Product Liability and Toxic Tort Section Newsletter

Vol. 14, No. 1 — June 2013

Message From the Chair

by Adam L. Rothenberg

The Product Liability and Toxic Tort Section has had a relatively quiet year. While we have seen legislation proposed that might affect our area, none that really changed the landscape was passed. Mark Shifton, our legislative chair, has done a nice job monitoring any acts that might concern us. Moreover, while the New Jersey courts continue to deal with individual cases and mass torts, there has been a dearth of cases that were really remarkable. Sometimes, stability can be welcome and allow us all a chance to catch our collective breath. Of course none of that means that our members have not had active years litigating important cases in this area.

As always, the presentation of the Dreier Award is a highpoint of the year for the section. We were pleased to honor Anita Hotchkiss this year with the Fourth Annual Product Liability and Toxic Tort Judge Dreier Award. The award is annually given to attorneys and jurists to recognize excellence in and advancement of product liability and toxic tort law in New Jersey, and is named after the distinguished jurist, the Honorable William A. Dreier, J.A.D (retired). Having Judge Dreier present for the presentation of the award made it even more special.

Anita is a very deserving recipient. She is a partner with the firm of Goldberg Segalla LLP and in the firm's product liability practice group. She was recognized for her more than 35 years of experience in the field of product liability, which included defending companies and individuals in state and federal trial and appellate courts. She has represented clients in pharmaceutical, medical device, and other products liability cases, mass torts and class actions. Her work on early *Daubert* issues put her at the forefront in this area of law. She also earned distinction going to trial on a medical monitoring class action and she is certified by the Supreme Court of New Jersey as a civil trial attorney.

Our section also presented a unique seminar— Recent Developments in New Jersey Case Law Affecting Product Liability Claims—that was well received by all those in attendance. While many seminars look at recent developments, this one took a special approach: Each case that was examined was presented by one of the attorneys who had been involved in the case at either the trial level or the appellate level. The unique perspective of the lawyers allowed them not only to reiterate

the holdings of the cases, but also to help participants understand the issues better by adding their insights based on their own handling of those cases.

Michael Galpern, from the Locks firm, discussed *Kendall v. Hoffman-LaRoche*, which dealt with when a claim accrued for failure to warn claims. George Helfrich Jr., of Marshall Dennehy, presented his case, *Schwartz v. Hasbro*, in which the comparative negligence of an infant was the key to the defense and the verdict was upheld by the Appellate Division. *Torres-Pena v. Seigmeister* was examined by Richard Winograd, of the Ginarte firm, who represented the plaintiff in a case in which the courts found that product liability could be imposed on maintenance companies with ongoing relationships with the product owner. Finally, Robert Hanlon, of Goldberg Segalla, spoke about the forum *non-conveniens* marvel of *Yousef v. General Dynamics,* which allowed a product liability case arising from an accident in South Africa to be tried in New Jersey as an appropriate forum.

On behalf of myself, the section leaders and all who attended, I would like to thank the presenters for sharing their perceptions and comments.

This is the end of my year leading the section. I want to thank the other board members for their support and efforts to enhance the section's value to the membership. Greater participation of the membership will only help make us better at that task. We are committed as a group to advancing the interests of all practitioners—plaintiff and defense counsel. Once again, we have alternated the nominees from each 'side of the v.' to assure that goal. I congratulate the new officers of the section and commend them for their commitment to helping us all. The new officers are:

Chair – Thomas O'Grady
Vice Chair – Lynne Kizis
Secretary – Mark D. Shifton
Legislative Coordinator – Rachel Placitella
Immediate Past Chair – Adam L. Rothenberg

Inside this issue

Smartphones Can Make for Dumb Juries: Preventing Jurors From Acquiring Information Outside the Courtroom

by John B. Kearney and Christopher Corsi

My grandmother, God rest her soul, loved the phrase: "Curiosity killed the cat; satisfaction brought it back." It is a simple truth, and an important one in this Internet age. Jurors now are empowered by their iPhone, iPad or iMac to become a one-person investigator of the matter that is being tried before them. They are accustomed to 'Googling' for information all day long. Why, then, can't they do it during a trial so they understand the 'issues' and get to the perceived 'right' result?

