Product Liability and Toxic Tort Section Newsletter

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Message From the Chair

by Robert M. Cook

Where has the time gone? It's hard to believe that May is upon us already. Perhaps it was the mild winter that helped the time pass so quickly. Or perhaps it was the activities that have been keeping our section busy.

In February, we had a great dinner meeting with a special guest, a continuing legal education (CLE) presentation, and thoughtful discussion on the pending 21st Century Improvement Act (A-763). Gene Locks joined us to accept the Product Liability and Toxic Tort Section's third annual Judge Dreier Award. Gene was a gracious recipient, who gave us a look at the history of New Jersey's mass tort litigation and some pointers to succeed as part of his acceptance speech. Thank you, Gene. And once again, congratulations!

John Kearney and Jim Pettit gave a timely CLE presentation on the ethical impacts of social media in litigation. John and Jim provided some great pointers on an ever-developing, contentious area that likely impacts all of our practices. Additionally, those of us in attendance all received an elusive ethics CLE credit.

We capped the business meeting off with a discussion about the pending 21st Century Improvement Act. Thanks to Alan Sklarsky for beginning the discussion with the legislative position form he prepared in the fall of 2011 on a similar bill, and to our legislative coordinator, Lynne Kizis, for bringing us up to speed on the current bill. After considerable discussion, the section recommended that the New Jersey State Bar Association oppose the act. While it appeared to have some laudable goals, the lack of information made it impossible for the section to analyze and debate the act meaningfully. At this point you are all likely aware that the NJSBA did oppose the act. Nevertheless, it was passed by the Assembly on March 15. Stay tuned, as this legislation will likely have a wide-ranging impact on New Jersey's legal community.

The section held a great seminar at the NJSBA's Annual Meeting in Atlantic City on Thursday, May 17, from 3–4:15 at The Water Club. The program offered an analysis of five timely topics that all products/toxic tort litigators can use to improve their practices. The

highlight of the seminar was a presentation by Justice Anne Patterson on effective appellate advocacy—a view from the bench. Additional topics and presenters were: social media discovery by John Kearney; preemption by Pamela Lee; emergent orders to show cause/obtaining the product by Andy Rossetti; and *per quod* emotional distress damages by Tom O'Grady. Thanks again to Justice Patterson and our other presenters!

May also brings the changing of the guard for our section. I'd like to thank our executive board and the members for making this a successful and rewarding term. And a special thanks to John Kearney, the long-time editor of this great newsletter. As is required by our bylaws, our new executive board was elected at our business meeting at the Annual Meeting. All of our candidates ran unopposed. I'm pleased to announce that our 2012 – 2013 section officers are:

Chair	Adam Rothenberg
Vice Chair	Thomas O'Grady
Secretary	Lynne Kizis
Legislative Coordinator	Mark Shifton
Immediate Past Chair	Robert Cook

Thanks again for a great year.

Inside this issue

The Defendant Manufacturer in Your Products Liability Case Just Declared Bankruptcy: Now What?

by Robert M. Cook

The bankruptcy of a defendant product manufacturer can leave both plaintiffs' and co-defendants' attorneys scratching their heads. What now? Where do we go from here? However, New Jersey's Products Liability Act provides a framework that will give both plaintiffs and defendants a chance to weather the bankruptcy storm.

Parties learn that a defendant declared bankruptcy when they receive a notice of suggestion of bankruptcy. The bankrupt defendant files this simple document in the court where the action is pending. In response to the notice, some counties *sua sponte* dismiss the defendant. If the defendant is not dismissed, federal bankruptcy laws require the action be stayed regarding the bankrupt defendant only, *unless* the plaintiff stipulates the damages recoverable from the bankrupt defendant are capped by that defendant's insurance limits and the plaintiff obtains leave of the stay from the bankruptcy court. The catch here is that the bankrupt defendant could be self-insured with a high self-insured retention; as a result, there is no insurance policy for a plaintiff to proceed against, rendering the bankrupt defendant judgment-proof. Examples of this situation include the bankruptcies of Chrysler LLC and General Motors. Both companies had high self-insured retentions and were dissolved, as opposed to reorganizing, in bankruptcy.

When the bankrupt defendant is not insured, the plaintiff can move the state court to sever the action regarding the bankrupt defendant, so it can continue against the remaining defendants. The remaining defendants can, of course, object to the severance of the bankrupt defendant and ask the court to stay the entire case until the bankrupt defendant emerges from bankruptcy. However, the trial court will usually sever the action and allow the plaintiff to proceed against the non-bankrupt defendants.

Once the bankrupt defendant is dismissed or severed, the plaintiff and co-defendants may look to find another strictly liable party to fill the shoes of the bankrupt defendant. The product seller is a potentially strictly liable defendant. New Jersey's Products Liability Act imposes strict liability on any "manufacturer or *seller* of a product."[1] And the act defines "seller" very broadly, as any person who, in the course of a business conducted for that purpose, sells; distributes; leases; installs; prepares or assembles; blends; packages; labels; markets; repairs; maintains;[2] or otherwise is involved in placing a product *in the line of commerce*.[3]

Sellers of real property; providers of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skills, or services; and any person who acts only in a financial capacity with respect to the sale of a product are not product sellers under the act.[4]

The seller of a defective product is strictly liable under the act, but the act does provide sellers with an out. The seller may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the injury.[5] Upon filing the affidavit, the product seller shall be relieved from all strict liability claims.[6] The seller may still be directly, as opposed to vicariously, liable if the seller exercised significant control over the design or manufacture of the product, created the defect or knew or should have known of the defect.[7] Accordingly, the act's "seller's defense" only applies to a traditional 'innocent' or 'pass through' seller.

The seller's defense will generally relieve innocent sellers from strict liability, but not if the product manufacturer declared bankruptcy. A product seller shall be subject to strict liability if the product manufacturer has no attachable asset, or has been adjudicated bankrupt and a judgment is not otherwise recoverable from

the assets of the bankruptcy estate.[8] Chrysler LLC and General Motors fit perfectly into this exception. Both of those entities were dissolved as part of their bankruptcies. When the product manufacturer is bankrupt, an otherwise innocent seller becomes potentially strictly liable for the product under the act.

However, if the product at issue is made up of component parts, all may not be lost for the product seller when the product manufacturer is bankrupt. The question to ask is what is the defective product at issue? Often the allegedly defective product is a component part of a larger piece of equipment, such as the seatbelt or tire of an automobile. New Jersey's form interrogatories require plaintiffs, as part of the preliminary information they have to provide before defendants are required to answer the Form C(4) interrogatories, to identify the parts or systems claimed to be defective when the product is a motor vehicle or has component parts.[9] Additionally, defendants are required to identify the entity that designed, manufactured, assembled, packaged, distributed, advertised, installed, serviced and/or maintain the allegedly defective part(s) or system(s).[10]

In the event the overall product manufacturer is bankrupt, but the manufacturer of the alleged defective component part has been identified, the product seller can file an affidavit identifying the component manufacturer as the solvent manufacturer of the allegedly defective product in order to relieve the seller of strict liability under the act. Plaintiffs need to keep this provision of the act in mind when deciding what parties to name in their product liability lawsuits.

