

Ohio Insurance Law

Regulatory, Legislative & Judicial Developments



December 2008 Vol. XII No. 2

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Bricker & Eckler LLP's Ohio Insurance Law is available to clients and friends of the firm, and highlights regulatory, legislative and judicial developments in the State of Ohio of interest to the insurance industry. It is not to be construed as legal advice or opinion.

Legislative Developments

■ 2008 Ohio Election Results The 128th Ohio General Assembly

Beginning in January 2009, Ohio House Democrats will be in the majority for the first time in fourteen years. With a net gain of 7 seats, Democrats will hold a 53-46 majority. Within a few short weeks of the November election, House Democrats elected Rep. Armond Budish (D-Beachwood), a second term member, to lead the caucus as Speaker in the 128th General Assembly.

Other House Democrat leaders elected by the caucus include: Rep. Matt Szollosi (D-Oregon), Speaker Pro Tem; Rep. Jennifer Garrison (D-Marietta), majority leader; Rep. Tracy Heard (D-Columbus), assistant majority leader; Rep. Jay Goyal (D-Mansfield), majority whip; Rep. Allan Sayre (D-Dover), assistant majority whip.

Rep. William Batchelder (R-Medina), currently the chair of the Ohio House Insurance Committee, was elected minority leader by the House Republican caucus. Other members in the 128th Ohio House minority leadership team include: Rep. Louis Blessing (R-Cincinnati), assistant minority leader; Rep. John Adams (R-Sidney), minority whip; Rep.-elect Kris Jordan (R-Powell) assistant minority whip.

In the Ohio Senate, Republicans will maintain a 21-12 majority. Sen. Bill Harris, a two term Republican member from Ashland, will remain President in 2009. Sen. Niehaus (R-New Richmond) will serve as President Pro Temp. Sen. Keith Faber (R-Celina) was elected majority floor leader and Sen. Mark Wagoner (R-Toledo) was elected majority whip.

The Senate Democrats selected Sen. Capri Cafaro of Hubbard to lead the Senate minority caucus.

Chairmanships of both the Senate and House Insurance Committees will change in 2009. Announcements regarding chairmanships and

committee assignments are expected early next year.

The Ohio Supreme Court

Two seats on Ohio's Supreme Court were at stake in the November election. Both incumbent candidates endorsed by the Ohio Republican party were re-elected. Justice Evelyn Stratton defeated Cuyahoga County Juvenile Administrative Court Judge Peter Sikora by a 63% to 37% margin. Justice Maureen O'Connor defeated Cuyahoga County Common Pleas Court Judge Joe Russo by a 67% to 33% margin.

The Ohio Attorney General

Also of interest to the insurance industry, a special election was held in November to elect a candidate to serve out the remainder of former Attorney General Marc Dann's term. Dann resigned his post in May of 2008.

The Democratic candidate, State Treasurer Richard Cordray, defeated Republican Mike Crites. Cordray received 57% of the vote and will serve the remainder of the unexpired term ending January 2011.

Democrats continue to hold all statewide offices except for Auditor.

Congressional Races

In 2009, Ohio's Congressional delegation will include 10 Democrats and 8 Republicans. Republicans currently have an 11-7 edge in the delegation.

In a closely watched race in Ohio and nationally, Franklin County Commissioner Mary Jo Kilroy narrowly defeated Sen. Steve Stivers, currently the chair of the Ohio Senate Insurance, Commerce & Labor Committee. The official certification of ballots in the 15th Ohio Congressional District race was delayed until

early December due to litigation over disputed provisional ballots. Kilroy will take the seat now occupied by retiring Republican Deborah Pryce. Two state senators were elected to fulfill two other seats left open by retiring Republicans Ralph Regula and Dave Hobson. Democrat John Bocchieri will succeed retiring Regula and Republican Steve Austria will succeed Hobson.

■ **Preneed Contract Legislation Receives Legislative Approval**

The Ohio General Assembly approved legislation that would amend Ohio law regarding preneed contracts and the funding of such contracts. Senate Bill 196 will affect insurers and agents that sell life insurance policies used to fund preneed contracts for funeral services by clarifying permissible and impermissible activities related to the sale of an insurance policy or annuity to be used to fund a preneed contract and defining enforcement authority over insurers and agents.

Senate Bill 196 is awaiting Governor Ted Strickland's signature.

