NEW JERSEY DEFENSE

A Publication by the New Jersey Defense Association | Volume 30 Issue 3 | Spring 2015

President's Message

Mario Delano, Esq.

So, today is the first day of Spring and I am in Bradley Beach, NJ looking at bright sunshine over a sandy beach and surfers on the breaking waves. I am suddenly brought back down to earth when my wife, sitting across the table, comments on the falling snow outside. I am intentionally sitting in one of my favorite lunch spots, with my back to the door so I can look at the surfing mural on the wall, rather than look at the depressing weather outside….more snow. They tell us "Spring is in the air," so let's go with that.

Things have been moving quickly and we have more exciting events planned for the upcoming months. First, in our continuing efforts to "Go Green", our editor, Greg McGroarty is working on having the last paper recipients receive our publication electronically. I would like to thank Natalie Watson, our diversity chairwoman, for her participation in the New Jersey State Bar Association's Diversity Summit. I would also like to thank the State Bar Association for presenting this important program and for inviting the NJDA to be a co-sponsor. By the time you are reading this, our Young Lawyers Seminar will have been held. We plan to have this seminar, providing the basics for newly admitted attorneys, as a yearly event. We are co-sponsoring a Municipal Court seminar with the Hudson County Young Lawyers and the Hispanic Bar Association of NJ Young Lawyers on April 16, 2015 and finally, our ADR committee has a breakfast seminar on April 28, 2015 at The Mansion in Voorhees, NJ. We hope to see all our South Jersey members there.

On January 20, 2015 Natalie Mantell represented us in front of the New Jersey Supreme Court for the hearing in Lippman v Ethicon, Inc. Natalie prepared the Amicus brief on behalf of the NJDA and wrote an article on the case in our Summer 2014 issue.

Our annual convention will be held at the Omni Bedford Springs Resort and Spa in Bedford Springs, PA from June 25 through 28. We will be presenting CLE accredited seminars covering Employment Law, Environmental Law, Products Liability, Workers' Compensation, Appellate Practice, Ethics and our annual Civil Case Law Update. In addition to the amenities already offered at the resort, for a small fee, our members can experience a private cooking demonstration given by the Omni's award-winning culinary team on Friday June 26. Although the convention begins with the 6PM welcome reception on June 25, getting there a day earlier to take advantage of all there is to do at the resort isn't a bad idea. Sign up NOW!

In closing I am taking another look outside my window where the bad weather continues and I think about the 10 or so years in a row that I have seen the Trans-Siberian Orchestra in concert. Echoing in my head is a line from their song What Is Christmas?, "Snow, I don't even like the sound of it." On March 20, 2015, neither do I….

Celebrating Our 30th Year of Publication

In This Issue

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INTERMEDIATE SUCCESSOR LIABILITY IN NEW JERSEY: WHO IS LIABLE?

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Intermediate Successor Liability

As noted in our previous article, the New Jersey Supreme Court in Ramirez v. Armsted Industries, Inc., 86 N.J. 332 (1981), reevaluated the traditional approach to successor liability and set forth the "Product Line Exception." Daniel R. Kuszmerski and Jason R. Gosnell, *Successor Liability in New Jersey: Am I Buying a Lawsuit?* NJDA Fall 2014 at 3. On the same day it decided Ramirez, the Court also decided Nieves v. Bruno Sherman Corp., 86 N.J. 361 (1981). In Nieves, the question before the Court was whether the Product Line Exception should "be extended to impose liability on an intermediate successor corporation -- one that acquired all the business assets from the original manufacturer and thereafter transferred those assets to its successor and discontinued the offending product line, all several years before plaintiff's accident occurred." Id. at 364. The Court ultimately held, "that the Ramirez rationale is not necessarily so limited as to visit liability upon only the current, viable manufacturer of the product line. In certain situations both the current successor corporation and the intermediate manufacturer may be responsible under Ramirez." Id. at 365.

In Nieves, plaintiff, Luis A. Nieves, Jr., suffered a severe injury to his right arm when it was crushed in a die-cutting power press manufactured by T.W. & C.B. Sheridan Company ("Old Sheridan"). Prior to the injury, Old Sheridan sold its entire manufacturing business, good will, trade name and substantially all other assets to Harris Intertype Corporation ("Harris"). Harris then formed a wholly owned subsidiary, T.W. & C.B. Sheridan Company ("New Sheridan") to receive the assets and continue the operation of Old Sheridan. Additionally, Harris executed a separate agreement with Old Sheridan whereby New Sheridan assumed certain debts, obligations and liabilities necessary for the uninterrupted continuation of the normal business operations. Ibid. Shortly, thereafter, Old Sheridan underwent dissolution. Approximately, four years after the sale, New Sheridan (the wholly owned subsidiary) and Harris (its parent corporation) merged and became the Sheridan Division of Harris-Intertype. Id. at 366.

Still prior to the injury, Harris sold to Bruno-Sherman ("Bruno") all the assets used in the manufacture of the Sheridan die-cutting press and related spare parts, including the good will, historical data, business records, customer correspondence, trade secrets, patents, trademarks, designs, patterns, jigs, fixtures, and equipment involved in the manufacturing operation. After the sale to Bruno, Harris changed its name, but remained in business and continued to manufacture a different product line. Ibid.

Thereafter, as indicated above, Nieves injured his right arm. He sought recovery from both Harris and Bruno as successor corporations to Old Sheridan, the original manufacturer of the machine that caused his injury. In separate motions for summary judgment heard and decided by two different trial judges, both Harris and Bruno argued that they were not successor corporations to Old Sheridan and therefore not liable for injuries caused by defects in products previously manufactured and distributed by the original manufacturer. Ibid.

Using the traditional McKee approach, one trial judge granted Bruno's summary judgment. The second trial judge however, relying on the Appellate Division's holding in Ramirez v. Armsted Industries, Inc., 171 N.J. Super. 261

(Continued on page 4)

(Continued from page 3)

(App. Div. 1979), denied Harris' motion. Both Harris and the plaintiff were granted leave to appeal to the Appellate Division from the denial of summary judgment to Harris and the grant of summary judgment to Bruno. The Supreme Court ordered direct certification of Harris' and the plaintiff's appeals to consider them with Ramirez. Nieves, supra, 86 N.J. at 367-68.

The Court dispensed with issues regarding Bruno's liability rather quickly. Using the analysis in Ramirez, the Court held that Bruno was a successor, even though there was an intermediary owner. To the Court, it was obvious that Bruno benefited from its use of the trade name and good will of Old Sheridan in manufacturing the same line of products and from holding itself out to customers and the public as substantially the same manufacturing enterprise. It also held that the imposition on Bruno of potential liability for injuries caused by defects in the Old Sheridan product line was justified as a fair and equitable burden necessarily attached to the substantial benefit that it enjoyed in the "deliberate albeit legitimate exploitation of [Old Sheridan's] established reputation as a going concern manufacturing a specific product line." Ray v. Alad Corp., 560 P.2d 3, 11, (1977) (the California case the Court in Ramirez relied upon when establishing the Product Line Exception). The Court further justified the imposition of liability on Bruno, because Bruno was able to gauge the risks of injury from defects in the Old Sheridan product line and to bear accident-avoidance costs. "As stated in Ramirez, because the successor corporation acquired the resources that had previously been available to the original manufacturer for meeting its responsibilities to persons injured by defects in its line of products, the successor remains in a better position than the user of the product to bear accident avoidance costs." Nieves, supra, 86 N.J. 369.

Alternatively, the issues regarding Harris' liability were unique as in both Ramirez and Ray, there was no intermediary company. Harris argued that once a company ceased manufacturing the product in question, and another viable company acquired the assets related to the manufacturing operation and continued to manufacturer the product line, there was no justification for imposing successor liability under Ramirez on the intermediate company. Indeed, Harris contended that there was an essential functional prerequisite missing for the imposition of successor liability on it, namely, the unavailability of a viable manufacturer of the product line against which plaintiff may seek recompense. Id. at 370.

