Yale University and its law school and began his career at Dewey, Ballantine, Bushby, Palmer & Wood. He has served as President of the Association of General Counsel and first joined Mid-Atlantic as a member of its Legal Advisory Council, on which he served for many years. Mr. Wyer has been a member of Mid-Atlantic's Board since 1986 and has served ably on the Foundation's Legal Issues Committee. His experience and insight will certainly be of great assistance as the Foundation embarks on new pursuits.

Baltimore Divestment Ordinance Challenged

In a test case that could have far-reaching consequences the trustees of three public employees' pension funds challenged the Baltimore Ordinance that requires the trustees to divest the funds of securities of companies doing business in South Africa and forbids the trustees to purchase any such securities. Mid-Atlantic appeared in the action on behalf of four beneficiaries of two of the funds to challenge the Ordinance on federal constitutional grounds.

Although Mid-Atlantic's motion to intervene was recently denied, in part because the attorneys for the trustees also represent two beneficiaries, the Court had previously permitted Mid-Atlantic to file a motion for summary judgment which we did on February 13, 1987. Our motion for summary judgment argued that the Ordinance violated the Supremacy and Commerce Clauses of the U.S. Constitution, specifically that the Ordinance infringed upon the sovereign power of the Federal Government to govern and administer the foreign policy of the United States and to regulate our foreign commerce. Moreover, we argued that the Comprehensive Anti-Apartheid Act of 1986 pre-empted the field and that the Baltimore Ordinance conflicted with it and with the Federal Government's policy of constructive engagement.

Mid-Atlantic also participated in the oral argument on the motion for summary judgment which took place on March 26 before Judge Martin Greenfeld of Baltimore Circuit Court. In its article summarizing the oral argument the Baltimore Evening Sun stated: "Whatever is decided by Greenfeld and the appellate courts 'will have impact far beyond the borders of the city. The eyes of the nation will be on this courtroom' said Douglas Foster, president of the Mid-Atlantic Legal Foundation, who believes the law does not stand up constitutionally."

At the end of oral argument Judge Greenfeld reserved decision on the motion for summary judgment, indicating that he would let the parties know in a month or so whether he thought one or more of the issues would be tried.

Judge Greenfeld has recently notified the parties by letter that the case will proceed to trial on June 22, 1987 on the two issues which he says can not be disposed of without further evidence: impairment of contract and violation of State law.

He further stated that a decision on these two issues will be rendered after trial, together with decision on the other issues which have already been argued at the hearing on the motion for summary judgment. It is, of course, those precise issues, namely the federal constitutional issues, that were briefed and argued by Mid-Atlantic in its motion for summary judgment and at the oral argument on March 26.

MAtLF Argues in Pennsylvania Supreme Court in Liquor System Suit

Representing a 2,000-person statewide consumer coalition (Pennsylvanians for a Responsible End to the State Store System), as well as an *ad hoc* coalition of restaurateurs, Mid-Atlantic argued in April before the Pennsylvania Supreme Court in support of an end to that state's state-owned liquor monopoly: the State Store system. Because the legislature had not reauthorized the agency which runs the system in 1986, the state's Sunset Review Act decreed its demise as of December 31, 1986, with a six-month wind-down period.

The agency itself and its employee unions and their union and legislative supporters clamored to enjoin the termination in Commonwealth Court, an intermediate appellate court which had original jurisdiction in the matter. Outgoing Governor Dick Thornburgh was the defendant and Mid-Atlantic, representing the above-described coalition, successfully intervened as co-defendants, alleging, especially, the potential inadequacy of representation of their views and of their consumer/taxpayer status by incoming Governor Robert Casey, a supporter of the state monopoly. Common Cause filed an *amicus curiae* brief in support of the besieged statute.

Oral argument was held in December in Commonwealth Court and on December 29th, the President Judge ordered the agency termi-

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Clean Water Act Brief Filed

As previously reported, Mid-Atlantic filed a brief with the U.S. Supreme Court ufging it to grant *certiorari* in a case involving the imposition of $1.28 million of civil penalties for wholly past permit violations under the federal Clean Water Act.

The Court did grant *certiorari* and Mid-Atlantic has now filed a brief on the merits in which it has urged that the Court disallow such penalties. The guts of Mid-Atlantic's argument are that the civil penalties in such a case are wholly punitive, that they would be passed along to consumers in the form of higher prices and that therefore the allowance of such penalties would operate as punishment of the public with no environmental benefit.