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■ **Asbestos Disclosure Legislation Fails**

Legislation intended to address additional issues related Ohio's asbestos litigation system was defeated by the Ohio House by a vote of 48-45. Senate Bill 370 House Bill 631 would have discourage "double dipping" by plaintiffs who file lawsuits in Ohio courts while making the same claims against bankruptcy trusts set up by federal bankruptcy courts. Neither bill was intended to limit a plaintiff's recovery, but rather both were aimed at requiring full disclosure as to the filing of all such asbestos claims by a particular plaintiff in the litigation process in order to ensure that all known avenues of recovery for that particular plaintiff were identified.

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Regulatory Developments

■ **Insurance Rules Rescinded**

In response to Executive Order 2008-04S ("Implementing Common Sense Business Regulations"), which was signed by Governor Ted Strickland on February 12, 2008, the Ohio Department of Insurance rescinded several rules, then re-proposed them in a new insurance chapter in the Ohio Administrative Code. The creation of a new chapter, according

to the Department, will make it easier to locate and understand the insurance rules.

A list of the rescinded rules is posted under the "Communications" section of the Department's website: www.ohioinsurance.gov

Executive Order 2008-04S is available at: <http://www.bricker.com/publications/attachments/200804s.pdf>

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Judicial Developments

■ **Ohio Supreme Court Upholds Asbestos Reform Bill**

In a long-awaited decision, on October 15, 2008, the Ohio Supreme Court held that the nation's first asbestos reform legislation – Ohio House Bill 292 – may be applied to cases pending prior to its effective date without offending the Retroactivity Clause of the Ohio Constitution. *Ackison v. Anchor Packing Company*, Slip Op. No. 2008-Ohio-5243. As of the effective date of H.B. 292, nearly 40,000 asbestos personal injury cases were pending in Ohio.

Recognizing that the "current asbestos personal injury litigation system is unfair and inefficient,

imposing a severe burden on litigants and taxpayers alike" the General Assembly enacted H.B. 292 (codified as R.C. 2307.91- .98) to prioritize asbestos-related claims.

The primary question before the Court was whether R.C. 2307.91, 2307.92, and 2307.93 can be applied to Plaintiff's claim, which had been filed prior to September 2, 2004, the effective date of H.B. 292, or whether such application is unconstitutionally retroactive. In short:

- R.C. 2307.01 sets forth the definitions for the sections.
- R.C. 2307.92 requires claimants to make a prima facie showing in order to proceed with their claims.

- R.C. 2307.93 requires claimants with cases pending before the enactment of H.B. 292 to file evidence of physical impairment within a certain period of time or face administrative dismissal.

First, the Court reiterated its own prior conclusion about the remedial nature of R.C. 2307.92 and 2307.93:

We have previously concluded that R.C. 2307.92 and 2307.93 ‘do not relate to the rights and duties that give rise to this cause of action or otherwise make it more difficult for a claimant to succeed on the merits of a claim. Rather, they pertain to the machinery for carrying on a suit. They are therefore procedural in nature, not substantive’...[T]hese two statutes establish a ‘procedural prioritization’ of asbestos-related claims. Simply put, these statutes create a cause of action that already exists. No new substantive burdens are placed on claimants.

Second, the Court held that various provisions of H.B. 292 are *not* unconstitutional as applied to Plaintiff’s claim because they do not impair vested rights and affect substantive rights by altering substantive common-law rules pertaining to asbestos-related claims.

In this regard, the Court rejected the Sixth District Court of Appeals’ conclusion that pleural plaque or pleural thickening constitutes “bodily harm” and thus is a compensable asbestos-related condition under Ohio law. In *Verbryke v. Owens-Corning Fiberglass Corp.* (1992), 83 Ohio App.3d 388, 616 N.E.2d 1162, the Sixth District Court of Appeals held “pleural plaque or pleural thickening is an alteration to the lining of the lung. Accordingly, a pleural plaque or thickening meets the definition of ‘bodily harm,’ which is a subspecies of ‘physical harm’ and thus satisfies the injury requirements of Section 388 and 402A of the Restatement [of Law 2d, Torts (1965)]. The *Verbryke* decision was based upon a “faulty interpretation of the Restatement.” Accordingly, “[t]he *Verbryke* court’s holding that pleural thickening alone is sufficient to constitute an injury was not the common law of this state such that Ackison had a vested right to its application to her case.”