The answer, of course, is that the Judiciary's role is to prevent jurors from acquiring information outside the courtroom that may inappropriately sway their findings. Obviously, when jurors are reaching conclusions and making decisions based on the potentially erroneous, outdated or incomplete musings of the online community, justice is not served. While it is true that it has always been the Judiciary's job to prevent jurors from seeking information outside the courtroom, that task has become increasingly more difficult now that every juror has an almost instant connection to information and people through smartphones, tablets and laptops.

The days of denying there is a problem are over. Stories of jurors tweeting, posting or researching issues online are becoming more common. By now, we know the endings of those stories are usually unhappy ones, involving sanctions, juror removal or even mistrial. New Jersey is certainly not immune. It has been reported that Superior Court Judge Peter Doyne, of Bergen County, recently imposed a $500 criminal contempt sanction on a jury foreman who Googled sentencing guidelines during jury deliberations and then shared that information with fellow jurors.

In response to similar types of outrageous online juror misconduct, such as jurors posting real-time trial developments to Facebook and uploading photographs of alleged murder weapons to the Internet during trial, California recently enacted a law that calls for criminal and civil contempt sanctions against jurors who inappropriately use social media or the Internet to research or disseminate information about cases.[1]

While sanctions certainly provide a punitive approach to address online juror misconduct, they do very little by themselves to prevent the Internet-savvy juror from acting inappropriately in the first place. Recognizing this problem, the Judiciary and the legal community at large recently have proposed solutions that take a more proactive role in preventing online juror misconduct.

One such solution centers on revisions to federal and state model jury instructions on the use of social media and the Internet during trial. These recent revisions use very specific language that precisely identifies what online activities and websites are prohibited, and provide a pragmatic explanation for why jurors should not engage in such activity. This approach effectively treats jurors as adults who will follow the prohibition once they are told specifically what it covers and why it is important to the integrity of the jury system to adhere to it.

For instance, New Jersey Model Civil Jury Instruction 1.11C was revised to restrict inappropriate juror use of social media and the Internet. It provided a rationale to jurors by stating:

> Why is this restriction imposed? You are here to decide this case based solely on the evidence—or lack of evidence—that is presented in this courtroom. You may wrongly be inclined to think that different or additional information from other sources would be helpful to you, or that this prohibition is somehow artificial…[t]his is not for you to determine. You must understand that any information you might access from sources outside of what is presented in this courtroom is not evidence.[2]

By clearly communicating the motivation and importance of restrictions on the use of social media and the Internet during trial, the trial judge brings the issue to the forefront of the juror's mind. In fact, some courts now begin the indoctrination process at the start of jury selection by using *voir dire* questions that ask potential jurors whether they will be able to adhere to social media and Internet usage prohibitions during the case. The bottom line: Tell jurors early, tell them specifically and tell them why.

A federal judge in the Southern District of New York recently communicated this message through the use of a written juror pledge. These pledges are signed by jurors under penalty of perjury and require the juror to swear that he or she will refrain from inappropriate use of social media or the Internet during trial. By requiring a juror to read and sign the pledge, rather than simply reciting an oath, the judge drives home the significance of complying with social media and Internet restrictions.

While some forward-looking judges and jurisdictions have started to address this issue of online juror misconduct, others have been slower to react. In an attempt to combat the problem, some legal organizations have acted. For example, the American College of Trial Lawyers has issued a best-practices guide that is available on its website.[3] The guide includes sample jury instructions, jury pledges and even a form message jurors can send to their social networking friends or email contacts advising them that they are a juror and are under a court order not to discuss anything online about the case.

In 2011, the Federal Judicial Center published its study of the issue. The center surveyed 508 judges to determine how frequently jurors use social media to communicate during trials and to identify strategies to halt this activity.[4] This study determined that the most common strategy used by judges to combat online juror misconduct was through the use of jury instructions. Surveyed judges also recommended reminding jurors regularly during the trial not to use social media or the Internet to communicate or research the case either during trial or deliberations. The respondents felt strongly that it was not enough merely to prohibit the activity, but also necessary to explain the reasons for the prohibition.