The facts of the case are, we believe, quite inviting. *Gwaltney* acquired an operating facility in October 1981 which was then exceeding its permit limitations with respect to three outfall characteristics. Within one year the problems relating to two characteristics were solved. One year after that, October 1983, a state-of-the-art waste water treatment facility was in place and in the process of being debugged. Through the following seven months only isolated start-up exceedences occured. On May 15, 1984 the last permit exceedence was recorded.

From May 15, 1984 to the date of Mid-Atlantic's brief, March 26, 1987, a period of two and three quarter years, not a single exceedence has occured save one attributable to an act of God.

As it had done on its brief in support of *Gwaltney's* petition for *certiorari*, Mid-Atlantic reversed the issue as defined by the two courts below and by *Gwaltney* itself. It stated the issue as follows:

> Did Congress intend to confer subject matter jurisdiction over suits by individual citizens which seek penalties for wholly past violations which occurred in a period during which the operator acted in good faith, with reasonable diligence, solved permit problems, employed state-of-the-art technology in the process, and accomplished full, effective, long-term compliance with its permits?

Mid-Atlantic's concise arguments asked the Court to decide this issue in the negative.

We understand that oral argument of this case will be conducted in the fall of 1987.

Carroll Up-date

In late February defendants moved for summary judgment relying chiefly upon two arguments: First, that the court should dismiss the case on the ground that the SUNY student activity fee regulation is a proper exercise of "educational policy" and that judicial review of that decision would be a violation of SUNY's First Amendment protected academic freedom; and second, that in *Galda v. Rutgers*, the Third Circuit recognized with approval the forum which a student activity fee may be used to create.

Mid-Atlantic after long deliberation decided to cross-move for summary judgment. In its cross-motion the Foundation argues: First and principally that NYPIRG is a political organization which exists for the purpose of political action directed off campus and that compelled financial support of such a group violates the First Amendment under *Abood v. Detroit Board of Education*; second, that the concept of academic freedom is an inappropriate defense because, in the words of defendants' own witnesses, the issue does not involve a "genuinely academic decision"; third, that with respect to student activity fees the discussions of the Third Circuit were *dicta*, but had NYPIRG and SUNY been before that Court rather than NJPIRG and Rutgers, that Court under its reasoning in *Galda* would have invalidated the SUNY fee because NJPIRG and NYPIRG are in all relevant respects parallel; and lastly, that in the words of their own experts, the State has no compelling interest in requiring students to pay compelled fees to a group such as NYPIRG whether as part of a student activity fee or otherwise.

Mid-Atlantic's cross-motion was served on April 3. Under the schedule worked out by the parties and approved by the Court, SUNY's and NYPIRG's reply to our answering material on their motion, and in answer to our cross-motion are due on May 18. Mid-Atlantic's reply on its cross-motion is due on June 18.

The District Court may decide the case on the motion and cross-motion papers or it may rule that a trial of all or a limited number of issues will be required.

Foundation to Participate In Pennsylvania Judges' Pension Suit

The Foundation's staff will provide legal representation to Citizens for the Common Wealth, a coalition of 300 independent business people/taxpayers from central Pennsylvania dedicated to promoting responsible government expenditures in that state. The group has sought to file a brief *amicus curiae* in opposition to a lawsuit by a group of Pennsylvania trial-court judges who have filed a class-action suit to overturn the state's two-tiered pension system. The judges were all elected after 1974, when the legislature, in an economy move, decreed a less generous pension plan for officials elected after that year. The judges claim violation of their equal protection rights.

The coalition, chaired by a state legislator who refuses to participate in the state pension system, fears that a successful suit by the judges could cost the taxpayers millions of dollars, especially if the precedent carried over to other governmental employers and, possibly, to the private sector.

The staff is awaiting the appropriate juncture in the suit to file its brief and will argue that the two-tiered system is rationally based to serve a valid public purpose and that the judges should be equitably estopped from changing the terms under which they were elected. Potential economic impact projections, made by the Pennsylvania Economy League, will be cited in support of the Foundation's arguments.

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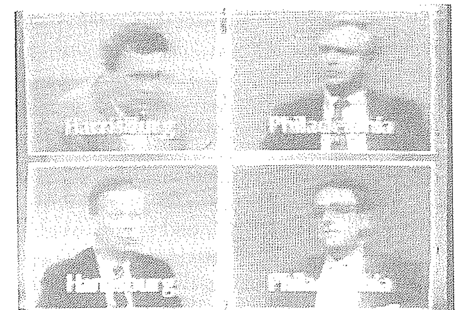
nated, upholding the Sunset Act. The agency and one of the unions then appealed to the state Supreme Court, which agreed to expedite the briefing and argument schedule.

