



# Report

ATLANTIC LEGAL FOUNDATION

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APRIL 1988

## Mid-Atlantic Legal Foundation Changes Name to Atlantic Legal Foundation

At the Philadelphia meeting on March 4, the Board of Directors of Mid-Atlantic Legal Foundation approved a change of name to Atlantic Legal Foundation. The staff had urged a change for several reasons.

First, it was felt that the former name was geographically too restrictive. The Foundation is concerned with issues which are broad in nature, and such issues do not confine themselves to the boundaries of six states which the term "Mid-Atlantic" encompassed. Moreover, as a number of our corporate supporters had moved or were moving into states not within the Mid-Atlantic region, it was felt that the former name rather artificially limited our fund raising activities and membership.

Second, the former name was somewhat confusing because Mid-Atlantic does not define a specific group of states as, for example, New England does. Indeed, some members

of the Board recalled from their elementary school geography that New York was included in the Northeast and not in the Mid-Atlantic region. Although it may be argued that Atlantic also does not precisely define a group of states, it tends to be more inclusive in nature rather than exclusive.

Finally, the Board thought that we could do worse than emulate the very successful Pacific Legal Foundation. Because the Board wanted to maintain a geographical identity, it was logical to change the name to Atlantic Legal Foundation.

The name change will not affect our main focus, which will remain those states that we have always emphasized. The name change merely signals a desire to expand our base of operations, both as to issues and membership, and to eliminate past confusion.

## Foundation to Appear as Counsel in Support of New Jersey Tort Reform Statute

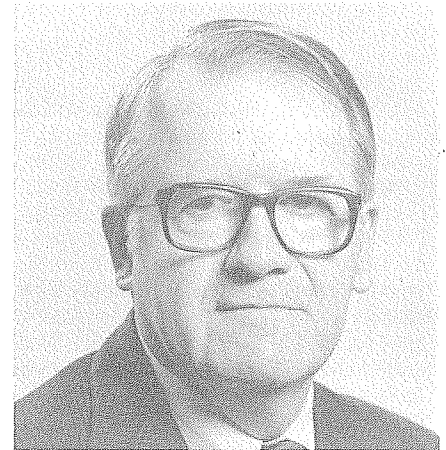
The Foundation has been asked by several corporations which do business in New Jersey or sell products in New Jersey but which are based in other states to represent them as intervenors or as friends of the court in support of the New Jersey tort reform statute in a case brought by the New Jersey chapter of the Association of Trial Lawyers (ATLA) challenging the constitutionality of Chapter 197 of the Laws of 1987 of New Jersey. The law established procedural and substantive limits on recoveries by plaintiffs in products liability actions brought in New Jersey. The statute provides that the plaintiff must show that the product was not reasonably fit, suitable or safe for its intended use because (a) it deviated from design or performance specifications, or (b) failed to contain adequate warnings or instructions or (c) was designed defectively. The statute also provides that liability will not be found if (a) at the time the product left the control of the manufacturer there was no feasible alternative design that would have prevented harm without substantially impairing the intended function of the product, (b) the characteristics of the product were reasonably known

to the ordinary user and the harm was caused by an unsafe characteristic that is inherent in the product which would be recognized by the ordinary person and (c) harm was caused by an unavoidably unsafe aspect of the product which was adequately disclosed by way of warning or instruction. The statute creates presumptions that FDA approval and FDA approved warnings will bring a product under the protection of the statute.

In addition, the statute provides that compensatory damages must be determined before punitive damages are considered, and evidence bearing on punitive damages will not be admissible in the trial on compensatory damages. Punitive damages are to be determined in a separate hearing. The substantive standards for recovery of punitive damages are also set forth, and the trier of fact in the punitive damages case must consider the alleged tortfeasor's awareness of the likelihood of serious harm or reckless disregard for the likelihood that serious harm would result. Punitive damages may not be awarded if the FDA has approved the

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## President's Message



Douglas Foster

The conservative public policy legal movement is in a somewhat anomalous situation. On the one hand, it is more active than ever — Mid-Atlantic Legal Foundation, for example, is becoming involved in more issues and being contacted about more issues than ever before. The movement is more successful than ever — *Galda, Wygant, Nollan* — to mention three highly successful, important cases litigated by Mid-Atlantic, Mountain States and Pacific Legal Foundations, respectively.