Plaintiffs also have to keep in mind the statute of limitations. In a typical situation, an accident occurs and the plaintiff files a complaint against an auto manufacturer alleging only, for example, defective brakes. Litigation ensues. During the course of discovery, the auto manufacturer identifies the selling dealership and the brake manufacturer in its answers to the Form C (4) interrogatories, but the plaintiff does not join either the seller or the component manufacturer. At some point after the statute of limitations expires, the auto manufacturer files for bankruptcy. Is it now too late for a plaintiff to join the seller and/or the component manufacturer?

The act tolls the statute of limitations regarding the product manufacturer if a plaintiff files a complaint against a seller. But the act does not toll the statute of limitations regarding sellers when suit is commenced against a manufacturer. Technically, in the example above it is too late for a plaintiff to sue the selling dealer and the manufacturer. But equitable arguments may prevail. The plaintiff arguably had no reason to sue the component manufacturer or the dealership prior to the manufacturer's bankruptcy. More likely than not, the issue will come down to whether the seller or component manufacturer is prejudiced as a result of being joined in the litigation after the expiration of the statute of limitations.

There are a couple of additional issues to keep in mind regarding joining product sellers and component manufacturers. It is possible the seller was a party to the litigation but was dismissed, as a result of filing the affidavit discussed above, before the defendant manufacturer filed for bankruptcy. If this is the case, the plaintiff should consider filing a motion to vacate under Rule 4:50-1. And don't forget about personal jurisdiction; if the seller/component manufacturer was not a New Jersey entity, a jurisdictional analysis will be critical.

In summary, bankruptcy of a manufacturer in a product liability case does not necessarily mean the end of all strict liability claims. The plaintiffs should investigate whether or not the bankrupt defendant is insured and whether or not they should petition the bankruptcy court to lift bankruptcy stay. If the bankrupt defendant is not dismissed by the court, the plaintiff should move to sever the claim against the bankrupt defendant and proceed against the remaining defendants. Don't forget about the product seller; remember that New Jersey's Products Liability Act broadly defines the term "seller." If the product issue is a complex piece of machinery, remember to evaluate the liability and defenses of each component part manufacturer. Finally, be mindful of the statute of limitations for each potential defendant. Keeping this information in mind will help plaintiffs and defendants weather the storm of a product manufacturer declaring bankruptcy during litigation. ■

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Endnotes

1. N.J.S. 2A:58C-2.
2. It is unclear what the act means by "repairs" and "maintains." Is a repair shop that performed one-time maintenance on a part of a product that is not at issue in the lawsuit now strictly liable for the product?
3. N.J.S. 2A:58C-8.
4. N.J.S. 2A:58C-8.
5. N.J.S. 2A:58C-9 sets forth the information that must be included in the affidavit.
6. Practically, "filing" means filing a summary judgment motion and supporting the motion with the affidavit.
7. N.J.S. 2A:58C-9.
8. *Id*.
9. The preliminary information request precedes the Form C(4) interrogatories.
10. Form C(4) interrogatory no. 1.

When is a Seller More Than a Seller for Purposes of Liability under the New Jersey Products Liability Act?

by Thomas O'Grady

Many product liability practitioners operate with the presumption that a seller of a product—while it may be named as a party defendant—ultimately will obtain a dismissal from the case, so long as a financially solvent product manufacturer is identified and the seller did not sell a known defective product or otherwise take any action affecting the condition of the product. In other words, a product seller generally cannot be held vicariously liable. However, the recent District of New Jersey decision *DeGennaro v. Rally Mfg.*[1] calls into question the scope of protection afforded to sellers under the New Jersey Products Liability Act (PLA),[2] and raises significant concerns for New Jersey retailers.

Pursuant to N.J.S.A 2A:58C-9, a defendant named by virtue of having sold the subject product is relieved of liability under the PLA if it files an affidavit identifying the manufacturer of the product, unless, essentially, the manufacturer is financially insolvent or has no presence in the United States.[3] However, there are exceptions to this defense, and a seller is liable if:

> (1) The product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage; or
>
> (2) The product seller knew or should have known of the defect in the product which caused the injury, death or damage or the plaintiff can affirmatively demonstrate that the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product which caused the injury, death or damage; or
>
> (3) The product seller created the defect in the product which caused the injury, death or damage.[4]

Notably, the seller bears the burden of demonstrating that none of these exceptions apply.[5]

In *DeGennaro*, a lead-acid battery pack manufactured by defendant Rally Manufacturing Inc., and sold by defendant Pep Boys, exploded in the plaintiff's hands after he left the Pep Boys store. The plaintiff claimed the heat-sealed packaging design of the battery pack was defective because it allowed for combustible gases to collect and potentially explode. Pep Boys moved for summary judgment based on the defense provided by N.J.S.A. 2A:58C-9.

Significantly, it was undisputed that Rally had been properly identified as the product manufacturer, and that Pep Boys had no role in the design, testing, manufacturing, packaging or labeling of the battery pack. Accordingly, only the second of the three exceptions provided by N.J.S.A 2A:58C-9—whether Pep Boys knew or should have known of the alleged defect at the time of sale—was at issue.

In that regard, the plaintiff argued that: 1) the labeling and separate instructions should have alerted Pep Boys that "the air-tight packaging was problematic"; 2) ventilation concerns with lead-acid batteries was "common knowledge amongst car mechanics"; and 3) a visual inspection of the plastic packaging would "reveal that pressure was building and thus reveal the defect."[6] The plaintiff also asserted that a post-accident Pep Boys email could be interpreted at evidencing that Pep Boys was aware of other relevant pre-accident complaints regarding the product.

Without further elaborating on the plaintiff's arguments, District Court Judge Peter G. Sheridan concluded that, "[t]aken together, this evidence could support a

finding that Pep Boys should have known that the [battery pack] had a packaging defect."[7]

The *DeGennaro* opinion will likely encourage creativity from the plaintiffs' bar in an effort to keep claims alive against product sellers, and thereby increase the number of parties potentially contributing to a recovery in product liability actions. From the defense perspective, it can be argued that the import of *DeGennaro* is limited, given it is an unpublished opinion involving a peculiar set of facts unlikely to be present in the vast majority of product liability cases. Clearly however, retailers in New Jersey should be aware of potential liabilities arising from claims that they "should have known" of defects in products that they sell. ■

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Endnotes

1. 2011 U.S. Dist. Lexis 126568 (D.N.J Nov. 2, 2011).
2. N.J.S.A. 2A:58C-1, *et seq.*
3. Although the PLA generally provides the exclusive remedy for harm caused by a product, a seller may otherwise be found liable if, for instance, it negligently provides services in connection with a product.
4. 2A:58C-9(d).
5. *Claypotch v. Heller, Inc.*, 360 N.J. Super. 472, 483 (App. Div. 2003).
6. *DeGennaro*, at *23.
7. *Id.* at *24.