This case is important to Ohio courts, to the ever-expanding list of companies named as defendants in asbestos personal injury lawsuits, and to those that are truly sick as a result of exposure to asbestos, as it allows for the “procedural prioritization” of literally tens of thousands of asbestos-related personal injury claims currently pending in Ohio courts.

The 5-2 opinion was written by Justice Cupp. Chief Justice Thomas Moyer dissented, as did Justice Paul Pfeifer.

Days after the Ohio Supreme Court released this decision, Cuyahoga County Common Pleas Judges Hanna, Spellacy and Sweeney administratively dismissed over 300,000 asbestos-related cases on the Court’s inactive asbestos docket. The full text of that order is available at: <http://www.bricker.com/publications/attachments/073958.pdf>

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■ Ohio Supreme Court Modifies Test for Piercing the Corporate Veil

On September 30, 2008, the Ohio Supreme Court ruled that to “pierce the corporate veil,” a plaintiff must show that the “defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act.” *Dombroski v. WellPoint, Inc.*, Slip Opinion No. 2008-Ohio-4827 (emphasis added).

In *Dombroski*, the plaintiff was a deaf woman who, after receiving a cochlear implant, largely regained her hearing in one ear. Dombroski’s doctor subsequently determined that a cochlear implant in her other ear was medically necessary to further improve her hearing. However, her new health insurance provider, Community Insurance Company (“CIC”), denied coverage based on its classification of bilateral cochlear implantation as an “experimental” procedure. Dombroski sued CIC and its parent company, WellPoint, Inc. (“WellPoint”), for bad faith denial of coverage. WellPoint sought dismissal of Dombroski’s claims on the basis that her insurance contract was with CIC and therefore she lacked privity of contract with WellPoint. WellPoint further asserted that Dombroski could not pierce the corporate veil to hold WellPoint liable as the sole shareholder of CIC. The trial court agreed, but the Seventh District Court of Appeals reversed, holding that there were sufficient facts to proceed with piercing the corporate veil under the three-part test set forth in *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 617 N.E.2d 1075.

The *Belvedere* three-part test provides that the corporate form may be disregarded when: 1) control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will or existence of its own; 2) control over the corporation by those to be held liable is exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and 3) injury or unjust loss resulted to the plaintiff from such control and wrong.

The Ohio Supreme Court accepted jurisdiction to resolve a conflict in the appellate courts regarding the second prong of *Belvedere*'s three-part test for piercing the corporate veil. The second prong of *Belvedere* requires a plaintiff to demonstrate that the shareholders exercised control over the corporation to be pierced "in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity." Several courts of appeal, including the Seventh District Court of Appeals in *Dombroski*, construed this provision broadly to include "unjust or inequitable acts." In contrast, the Sixth District Court of Appeals adopted a narrow application of *Belvedere* which specifically required fraud or an illegal act before piercing the corporate veil.

The Ohio Supreme Court rejected the broad reading of *Belvedere*, noting that limited liability for shareholders remains the rule, whereas piercing the corporate veil remains the "rare exception." Although the Court recognized that a broader view of *Belvedere* would have the benefit of holding more individuals accountable for their actions, the pitfalls would be too great: "Were we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued." The Court also recognized that relaxing the requirements for piercing would negatively affect controlling shareholders in publicly traded companies.

The Court did, however, modify the second prong of the *Belvedere* test to allow for piercing the corporate veil when shareholders commit "egregious wrongs." Specifically, the Court cautiously expanded *Belvedere*'s second prong to include not only fraud and illegal acts but also "similarly unlawful acts."

Despite this expansion, the Court concluded that Dombroski's claim did not satisfy the second prong of the *Belvedere* test because an insurer bad faith claim, the Court held, is a "straightforward tort" and is not "the type of exceptional wrong that piercing is designed to remedy."

As a result, the Supreme Court reversed the Seventh District Court of Appeals. The Court expanded the definition of "fraud and illegal acts" to include "similarly unlawful acts," but it clearly rejected the majority appellate court view that "fraud and illegal acts" also includes "unjust or inequitable acts."

Justice Pfeifer was the only member of the Court who dissented. He wrote that the majority's modification of the *Belvedere* test "adds words to the test but no clarification." Justice Pfeifer noted that the *Belvedere* test was based on the Sixth Circuit decision in *Bucyrus-Erie Co. v. Gen. Prods. Corp.* (C.A.6, 1981), 643 F.2d 413. In *Bucyrus-Erie*, the Sixth Circuit specifically allowed for claims based on "other dishonest or unjust acts" and nothing in *Belvedere* was meant to restrict that view. While the majority believes that it expanded the second prong requirement of "fraud or an illegal act" by adding "or a similarly unlawful act," Justice Pfeifer questioned whether there is any notable distinction between an "illegal act" and an "unlawful act." As a result of the majority's holding, Justice Pfeifer argued that Ohio is now one of the most difficult jurisdictions for proving a case of piercing the corporate veil.