On the other hand, the conservative legal foundations are struggling more financially. As stated in an article in the March 21, 1988 edition of *Insight*, "conservative public interest law firms were a nationwide fad during ... the mid-to-late 1970s and early 1980s" but they "have failed to flourish." Although this may be true if measured by fund raising, it is not so if measured by the number and type of cases being litigated by the foundations or by their degree of success.

The fall-off in fund raising at the same time litigation is increasing points up this anomaly. A number of corporations, foundations and other organizations that would normally support the conservative public policy movement have apparently decided that the conservative movement is in good shape because Ronald Reagan is in the White House. What they have lost sight of, however, is that legislatures — federal, state and city — are generally liberal and are enacting a steady

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## C. L. Clemente Joins Foundation Board



C.L. Clemente

At its recent meeting in Philadelphia the Foundation elected C. L. Clemente, Vice President - General Counsel and Secretary of the Board of Directors of Pfizer Inc., to its Board of Directors. Mr. Clemente has been a member of the Pfizer legal division since 1964. In 1974 he was appointed Vice President -General Counsel of Pfizer International Inc. and became a member of its Board of Directors. Mr. Clemente is currently a member of the Board of Directors of the Pfizer International Bank. Mr. Clemente earned his A.B. degree from Holy Cross College in 1958 and his LL.B. in 1961 from Columbia Law School.

## Carroll Case Moves Toward Trial

*Carroll, et al. v. Blinken, et al.*, the case in which the Foundation represents present and former students at three campuses of the State University of New York (SUNY) who object to the payment of a portion of the student activity fee, required of each undergraduate student who wishes to enroll, to New York Public Interest Research Group (NYPIRG) took two steps closer to trial in March, 1988, when two of the additional plaintiffs were deposed.

The deposition of the third and last additional plaintiff is scheduled for April 15, 1988. Once the last deposition is completed, the parties should be in a position to file their respective pre-trial orders, after which the court will schedule the non-jury trial.

The plaintiffs in the *Carroll* case assert that the use of a portion of the mandatory student activity fee to support NYPIRG violates their First Amendment and Fourteenth Amendment free speech rights because the payment of any part of their student activity fee to NYPIRG supports a political and ideological organization which advocates positions, policies and legislation the plaintiff students do not share. NYPIRG is one of many "public interest" groups inspired by Ralph Nader and his colleagues. While PIRGs usually characterize themselves as "good government" organizations, they often take stridently liberal positions on a broad range of political issues and carry out lobbying activities in state and local legislative

bodies. The national PIRG organization conducts lobbying activities in Congress.

NYPIRG is no exception, and in fact has registered with the New York State Temporary Commission on Lobbying as a lobbying organization. NYPIRG has taken positions on such matters as toxic waste, toxic tort legislation, recycling of garbage, South African divestment, nuclear disarmament, etc. The student plaintiffs believe that whatever their views are on any particular issue, they should not be compelled to finance NYPIRG's activities in the political arena. NYPIRG and the SUNY administration defendants argue that NYPIRG's campus activities confer substantial educational benefits on students and that the student body at each campus votes, usually every two years, in a referendum on whether to fund NYPIRG out of the proceeds of the student activity fee. Plaintiffs' response is that the educational benefits, if any, are marginal and could be achieved without mandatory funding, and that a majority vote of students cannot abridge plaintiffs' constitutional rights.

## Board Authorizes Re-Examination of Galda

At the meeting of the Foundation's Board of Directors in March, the staff of the Foundation was authorized to examine whether the implementation of the settlement in *Galda v. Rutgers* complies with constitutional mandates.