Because the Commonwealth Court ordered the legislature to determine what should replace the State Stores, the legislature must act to fill the void and prevent a court-ordered return to Prohibition on July 1. The new governor has proposed a plan, however, which will essentially re-create the State Store system. Discord in the legislature should postpone resolution until the "twelfth hour."

Mid-Atlantic's staff continues to provide counsel to the coalition and has appeared on several statewide and local television and radio public affairs programs in connection with this issue. Aides to former Governor Dick Thornburgh have been quite complimentary of Mid-Atlantic's efforts.



Shown above, debating Gov. Casey's proposed legislation extending the Pennsylvania state liquor store monopoly, on the PA. public television network, April 12, 1987 (left upper, clockwise): Vincent P. Carocci, Gov. Casey's Deputy Secretary for Legislative Affairs; State Senator Stewart Greenleaf (R. Montgomery Co.); Stuart Niemtzow, Mid-Atlantic Legal Foundation, counsel for Pennsylvanians for a Responsible End to the State Store System (PRESSS); former State Senator Franklin Kury appearing as counsel to The Stroh Brewery Co.

Supreme Court Issues Twin Shockers

Anchor of Takings Law Scuttled

By a five to four decision the Supreme Court upheld in March Pennsylvania's 1967 statute requiring coal operators to leave unmined over 27 million tons of coal without compensation. To do that the majority had to distinguish the 1967 statute from a substantively identical statute which the Supreme Court had found unconstitutional 60 years ago. Additionally troubling is that the earlier decision, *Pennsylvania Coal Co. v. Mahon*, is, or at least had been, the only anchor of takings law in a sea of conflicting decisions which the Supreme Court has itself acknowledged are beyond reconciliation among themselves.

In *Mahon* the Supreme Court had held that a statute which required anthracite coal operators to leave unmined coal beneath the surface of dwellings in order to avoid surface subsidence and consequent damage to the dwellings was an unconstitutional taking of the unmined coal.

The current case, *Keystone Bituminous Coal Association, et al. v. DeBenedictis*, in which Mid-Atlantic filed an *amicus* brief in support of the coal operators, involved a regulation which required property owners to leave unmined 50% of bituminous coal beneath defined public buildings without compensation and required mine owners to leave identical amounts of unmined coal beneath private buildings at the election of the building owners in return for an arbitrated payment.

To uphold the 1967 regulation the Court deemed it necessary to distinguish *Mahon*. It did so, "factually", by emphasizing that the current regulation ordered only 2% of the total coal in the affected mines be left unmined and that, therefore, the regulation did not deprive the mine owners of all of their profit from the mines. It did so, "legally", by accepting the findings of the 1967 Legislature that the new prohibitions were needed to enhance the public welfare.

In preparation for its brief Mid-Atlantic's staff sought to identify common denominators which might underlie the conflicting and sometimes irreconcilable case law in takings jurisprudence. The staff believes that it did so. It appears that notwithstanding complex reasoning expressed with exceeding verbosity the court has followed an instinct, to wit: Where the effect of a regulation has been as a practical matter to effect an affirmative acquisition of private assets for their affirmative use in the accomplishment of a public goal, a taking has been held. But where a regulation is merely passive in nature so that a particular use of private property is merely limited a taking will not necessarily be found. In the latter situation a taking might be found although the limitation is passive, for example, if a passive regulation went beyond the degree necessary to accomplish the stated public goal.

Mid-Atlantic advanced the argument that the action of the Court which it had identified should be adopted as a new standard, or at least the threshold test, for determining whether a taking had occurred. It argued that in the facts of *Keystone*, analysis of similarity between the *Mahon* regulation and that involved in *Keystone* would not even have to be reached. The argument's basis was that although the language of the 1967 statute was prohibitive, the practical effect of the statute by its own stated terms was the affirmative acquisition of the operator's column of coal for the affirmative purpose of physical support of industrial facilities, residential buildings, and of course indirectly, Pennsylvania's tax base and that the coal had no alternate use. Unhappily the Court did not see fit to adopt the rule although Mid-Atlantic believes that its proposed rule or one very close to it will in fact sooner or later be adopted by the Court.