Please click the following link to access a copy of the Dombroski case: <http://www.sconet.state.oh.us/rod/docs/pdf/0/2008/2008-ohio-4827.pdf>

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General Interest

■ STOLI Update

On September 11, 2008, House Bill 404, a new law aimed at eliminating Stranger-Originated Life Insurance (STOLI) transactions took effect. A hybrid of the NAIC and NCOIL Models, the Ohio law includes both a prohibition on marketing and issuing STOLI and a five-year "waiting period" before settlement of policies with STOLI characteristics. To date, the Ohio Department of Insurance has not proposed any rules implementing this new law.

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■ ADA Amendments Broaden the Scope of Disability Coverage

The ADA Amendments Act of 2008 ("ADAAA") will become effective on January 1, 2009. The ADAAA expresses both Congress's intent that the Americans with Disabilities Act of 1990 ("ADA") was designed to provide a "national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage," and its opinion that federal courts had not interpreted the ADA broadly enough. As a result, insurance

companies have had little time to learn about the ADAAA and its significant impact.

The ADAAA made substantial changes related to the determination of whether an individual has a “disability,” including changes to the definition of “major life activities,” to the rules of construction regarding the definition of “disability” and to the “regarded as” disabled provisions.

The ADAAA added to the list of “major life activities” used to determine if an impairment is a disability, including: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communications and the operation of major bodily

functions, which were not previously included in the regulations.

The ADAAA rules of construction mandate that the definition of disability shall be construed broadly and to the maximum extent of the ADA’s purpose. For example, the Congressional findings state that the federal regulation that defines the term “substantially limits” as “significantly restricted” is too high a standard. The rules of construction also explain that an impairment that is episodic or in remission (*i.e.*, cancer, epilepsy, etc.) is a disability *if* it would substantially limit a major life activity when active.

Resurrecting Corporate America After the Failure of Governance

Commentary by John P. Beavers and Kevin M. Kinross

AIG, Bear Stearns, Fannie Mae, Freddie Mac, Lehman Brothers et al. are the result of a fundamental flaw in governance of corporate America: Failure to provide independent oversight of management in the governance of these organizations. Management failed to assess, and boards failed to understand, the enterprise risks to these organizations in the debt and investment decisions made by management.

Commentators are stating that the blame is at the top of these organizations – the board of directors, including this statement of Nell Minrow, the editor and chair of the Corporate Library, published by CNN:

“Failure this broad and deep takes a village, and regulators, lawyers, compensation consultants, auditors, executives, shareholders and the press all played a part. But the people who are most responsible for the massive meltdowns of these institutions are the board of directors.”

Regulators are considering more drastic measures, including Ben S. Bernanke, Chairman of the Federal Reserve, from a speech at the UC Berkeley/UCLA Symposium: The Mortgage Meltdown, the Economy and Public Policy, Berkeley, California, on October 31, 2008, as offered with respect to government sponsored enterprises, consideration of “a public utility model” overseen by a public board whose members are approved by a regulator that would have regulatory authority beyond simply monitoring

safety and soundness but also for establishing pricing and other rules consistent with a promised rate of return to shareholders.

The likely reaction of the President, Congress, investors and consumers, after this November’s election, will be to provide oversight though government regulation. To avert such regulation, corporate America needs to act quickly in correcting its governance.

The National Association of Corporate Directors has taken a first step to avert such regulations by adopting and publishing on October 16, 2008, Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies (the “Key Agreed Principles”). The intent of the Key Agreed Principles is to focus board attention to the “oversight of risk, corporate strategy, compensation and transparency.”

Because the reach of the President and Congress will be publicly traded companies and tax-exempt organizations, which will likely be followed by regulators of regulated industries such as insurance and banks, tax-exempt organizations and regulated companies should similarly try to avert regulations by adopting and following similar key principles.