*Galda* was the case in which students at Rutgers — The State University of New Jersey — successfully challenged the use of a portion of the mandatory student activity fee to support New Jersey PIRG (NJPIRG), a sister organization of NYPIRG, and also a Ralph Nader-inspired political activist group. In *Galda* the United States Court of Appeals held that NJPIRG was a "political" organization, and that the educational aspects of its activities were not sufficient to insulate the use of compulsory fees from constitutional challenge. As a result of that decision, Rutgers was to have changed its student activity fee mechanism. Staff of the Foundation has been informed that Rutgers now uses a "negative check off" system, which requires students to pay the student activity fee each semester unless they indicate that they do not wish part of their payment to go to NJPIRG.

Staff will undertake an investigation as to the precise funding mechanism used at Rutgers and legal research to determine if a negative check off system adequately protects students' First Amendment rights and complies with the intent of the Third Circuit's mandate.

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## Foundation to Challenge State Minority Set-Asides

The Board, at its March meeting in Philadelphia, authorized the Foundation to file an amicus brief in a case on appeal to the Appellate Division, Third Department of the New York Supreme Court. In *Rex Paving v. White*, the plaintiff, a paving contractor, is challenging the preferences given to minority and woman-owned businesses that bid on state contracts. The thrust of the complaint is that the minority and woman-owned business preferences are the creature of state executive branch officials, and have not been authorized by appropriate legislation. The plaintiff is also challenging the constitutionality of the set-aside programs adopted by the Transportation Department and the state Office of General Services.

The New York State Supreme Court, Albany County, granted summary judgment to plaintiff on the claim that the defendants did not follow the State Administration Procedure Act in adopting the program. The State has appealed, and plaintiff has cross-appealed from the lower court's failure to address the underlying constitutional question. This latter issue is important because the governor has introduced legislation that would, if passed and found to be constitutional, give solid ground to the set-aside program.

The Foundation is seeking leave to file an amicus brief in support of Rex Paving's position.

# Four Outstanding Lawyers Join Legal Advisory Council

Joining the Foundation's Legal Advisory Council are Victor M. Earle, III, R. Kent Greenawalt, Thomas D. Kent and Paul C. Rooney, Jr. Victor Earle is a member of the New York City firm of Cahill, Gordon and Reindel. Previously he was General Counsel of Peat Marwick and Peat Marwick International where he achieved an international reputation in the area of accountant's professional liability. He received his A.B. from Williams College and his L.L.B. from Columbia Law School. Following graduation from law school he clerked for Judge Leonard Moore of the U.S. Court of Appeals for the Second Circuit.

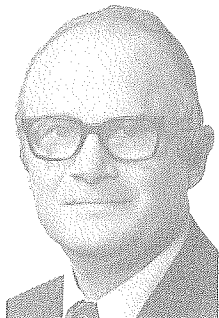
Kent Greenawalt is Cardozo Professor of Jurisprudence at Columbia Law School where he teaches Jurisprudence, Constitutional Law and Criminal Law and Procedure. He has been a member of the Columbia Law School faculty since 1965. Professor Greenawalt received his A.B. from Swarthmore College in 1958 where he was a member of Phi Beta Kappa and co-captain of the basketball team. Following his graduation, he spent two years at Oxford University as a Keasbey Scholar at New College. He then matriculated at Columbia Law School from which he graduated in 1963 as



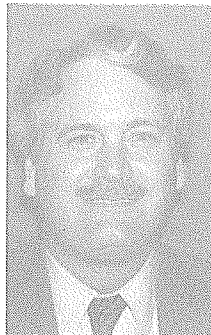
Victor M. Earle, III



R. Kent Greenawalt



Thomas D. Kent



Paul C. Rooney, Jr.

Editor-in-Chief of the Law Review. After graduating from law school, Professor Greenawalt was a law clerk to Justice John M. Harlan of the U.S. Supreme Court. Professor Greenawalt was Deputy Solicitor General of the U.S. in 1971-72. He has been a Visiting Professor at Princeton University and Northwestern and Stanford Law Schools, among others. He has written and lectured extensively in many areas of jurisprudence and constitutional law.

Thomas Kent is Staff Vice President and Associate General Counsel of Allied-Signal Inc. Mr. Kent has been a member of Allied-Signal's legal department since 1964. Previously, he was an associate in the litigation department of Cravath, Swaine and Moore. He is a graduate of Williams College and Columbia Law School. He served as a councilman for the city of Summit, New Jersey. He has published extensively, particularly in the field of toxic waste.