Fighting Over Facebook: Different Approaches by Different Judges

by John B. Kearney

Over the past year, there have been a number of decisions in which courts have been faced with the issue of whether a plaintiff must provide a defendant with access to his or her Facebook pages. In these cases, courts in various jurisdictions have had to grapple with the tension between what is public and what is private when one posts information on Facebook.

Largent v. Reed—The Case for Disclosure

Judge Richard Walsh, of the Pennsylvania Court of Common Pleas for Franklin County, recently confronted the Facebook discovery issue in the case of *Largent v. Reed*. The judge framed the issue simply and directly: "Whether and to what extent online social networking information is discoverable in a civil case is the issue currently before the Court."[1]

The *Largent* facts are similar to the types of cases personal injury lawyers face on a regular basis. The case centered on a chain-reaction auto accident. Keith Largent was the driver of a motorcycle and Jessica Largent was his passenger. When defendant Reed's car collided with a minivan driven by third-party defendant Pena, the minivan was pushed into the Largents' motorcycle. As a result, the plaintiffs alleged serious and permanent physical and mental injuries, as well as pain and suffering.

Suit was filed and discovery was undertaken. In the course of the deposition of the plaintiff-passenger, Jennifer Largent, it was revealed that she had a Facebook profile, that she used it regularly, and that she had accessed Facebook as recently as the night before her deposition. When asked, the witness refused to disclose any information about her Facebook account, and her counsel advised that they would not voluntarily turn over such information.

A motion to compel the plaintiff's Facebook login information soon followed. The defendant sought disclosure by arguing that the plaintiff's Facebook profile had been public sometime prior to the plaintiffs' deposition, and that any other Facebook user could read or view the plaintiff's profile, posts and photographs. The defendant further argued that certain posts on the plaintiff's Facebook account contradicted her claim of serious and severe injury.[2] In opposition to the motion, the plaintiff argued the information sought was irrelevant, did not appear reasonably calculated to lead to the discovery of admissible evidence, would cause unreasonable embarrassment and annoyance, and may violate privacy laws like the Stored Communications Act of 1986.

In a comprehensive 14-page opinion, Judge Walsh determined that under the facts of this case, information contained on the plaintiff's Facebook profile was discoverable since it was relevant, was not covered by any privilege, and was a reasonable request. Significantly, however, the court made clear that it was not holding that discovery of a party's social networking information was available as a matter of course, as there must be a good faith basis that such discovery will lead to relevant information.[3]

In its order, the court presented defense counsel with the keys to Largent's Facebook account, but only for a limited time. Thus, the court ordered Largent to turn over her Facebook login information to defense counsel, who could use it during a 21-day window to inspect Largent's Facebook postings. Once that three-week period passed, the plaintiff could change her password to prevent any further access to her account.

As part of his lengthy analysis, Judge Walsh explored what Facebook is, how it is used, and what Facebook tells its users about how information is stored and shared with others. Noting that Facebook has a "detailed, ever-changing privacy policy," Judge Walsh explained that one must set up a user account to access Facebook. Once that is done, users can set their privacy settings to various levels. Even then, however, a person's name, profile picture and user ID is publically available and if one chooses the least restrictive setting ("public"), every Facebook user can view whatever a user has posted as

part of his or her profile.[4] There is also an intermediate level setting, which restricts viewing of such information to a user's "Facebook Friends."[5]

Clearly, Facebook communicates to its users that posting is not necessarily private.

The *Largent* court discussed additional ways in which the very workings of Facebook undercut the claim that posted information comes with an expectation of privacy. For example, the court explained how Facebook friends may "tag" users, which then creates a link to a user's profile,[5] which can reveal to others information about you. For the court, "tagging" was significant because "users of Facebook know that their information may be shared by default, and a user must take affirmative steps to prevent the sharing of such information."[6]

Finally, the court noted that Facebook puts users on notice in its "Data Use Policy" that it may share a user's information "in response to a legal request…if we have a good faith belief that the law requires us to do so… [and] when we have a good faith belief it is necessary to detect, prevent and address fraud and other illegal activity…."[7]

Thus, with this analysis, it is not surprising that the *Largent* court had little trouble finding that the discovery of social networking data was discoverable, especially since discovery rules generally are broad. Moreover, here defense counsel established a good faith basis for seeking material from the plaintiff's Facebook account by reference both to the plaintiff's pleadings and to her deposition testimony. The court found significant that Largent had pled that she suffers from chronic physical and mental pain, and that she had testified at her deposition that she suffers from depression, has spasms in her legs, and uses a cane to walk. With such claims being made, the court found information on the plaintiff's Facebook page about going to the gym and photographs of her with her family were clearly relevant, since such information might prove the plaintiff's injuries did not exist or were exaggerated.[8]

As for the plaintiff's claims that there were privilege and privacy rights to be protected, the court rejected both claims. The court noted that almost all information on Facebook was shared with third parties, such that "there is no reasonable privacy expectation in such information."[9] Quoting Facebook's own slogan that it "helps you connect and share with the people in your life," the court explained that you can only connect by sharing information with others and, that being the case, "(O)nly the uninitiated or foolish could believe that Facebook is an online lockbox of secrets."[10]

The court also rejected the plaintiff's claim that the Stored Communication Act (SCA) prohibited disclosure of Largent's Facebook information. The court distinguished this case from those where a subpoena is served directly on Facebook or other social networking sites. There, the court explained, the SCA comes into play as a basis to quash the subpoena. But here, in contrast, the defendant sought the information directly from the plaintiff through an order compelling her to provide access to her Facebook account. Since the SCA did not apply to the plaintiff, that act could not protect her Facebook profile from discovery by the defendant.

Finally, the court analyzed the breadth of the defendant's discovery request. In the court's view, any posts regarding plaintiff's mental or physical health were fair game, because the plaintiff put her health in issue by filing a lawsuit seeking money damages. The plaintiff argued that allowing access to her Facebook page was "akin to asking her to turn over all of her private photo albums and requesting to view her personal mail."[11] Not so, according to Judge Walsh. Why?

> Photographs posted on Facebook are not private, and Facebook postings are not the same as personal mail. Facebook posts are not truly private and there is little harm in disclosing that information in discovery.[12]

Thus, the *Largent* opinion, as well as several other Pennsylvania trial court decisions,[13] articulates well the case for discovery of material on social network websites.[14] But there is another side to the story.

Krawchuk v. Bachman—The Case for Non-Disclosure

In cases where parties have prevented access, the winning argument generally is based on privacy concerns. A good example is the New Jersey Superior Court case of *Krawchuk v. Bachman*, decided by Judge Daniel Waldman of Monmouth County in May 2010.[15]

As in *Largent*, the case arose out of a traffic accident when the plaintiff's vehicle was struck in the rear while the plaintiff was stopped at a light. The issue of damages was hotly contested in the lawsuit that followed. The plaintiff went from seeing her family doctor, to treating with physical therapy, to visiting an orthopedic specialist, and to treating with a chiropractor. Thereafter, the

plaintiff visited three different doctors for dizziness, post-traumatic brainstem injury, post-traumatic inner ear injury, and visual-vestibular integration dysfunction. Needless to say, the plaintiff's physical condition was at issue in the case, as the defendant claimed the plaintiff had denied being injured at the accident scene.