The best defenses against corporate mismanagement remain (1) independent oversight of management by independent directors; (2) with counsel of independent advisors; and (3) holding management accountable for the information

Also, the new determination of whether an impairment substantially limits a major life activity is made without regard to effective mitigating measures such as medication, prosthetics or hearing aids. However, ordinary eyeglasses and contact lenses *can* still be considered in that determination.

The ADAAA further provides that an individual can meet the requirement of being “regarded as” disabled *regardless* of whether an actual or perceived impairment limits or is perceived to limit a major life activity.

The ADAAA will allow an employee to more easily establish an ADA disability. As a result, insurance companies should experience more accommodation

requests from employees. More ADA lawsuits will turn on whether the insurance company complied with its obligations to engage in the interactive process or provide a reasonable accommodation rather than whether the employee has a disability. This will, most likely, result in more trials and higher litigation expenses.

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■ Employment Legislation Watch

President-elect Obama co-sponsored several significant pieces of legislation pending in Congress that are at the top of organized labor’s domestic legislative agenda. If the following legislation is

provided for reason that independent directors know more about, and are closer to, the business of their organizations and can take corrective action more quickly and knowledgeably than any government or other regulatory official or agency.

Although a director has a state-law right of reliance on management, a director is only entitled to rely on a member of management for matters that the director reasonably believes management is reliable and competent. Determining reliability and competence requires a director to ask questions. Not just once, but repeatedly and of different constituencies of management, sometimes separately with each in executive session. Management must be held accountable for their answers because without reliable and complete information, governance will fail. This requires a director to have sufficient understanding of the matter, or access to counsel of an advisor having sufficient understanding of the matter, to be able to ask the appropriate questions.

The state-law duty of care generally requires each director to have either directly, or with counsel of someone who has, such a sufficient understanding to be able to ask appropriate questions to determine the reliability and competence of management or others for the matters being considered by the board. The state-law duty of care likely requires the board, as a whole, to assure that each director either directly has such knowledge or has access to such counsel.

This is reflected in the Key Agreed Principles: “an effective board [should be] far more than the sum of its parts: it should bring together a variety of skill sets, experiences and viewpoints in an environment” by adding members, or seeking counsel, of “persons with specialized knowledge of rel-

evant businesses and industries and the business environment in which the company functions who can provide insight regarding strategy and risk.” See “III. Director Competency & Commitment” of the Key Agreed Principles.

Accordingly, the solution is for boards to act before the government and other regulators can react. The following are steps that a board should consider taking:

Board Education. Boards should begin with educating their members to be better directors, to become more familiar with the risks to the enterprise of their organizations, to be more aware of the strengths and weaknesses of the members of management and to learn how to hold management accountable for information being provided. This is reflected in the Key Agreed Principles: “A board’s effectiveness depends on the competency and commitment of its individual members, their understanding of the role of a fiduciary and their ability to work together as a group [including] an understanding of the fiduciary role and the basic principles that position directors to fulfill their responsibilities of care, loyalty and good faith.” See “III. Director Competency & Commitment” of the Key Agreed Principles.

Assessing Current Board Experience. Boards should assess and create a database inventorying the experience, skills and expertise of their current members. That database expertise should be reviewed periodically to evaluate whether the correct mix is represented by the current members of the board.

Adding Directors with Needed Experience, Skills and Expertise. In September 2000, Dana Mead, former chairperson of Tenneco, advocated an “expertised” board, which he first described in a

reintroduced (which is almost certain to occur) and the new Congress passes the various pieces of legislation in their current form, these bills would drastically change and significantly ease the process for the unionization of employees, expand the scope of employment discrimination claims and increase the amounts of damages recoverable from employers. The following legislation should be carefully tracked:

Employee Free Choice Act. Commonly referred to as the “card check” legislation, the EFCA contains a number of provisions that would significantly alter the traditional union-management collective bargaining processes. As currently proposed,

if a union presents signed authorization cards from more than 50% of the employees in the sought-after bargaining unit, the National Labor Relations Board would certify the union as the employees’ exclusive bargaining representation, foreclosing the employees’ long-held right to vote in a secret-ballot election to determine union representation. The parties would be required to commence bargaining within 10 days of the union’s request to begin negotiations. If, after 90 days of bargaining, an agreement is not reached, then either party could request mediation. If, 30 days after the mediation request, no agreement is reached, then an arbitration panel would determine the unresolved terms of the collective bargaining

conference held at the Fisher College of Business at The Ohio State University on “Building Better Boards.” An “expertised board” is composed by persons each having particular experience, skills or expertise needed for the board to have as a whole all of the experience, skills and expertise necessary to achieve its future objectives.”