The Court held however, that Harris misinterpreted Ramirez, and Ray, as the Court was not as concerned with the availability of one particular successor, as it was the unavailability of the original manufacturer. Nieves at 370-371. It opined:

> [t]he fact that there are two such successors to Old Sheridan in the present case does not alter the reality that Harris' acquisition of the business assets and manufacturing operation of Old Sheridan contributed to the destruction of the plaintiff's remedies against the original manufacturer. By acquiring the business assets of Old Sheridan and continuing the established operation of manufacturing and selling Sheridan die-cutting products, Harris became an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.
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> [Id. at 371. (internal citations omitted.)]

Ultimately the Court found, at least to an injured plaintiff, any successor company or companies, to a virtually destroyed manufacturer, following the Product Liability Exception, is an available source of restitution. In fact, the Court in Nieves emphasized that regardless of contractual provisions as to indemnity and liabilities between two successor companies, neither Ramirez nor the injured plaintiff is concerned how the liability will eventually

(Continued on page 5)

be borne or allocated to the successor companies. Contracting away liability will not prevent a plaintiff from seeking allocation from a successor company. Although, "between the two successor corporations the provisions of [an] indemnification agreement, if applicable to the particular fact situation presented, should be given [its] intended effect as a risk-spreading and cost-avoidance measure." Nieves, supra, at 372.

Allocation of Liability When There is No Applicable Indemnification Agreement

Neither Ramirez nor Nieves, address the issue of allocation of liability among successor corporations when there was no indemnity. This issue was instead decided by the Appellate Division in Class v. American Roller Die Corp., 308 N.J. Super. 47 (App. Div. 1998). In Class, the Appellate Division reversed the trial court's order directing an equal apportionment of damages among successor corporations and held alternatively that plaintiffs' damages should be apportioned based upon the benefits obtained by each successor. The court in Class found that because a strong policy reason for the imposition of successor liability is that the corporation "benefits from trading its product line on the name of the predecessor and takes advantage from its accumulated good will, business reputation and established customers," Ramirez, supra, 86 N.J. at 358, that apportioning damages based on the benefits received by each successor corporation was the appropriate method to allocate plaintiff's damages. Class, supra, 308 N.J. Super. at 53-55.

The Appellate Division further held that because the benefits received by any individual successor may be difficult to measure, a reasonable basis for allocation would be calculated based on the number of units produced by each successor corporation in relation to the total number of units produced by all successor corporations up to the date of plaintiff's accident. However, in cases like Class, where the number of units produced by each successor could not be determined, apportionment of damages should be calculated by the number of years each successor corporation manufactured the product line in relation to the total number of years the product line was produced by all successor corporations up to the date of plaintiff's accident. Either way, the difference in units or time between each successor, fairly reflects the difference in the benefits that each successor received from the good will they enjoyed in the continued operation of the original manufacturer's product line. Id. at 55-56.

Consequently, in the event the original manufacturer is virtually destroyed, the case law in New Jersey is clear, all successor corporations which continue the original manufacturer's product line shall be liable to the plaintiff. It is further evident that provided there are no contractual provisions between successors, liability will subsequently be apportioned pursuant to the amount of units produced and in the alternative according to the amount of years units are manufactured.

Therefore, as indicated in our previous article, purchase agreements clearly need to express who will assume any of the original manufacturer's liabilities. Moreover, as a result of Nieves, an additional indemnity clause within the purchase agreement should be included, as an injured party may collect an award from any successor corporation. Post-sale insurance which will cover the original manufacturer's product line should also be considered. Furthermore, a determination of whether to dissolve upon the sale of assets and thereafter reforming as a new company should also be discussed with your client.

*** Daniel Kuszmerski and Jason Gosnell are both associates of the law firm Hoagland, Longo, Moran, Dunst & Doukas, LLP in New Brunswick, NJ.** **This article is the second in a series which discusses many of the issues they have encountered concerning successor liability including: intermediary successors, viability of the original manufacturer, continuation of the product or a substantial similar product, and supplier successor liability.**

MENSING PREEMPTION OF FAILURE-TO-WARN CLAIMS AGAINST GENERIC DRUG MAKERS: CONGRESS GIVETH. WILL THE FDA TAKETH AWAY?

*Jodi Sydell Rosenzweig, Esq.**

Pliva, Inc. v. Mensing, ___ U.S. ___, 131 S. Ct. 2567 (2011), was a landmark victory for the generic pharmaceutical industry, but one that may be short-lived. Two years after the United States Supreme Court dismissed state-law failure-to-warn claims against generic drug makers under principles of conflict preemption, the Food and Drug Administration ("FDA") proposed to amend its regulations and enable generic manufacturers to make safety-related label revisions, overruling *Mensing*. FDA, *Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products*, Proposed Rule, 78 Fed Reg. 67985 (Nov. 13, 2013) ("Proposed Rule"). Generic drug makers, however, are ill-equipped to make safety-related labeling revisions,[1] and the Proposed Rule will lead to needless and inconsistent safety warnings, confusing healthcare professionals and patients and wreaking havoc on public health and safety.

Background. The Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301, *et seq.*, authorizes the FDA to approve new drug applications ("NDAs") for the marketing of brand-name or innovator drugs and abbreviated new drug applications ("ANDAs") for generic drugs. 21 U.S.C. §§ 355(a), (b) and (j). A pharmaceutical company seeking FDA approval to market a branded drug must prove the medicine is "safe and effective" and the "proposed label is accurate and adequate." *Mensing*, 131 S. Ct. at 2574 (citing 21 U.S.C. §§ 355(b)(1) and (d); *Wyeth v. Levine*, 555 U.S. 555, 567 (2009)). In contrast, pursuant to the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 – the Hatch-Waxman Act – generic manufacturers need only demonstrate equivalence to a reference listed drug ("RLD") (ordinarily its branded counterpart), including identical safety and efficacy warnings. *Mensing*, 131 S. Ct. at 2574 (citing 21 U.S.C. § 355(j); D. Beers, Generic and Innovator Drugs: A Guide to FDA Approval Requirements §§ 3.01, 3.03[A] (7th ed. 2008)).

As new information becomes available, pharmaceutical companies are responsible for updating their labeling. Under the changes-being-effected (CBE) process, innovator drug manufacturers may make safety-related labeling revisions without FDA pre-approval, but with simultaneous supplemental application to the FDA. *Mensing*, 131 S. Ct. at 2574 (citing 21 C.F.R. § 314.70(c)(6); *Levine*, 555 U.S. at 568). Brand-name drug manufacturers may also disseminate updated warning information via Dear Health Care Professional ("DHCP") or Dear Doctor letters ("DDLs"), 21 C.F.R. § 200.5, which also qualify as labeling, 21 U.S.C. § 321(m); 21 C.F.R. § 202.1(*l*)(2). Bound by their ongoing federal statutory "duty of 'sameness,'" generic drug makers may not make safety-related label revisions under the CBE process or communicate additional safety information via DDLs. *Mensing*, 131 S. Ct. at 2575-76. Accordingly, the *Mensing* Court held it impossible for generic drug manufacturers to comply with both their state-law duty to revise warning labels and their federal duty to maintain safety labeling that is identical to their branded counterparts.

FDA's Proposed Rule. On November 13, 2013, the FDA revisited its regulations with a proposal that enables ANDA holders (generic drug makers) to use the CBE process to update and distribute revised generic drug labeling – that temporarily differs from RLD labeling – which reflects newly-acquired safety information. 78

(Continued on page 7)

(Continued from page 6)

Fed. Reg. at 67986. When an ANDA holder revises labeling and files its CBE-0 supplement, it must send notice of the changes, together with a copy of supporting information, to the NDA holder for the RLD. 78 Fed. Reg. at 67986. The ANDA holder may disseminate DDLs to alert healthcare professionals to safety-related information, but in order to ensure that other ANDA holders, prescribers, and the public are aware of the CBE supplement while it is under FDA review, the FDA will post the label revisions to a "dedicated Web page." Id. at 67989, 67986. If the supplement is approved, or approved with revisions, other ANDA holders have thirty days to submit supplements with conforming labels, but only after FDA approval of the revised labeling for the RLD. Id. at 67986. If rejected, the ANDA holder must discontinue distribution of the product with the revised labeling and proceed with the previous version of the label. Id. at 67993.