In the course of the plaintiff's deposition, it was revealed the plaintiff maintained a Facebook account, but the plaintiff claimed she did not "put stuff on Facebook." After the deposition was concluded, things got interesting, as defense counsel checked for the plaintiff's Facebook account, but found it had been "removed" at some point.

Defense counsel then requested through counsel that the plaintiff sign an authorization to obtain any and all Facebook postings, photographs, and other materials for a specific period of time up to the present. The plaintiff refused to sign the authorization, prompting the defendant to bring a motion to compel.

The defendant's arguments, as recited by Judge Waldman, were centered on the issue of the plaintiff's credibility, and the fact that information from the plaintiff's Facebook account may speak to that very issue. The defendant pointed out that under Facebook's privacy policy, certain categories of information, such as name, profile and photos are publically available, and do not have privacy settings.[16] The defendant argued that he should be given access to the plaintiff's Facebook account in order to challenge the plaintiff's credibility on the issue of her alleged injuries, as he believed the plaintiff may have posted various statements, photographs and information on her Facebook account regarding her medical condition and/or her activities.

The plaintiff vigorously opposed the motion with an argument grounded in her right of privacy. First, the plaintiff explained that while Facebook is a means of communicating with others, the user has the option of keeping communications and posted materials for her account private by restricting access to those she chooses. Without the status of "Facebook friend" granted by a user, one cannot access that user's private Facebook material.

Second, the plaintiff noted that Facebook is like correspondence or email when used as a similar private communication tool.

Third, the plaintiff argued the records being sought were irrelevant to the litigation (though relevance is not the test for discovery), and, further, that the request would annoy, embarrass or oppress the plaintiff. Also, the plaintiff threw in the 'kitchen sink' argument that the defendant had failed to demonstrate this sought-after discovery would be useful.[17]

In addition, the plaintiff argued that this discovery request was an invasion of her privacy, by comparing her Facebook page to her "electronic home" in which she had a reasonable expectation of privacy. The plaintiff also noted that what the defendant sought was nothing but a fishing expedition for which there was no basis to proceed.

The plaintiff then took the argument one step further by raising the specter of the slippery slope. If looking at one's Facebook page is allowed, the plaintiff argued, where does the invasion of privacy stop? Why not all email correspondence, or all letters sent by regular mail, and why not a requirement to produce "all electronic devices including computers that a plaintiff possesses"?[18]

(As an aside, one might ask why the plaintiff shouldn't produce emails and other electronically stored information on her computer if it is requested and meets the discovery rule standard of "reasonably calculated to lead to the discovery of admissible evidence" individuals, as well as corporations, have obligations to maintain and produce electronically stored information. But that is an issue for another day and another article.)

As if this slippery slope argument wasn't enough, the plaintiff made it a bit more slippery by arguing that granting the defendant's motion not only would invade the plaintiff's privacy, but inevitably would invade the privacy of others. In the plaintiff's view, the defendant would have access to the plaintiff's communications with her "Facebook friends," which may include highly personal or private information. Finally, the plaintiff argued that if the defendant wanted to attack the plaintiff's credibility, there were numerous ways to do so without providing Facebook account access.

In stark contrast to the reasoning of Judge Walsh in *Largent*, Judge Waldman denied the defendant's motion for access to the plaintiff's Facebook account because there were "numerous alternative means to corroborate or contradict plaintiff's personal injury claims and/or undermine plaintiff's credibility," and because such access "would be an invasion of plaintiff's privacy."[19]

Thus, Judge Waldman noted the defendant could have the plaintiff examined by an expert, redepose the plaintiff, depose the plaintiff's doctors and/or conduct surveillance while the plaintiff was in public to undermine the plaintiff's credibility, which would not invade

the plaintiff's privacy. While acknowledging that some aspects of a Facebook account do subject one to public view, Judge Waldman brushed aside that argument by noting that the "plaintiff is free to change her personal privacy settings to shield 'non-friends' from viewing her photos, postings, personal profile information, emails, and other communications."[20]

One cannot help but wonder, however, whether the court had thought through the implications of that statement. Is it all right for a plaintiff to change personal privacy settings after an accident? After a visit to a lawyer? After suit is filed? Just before (or after) a deposition? Surely the court would not sanction hiding or destroying evidence once litigation is anticipated, let alone instituted. That being the case, why should a litigant be able to prevent the production of evidence merely by changing what was once public to 'private'?

The *Krawchuk* court's claim that there are other ways the defendant could attack the plaintiff's credibility is somewhat problematic in that it puts the court in the middle of the defendant's decision regarding how best to defend the case. While an independent medical exam and a deposition of the plaintiff's doctors are often used by defendants, many attorneys believe information that comes directly from a plaintiff often is more effective with a jury than anything else. For example, the plaintiff is hard-pressed to explain away pictures she posted on Facebook that show her engaged in physical activity. Such evidence bears the plaintiff's own stamp of authenticity, while a surveillance video (which the court points to as an alternative), is more open to interpretation and explanation to deflect its impact. Not so regarding a photo the *plaintiff* chose to display to others.

A recent decision on this issue of Facebook access (which comes to the same conclusion as *Krawchuk*) is *Tompkins v. Detroit Metropolitan Airport*.[21] Tompkins involved a slip and fall at the Detroit Metropolitan Airport by Tompkins, who claimed she is impaired in her ability to work and enjoy life. In discovery, the defendant sought the production of the plaintiff's entire Facebook account, including sections not available for viewing by the general public.

The court cited several state court decisions allowing such discovery,[22] and noted that in those cases, "the public profile Facebook pages contained information that was clearly inconsistent with the plaintiff's claims of disabling injuries."[23] And unlike Judge Waldman in *Krawchuk*, the *Tompkins* court agreed that material posted on a 'private' Facebook page that could be accessed by a select group, but not the general public, was generally neither privileged nor protected by common law or civil law notions of privacy. However, the court maintained that FRCP 26(b) required a threshold showing that the requested information was reasonably calculated to lead to the discovery of admissible evidence so that a fishing expedition was not undertaken.