The issue of online juror misconduct likely will continue to develop as technology advances and access to information and people stored 'in the cloud' becomes easier. While no particular proposed solution offers a panacea for the problem, recent proposals by the Judiciary and the legal community, when used in combination, offer some guidance for dealing with the issue.

First and foremost, the key to addressing the problem is planting a seed in the juror's mind from the outset that the issue is critically important and worthy of the juror's continual attention. This can be done initially through *voir dire* questions, jury charges or even jury pledges. In fact, the issue can and should be addressed even earlier than the start of *voir dire* for a particular case.

Many jurisdictions, including New Jersey, use jury brochures and videos to educate potential jurors when they first arrive at the courthouse for jury duty. Many of these brochures and videos are extremely outdated, often predating smartphones and social media interaction. Clearly, updating these brochures and videos to address directly and specifically that there is no place for smartphone, tablet and computer use in the jury room should be a top priority. An explanation of the rationale for prohibiting such activity also is needed so jurors understand why they cannot do what now seems second nature to them.

Revising model jury charges to address this issue is also vital. Revisions that use very specific language to identify precisely which online activities and websites are prohibited are a better alternative to generic jury charge prohibitions against 'talking about the case with anyone.' Moreover, revisions should give jurors pragmatic explanations for why it is important for them not to engage in such inappropriate online activity. The revised New Jersey state court model civil jury instructions go a long way to accomplish that goal.

Although it is too early to measure the success of using a written juror pledge, it seems reasonable to conclude that such a pledge would make the juror's oath more striking and draw the juror's attention to this issue. As technology develops and connectivity increases, the Judiciary may find this approach is both effective and necessary.

If a juror is simply instructed not to do something, but the message is never reinforced, it will likely be forgotten in short order. Judges must remind jurors throughout the trial not to use social media or the Internet until their jury service ends. The judge can deliver constant reminders very informally and efficiently during morning greetings, at every break, and at the close of the day. Even though there is no singular perfect

solution to this problem, if the Judiciary uses the different emerging tools in a proactive and strategic manner, recent instances of jurors gone wild should become as passé as Myspace.

John B. Kearney is a partner, and Christopher Corsi is an associate, in the Cherry Hill office of Ballard Spahr LLP. This article was first published in the Feb. 11, 2013, issue of the New Jersey Law Journal and is republished here with permission.

Endnotes

1. *See* Cal. Laws chap. 181.
2. *See* New Jersey Model Civil Jury Instruction 1.11C, Revised April 2012.
3. *See* Jury Instructions Cautioning Against Use of the Internet and Social Networking, American College of Trial Lawyers, September 2010.
4. *See* Jurors' Use of Social Media During Trials and Deliberations, Federal Judicial Center, Meghan Dunn, Nov. 22, 2011.

2012: A Survey of Products Liability Cases From the Past Year

by Mark D. Shifton and David S. Kostus

Kendall v. Hoffman-LaRoche, Inc., 209 N.J. 173 (2012)—February 27, 2012

In this products liability action involving the drug Accutane, the Supreme Court affirmed the Appellate Division's holding, which found that the "presumption of adequacy" for warnings approved by the Food and Drug Administration (FDA) can be used at a *Lopez* hearing to establish a rebuttable presumption that the plaintiff should have been aware their injury was caused by the defendant's drug. That presumption, however, can be rebutted with evidence that even with the FDA warning of a potential side effect, a reasonable person could still be unaware their injuries were linked to the defendant's drug.

The plaintiff received multiple courses of Accutane treatments for acne from 1997 through 2003. She developed irritable bowel disease (IBD), a side effect sometimes associated with Accutane, in 1999. While the plaintiff continued to suffer from IBD intermittently over the course of her treatment, she never had IBD while she was taking Accutane, and her primary care physician never mentioned the association between Accutane and IBD. Over the course of the six years, however, the plaintiff received multiple pamphlets that mentioned the possible link. The plaintiff claimed to not have linked the IBD to taking Accutane until January 2004, when she was finishing her last course of Accutane and saw an advertisement in a magazine that listed IBD as a potential risk of Accutane.