Paul Rooney is a member of the New York City firm of White and Case. Mr. Rooney is a graduate of Harvard College and Harvard Law School. He is an expert in the field of tax law and serves on several New York State and American Bar Association committees pertaining to that field.

## Divestment Case Argued Before Maryland Court of Appeals

With the permission of the Maryland Court of Appeals, the Foundation orally argued the Baltimore divestment case before the Court on December 3, 1987. The Foundation argued both the merits and the issue of intervention. The Foundation stressed that it did not seek a remand for a new trial but only sought party status so that the beneficiaries represented by the Foundation could be heard by the U.S. Supreme Court, if it became necessary to take an appeal.

The Maryland Court of Appeals was most interested in the case, allowing the parties approximately two hours for oral argument. In asking the Court of Appeals to reverse the lower court and to find the Baltimore divestment ordinance unconstitutional, the Foundation stressed that the ordinance violated the Federal Government's sovereign power to conduct foreign affairs. On the issue of intervention the Foundation stressed that the trustees may well not pursue the case beyond the Court of Appeals and that the beneficiaries, who have a financial stake in the matter, should be made parties to preserve their right to appeal to the U.S. Supreme Court.

We are eagerly awaiting the decision of the Maryland Court of Appeals.

## Foundation to Challenge Pennsylvania Tax on 401(k) Benefits

Pennsylvania, apparently alone among the 50 states, treats certain employee benefits, known as 401(k) plan contributions, as regular income for state income tax purposes.

Many corporations have instituted employee savings plans pursuant to section 401(k) of the Internal Revenue Code. Commonly, employees and employers contribute to the 401(k) plan. Some plans provide for employer contributions which are in addition to the employee's normal compensation, and some also permit the employee to elect to have the employer make contributions which are deducted from the employee's normal compensation (these latter contributions are known as "elective 401(k) deferrals"). Additionally, some plans provide for employer contributions out of company profits, usually in lieu of a bonus or other incentive compensation. Under section 401(k), amounts electively deferred by the employee are treated for federal income tax purposes as an employer contribution to a qualified plan; the employer gets a tax deduction, the contribution earns income tax-free while in trust, and the employee is not taxed on any amount until amounts are actually distributed to him. Under Rev. Ruling 63-180, the Internal Revenue Service took the position that there

is no current taxation on elective deferrals by participants in a qualified 401(k) plan.

Pennsylvania, however, treats elective deferrals as income under Sections 7301 and 7303(a) of Title 72 of the Pennsylvania statutes, which deal with state personal income tax and the definition of "compensation". Pennsylvania tax regulations, sections 101.6 and 101.7, as well as the instructions accompanying Pennsylvania personal income tax reporting forms indicate that employee contributions to old age or retirement benefit plans are not excludable, while employer contributions need not be reported as income until actually distributed or made available to the employee.

The issue that staff, with the assistance of members of the Legal Advisory Council, is exploring is whether state taxation of employee contributions to 401(k) plans is barred by the Supremacy Clause of the Constitution, on the theory that ERISA is a comprehensive federal regulation of retirement plans, and that state tax treatment of such plans which is inconsistent with federal tax treatment of such plans is impermissible. The issue is not clear-cut, and there are arguments on both sides of the question.

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# Application of "Wetlands" Regulations Hurts Farmers

Northwest Pennsylvania Landowners Association invited Mid-Atlantic to attend its meeting on March 24 in Waterford, Pennsylvania, at which the enforcement of the Clean Water Act (the "Act") and particularly the regulations pertaining to wetlands was discussed. The president of the Foundation attended the meeting which was co-chaired by the president of the Landowners Association and Congressman Tom Ridge of the congressional district in or about Erie and Waterford, Pennsylvania.

The meeting illustrated how farmers of this country have been adversely impacted by the Act. The Act was passed "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." This is a salutary objective with which no one takes issue. However, the Act has been applied much more broadly, creating problems for farmers and individual landowners that stymie their efforts to develop their land more productively.