Here, the court found the plaintiff's public postings, as well as some surveillance photographs, did not establish that required threshold showing of the relevance of the plaintiff's Facebook private postings. In the court's view, the public postings (the plaintiff holding a small dog and smiling, and the plaintiff standing with two other people at a birthday party), as well as surveillance photos of the plaintiff pushing a grocery cart, were not inconsistent with the plaintiff's claims of injury in the case. The Court explained that if the public Facebook page had contained photos of the plaintiff playing golf or riding horseback, there might have been a stronger argument for delving into the nonpublic section of her account. The court also pointed out that the request for the entire account was overly broad, and thus may contain voluminous personal material unrelated to this case.[24]

Both *Krawchuk* and *Tompkins* raise the question of how to convince a court that the 'private' section of a Facebook page should be opened for examination. What does not appear to have been suggested in either *Krawchuk* or *Tompkins* is to have the private postings produced for an *in camera* inspection by the court. Only in that way can the court know if the information at issue is reasonably calculated to lead to the discovery of admissible evidence or, for that matter, whether concerns about the privacy of third parties are real or merely hypothetical. The issue should not turn on whether there are public portions of Facebook available for viewing that can help convince the court that photos or information of a similar nature are behind the private setting on the plaintiff's Facebook account. ■

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Endnotes

1. *Largent v. Reed*, No. 2009-1823, Court of Common Pleas, 39th Judicial District, Franklin County Branch, Nov. 8, 2011 (Judge Richard Walsh), at 1. As of this time, the case is unpublished. All page citations are to the court's written opinion. A copy of the opinion is available at HYPERLINK "http://www.scribd.com" www.scribd.com.
2. The court notes several photographs showing the plaintiff enjoying life with her family and a status update about going to the gym.
3. *Largent*, at 13, fn. 13.
4. Facebook Data Use Policy—Sharing and finding you on Facebook, http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile (last visited Oct. 27, 2011).
5. A question that courts will have to grapple with in the future is how many "facebook friends" can you have before the claim that privacy should attach to that designation is rendered meaningless. Three friends, 300, 3,000?
6. *Largent*, at 4-5 and fn. 7.
7. *Largent*, at 5.
8. *Largent* at 5 and fn. 8.
9. *Largent* at 8.
10. *Largent* at 9.
11. *Largent* at 1 and 10. See also http://www.facebook.com.
12. *Largent* at 12.
13. *Largent* at 12.
14. *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland, May 19, 2011); and *McMillen v. Hummingbird Speedway, Inc.,* No. 113-2010 CD, 2010 WL 4403285 (Pa. C.P. Jefferson, Sept. 9, 2010).
15. Cases cited in the *Largent* opinion include *Offenback v. LM Bowman, Inc.*, No. 1:10-cv-1789, 2011 WL 2491371 (M.D. Pa., June 22, 2011); *EEDC v. Simply Storage Mgmt, LLC*, 270 F.R.D. 430 (S.D. Ind., 2010); and *Romano v. Steelcase, Inc.*, 907 N.Y.S. 2d650 (Sup. Ct. Suffolk, 2011). *Largent* at 7-8.
16. *Krawchuk v. Bachman*, Superior Court of New Jersey, Law Division, Monmouth County, Docket No. MON-L-902-08. Judge Waldman's "Statement of Reasons Pursuant to R. 1:6-2 (f) dated April 14, 2010 (Statement of Reasons) is unreported.
17. *Krawchuk*, Statement of Reasons, at 2.
18. *Krawchuk*, Statement of Reasons, at 2-3.
19. *Krawchuk*, Statement of Reasons, at 3.
20. *Krawchuk*, Statement of Reasons, at 5.
21. Case No. 10-10413, (E.D. Mich, 2012), Jan. 18, 2012.
22 *Krawchuk*, Statement of Reasons, at 5.
23. *McMillen v. Hummingbird Speedway, Inc.*, 2010 WL 4403285 (Pa. Com. Pl., 2010), and *Romano v. Steelcase, Inc.,* 907 N.Y.S. 2d 650 (2010).
24. *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (2012).
25. *Tompkins*, 278 F.R.D. at 389.

A Survey of Products Liability Cases From the Past Year

by Mark D. Shifton and Geoffrey Silverberg

1. *Glauberzon v. Pella Corp.*, 2011 WL 1337509 (D.N.J., April 7, 2011)

The plaintiffs commenced a putative class action against a window and door manufacturer, after several representative plaintiffs experienced water infiltration through their windows and doors. The plaintiffs alleged the manufacturer knew its defective mullion design allowed water to penetrate the assembly, and that the defect might not manifest itself until after the expiration of the warranty period. The plaintiffs' complaint contained causes of action for, among others: violation of the implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, violation of various states' consumer fraud acts (including the New Jersey Consumer Fraud Act), and common-law fraud.

The court dismissed many of the plaintiffs' claims, including claims for violation of the warranty of merchantability, violation of the Magnuson-Moss Warranty Act, violation of various state consumer fraud statutes, and common-law fraud without prejudice, as the plaintiffs' complaint did not meet the heightened pleading standard of Rule 9(b).

The manufacturer argued the plaintiffs' claims for violation of the implied warranty of merchantability and violation of the Magnuson-Moss Warranty Act were time barred. The plaintiffs argued the various statutes of limitation relevant to their claims for implied warranty of merchantability were tolled by virtue of the manufacturer's fraudulent concealment of the nature of its products' defects. The court, however, held that the statutes of limitation would not be tolled, as the plaintiffs had failed to specifically plead the requisite facts in support of their argument for equitable tolling. Relying on the United States Supreme Court's decision in *Iqbal*, the court noted the plaintiffs had failed to allege a plausible basis for the application of equitable tolling by fraudulent concealment, and without such a basis, the plaintiffs' claims of implied warranty of merchantability (as well as the claims for violation of the Magnuson-Moss Warranty Act, which was derivative of the state law claims of breach of implied warranty) would be time-barred.

The court also dismissed the plaintiffs' consumer fraud and common-law fraud claims for their failure to plead with specificity under Rule 9(b). The court noted the plaintiffs failed to plead such facts as: who at the manufacturer was aware of the alleged defect, when and how the manufacturer learned of the defect, and when or how the manufacturer decided to conceal the defect. The court noted the plaintiffs similarly failed to plead that all or substantially all of the manufacturer's products were similarly defective, that the manufacturer knew that as a result of the alleged defect its product was certain to fail, and that the manufacturer attempted to limit the warranty period in an effort to avoid the cost of repairs.

2. *J. McIntyre Machinery, Ltd. v. Nicastro*, __ U.S. __, 131 S. Ct. 2780 (2011)

The plaintiff, a New Jersey resident, sued the defendant, the English manufacturer of industrial machinery, after the plaintiff was injured using the defendant's product in New Jersey. The defendant's product was sold through a United States distributor, although the defendant did not purposely sell its products in New Jersey. The defendant had no contacts with New Jersey. Last year, the New Jersey Supreme Court held that New Jersey could exercise jurisdiction over the defendant, under the theory the defendant had placed its product into the stream of commerce. *Nicastro v. McIntyre Machinery Amer., Ltd.*, 201 N.J. 48, 61 (2010).

The United States Supreme Court reversed the New Jersey Supreme Court in a 6-3 decision authored by Justice Anthony Kennedy (although only four justices joined in Justice Kennedy's reasoning), and held that New Jersey could not assert jurisdiction over the defendant, because while the defendant may have purposely availed itself of the United States' market, it had not directed its conduct toward New Jersey. The Supreme Court sought to clarify over two decades of personal

jurisdiction jurisprudence, since its decision in *Asahi v. Metal Industry Co v. Superior Court*, 480 U.S. 1027 (1987).