Access to Independent Advisors Who Can Provide Necessary Counsel. Because it takes time to constitute a board composed of the appropriate mix of experience, skills and expertise, a board should require that it be given access to independent advisors having the experience, skills and expertise to counsel the board. This requires a board to first have access to a database of such advisors and then to have the resources to retain those advisors to counsel the board. This is important because it is likely that boards will be judged by investors, regulators and eventually courts by the least experienced, least skilled or least knowledgeable of its members unless such members have access to such counsel.

Coaching on Asking Questions. Boards should periodically receive coaching or training on how to ask questions, including: the purposes for which they should be asking questions; the extent to which they should ask questions; when they should accept answers and stop asking questions; and when they need to explore more deeply. This should be considered on a matter-by-matter basis for issues a director identifies that may need the help of an independent advisor. It also should be considered periodically as part of the board’s continuing education process.

Authorize a Standing Committee to Oversee Enterprise Risks. Boards should delegate to a standing committee, or constitute a new standing committee

with authority on behalf of the board to investigate, assess and take appropriate action with respect to risks of the organization’s enterprise. To facilitate the exercise of this authority, the boards should require the organizations management, including each of its executive officers, to report such risks to this oversight committee and to meet at least annually with the committee in executive session. For publicly held companies, this authority is to be assumed by the audit committee unless another committee has been designated. However, another committee may be more appropriate given the other responsibilities of most audit committees.

What’s Next? Regardless of the cause, the meltdown of the large financial institutions will directly impact how directors of all organizations must think, evaluate and make decisions.

Whether viewed as an overdue wake-up call or an unfair impugning of director’s integrity, this energizes the debate over director liability and will refocus attention on the duty of care and its required oversight responsibility to expose any disregard of apparent risk.

Directors need to become risk smarter. They need to broaden their view of risk and not limit discussions or analysis only to specific areas of risk. This will require directors to evaluate the role of the boards overseeing that there is adequate risk assessment and make changes where appropriate. To resurrect corporate America directors must realize not only that they remain the first and best line of defense against mismanagement and fraud, but also that they can be the best line of offense for good management and best practices.

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agreement (wages, hours, terms and conditions of employment) that would be binding on the parties for two years, unless the parties agree otherwise. Employers would be subject to triple back pay for certain types of unlawful discharges and civil penalties up to \$20,000 for each willful or repeated unfair labor practice.

Ledbetter Fair Pay Act. Under current law, an employee is required to timely commence a pay discrimination suit within 300 days of the discriminatory decision that resulted in the alleged discriminatory pay. *Ledbetter v. Goodyear Tire & Rubber Co.* This bill would legislatively reverse the 2007 United States Supreme Court decision, and indefinitely extend the time limit for employees to file claims of pay discrimination based on race, color, sex, age, religion, national origin or disability. As proposed, the LFPA provides that each paycheck that is affected by a past discriminatory decision would constitute a new unlawful practice, thereby giving rise to a new cause of action each time the employee receives a paycheck. As a result, an employee could file a pay discrimination claim within 300 days after receipt of a paycheck even though the claim may be based on an alleged discriminatory decision made many years before.

Paycheck Fairness Act. This bill would amend the Equal Pay Act to prohibit paying less to an employee of one sex for the performance of substantially similar work (*i.e.*, comparable worth) and would eliminate or substantially curtail many defenses to equal pay

claims currently available to employers. The legislation also provides for unlimited compensatory and punitive damages, would facilitate class action claims (allowing challenges, for example, to pay to an entire class of jobs) and would prohibit employer policies regarding confidentiality of compensation information or restricting employees' discussion of their wages or the wages of another employee.

RESPECT Act. This bill would amend the National Labor Relation Act's longstanding definition of "supervisor," thereby making more individuals eligible for union representation. Under current law, a "supervisor" is a part of management and is not an "employee" entitled to rights under the National Labor Relations Act. A "supervisor" is defined as an employee who acts in the interest of the employer and uses independent judgment to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively recommend such actions." This bill would delete the terms "assign" and "responsibly direct" from the definition of supervisor. In addition, a supervisor would be required to spend a majority of his/her work time on the performance of supervisory duties. The affect of these changes would be the removal of many first line and lower level supervisors who are currently a part of management from the definition of "supervisor" and thereby make them eligible for organization by a union.

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