Section 404 of the Act (33USC Section 1344) and its implementing regulations represent a major source of trouble. That section essentially requires landowners to obtain permits to dredge or fill their land if such action might affect the waters of the United States. Although there is an exemption for "normal farming," this exemption has been so narrowly construed that it is of little use.

The waters of the United States are defined to include "wetlands" which, in turn, are very broadly defined to include any saturated ground that has hydric soil. As a practical result any farmer who has a stream, pond or any standing water on his property must obtain a permit to dredge, fill, build or do anything with respect to that property. In Pennsylvania, where there is a state analog

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## Foundation to Challenge Tax Benefits

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If staff and the members of the Legal Advisory Council conclude that the preemption argument is valid, staff will take steps to commence an action, on behalf of one or more Pennsylvania residents who are employed by domestic and/or out of state companies, seeking to have the Pennsylvania taxation of 401(k) plan deferrals declared unconstitutional, and perhaps seeking refunds of amounts paid due to the inclusion of such contributions as taxable income.

to the Clean Water Act, the approval of seven different agencies is needed to obtain a permit.

Failure to obtain a permit means the farmer cannot improve his land. The farmer is not compensated for this "taking" of his property. One farmer at the meeting said that he had lost \$20,000 of potatoes because beavers had dammed up water on his property which flooded the potatoes but he could do nothing about them because he would first need a permit and even if he could have gotten one, it would have been too late to avert the damage. Another farmer could not build a pond on his property for the enjoyment of his family, again because of the need to get a permit.

The principal culprit seems to be the broad definition of wetlands. It should not be so broadly defined as to prohibit small farmers from enjoying their property, improving it or making it productive.

The Foundation will continue to monitor this problem and will continue to be in touch with the Western Pennsylvania Landowners Association.

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## President's Message

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stream of legislation, much of which is burdensome and needs to be challenged.

It is conservative public policy legal foundations, like Mid-Atlantic, that are in the best position to mount such challenges. To do so they need financial support from those who believe in the principles of private enterprise, and who recognize that all is not right with the world just because we currently have a conservative in the White House. Indeed, with a presidential election only months away, the executive branch may not be as safe for conservative views as has been true for the past eight years.

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## Your Support is Needed

Please help us in representing the true public interest at all levels of the judicial and administrative processes. Atlantic Legal Foundation charges no fees for the services it renders. Your tax-deductible contribution will be used to help defend private rights, free enterprise and sound economic development.

To: Atlantic Legal Foundation/360 Lexington Ave./6th Floor, New York, NY 10017

Yes, I support your defense of the traditional American values.

Enclosed is my tax-deductible contribution.

( ) Individual (\$25-\$100+) Name \_\_\_\_\_  
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## Foundation to Appear

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product or if FDA regulations establish the product as generally recognized to be safe and effective unless the manufacturer withheld information required to be submitted to the FDA.

The plaintiff alleges that these provisions violate the Constitutional prohibition of impairment of contracts, the equal protection clause of the Fourteenth Amendment, the "implicit" equal protection provisions of the New Jersey Constitution, the right to trial by jury guaranteed by the state constitution and the requirement of the state constitution that the state Supreme Court make rules governing practice and procedure in state courts.

Because the statute itself is being challenged, the New Jersey Attorney General will defend the constitutionality of the law. The New Jersey Business and Industry Association, representing companies based in New Jersey, plans to intervene or seek amicus status after certain procedural motions (challenging ATLA's standing) are made and decided.

The Foundation believes this is an important case, because industry has long sought reform of tort law to correct the pro-plaintiff trend in products liability cases. Having urged legislatures to adopt tort reform measures, we feel it is critical for business now to assist in efforts to uphold the validity of such reform legislation.

## Harrisburg Office Opened

On December 1, 1987, the Foundation closed its Philadelphia office as part of its belt-tightening program. It has recently opened a small office in Harrisburg which is staffed by its Administrative Vice President Rosemary Heckard. The office space has been generously donated to us by Commonwealth Foundation for Public Policy Alternatives, a conservative think tank modeled after the Heritage Foundation, for the state of Pennsylvania. Rosemary continues to oversee the Foundation's books and records and to discharge her many other responsibilities.