In *Asahi*, the Supreme Court held that a forum could assert jurisdiction over a foreign defendant if the defendant had placed its goods into the stream of commerce entering the forum. Subsequent decisions by the Supreme Court expanded on this doctrine, including the Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, which held that a defendant's placing its goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State," and that the exercise of jurisdiction over such a defendant would be constitutional. 444 U.S. 286, 298 (1980).

In *McIntyre*, however, the Supreme Court noted an "imprecision" arising from its decision in *Asahi*. The Court noted that while a defendant whose goods are placed into the stream of commerce may indicate purposeful availment of the forum state, it did not mean, in and of itself, that the manufacturer would be subject to jurisdiction in that state. The Court noted that the principal inquiry behind the jurisdictional analysis must be whether the defendant purposely availed itself of the forum state; the stream of commerce analysis would merely be evidence regarding whether a defendant had.

Justice Stephen Breyer filed a brief concurring opinion, joined by Justice Samuel Alito, arguing that the same result could have been reached by the Supreme Court's own precedents, in that under both *Asahi* and *World-Wide Volkswagen*, New Jersey courts would be without jurisdiction over the defendant. Justice Ginsburg authored a dissenting opinion discussing the breadth of the scrap metal processing industry in New Jersey, and arguing that under the majority's reasoning, a foreign manufacturer could sell its products through a distributor, and could avoid the exercise of jurisdiction in any forum in which it does not sell sizeable quantities of its products.

3. *Worrell v. Elliott*, 2011 WL 2580386 (D.N.J., June 28, 2011)

The plaintiff brought a negligence and products liability action against a heavy equipment servicer, seeking to recover damages for injury he sustained at work when he attempted to secure a hose allegedly installed by the servicer on his employer's excavator. The plaintiff was injured when he fell off the excavator's boom arm while trying to secure a protruding hose on the excavator using a wet kit so he could transport it from New Jersey to Pennsylvania without hitting the underside of bridges or overpasses. The defendants disputed they installed the wet kit, and moved to bar the plaintiff's expert opinion on the grounds that it was an inadmissible net opinion. The parties also cross-moved for summary judgment.

The court held there was an issue of fact regarding whether the defendant actually installed the wet kit. The court also denied the defendant's motion to preclude the plaintiff's expert's opinion, holding the opinion was not a net opinion. The court noted that it could not determine whether the negligence claim was subsumed by the PLA, and noted that if the addition of the wet kit rendered the excavator defective, the plaintiff could seek redress under the PLA, but if the machine was not defective, the action would sound in negligence.

Because the court could not determine whether the alleged defect or improper installation of the wet kit was a substantial factor in causing the plaintiff's injuries, or whether it was the plaintiff's own actions, the court denied the defendant's motions for summary judgment on both the negligence and products liability claims. Finally, the court granted the plaintiffs' motion for summary judgment, dismissing the defendants' comparative fault claims, although noting the defendant could argue at trial that the plaintiff's actions were the sole cause of his injuries.

4. *Lewis v. AIRCO, Inc.*, 2011 WL 2731880 (App. Div., July 15, 2011)

The plaintiff's estate filed an occupational exposure toxic tort action after the decedent's death in 2000. The decedent had worked at a polyvinyl chloride (PVC) manufacturing plant for nearly 30 years, where he allegedly was exposed to vinyl chloride (VCM). Scientific studies over the past several decades have associated occupational exposure to VCM with angiosarcoma, an extremely rare form of liver cancer. Prior to his death, however, the decedent had been diagnosed with hepatocellular carcinoma, a common form of liver cancer. The plaintiff's estate's complaint contained causes of action for negligence, failure to warn, fraud, and civil conspiracy.

The defendants filed a motion to exclude the testimony of four of the plaintiff's experts, consisting of an epidemiologist, an occupational physician, a pathologist, and an industrial hygienist. The superior court granted the defendant's motion regarding the epidemiologist and the occupational physician. The defendant filed a motion

for summary judgment, on the grounds the plaintiff could not prove general or specific causation without the epidemiologist and occupational physicians' testimony. The superior court granted the motion, dismissing the plaintiff's complaint, and the plaintiff appealed. The plaintiff argued the superior court had improperly excluded evidence from several scientific studies relied-upon by its experts, and had improperly conducted its own analysis of the epidemiological studies contained in the literature, which led the court to erroneously preclude the plaintiff's experts from testifying regarding causation.

The Appellate Division engaged in a lengthy recitation of the alleged facts, including the history of VCM and PVC manufacturing, and the industry studies from the 1940s that first promulgated threshold limit values of VCM exposure. The Appellate Division held that the superior court had erroneously prohibited the plaintiff's expert from referencing several articles in the scientific literature during his Rule 104 hearing, had improperly conducted its own review of the epidemiological studies, and had improperly precluded the plaintiff's experts from testifying regarding causation.

5. *DeBenedetto v. Denny's Inc.*, 421 N.J. Super. 312, 23 A.3d 496 (2010) (approved for publication July 20, 2011).

The plaintiff filed a putative class action against Denny's restaurant under the Consumer Fraud Act (CFA), alleging economic damages for failure to disclose its meals contained excessive amounts of sodium.

The plaintiff's second amended complaint alleged harm to health, yet disclaimed any damages for personal injuries, and claimed only equitable relief under the CFA, such as a refund of the purchase price of the meals the plaintiff consumed. The defendant moved to dismiss the first amended complaint, arguing the plaintiff's claims under the CFA were subsumed by the Products Liability Act (PLA).

The court granted the defendant's motion to dismiss, holding that despite the plaintiff's "strategic" omission of an express allegation of personal injury, his claims remained subsumed by the PLA. As the plaintiff alleged no physical injury, he could not maintain an action under the PLA.

6. *Bashir v. Home Depot*, 2011 WL 3625707 (D.N.J., Aug. 16, 2011)

The plaintiff was injured from a stump grinder he rented from Home Depot. The plaintiff was not given a copy of the product's operating manual, but was shown how to use the grinder by a Home Depot employee. While awaiting the ambulance, the plaintiff directed a family member to return the stump grinder, as well as the two laborers who were helping him, to Home Depot. The plaintiff subsequently sued the product's manufacturer, as well as Home Depot, alleging the stump grinder was defectively designed, and that it bore inadequate warnings. Home Depot moved for summary judgment on the grounds that it, as a product lessor, could not be held liable under the New Jersey Products Liability Act, and for summary judgment based on the plaintiff's spoliation. At issue was whether Home Depot, as the lessor of the product, could nonetheless be liable under a products liability theory on the grounds it had exercised some significant control over the labeling of the product. Also at issue was whether the plaintiff's failure to secure the identities of the laborer who had helped the plaintiff use the product, or his failure to notify Home Depot of the accident, constituted spoliation.