Consequences of the Proposed Rule. Under the guise of "creat[ing] parity" among branded and generic drug makers in connection with safety-related label revisions, 78 Fed. Reg. at 67985, the FDA proposes to overrule *Mensing* and make the CBE process available to ANDA holders. Because ANDA holders do not have access to the innovator's clinical trial data or FDA files (much of which is confidential and protected proprietary information), they are ill-equipped to determine whether there is "reasonable evidence of a causal association" between a drug and a "clinically significant hazard" or risk, and any alleged "parity" is an illusion. *See* 78 Fed. Reg. at 67987 (identifying standard and citing 21 C.F.R. § 201.57(c)(6)). *See also* Comments to Proposed Rule by Kirkland & Ellis LLP, on behalf of Roxane Laboratories, Inc., *et al.*, at 19-21 (Mar. 13, 2014) ("Kirkland & Ellis Comments"); Mylan, Inc. at 6-10, 24-25 (Mar. 13, 2014) ("Mylan Comments"); GreenbergTraurig, on behalf of the U.S. Chamber Institute for Legal Reform, at 8 (Mar. 13, 2014) ("GreenbergTraurig Comments"); Actavis, Inc. at 4-6 (Mar. 13, 2014) ("Actavis Comments"); National Conference of State Legislature (NCSL) at 1 (Mar. 13, 2014) ("NCSL Comments"); Amneal Pharmaceuticals LLC at 6 (Mar. 11, 2014) ("Amneal Comments"); Alston & Bird LLP, on behalf of Lannett Company, Inc., *et al.*, at 4-7 (Feb. 24, 2014) ("Alston & Bird Comments"); Generic Pharmaceutical Association (GPhA) at 10 (Jan. 2014) ("GPhA Comments").

Notably, the FDA concedes that an ANDA holder, relying on "published literature" or "spontaneous adverse event reports" ("AERs"), "may not possess sufficient data to perform an adequate assessment of the potential new safety concern raised by the newly acquired information," and the procedure, therefore, enables ANDA holders to benefit from the knowledge and experience of the NDA holder. 78 Fed. Reg. at 679991. The FDA states:

> The NDA holder has full access to the data upon which the RLD was approved and, in most cases, has substantial knowledge about the postmarketing experience for the drug product. FDA's analysis of whether the labeling change proposed by an ANDA holder in a CBE-0 supplement should be approved (and required for inclusion in the labeling of all versions of the drug) would benefit from the views of the NDA holder for the listed drug that was the basis for the ANDA submission.
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> It should be emphasized that interpretation of postmarketing safety data is complex, involving analysis of postapproval clinical data, detailed review of adverse drug experience reports in the context of relevant clinical studies, estimates of background rates of the adverse event, and other relevant information. FDA

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(Continued from page 7)

> recognizes that decisions about how to address a safety concern often are a matter of judgment, about which reasonable persons with relevant expertise may disagree, and this may be reflected in different approaches to proposed labeling changes based on newly acquired safety information.

Id. However, without access to clinical studies and FDA/NDA holder files, generic manufacturers revising labels under the CBE process do not know whether the FDA already evaluated specific label revisions. 1/22/14 Rep. Upton Letter at 2; *see also* Actavis Comments at 6 (noting an ANDA holder's labeling change, which was previously addressed and rejected by the FDA and NDA holder, "with full benefit of clinical studies and access to a wide range of [AERs]," "does not benefit, and could in fact negatively impact, physicians' treatment decisions or the public health").

Moreover, AERs do not reflect a causal association between a drug and adverse event, 21 C.F.R. § 314.80(k), and, therefore, do not qualify as "reasonable evidence of a causal association" between a drug product and a "clinically significant hazard" or risk. *See*, *e.g.*, Kirkland & Ellis Comments at 20 (citations omitted). In addition, each ANDA holder merely receives a few of the many AERS and cannot evaluate the AERs "in the context of relevant clinical studies," 78 Fed. Reg. at 679991. *See*, *e.g.*, Mylan Comments at 7-9; Kirkland & Ellis Comments at 20-21; Alston & Bird Comments at 4-7; Amneal Comments at 6; Comments to Proposed Rule by Pfizer, Inc. at 2 (Mar. 13, 2014) ("Pfizer Comments"). In short, ANDA holders do not have sufficient supporting data to make labeling decisions under the CBE process.

"[I]t is the special, and different, regulation of generic drugs" – their development "without duplicating the clinical trials already performed on the equivalent brand-name drug," *Mensing*, 131 S. Ct. at 2574 – "that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public," *id.* at 2582. As noted by Representative Upton, "compliance with the Proposed Rule "could result in costly, duplicative testing." 1/22/14 Rep. Upton Letter at 2. The generic pharmaceutical industry would incur massive costs to monitor post-marketing safety data – the "complex … analysis of postapproval clinical data" and "detailed review of [AERs] in the context of relevant clinical studies" – and prevent litigation. *See*, *e.g.*, GreenbergTraurig Comments at 4, 6; Kirkland & Ellis Comments at 24; Actavis Comments at 9; NCSL Comments at 1; *see also* A. Brill, *FDA's Proposed Generic Drug labeling Rule: An Economic Assessment* at 6 (Feb. 5. 2014) ("Generic manufacturers would also bear the cost of duplicating brand companies' efforts to monitor for safety-related issues) <http://www.matrixglobaladvisors.com/GenericLabelingRule.pdf> ("Brill").[2]

Still, ANDA holders would not have access to confidential proprietary information and remain ill-equipped to make proper, scientifically-supported label revisions. Accordingly, under threat of potential civil tort liability, ANDA holders may exercise their FDA-given judgment, 78 Fed. Reg. at 67991, and implement label revisions based upon limited data. *Cf.* Kirkland & Ellis at 21 (noting generic manufacturers have limited ability to evaluate the scientific sufficiency of drug warnings, but may be forced to "act hastily" in light of "potentially

(Continued on page 9)

(Continued from page 8)

ruinous [civil tort] liability); GreenbergTraurig Comments at 8 (noting the Proposed Rule 'invites" or "forces" ANDA holders "to pursue label changes that are not scientifically justified"); Amneal Comments at 6 (discussing the FDA's concern that the threat of tort liability would induce unjustified label revisions).[3]

Even hasty label revisions will snowball: the NDA holder and other ANDA holders are likely to implement labeling changes, modified to include inconsistent language or information, all highlighted on the FDA's website. *See* 1/22/14 Rep. Upton Letter at 2 (noting "potentially dozens of drugs that are chemically and biologically identical might … bear different safety information, confusing patients and prescribers alike"). Unjustified and inconsistent label revisions, as well as exaggeration of risks and over-warning, will confuse healthcare professionals, pharmacists and consumers; have a detrimental impact on behavior and the value and availability of generic drugs; and wreak havoc on consumer health and safety. Examples are as follows:

- Physicians may be unable to perform proper risk-benefit analyses, make informed prescribing decisions, and properly educate their patients about potential risks and side effects, compromising patient health and safety.
- Physicians may stop reading safety updates and stop prescribing needed medications.
- Patients may stop following prescribed medication regimens.
- Physicians and patients may assume generic and branded drugs are no longer (or never were) equivalent, leading to a loss of confidence in generic drugs and discouraging generic substitution in favor of innovator drugs.
- Physicians and patients may assume generic drugs are no longer (or never were) interchangeable, leading to a loss of confidence in generic drugs and discouraging generic substitution in favor of innovator drugs.
- Although physicians cannot control generic drug selections, they may recommend specific generic drugs, challenging patients to find pharmacies that stock a specific manufacturer's drug products. Alternatively, physicians may attempt to coordinate generic drug selections with pharmacists.
- Pharmacies that distribute their own patient package inserts may be required to prepare new and different patient information sheets for each generic version of a branded drug product and revise the same with each labeling revision.
- The time required by the FDA to evaluate CBE-0 supplements may cause healthcare professionals and consumers to lose confidence in the pharmaceutical industry, particularly when the FDA fails to approve revisions proposed by multiple ANDA holders.