Court Approves Reverse Discrimination

While the Supreme Court had little difficulty in avoiding *stare decisis* in upholding Pennsylvania's bituminous coal regulation (see Anchor of Takings Law Scuttled, above), a majority of the Court found no difficulty strapping itself with purported application of *stare decisis* in order to justify reverse discrimination in *Johnson v. Transportation Agency, Santa Clara County California*.

Prior to 1978 the Supreme Court had interpreted Title VII of the Civil Rights Act to mean what its language said, *i.e.*, that it was illegal for an employer to discriminate against anyone on the basis of race or sex, *inter alia*. Through the *Bakke* case in that year the Court had held that Congress intended by the Civil Rights Act "to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII including Caucasians." To that point it had looked to and relied upon the legislative history of the Act which is replete with statements indicating that the Act was intended to be color and gender blind.

In 1979, in *Steelworkers v. Weber*, the Court sanctioned a skilled craft training program entry to which was to be 50% black and 50% white until the percentage of blacks in skilled craft jobs in the plant involved approximated the percentage of blacks in the local labor force. In doing so the Court specifically stated that it was not relying upon "societal discrimination" but upon findings in six cited federal cases, and others summarized by the EEOC, that blacks had been intentionally and invidiously excluded from craft jobs not only in the steel industry involved in *Weber* but in many industries.

Now comes the *Johnson* case. The District Court found the following facts: that Mr. Johnson had more relevant experience than one Ms. Joyce, that he was senior to Ms. Joyce, that he had in his career with the County intentionally taken a demotion in order to build his relevant experience, that he had tested better than Ms. Joyce and finally, that he was determined to be the best qualified applicant for the position at issue. Mr. Johnson didn't get the job. Ms. Joyce did, pursuant to a County affirmative action plan the objective of which was to someday create in every job category an employee distribution by gender and sex which copied the entire labor force, public and private, in the County.

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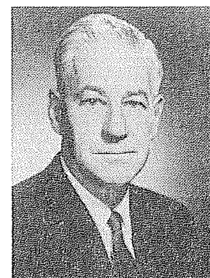
Felix Larkin Joins Board: Professor Mooney Added to Legal Advisory Council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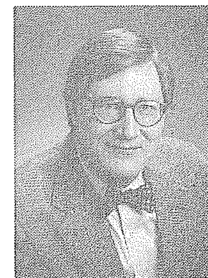
Mooney

Felix E. Larkin, retired President and Chairman of W. R. Grace & Co., was elected to MAtLF's Board of Directors at its annual meeting in March. He currently remains on the W. R. Grace Board and on various W. R. Grace committees. Additionally, Mr. Larkin remains active on the boards of various businesses, educational, religious and social organizations. Prior to his retirement, Mr. Larkin was a leading player on President Reagan's Grace Commission on government spending.

Joining MAtLF's Legal Advisory Council is Charles Mooney, a professor at the University of Pennsylvania Law School. Professor Mooney, a graduate of the University of Oklahoma and of Harvard Law School in 1972, practiced for many years with Crowe and Dunlevey in Oklahoma City and from 1981-86 with Shearman & Sterling in New York. He is active in many commercial law associations and has authored several articles on business-law subjects. At Penn, Prof. Mooney teaches in the banking and commercial law field and is faculty advisor to the Federalist Society.

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The Court also found that the County had never discriminated against women and that but for her sex, Ms. Joyce would not have been promoted ahead of Mr. Johnson. The District Court found that Mr. Johnson had been discriminated against in violation of Title VII but the 9th Circuit reversed, upholding the affirmative action plan because "plans like this one are usually voluntarily adopted by employers who wish to express and act upon their commitment to social justice," citing the *Weber* case.

A six judge Supreme Court majority agreed with the 9th Circuit and legalized affirmative action plans under which an employer voluntarily takes into consideration the race or gender of the competing applicant as "only one factor" in attempting to reach a goal established to eliminate a "manifest imbalance" in "traditionally segregated job categories." In doing so it cited and adopted the Court of Appeals' statement that "a plethora of proof is hardly necessary to show that women are generally under represented in (road maintenance) positions and that strong social pressures weigh against their participation."

Amazingly the majority of the Supreme Court equated the statistics showing only that women had not sought out such maintenance jobs with the intentional, invidious, decades long, actual and demonstrated exclusion of blacks from skilled jobs for which they repeatedly applied and for which they were repeatedly rejected.

This apparently is the Court's new meaning of *stare decicis*. The Court, moreover, through the language of Justice Stevens' concurring opinion, certified itself as a legislative body. In Justice Stevens' words, "the only problem for me is whether to adhere to an authoritative construction of the Act (*Weber*) that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative..."