In support of its motion for summary judgment, Home Depot argued it met its obligations by identifying the stump grinder's manufacturer. The plaintiff, however, argued that as Home Depot permitted customers to "waive" reading the operating manual, Home Depot effectively substituted itself in place of the manufacturer's warning, and thus exercised "significant control over the labeling of the product." Accordingly, the court did not consider Home Depot a truly innocent retailer, and denied the motion for summary judgment.

The court also denied Home Depot's motion for summary judgment based on spoliation, noting that after the accident, the plaintiff was more focused on getting emergency assistance than preserving evidence. The court held that there were no facts indicating the plaintiff anticipated litigation, and thus he did not have a duty to preserve evidence immediately following the accident.

7. *Electric Insurance Co. v. Electrolux North America*, 2011 WL 3667518 (D.N.J., Aug. 22, 2011)

The issue in this subrogation action was limited to a discovery dispute between the parties. The plaintiff sought all documents concerning any fires allegedly caused by a specific gas dryer manufactured by the defendant, including all claims and litigation files, which it alleged had previously been ordered by the court.

The defendant produced copies of all complaints filed in every lawsuit involving the dryer in question, along with the underlying claims files for all such cases, which included investigative materials, expert assessments, inspection reports, photographs, and correspondence between the defendant's attorneys and other claimants. The defendant argued against producing complete litigation files, stating the plaintiff could obtain the same material by reviewing the docket sheets for the litigation matters the defendant identified, and by requesting copies of what it needed from the various courts. The defendant also argued that the burden of locating and logging the litigation files outweighed any benefit to the plaintiff, because most of the information in the files was protected by attorney/client privilege or by confidentiality orders.

The court noted that its previous orders did encompass the defendant's litigation files, and ordered the defendant to produce all investigative materials, expert assessments, inspection reports, and photographs.

8. *Flower v. Techtronic Industries, Co., Ltd.*, 2011 WL 3667512 (D.N.J., Aug. 22, 2011)

The plaintiff alleged injuries caused by a table saw marketed and sold by Ryobi Technologies. The plaintiff sued Ryobi Technologies, One World Technologies (Ryobi's parent corporation), and Techtronic Industries (One World's parent corporation). Techtronic Industries filed a motion to dismiss for lack of personal jurisdiction.

Rule 4(k) of the Civil Rules of Civil Procedure states that a district court may exercise jurisdiction over a non-resident defendant to the extent permitted by the law of the state where the district court sits. The court noted that New Jersey's long-arm statute confers jurisdiction over non-resident defendants to the extent allowed under the United States Constitution. Accordingly, the court noted that it could exercise jurisdiction over Techtronic if it had specific or general contacts with New Jersey.

Techtronic argued that it had no real or personal property located in New Jersey, no bank accounts or offices in New Jersey, nor did it conduct business in New Jersey or otherwise purposely direct its activities at New Jersey. In support of his motion, the plaintiff argued documents obtained in discovery against Techtronic's subsidiaries established a *prima facie* case that Techtronic was involved in the design, manufacture, and release into the stream of commerce of the table saw at issue, and the plaintiff sought jurisdiction discovery regarding Techtronic's contacts with New Jersey and its relationship to its subsidiaries. The court denied Techtronic's motion without prejudice, but permitted jurisdictional discovery to continue.

9. *Jatczyszyn v. Marcal Paper Mills, Inc.*, 422 N.J. Super. 123 (App. Div., Sept. 9, 2011)

The plaintiff was allegedly injured by a mechanical lift vehicle, and on Oct. 17, 2007, commenced a products liability action in superior court, Bergen County. Immediately after the filing of the complaint, the court sent a track assignment notice, assigning the case to Track III, which provided the parties with 450 days of discovery, commencing from the date the first answer was filed, or 90 days from service of the complaint upon the first defendant, whichever came first. The owner of the product filed its answer on Nov. 29, 2007, but the manufacturer removed the case to federal court. The district court ordered a Rule 16 conference, which was never held, because the plaintiff filed a motion to remand the matter back to the superior court. The plaintiff's motion to remand was granted seven months later.

Once the matter returned to superior court, the parties began engaging in discovery. Within months, the plaintiff received a court notice of the discovery end date, and the plaintiff requested a 60-day extension of the discovery period pursuant to Rule 4:24-1(c). In the interim, the plaintiff (who had not yet served responses to form interrogatories) continued serving document demands. While engaging in discovery, the plaintiff neglected to file a motion to extend discovery, and a trial date was scheduled. The trial date was eventually adjourned, and discovery extended until Aug. 11, 2009. In extending discovery, the court stated the plaintiff had not demonstrated exceptional circumstances, because he had received 450 days to conduct discovery. The plaintiff again filed a motion to extend discovery, which the court denied. The defendants moved for summary judgment, which the court granted.

On appeal, the plaintiff argued that court erred in denying his final motion to extend discovery because he had not received the benefit of 450 days to conduct discovery. The plaintiff argued that the time between the filing of the notice of removal and the point where the case was remanded should not apply to the 450 days of discovery available under Track III. The defendants argued that there was no basis to exclude the time the case spent in district court from the discovery period, and that the plaintiff could have continued to engage in discovery while the motion for remand was pending.

The court held that the discovery period should not have run between the time the case had been removed until it had been remanded. The court noted that 28 U.S.C. Section 1446(d) states that after the notice of removal is filed, "the State court shall proceed no further unless and until the case is remanded." Furthermore, the court noted that under FRPC 26(d)(1), the plaintiff could not have sought any discovery from any source before the parties conferred prior to the Rule 16 conference. Accordingly, the plaintiff was effectively prevented from engaging in any discovery until the district court had ruled on his motion to remand.

10. *Posada v. Big Lots, Inc.*, 2011 WL 4550158 (D.N.J., Sept. 29, 2011)

The plaintiff, a truck driver, was injured after he slipped on snow and ice at the defendant's distribution center located in Pennsylvania. The distribution center was owned by an Ohio corporation, and was operated by a Pennsylvania corporation. The defendants filed a motion to dismiss for improper venue.

The court held that venue was proper in the Eastern District of Pennsylvania, rather than the District of New Jersey. Pursuant to the venue statute, 28 U.S.C. Section 1391, an action based on diversity of citizenship may be brought in: 1) a district where any defendant resides, if all defendants reside in the same state; 2) a district in which a substantial part of the events giving rise to the claim occurred; or 3) a district in which any defendant is subject to personal jurisdiction, if there is no district in which the action may otherwise be brought. As a threshold matter, the court noted that venue was clearly proper in the Eastern District of Pennsylvania, because the plaintiff's accident occurred there. Thus, because the Eastern District of Pennsylvania was a "district in which the action may otherwise be brought," venue could not be based on the third subsection of 28 U.S.C. Section 1391 (allowing venue to lay in any district in which any defendant is subject to personal jurisdiction). Therefore, the court noted that venue could only lay in the District of New Jersey if all defendants resided in New Jersey.