Mylan Comments at 9 , 16-17, 19-22; GreenbergTraurig Comments at 5, 8; Apotex Comments at 3-4; Actavis Comments at 6-8; Alston & Bird Comments at 5, 8; Kirkland & Ellis Comments at 23-24; Comments to Proposed Rule by the Pharmaceutical Care Management Association (PCMA) at 2-3 ("PCMA Comments"); Comments to Proposed Rule by Perrigo Company at 6 (Mar. 10, 2014) ("Perrigo Comments"); GPhA Comments at 10.

Conclusion. The generic pharmaceutical industry has grown under a stable regulatory framework for thirty years. The FDA's Proposed Rule is not workable in a market where generic drug approval is based on a showing of equivalence to its branded counterpart. The anticipated confusion is likely to encourage physicians to return to their old ways and prescribe innovator drugs, resulting in a dwindling generic market and increased costs.

(Continued on page 10)

(Continued from page 9)

Although the FDA cannot "create parity" among NDA and ANDA holders in connection with "safety-related labeling changes," it will expose generic drug makers to civil tort liability to the extent generics remain on the market. The comment period ended on March 13, 2014, and the FDA has until September 2015 to consider 64 comments and determine whether to finalize the rule as drafted or with revisions.

END NOTES

[1] Legal and industry experts and interested parties have challenged the FDA's authority to implement the Proposed Rule, an issue that will not be addressed here. *See*, *e.g.*, Correspondence from Hon. Fred Upton, Chairman, House Committee on Energy and Commerce, *et al.*, to Margaret Hamburg, M.D., FDA Commissioner, at 1-2 (Jan. 22, 2014) ("1/22/14 Rep. Upton Letter"); J.M. Beck, *A Closer Look at Some Aspects of the FDA's Generic CBE Proposal*, Drug and Device Law Blog (Nov. 14, 2013), <http:// druganddevicelaw.blogspot.com/2013/11/a-closer-look-at-some-aspects-of-fdas.html>; FDA, *Comments to Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products*, <http:// www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS; D=FDA-2013-N-0500> ("Comments to Proposed Rule") (citations to specific comments omitted).

[2] Because of the exposure to product liability actions, Brill maintains the Proposed Rule would impose exorbitant costs on the generic pharmaceutical industry, public and private payors, and consumers. "[It] could be expected to increase spending on generic drugs by $4 billion per year (or 5.4 percent of generic retail prescription drug spending in 2012)." Brill at 1. The costs are addressed in Brill's report and many of the Comments to the Proposed Rule and will not be discussed here.

[3] The FDA maintains *Mensing* "alters the incentives for generic drug manufacturers to comply with current requirements to conduct robust postmarketing surveillance, evaluation, and reporting, and to ensure that the labeling for their drugs is accurate and up-to-date." 78 Fed. Reg. at 67988-89. However, after nearly three decades, the Supreme Court merely affirmed the Hatch-Waxman Act. Indeed, *Mensing* has no impact on the FDA's authority to enforce the FDCA and bring actions against both innovator and generic drug makers who fail to comply with their federal duties. *See*, *e.g.*, Kirkland & Ellis Comments at 18 (citing 21 U.S.C. §§ 332-34, 337(a)).

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New Jersey's Law Pregnancy Workers Fairness Act

*Reid H. Eder, Esq.**

On January 21, 2014, in joining with thirteen other states, New Jersey's Governor Christie signed into law the "New Jersey's Pregnancy Workers Fairness Act" (PWFA), marking a milestone in the advancement of women's rights in the workplace and creating greater protections to pregnant employees. While most employers are aware of federal and state legislation mandating that individuals with disabilities be provided with reasonable accommodations and know that any form of discrimination or retaliation against an individual on the basis of their protected status or disability is prime for litigation, the PWFA goes further in protecting the rights of pregnant employees or those that the employer should know to be affected by pregnancy.

While the New Jersey Law Against Discrimination (N.J.S.A. 10:5-12) (LAD), Title VII of the Civil Rights Act, its subsequent amendment of the Pregnancy Discrimination Act of 1978 (PDA), and the Americans With Disability Act ("ADA") have always provided employees with certain rights and protections from discrimination, these acts had certain underpinnings creating ambiguities for pregnant employees who were not considered disabled prior to the weeks leading up to and following the pregnancy, albeit allow for special medical circumstances.

Although pregnancy has never been explicitly protected under New Jersey law, pregnancy has always found protections under LAD, Family Medical Leave Act, (FMLA) (29 U.S.C.S. § 2612(a)(1)(D)) and other legislation geared towards eradicating the evils of discrimination in the workplace and prohibiting retaliation against those individuals who are within the protected class. Similarly, the ADA and PDA mandates that individuals with disabilities be provided with reasonable accommodations to the extent the accommodation does not present undue hardships to the employer. The ADA and PDA, however, only apply to employers of 15 or more employees. In the federal realm, the FMLA requires employers of 50 or more employees to provide employees with up to 12 weeks of medical leave within a 12-month period for pregnancy related or other medical needs. The New Jersey Medical Leave Act parallels the FMLA, applying only to employers of 50 or more. Depending on the size of an employer's workforce, the legislation requires that paid or unpaid family leave time be provided to eligible employees following the birth or adoption of a child to allow the employee to care for the new member of the family. N.J.S.A. § 34:11B-4.

The New Jersey Legislative intent in passing the PWFA is to combat forms of discrimination against pregnant women by providing reasonable accommodations. N.J.S.A. 10:5-3.1(a)(b). Thus, for the first time in New Jersey's history, "pregnancy" is now considered a protected class under New Jersey's LAD which carries with it certain obligations that employers must know.

This article will explain who is protected under the PWFA, to whom it applies, employer requirements under the PWFA, and how to deal with pregnant employees in light of the PWFA.

A) Who is protected under the PWFA

The PWFA, an amendment to New Jersey Law Against Discrimination, N.J.S.A. § 10:5-12(s), states that an employer is required not to treat differently an employee who the employer knows, or **should know**, is affected by

(Continued on page 13)

(Continued from page 12)

pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work. Any question as to who is protected under the PWFA is quickly dispelled through the explicit definitions provided under the Act. "Pregnancy" under the PWFA means pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth. N.J.S.A. § 10:5-12(s).

Critical to the PWFA is the provision "should know." Unlike other definitions under LAD, for the first time, employers are not required to be on notice that the employee is part of a protected class; rather employers have the obligation to take affirmative measures to ensure that they not discriminate against employees who they "should know" are pregnant and provide to those protected reasonable accommodations. As new legislation, there has been no guidance by our Courts as of yet as to what "should know" means. This ambiguity may lead employers into pitfalls since it would be a violation of the ADA and LAD to inquire into whether an employee is pregnant. Notwithstanding same, employers should be advised that if it comes to their attention either directly by the individual through physical observation, or through third parties, the effects of the PWFA are implicated.

B) To Whom does the PWFA apply

Unlike most of New Jersey's anti-discrimination laws, e.g. New Jersey Medical Leave Act, and federal Americans with Disability Act, the PWFA applies to **all** employers regardless of size. The protections afforded under the PWFA are effective immediately and apply to all employers in New Jersey. N.J.S.A. § 10:5-12(s). Thus, employers should be advised that irrespective of what trimester the individual is in; the protections afforded under the PWFA are implicated.

C) What does the PWFA require of employers

The new addition to LAD now requires that an employer of a pregnant employee make available reasonable accommodations in the workplace. Unlike the ADA, New Jersey's PWFA for the first time in New Jersey's anti-discrimination law provides explicit examples of accommodations an employer are required to provide these include:

(a) bathroom breaks;
(b) breaks for increased water intake;
(c) periodic rest;
(d) assistance with manual labor;
(e) job restructuring or modified work schedules,: and
(f) temporary transfers to less strenuous or hazardous work.