Mid-Atlantic's brief in support of Mr. Johnson had relied upon the District Court's findings of fact and called for reformulation of the *Weber* rule precisely because of what it viewed as an amorphous signal given to lower courts that affirmative action plans might be used to sanction reverse discrimination if born of a proper motive irrespective of the facts at hand.

Our brief also pointed out that the 9th Circuit's sanction of well intentioned plans drafted because of an employer's view of social justice should not be placed above Congress' view of social justice as determined by the Civil Rights Act. Justices White, Scalia and Rehnquist expressed a stronger feeling about *Weber* than Mid-Atlantic had argued. They called for reversal of that case and of course for reversal of the 9th Circuit in *Johnson*.

While Mid-Atlantic relied upon the District Court's findings of fact, the majority obviously did not. As Justice Scalia noted, "the fact of discrimination against Johnson is much clearer, and its degree more shocking than the majority and Justice O'Connor's concurring opinion would suggest — largely because neither of them recites a single one of the District Court's findings that govern this appeal. ***** Today's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced. ***** A statute designed to establish a colorblind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely permitting intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled."

Annual Meeting Held In Philadelphia

The Foundation held its annual meeting at the Hershey Hotel in Philadelphia on March 19-20. It was a spirited and stimulating meeting and much ground was covered.

Following dinner on Thursday evening, an interesting discussion, led by the Foundation's president, was held during which a number of questions concerning the Foundation's focus and objectives were raised. Everyone participated in the discussion and although no conclusions were reached, the discussion was helpful to the staff as it plans for the future of the Foundation.

On Friday morning we held our regular business meeting, at which Jim Wyer was elected the new chairman of the Foundation (see article on p. 1 of this newsletter). Appropriate tribute was paid to Rich McGlynn, the retiring chairman, for his valuable contribution to the Foundation. (Mr. McGlynn will continue to serve on the Board). Felix Larkin, retired president and chairman of W. R. Grace & Co., was elected to the Board and Professor Charles Mooney of the University of Pennsylvania Law School was elected to our Legal Advisory Council.

The 1987 budget was approved. The president gave his report which included an explanation of the final chapter in *Galda* and a description of the Foundation's fund raising activities and the attempts to reach a broader constituency. He also described how he has sought to develop a dialogue with chambers of commerce and other such organizations which may be sources of new legal issues for the Foundation to tackle.

Thereafter, John Collins and Stuart Niemtzow led a discussion with respect to current and future issues in which the Foundation is or may be involved. A number of these issues are described more fully elsewhere in this newsletter.

The meeting was adjourned with selection of New York City on June 18-19 as the place and dates of our next meeting.

Significance of Challenge to Divestment Legislation

This newsletter, on p. 1, contains an article describing the Foundation's involvement in the challenge to the Baltimore divestment ordinance. This ordinance is typical of the proliferation of local and state divestment legislation that requires trustees of public pension funds to divest those funds of securities of companies doing business in South Africa.

Such legislation cannot continue unchecked and unchallenged. Already several states have enacted or introduced legislation that targets Northern Ireland or Iran for the same treatment. Who is to say where this type of legislation will end? Unfortunately, there are a number of governments in the world with whose policies we disagree. That should not give license, however, to local and state governments to pass legislation that penalizes American companies for doing business in those countries.

Moreover, the enactment of divestment legislation violates the U.S. Constitution which gives the Federal Government the sovereign power to govern foreign policy and to regulate foreign commerce. Regardless of what they may argue, the state and local governments that have enacted such legislation have done so to effect the internal policies of South Africa, specifically to force South Africa to abandon its policy of apartheid. Now, no one condones apartheid — indeed, the Foundation abhors it. But that is not the issue *vis-a-vis* this legislation. Rather the issue is whether a state or local government can pass legislation that impacts on the foreign affairs and foreign commerce of the United States. The answer clearly is and should be no.

It is submitted that the same answer pertains to the various local and state procurement statutes that have been enacted for the same purpose, *i.e.,* to condemn the policy of apartheid and to bring about its demise. Such statutes need to be challenged. Indeed, they are probably more readily challenged because the injured party is more readily discernible — he is the low bidder who was denied the contract because he does business in South Africa.

In any event, it is time to stand up for the U.S. Constitution and insure that this country will continue to speak with one voice in the areas of foreign affairs and foreign commerce so that we do not return to the weakness of this country under the Articles of Confederation.