After noting that a corporate defendant is deemed to reside in any district in which it is subject to personal jurisdiction at the time the action is commenced, the court held that none of the defendants resided in New Jersey, and thus transfer to the Eastern District of New York was appropriate.

11. *Bailey v. Wyeth Inc.*, 2008 WL 8658569 (N.J. Super. L., March 7, 2008) (approved for publication on Sept. 29, 2011)

Three cases remaining from a mass tort action involving allegations of harm from the ingestion of certain hormone replacement therapy products were consolidated. The defendants filed choice of law motions to apply non-New Jersey law, on the grounds the alleged harm occurred in other states. The court denied the defendants' motions, holding the defendants failed to timely file the motions.

The court noted that choice of law issues should be raised and decided early, preferably before trial. While it is well-settled that an affirmative defense is waived if not pleaded or otherwise raised in a timely fashion, exceptions may be allowed where public policy demands it and there is no unfair surprise, substantial prejudice or undue interference with the administration of justice.

In each of the three consolidated cases, however, the defendants failed to inform the court that choice of law was an issue until discovery had already been concluded, and expert reports served, legal strategy developed, and a trial date scheduled. The defendants' motions were, therefore, denied, as they would have caused unnecessary delay and prejudice to the plaintiffs.

12. *Bailey v. Wyeth Inc.*, __ A.2d __, 2008 WL 8658571 (N.J. Super. L., July 11, 2008) (approved for publication on Sept. 29, 2011)

The plaintiffs commenced an action under the PLA and CFA for allegedly contracting breast cancer as a result of hormone replacement therapy. The court granted the defendant's motion for summary judgment, dismissing the plaintiffs' complaint with prejudice. Of note is Judge Jamie Happas's informative summary of the Food and Drug Administration's (FDA) authority and procedures regarding pharmaceutical labeling and off-label use as they apply to products liability jurisprudence.

As part of their CFA claim, the plaintiffs argued the defendants misled physicians and the public about the safety of these hormone replacement therapy products, and that the defendants' fraudulent misrepresentation led directly to the plaintiffs' purchase of the prescription drugs in issue, and receipt of less than what they were promised. The plaintiffs alleged a purely economic loss, which was separate and distinct from the damages the plaintiffs incurred as personal injuries. The court noted that the PLA was enacted in 1987 to "re-balance the law 'in favor of manufacturers.'" And that the PLA provided the exclusive remedy for harm caused by a product. The central focus of the plaintiffs' action, and the essential nature of their claims, was that the defendant failed to warn of the dangers of its product, and the plaintiff cannot avoid the exclusive remedy of the PLA by seeking economic damages on a theory not normally pled in a products liability action. Thus, the court held the plaintiffs' CFA claim to be subsumed by the PLA.

Regarding the plaintiff's failure to warn claim, the court noted that the PLA provides a rebuttable presumption of adequacy of a prescription drugs label based on FDA approval. The presumption, however, may be overcome with proof of: 1) deliberate concealment of nondisclosure of after-acquired knowledge of harmful effects, or 2) manipulation of the post-market regulatory process. The court noted there was no evidence the defendants actively sought to dilute the labeling recommendations of the FDA, intentionally withheld any risk information from the FDA, or manipulated the regulatory process. Accordingly, the court held the warnings on the defendants' labels adequate as a matter of law, and granted the defendants' motion for summary judgment.

The court further held the plaintiffs' fraudulent and negligent misrepresentation claims subsumed by the PLA, noting the plaintiffs could not recast their products liability claim as common-law fraud or negligence.

13. *DeBoard v. Wyeth, Inc.*, 422 N.J. Super. 360 (2011)

Plaintiffs DeBoard and Bailey (*see Bailey v. Wyeth Inc.*, 2008 WL 8658571 (N.J. Super. L., July 11, 2011), *infra.*), who contracted breast cancer after being treated with various hormone replacement therapy drugs, appealed orders of summary judgment in favor of the defendants. On appeal, the plaintiffs challenged the presumption of adequacy the superior court applied to the drug warnings, arguing the presumption of adequacy could not apply prior to 1995 because the combined use of estrogen and progesterone constituted an off-label use of the drugs. The plaintiffs argued the superior court misconstrued established law regarding the application of the presumption, and that the judge failed to draw all favorable inferences from the plaintiffs' evidence of the defendants' conduct. In a one paragraph opinion, the Appellate Division affirmed the superior court's opinion, noting it to be "well supported by the evidence and legally unassailable."

14. *Andreoli v. State Insulation Corporation*, 2011 WL 4577646 (N.J. Super. A.D., Oct. 5, 2011)

The plaintiff died from mesothelioma in 2006 after working at a Hess refinery for several years, and on March 1, 2007, his estate filed a wrongful death action. The complaint did not name Hess as a defendant, but named several categories of fictitious parties. In 2010, the plaintiff sought leave to file an amended complaint naming Hess as a defendant. Hess moved to dismiss on the grounds that the statute of limitations had elapsed. The trial court denied the defendant's motion, and the defendant appealed.

On appeal, the defendant argued the plaintiff was not entitled to avail himself of fictitious-party practice. The Appellate Division reversed, holding that: 1) the plaintiff's first complaint had failed to describe the fictitiously named defendant with sufficient detail; 2) the plaintiff had failed to exercise due diligence in identifying Hess as a defendant; and 3) the defendant would suffer prejudice by allowing the amendment.

The court noted that a plaintiff invoking fictitious-party practice must satisfy four requirements: 1) the plaintiff must not know the identity of the defendant to be named fictitiously; 2) the fictitiously named defendant must be described with appropriate detail sufficient to allow identification; 3) the plaintiff must provide proof regarding how it learned the defendant's identity; and 4) the plaintiff must act diligently in identifying the defendant. The purpose of the rule is to protect a diligent plaintiff who is aware of a cause of action against a defendant but not the defendant's name, at the point at which the statute of limitations is about to run.

The court noted the plaintiff was aware he came into contact with asbestos at the defendants' facilities. Significantly, Hess was mentioned in both of the plaintiff's prior complaints. The plaintiff, however, failed to adequately

describe the fictitiously named defendant who was allegedly liable for negligently maintaining a job site. His complaint fictitiously named three categories of defendants: 1) defendants "in the business of mining, manufacturing, supplying, installing and/or distributing asbestos containing products, fibers and dust"; 2) defendants conspiring with other defendants; and 3) defendants "who stand in the shoes of the defendants… as successors in interest…"

The plaintiff also failed to provide the court with the required affidavit stating the manner in which the plaintiff obtained information about the identity of the fictitiously named defendant. The plaintiff did not provide evidence showing his due diligence in identifying Hess as a defendant before filing his complaint or before the statute of limitations had run, nor did the plaintiff seek timely amendment of his complaint once the fictitious defendant was identified by name. Finally, the court rejected the plaintiff's argument that the defendant would suffer no prejudice by the late amendment, as surely the defendant would be prejudiced merely by being exposed to liability after the statute of limitations had expired. ■

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