The above accommodations are examples of accommodations that are required to be provided, but do not limit other reasonable requests by the employee for accommodations so long as the requests do not prove to be an undue burden to the employer. For example, other states that have enacted similar PWFA statutes provide accommodations such as providing a stool to a pregnant employee experiencing swelling of the legs as a result of standing for an entire shift, modifying a no-food-or-drink policy, and making available private non-bathroom space for expressing breast milk and breastfeeding. (Ill. PWFA 2015);(19 Del. C. § 711(3)(a)). In addition, Illinois and Maryland's PWFA make it a violation to force a pregnant individual into taking a less strenuous job or to take paid

(Continued on page 14)

(Continued from page 13)

or unpaid leave, if not requested by the pregnant individual, when a reasonable accommodation that would allow the individual to continue working is available.

D) What does the PWFA require of employers

Should an employee who is pregnant or who the employer should know is pregnant requests special accommodations for needs related to the pregnancy based on the advice of her physician, an employer is prohibited in any way from penalizing the employee in the terms, conditions or privileges of their employment for requesting or using the accommodation. This Act does not replace or supersede any laws already in place for disabled employees, including New Jersey's Paid Disability Leave Act. Similar to the reasonable accommodation provision under the ADA, a reasonable solution to these impositions under the PWFA is to have a meeting with the employee and ask what further accommodations the employer can make to assist the employee. Through discussions with employees, employers are better suited to decrease any animosity in the office as well as provide a basis for a defense should a suit later arise alleging that the employer failed to provide reasonable accommodations or violated the PWFA.

Indeed, employers are required to provide reasonable accommodations to pregnant employees and not treat those affected by pregnancy in any way different than other employees not affect by pregnancy. Notwithstanding same, the PWFA explicitly provides that an employer is not required to undergo an undue hardship on the operation of an employer's business to accommodate such requests. In determining whether an undue hardship exists, the PWFA states factors to be considered including: the overall size of the employer's business with respect to the number of employees, the number and type of facilities, the size of its budget; the type of employer's operations, including the composition and structure of the employer's workforce; the nature and cost of the accommodation needed, the availability of tax credits, tax deductions, and outside funding; and the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

E) Repercussions for violations of the PWFA

As the PWFA falls under LAD, employers who discriminate or fail to provide accommodations to pregnant employees are subject to both private civil actions and monetary fines. Employers found to have violated the LAD for the first time are subject to a fine in an amount not exceeding $10,000. If the violator has committed more than one violation, the fine is up to but may not exceed $ 25,000. If three or more violations are committed civil penalties may not exceed $50,000. N.J.S.A. 10:5-14.1a.

In addition to the civil penalties, an employee under the PWFA has standing to bring private causes of action against their employer. N.J.S.A. § 10:5-38. Successful litigations are entitled to both economic and non-economic damages as well as punitive damages. N.J.S.A. 0:5-12.6. Lastly, should a plaintiff succeed the employer plaintiff's attorney fees are recoverable. N.J.S.A. § 10:5-27.1.

(Continued on page 15)

(Continued from page 14)

In light of the passage of the PWFA, employers must now reconsider and revise previous human resources protocol. No longer is it the responsibility of the employee to raise the issue of a need for an accommodation related to their pregnancy, as was the case under the ADA; rather employers and attorneys advising employers should consider a proactive approach in addressing the requirements set forth under the PWFA. As highlighted through the PWFA, reasonable accommodations including bathroom breaks, snack breaks, and reassignment of high strenuous or hazardous work. In addition, should an employer come to know or should know that an employee is pregnant, it is advisable that the employer have a discussion with human resources and the employee to discuss what additional accommodations are available to address their concerns without creating an undue burden on the employer. Employers can take heed from case law surrounding the issues of accommodations under the ADA, such replacing a chair if it is causing pain, moving the individuals desk location closer to a bathroom or other reasonably, but not unduly burdensome accommodations.

Moreover, in light of the passage of the PWFA, it is important that employers update their employee handbooks to advise employees of their rights under the PWFA. Further, employers should advise management of the requirements set forth under the PWFA and implement procedures to address any concerns the employees may raise. As case law develops in this new area, employers will further be guided on how to address and deal with these issues.

Ambiguity in the law raises employers' concerns regarding potential litigation, but through proactive implementations, including advising all staff of the new law, updating the employee handbook, and encouraging employees to feel welcomed rather than afraid to raise their pregnancy to their employer without fear of retaliation, the lasting effects should be positive. If adherence to the PWFA regulations is taken seriously, the saying "a happy employee is a good employee," will endure. Lastly, employers must not forget that the PWFA does not supersede or replace any other anti-discrimination laws; including but not limited to the state and federal FMLA, ADA, and the federal PDA.

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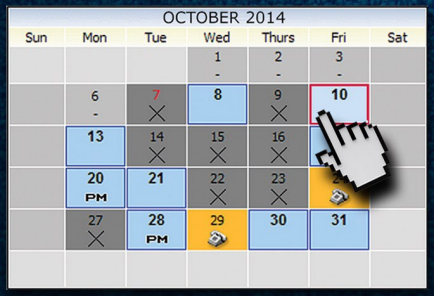

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When Products Liability Begets Directors And Officers Liability

*Joseph Monteleone, Esq.**

This is not an article so much about product liability, as it is about the collateral damage that may be faced by a corporation and its directors and officers in shareholder litigation commenced in the aftermath of and in consequence of a massive product liability exposure.

Perhaps the best illustrative examples emanate from the automobile industry, in particular the now notorious General Motors Company ("GM") ignition switch failures, vehicle recalls and ensuing claims by people allegedly injured or killed as a result of the product defects.

By way of brief background, GM has been hit with a number of product liability lawsuits arising from incidents where an allegedly defectively designed ignition switch moved to the "accessory" or "off" position while the vehicle was being driven, as a result of causes such as weight on the key ring or simply being jostled by a rough road surface. As a result, the driver had difficulty controlling the vehicle and, in cases where the vehicle subsequently crashed, its airbags failed to deploy. In addition to the product liability suits, consumer class actions have been filed by vehicle owners alleging economic loss and claims by injured parties have been filed with a victims' compensation fund before a mediator.

In the midst of all of this, there have emerged two actions filed by GM shareholders. Both actions are pending in the United States District Court for the Eastern District of Michigan.

The first is a shareholder derivative action styled *In Re General Motors Company Shareholder Derivative Litigation*, Case No. 14-cv-11277. A verified consolidated complaint was filed in this action on August 21, 2014 and alleges on the part of various GM executive officers and members of its Board of Directors breaches of fiduciary duty, waste of corporate assets and unjust enrichment.[1] The extent of alleged monetary damage to the company is already in the billions of dollars with $2.7 billion in recall and loaner vehicle costs, and $10 billion at issue in the consumer fraud actions, without even considering the bodily injury claims and damages to the company's reputation and goodwill. A Motion to Dismiss has been fully briefed and the motion is set to be heard on December 17, 2014.[2]

The second suit is a shareholder class action styled *Pio v. General Motors Company et al.*, Case No. 14-cv-11191. *Pio* was filed on March 21, 2014 and remains in its early stages while putative lead plaintiffs and lead counsel jockey for appointment by the Court. This class action is brought on behalf of all GM shareholders who purchased their securities between November 17, 2010 and March 10, 2014. The allegations are that GM and its officers engaged in a scheme to hide from both its customers and investors the fact that its products were plagued with a number of serious safety defects, which were causing vehicle crashes and consequential serious injury and, in some cases, deaths. Allegedly, despite the company's awareness of the problems as far back as 2001, it never initiated any recalls of the vehicles until early 2014. Unlike the shareholder derivative action, the class action confines the defendants to GM and certain officers who are members of its present and past executive level management.

Shareholder suits following on the heels of massive and costly product liability litigation is not a new phenomenon and one need not look any further than the automobile industry for a past and likely future example.

(Continued on page 18)

(Continued from page 17)

Prior to the current GM litigation, Toyota Motor Corporation ("Toyota") experienced unintended acceleration issues in many of its vehicles, allegedly due to poorly designed floor mats becoming lodged under the accelerator pedal. Toyota paid a then record $1.2 billion penalty to the U.S. Department of Justice ("DOJ"), but was able to avoid a corporate guilty plea. Ensuing shareholder class action litigation in the U.S. was settled for $25.5 million. The shareholder class was comprised of investors who bought Toyota's American Depositary Receipts ("ADRs"), which were publicly traded on the New York Stock Exchange. To put the settlement in perspective, the negative publicity from the recall campaign and DOJ penalty wiped out as much as $30 billion in Toyota market capitalization. The settlement represents only about 0.08% of that market cap loss.

If there is ghost of Christmas future lurking here, it is with the ongoing Takata Corporation ("Takata") air bag saga, which is of more recent vintage than the GM ignition switch problems. Allegedly defective Takata airbags have been found in a wide range of vehicles manufactured by almost all of the world's major automobile producers, including GM. The company's stock has fared poorly in the face of massive vehicle recalls in Japan and at least one consumer class action brought in the U.S. Note that Japan does not have a class action mechanism similar to the U.S. and recalls in the U.S. are only now being considered. It remains to be seen whether U.S. securities litigation follows, as Takata ADRs are also traded in the U.S.

Turning back to GM, the *Pio* class action is grounded, as are most securities fraud class actions, in allegations of no or inadequate disclosure as to the impact of events, facts and circumstances during the class period on the company's stock performance once the "bad news" is fully revealed at the very end of the class period. As is somewhat typical, the defendants are the company itself and executive level management, in this case including GM's current and former CEO, the company's President and two executive vice presidents.

Interestingly, the company's CFO is not named as a defendant, perhaps because the complaint does not directly allege misrepresentation as to financial data. Somewhat more interesting is the fact that the complaint does not name GM's general counsel, despite the fact that it is replete with allegations as to what the company's law department knew or should have known. Most of the allegations center upon GM touting its vehicles' safety and reliability. Although it remains to be seen what unfolds in the litigation, it would not be unusual for the defendants to file a Motion to Dismiss once the lead plaintiff and lead counsel issues are resolved. That motion will attack the sufficiency of the pleading and will likely raise issues of loss causation, particularly on the basis that statements as to product reliability and safety were very general, non-actionable, and permissible "puffery". The mere fact of a significant stock price decline at the close of the class period is not sufficient, in and of itself, to sustain a viable securities fraud claim. Until this motion practice is concluded, no discovery can take place, a significant benefit to the defendants.

Another key element of establishing securities fraud under the federal securities laws[3] is *scienter*, which must be established by at least reckless conduct. One key element in support of a *scienter* allegation is insider sales by the individual defendants, but none is alleged in *Pio*.[4]

Although not so purely in terms of time, the shareholder derivative actions are much further along, with several individual actions having now been consolidated in the Eastern District of Michigan. As noted above, the next critical event will be the hearing on the Motion to Dismiss set for December 17, 2014. The judge may or may not rule on that motion from the bench that day.

(Continued on page 19)

(Continued from page 18)

The key issues in the shareholder derivative litigation at present are the following. First, whether the plaintiffs were justified in not first making a demand pre-suit on the entire GM Board of Directors to take action. The plaintiff's response is that such demand would have been futile in that virtually the entire Board's conduct is implicated thus not "disinterested", and they have each been named as defendants.

Second, as a Delaware corporation, GM has apparently adopted a charter provision pursuant to Section 102(b) (7) of the Delaware General Corporation Law, exculpating its directors from liability for breaches of the fiduciary duty of care. If this defense is successful, the shareholder can only establish director liability through breaches of the duty of loyalty or good faith. These are much more difficult to establish than duty of care violations, although 102(b) (7) only extends its protection to directors, and not to officers of the corporation.

Even more explicit than in the shareholder class action, the derivative litigation contains numerous allegations that the product defects at issue were well-known to GM's legal department long before the recalls took place. As in the shareholder class action, the GM general counsel, is not named as a defendant.[5]

Looking down the road, and assuming *arguendo* that defendants will not prevail upon the Motion to Dismiss, plaintiffs will face a considerable hurdle, as they would in any shareholder derivative suit, that the Board's actions are protected by the "business judgment rule" defense, requiring that the plaintiffs establish at least gross negligence on the part of the Board to overcome the defense. All of the individual defendants named are present or former Board members, although some are also identified as present or former officers of GM. Corporate officers do not necessarily enjoy the same protection under the business judgment rule under applicable Delaware law.

Who Ultimately Pays For All of This?

In product liability litigation, commercial general liability ("CGL") insurance typically covers much of the defense costs, as well as settlement and judgment amounts that may ensue. In the shareholder litigation discussed here, it is typically D&O insurance that will respond.[6]

Although we will not attempt to give anything close to an exhaustive treatment of D&O insurance policy features here, there are a few key points to bear in mind with respect to how D&O differs from CGL insurance and how a D&O policy may respond differently to a shareholder class action, as opposed to a shareholder derivative action.

First, unlike as in the case of CGL insurance, defense costs under a D&O policy are subject to a retention or deductible amount and will erode the available limit of liability. With defense costs in many of these claims running into the tens of millions of dollars, it is not unusual for the primary layer of insurance to be fully exhausted by covered defense costs and then the liability to pay these costs proceeds into the next excess layer.[7]

Second, there are usually three (3) principal insuring agreements under a D&O policy issued to a public company.

- Side A – applies to cover the directors and officers in situations where they cannot and are in fact not indemnified by the company. Typically, these situations occur when the company is financially insolvent or where the company is not permitted to indemnify as a matter of law.

(Continued on page 20)

(Continued from page 19)

- Side B – applies to cover the company to the extent it lawfully indemnifies its directors and officers. This is sometimes called corporate reimbursement coverage.
- Side C – applies to cover the company for its own liability and costs of defense, but this coverage is typically limited to "securities claims", which would include the class and derivative actions discussed in this article.

Third, D&O policies are almost always written on a claims-made or claims-made and reported basis. Thus, unlike in the case of occurrence-triggered CGL coverage, there is rarely a situation where a single claim or series of interrelated claims trigger more than one year of insurance coverage. That being said, it is not unusual for large public companies to carry excess D&O limits into the hundreds of millions of dollars for a policy year.

Fourth, the D&O policy may respond differently to a shareholder derivative action than to a shareholder class action. Two important differences are as follows.

- In a shareholder derivative action, the company is typically a "nominal defendant" only, as is GM in this litigation. That means that any monetary recovery will be paid into the corporate treasury, as opposed to the shareholder(s) bringing the suit. That is not to say, however, that the plaintiff lawyers will not potentially be paid a significant fee award to be borne by some combination of the company, the individual defendants and the D&O insurers.
- As a nominal defendant with no wrongdoing alleged on its part, many D&O insurance policies will not cover legal costs incurred by the company to produce documents and otherwise respond to discovery and disclosure requests. These expenses may be sizeable.
- Under Delaware law and the law of most other states, it is not permissible for a company to indemnify its directors and officers for their share of any settlement or judgment amount in a derivative action.[8] This is because the law seeks to avoid "circularity" in any payment by the directors and officers, only to have them indemnified for their payments by the corporation. The D&O insurance implication of this is that these derivative settlements and judgments will be paid under the Side A insuring agreement. That is significant because there is usually no retention amount under Side A of the policy, and there is often a separate "tower" of Side A only D&O insurance that sits on top of the traditional D&O coverage and could well be implicated in the case of a large settlement or judgment.

END NOTES

[1] None of these counts is spelled out in great detail in the pleadings, but the breach of fiduciary duty is essentially one of care that is owed to the corporation to manage its business effectively and efficiently. The waste of corporate assets is presumably the exacerbated monetary costs to GM as a result of not timely identifying the product defect and recalling the vehicles for corrective action. The unjust enrichment count is also confusing in that no insider sales activity is alleged. However, the complaint sets forth in detail the individual defendants' compensation levels during the years at issue. As such, it is possible that will be later fleshed out to sustain an allegation that they ignored the problem in order to entrench themselves in their positions and perhaps enhance the value of any GM stock options they may have held.

(Continued on page 21)

(Continued from page 20)

[2] Linder Sandler, *GM Nine-Month Recall Costs Total $2.7 Billion on Repairs*, Bloomberg News, October 27, 2014, www.bloomberg.com/news/2014-10-27.

[3] The key federal laws in this regard are Section 10 (b) of the Securities Exchange Act of 1934 ("the Exchange Act") and Rule 10b-5 promulgated thereunder.

[4] In Pio, the individual defendants are also alleged to be liable on the basis that their executive positions made them "controlling persons" for purposes of Section 20 (a) of the Exchange Act.

[5] This may be the case for numerous reasons, including the fact that the derivative allegations are grounded in breaches of director's fiduciary duties.

[6] The author is not aware of the extent of D&O insurance, if any, in force for GM and specifically whether and how it may apply to the litigation discussed here. His commentary is based upon D&O insurance in general.

[7] Note also that D&O policies for public corporations are not typically written with a duty to defend, only an obligation to pay defense costs. As such, once its limits are exhausted – even if only by payment of defense costs – that insurer has no further payment obligations, including payment of any settlement or judgment amount, under its policy.

[8] This same prohibition, however, does not usually apply to advancing their defense costs.

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Out Of Joint (And Several Liability)

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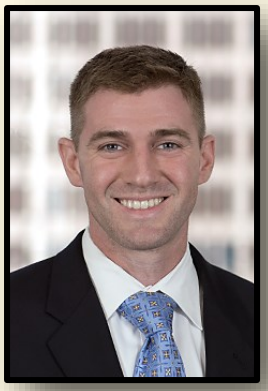

For many years, a New Jersey practitioner who tried a case in Pennsylvania had to acclimate him or herself to joint and several liability. Until very recently, Pennsylvania followed traditional joint and several liability. Of course, for many years, New Jersey has followed a modified joint and several liability rule so that each defendant was responsible only for its proportionate share of liability, unless the plaintiff or plaintiffs could prove one of them was at least 60% liable.

Needless to say, one's trial strategy needs to reflect the reality of the venue, especially if practical considerations such as insurance coverage have a meaningful effect. For many years, the joint and several liability rule resulted in unfairness at trial. Consider, for instance, a case where plaintiff sues 6 defendants, only one of whom is insured or still in business. The surviving defendant, however, is only tangentially involved and liability, if any, is minimal. An assessment by the jury of even 1% liability would mean that defendant pays the entire judgment. Indeed, in *St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc.*, 74 Fed. Evid. Serv 461 (E.D. Pa. 2007), exactly that situation occurred. After trial, the defendant subcontractor was found to be just 1% negligent, but was required to pay the entirety of the more than $8,000,000.00 judgment. Talk about can't win for losing!

Now that Pennsylvania has joined the modern world[1], it is a fair question to ask what effect this change has wrought. Pennsylvania's "fair share" rule is found at 42 Pa. C.S.A. 7102, in which is codified Pennsylvania's Comparative Negligence Act. The change became effective June 28, 2011, but applies to "causes of action which accrue on or after the effective date…" Thus, as of this writing, Pennsylvania's several liability rule has been in effect for all cases for more than one year. On the whole, it is too early to discern a pattern, as only one case in Pennsylvania has reached the issue.

In *Seaman v. Owens-Illinois, Inc*., husband and wife plaintiffs brought suit seeking damages for asbestos-related health problems, namely mesothelioma. Suit was filed on December 10, 2011 against only Owens-Illinois, the manufacturer of the material alleged to have caused ill health effects. Shortly before trial, Owens-Illinois tried to implead several other defendants, for purposes of identifying them on the verdict sheet for the jury's consideration. That request was denied, and plaintiffs' $1.4 million judgment was upheld on appeal. *See, Seaman v. Owens-Illinois*, 2013 Phila. Ct. Com. Pl. LEXIS 177 (Jun. 5 2013).

Because *Seaman* dealt as much with a procedural trial questions as anything else, it is hard to use the case to predict future outcomes. However, here are some things to consider:

Perhaps, notwithstanding the change in law, little practical change will result. Obviously, in cases in which there is only one defendant, the law has no meaningful impact at all. In cases where *Seaman* is the only reported case in the Commonwealth of Pennsylvania dealing with the "fair share" statute. *Seaman* dealt more directly with the procedural question of adding parties late in the litigation than equitably apportioning liability. While, certainly, many more cases will follow dealing with application of the fair share statute, practitioners have an opportunity now to shape how these principles are applied. This is especially so for practitioners who have trial experience in the New Jersey courts, where questions of "fair share" are answered every day.

On the other hand, defendants are incentivized to shift responsibility as much as possible now, regardless how such a tactic may appear to the jury. There is, of course, a justifiable concern that the jury will perceive in-fighting

(Continued on page 26)

(Continued from page 25)

among the defendants as evidence of collective liability. Certainly, one would expect that argument from the plaintiff during closing arguments. However, that may not be altogether a bad thing; the jury will be asked to assess percentage liability anyway on the verdict sheet, and perhaps by discussing with the jury what they are likely to have pieced together anyway, one may gain some credibility that might result in a reduction in percentage liability. The fair share law will impact jury selection. Whereas before, joint and several liability meant Pennsylvania juries answered basically two questions (is this defendant negligent, and if so how much does the plaintiff get), now the jury may be called upon to answer relatively complicated questions of proportionate liability. As New Jersey practitioners are well aware, experts can be useful in answering these questions, but just as useful in confounding things. As always, use caution in presenting expert testimony.

Fair share will also – and is already, at least to some degree – impact settlement and/or resolution in cases where one or more defendants have failed to appear. Whereas under the joint and several liability rule, the "empty chair" defense was not always very useful in the end, now it could be quite so. For every percentage of liability placed on the head of the empty chair, your client's percentage – and therefore eventual payment – is lessened. It is always a good idea to make sure cross claims are served on even non-appearing parties.

Given that the change in law is so recent, standard jury instructions do not yet exist. However, providing a way for the jury to apportion liability among the several defendants accomplishes the aims of the law.

Finally, I find in practice there is still quite a lot of unfamiliarity with this change. I have reached favorable settlements in two (2) recent cases, each just as trial began, when plaintiffs' counsel finally realized what the fair share means for the collectability of any award. Undoubtedly, my experience trying cases in New Jersey helped me understand the nuances involved. New Jersey practitioners who occasionally try cases in Pennsylvania will no doubt find the change in rules familiar. This change can also be put to one's advantage if one positions the case accordingly.

END NOTES

[1] Modernity must wait for "Dram Shop" cases. In Pennsylvania, joint and several liability still applies in such cases.

[2] It must be said there may be some exceptions, for instance where a case is filed but then stayed for one reason or another.

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Perception, An Expansion of the Scope of the Law Against Discrimination

*Ida M. Fuda, Esq.**

The New Jersey Law Against Discrimination (LAD) makes it unlawful to subject people to differential treatment based on race, creed, color, national origin, nationality, ancestry, age, sex and a number of other criteria. In order to establish a hostile work environment, a plaintiff must prove that: (1) the conduct would not have occurred "but for" his identity within a class protected by the LAD, and (2) the conduct was severe or pervasive such that (3) a reasonable person in the same protected class would believe that (4) "the conditions of employment are altered and the working environment is hostile or abusive." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)).

The recently published case of Cowher v. Carson & Roberts, 425 N.J. Super. 285; 40 A.3d 1171 (App. Div. 2012) has now expanded the reach of a claim under the LAD on the basis of perception. In the Cowher case, the plaintiff was employed as a truck driver for Carson & Roberts for two years. During that time period, the plaintiff was repeatedly subjected to anti-Semitic slurs, derogatory jokes and harassment. In spite of the plaintiff's requests to his co-workers to stop their comments, he was bullied on a daily basis with insults pertaining to his perceived status as a member of the Jewish faith. Perception is key here, as the plaintiff was in fact not Jewish.

The defendants were initially granted summary judgment on the basis that perceived status was not actionable because New Jersey did not recognize a cause of action premised upon perceived membership in a protected group, other than for disabled persons. The trial court's rationale was that the plaintiff had not met the criteria for establishing a claim under the LAD because he was not a member of a protected class. The plaintiff appealed this ruling, and the Appellate Division overturned the lower court's finding.

In reviewing the above matter, the Appellate Division found that the plaintiff need not be Jewish in order to satisfy the elements of a violation of the LAD. The court found that the plaintiff instead needed to prove that the conduct of the defendants would not have occurred but for the perception that the plaintiff was Jewish. In light of the fact that the plaintiff was not Jewish, the court noted that the reasonable person standard, with regard to whether a reasonable person in the same protected class would believe that the conditions of employment were altered/hostile, would be examined from the perspective of a reasonable Jewish person.

In overturning the lower court's decision, the court rationalized that the defendants were motivated by their belief that the plaintiff was in fact Jewish and, thus, engaged in the kind of discrimination and harassment that the LAD seeks to eliminate. During the course of discovery, the plaintiff produced DVDs containing video footage in which the defendants had made repeated anti-Semitic comments to him. Given that the DVDs had been produced beforehand, at depositions the defendants admitted that there were instances in which they had used anti-Semitic slurs against the plaintiff. One defendant, in particular, could not remember how many times he had made anti-Semitic comments and guessed that he had made derogatory marks on at least twenty occasions. In light of the circumstances, the court found that, the fact that plaintiff was not Jewish, was not sufficient to bar the defendants' actions from liability under the LAD.

(Continued on page 28)

(Continued from page 27)

Prior to Cowher, in order to have a claim under the LAD, a person had to be a member of a protected class in order to satisfy the elements for a cause of action, except in circumstances in which someone was perceived to be disabled. The Appellate Division cited the case of Poff v. Caro, 228 N.J. Super. 370 (Law Div. 1987) to explain this distinction. In Poff, a judge found a landlord liable for discrimination after he refused to rent an apartment to three gay men because he feared they would contract AIDS. The Poff court determined that there was discrimination based on a perception of a handicap, which was within the protection of the LAD. In setting forth the Cowher opinion, Judge Edith Payne of the Appellate Division articulated that that there is "no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure."

Cowher is a groundbreaking case that has dramatically expanded the potential for claims under the LAD. Plaintiffs need only introduce some facts that demonstrate that they were perceived to be members of a protected class. Thereafter, the alleged discriminatory behavior in question will not be evaluated from the point of view of the plaintiff, but from the perspective of a reasonable person of the protected class that they were perceived to be a member of.

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Mount Laurel

Brian O'Toole, Esq.

Chapman Place in Irvington intersects with Laurel Avenue. Growing up, I lived on that corner. Laurel Avenue was over four blocks long, bounded by Sanford Avenue and Stuyvesant Avenue. Sanford Avenue was the boundary line between Maplewood and Irvington. The necessity for this geography lesson is so you can understand the strategic importance of Laurel Avenue, which is very wide and very steep. Our house sat almost at the top of this majestic hill. When we had a snow storm we would receive a dozen or more phone calls asking whether our favorite hill, known as Mount Laurel, was open for sleigh riding. One snowy winter my sainted mother called the Irvington Police Department and convinced them to close Laurel Avenue to traffic so that the kids could sleigh ride on the hill. She was unsuccessful her first couple of tries, but eventually, a weary desk sergeant gave in and we had cones and saw horses blocking off all the intersecting streets with Laurel Avenue. It didn't take long for the word to spread and within an hour we had over 50 kids sleigh riding. Of course, this became a tradition as long as my mother could convince Sergeant O'Leary that there was enough snow to justify closing the street. (I guess my mother being an O'Toole didn't hurt, either.) As long as the weather cooperated, we usually got to sleigh this hill several times a year.

The entire event was really quite a spectacle. While the younger kids, such as myself, usually took turns in giving each other a startup push; my brother, Joe, and his teenage friends would take a running start from Sanford Avenue and belly flop straight down the hill at quite a speed. Because Mount Laurel was so wide, they were usually able to steer around all of the sledders climbing back up the hill. Occasionally, some poor soul was not fortunate enough to get out of the way, which usually meant he or she wound up at the bottom of the hill.

After several hours of sleigh riding, we started to get bored and resorted to rides that were a little more daring. The "aircraft carrier" was such a ride. We piled sleds on top of each other at right angles five sleds high. Four of us would then jump on while two or three of our friends gave us a running push. As you can imagine, there was really no way to steer the carrier so we just hung on tight and went as far as we could, which usually wasn't more than a block. We always wound up tipping over with all of us being thrown about. We also had several dare devils who would hook up two sleds together and go down the hill standing up with one foot on each sled. Using body language several of our riders actually made it to the bottom of Stuyvesant Avenue. I should also mention that all of our sleigh riders were fair game for some of the little kids on the side of the hill who bombarded them with snowballs as they went by. A huge snowball fight usually broke out towards the end of the day with everyone on one side of the street fighting everyone on the other side. It couldn't get any better than that, until my mother and father came to the rescue of our frozen participants by providing hot chocolate and cookies in front of our garage. Although my mother provided a couple gallons of hot chocolate and many dozens of cookies, there never seemed to be enough to go around. My father would sometimes come to the rescue, however, by going to Mrs. Blum's delicatessen, which was right around the corner, and buying more cookies. One thing was certain after a day on Mount Laurel, everyone slept well despite a few bumps and bruises from a great day on our Flexible Flyers! You might

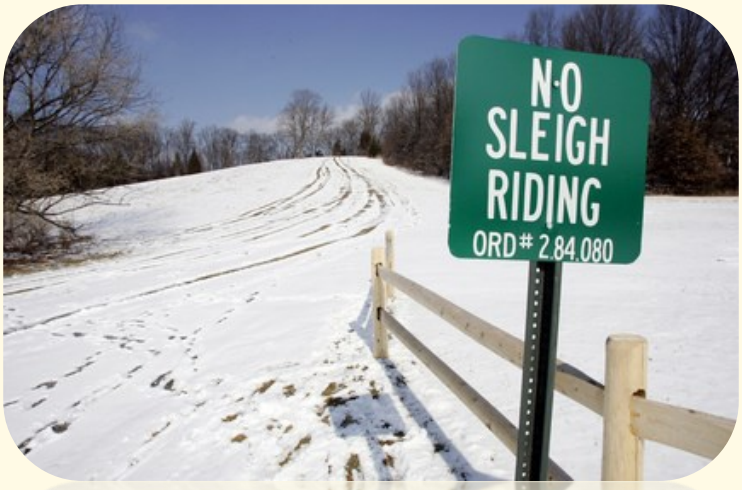
(Continued on page 30)

(Continued from page 29)

remember Flexible Flyers and the Bamberger's sign depicting Santa going down a hill at the North Pole on his personal Flyer. Back in those days, kids didn't ask Santa for a sled, they asked him for a Flexible Flyer!

As we fast forward to my days as a father of three young children, we did most of our sleigh riding down the hills in South Mountain Reservation. There were always huge crowds, but everyone was very congenial and polite. It seemed like all the fathers and mothers looked after all the kids and after several hours you really got to know most of the parents. As a matter of fact, one year we joined three couples for coffee and ice cream at Grunnings in South Orange Village after our exhaustions on the slopes.

Recently, a North Jersey community passed an ordinance banning sleigh riding because it wasn't safe. When I read the article I immediately thought of the Grand Canyon. If you've been there, you know there are few barriers protecting the public from the canyon below. There is one large sign warning people there are few barriers and few guardrails. The custodians of this National Park realized that to make everything "engineering type safe" you would have to destroy the very essence of these breathtaking cliffs and forfeit all of its natural beauty. In a small way, I believe the same rationale applies to sleigh riding. There is no way you can make sliding down a hill on some boards attached to runners totally safe. However, I believe the incidence of injury also seems to be extremely minimal. Ask yourself when was the last time you remember reading about a sleigh riding accident? Hopefully, other communities will not follow suit and we won't have to wipe a tear from Santa's eye.



With the winter we are going through, here's hoping you've gotten out on a steep hill with a sleigh and your kids and made yourself some memories

Stay warm and enjoy the end of winter.

P.S. to our "Christmas Trimmings" article. Our orphan friend, Ronald, became a successful chemical engineer and is now living in Vancouver, Canada with his wife. He has four children. We get a Christmas card from him every year thanking us for our family's kindness.

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