The plaintiff filed suit against the manufacturer in December 2005, and the defendant moved for summary judgment on statute of limitations grounds. The Law Division conducted a *Lopez* hearing, and held that the statute of limitations was tolled, because a reasonable person would not have connected the plaintiff's diagnosis of IBD with Accutane. The Appellate Division affirmed the trial court's decision on the statute of limitations.

On appeal to the New Jersey Supreme Court, the defendant raised the issue of the New Jersey Products Liability Act (PLA) and the presumption of adequacy of FDA-approved warning labels. The defendant argued this should act as a complete bar to any tolling of the statute of limitations, while the plaintiff argued it was inapplicable to an analysis under the discovery rule. The Supreme Court, in affirming the "middle-of-the-road" approach adopted by the Appellate Division, engaged in a thorough analysis of *Lopez v. Swyer* and its progeny.

The Supreme Court also adopted the reasoning of the Appellate Division, and noted that while the intent of the PLA was to limit the liability of manufacturers, establish clear rules, and reduce the burden on manufacturers of FDA-approved products resulting from product liability litigation, nothing in the PLA explicitly abolished use of the discovery rule, and thus a complete bar to use of the discovery rule was inappropriate.

The Supreme Court also rejected the plaintiff's argument that this evidence should not be permissible at a *Lopez* hearing, finding that the very intent of the PLA was to establish that a manufacturer had satisfied its duty to warn. As such, the Supreme Court endorsed the Appellate Division's approach, finding an FDA-approved warning of a specific side effect should create a rebuttable presumption that a plaintiff must overcome to establish entitlement to the benefits of the discovery rule.

Montich v. Miele, 849 F. Supp. 2d 439 (D.N.J. 2012)—March 27, 2012

In this purported class action, the District of New Jersey held that the law of California—rather than New Jersey—applied to a motion to dismiss, and partially dismissed the plaintiff's complaint.

The plaintiff purchased a Miele washing machine and alleged that mold or mildew began to develop after only a year of use. The plaintiff filed a class action complaint in the District of New Jersey, asserting causes of action under the New Jersey Consumer Fraud Act (CFA), California's Unfair Competition and False Advertising Laws (California's equivalent to New Jersey's CFA), and various common law claims. The defendant moved to dismiss, arguing that as California law applied, the

plaintiff's claims under the CFA and California's statutes were barred.

Under the CFA, a plaintiff need not prove reliance, although under various California consumer protection statutes, the plaintiff must do so. Accordingly, the district court noted that a conflict of law was created. As a threshold matter, the district court noted that although courts in the Third Circuit are, at times, unable to determine choice of law issues on a motion to dismiss due to a paucity in the record, the court could do so here on the pleadings alone. The district court held that the choice of law analysis greatly favored applying California law, because the plaintiff—a California resident—received the alleged misrepresentation in California, relied on it in California, and the washing machine was located in California. The court noted the fact that the defendant was headquartered in New Jersey to be insufficient to outweigh the plaintiff's numerous contacts with California, and thus California had the most significant relationship under the conflict of laws analysis. Accordingly, the district court dismissed the plaintiff's CFA claim. Additionally, as the plaintiff's complaint did not plead reliance on the defendant's alleged misrepresentations, the district court dismissed the plaintiff's claims under California's consumer protection statutes.

The court let stand the plaintiff's claim for breach of implied warranty, however, noting that New Jersey law applied, as there was no conflict between New Jersey and California law, and held the plaintiff's breach of implied warranty claim was not subsumed by the PLA. Finally, the court upheld the plaintiff's claim for unjust enrichment, and noting that while there appeared to be a conflict between New Jersey and California's laws regarding whether privity was required to support a claim for unjust enrichment, declined to decide the issue as it had not been fully briefed by the parties.

Beim v. Hulfish, 427 N.J. Super. 560 (App. Div. 2012)—May 29, 2012

In this novel wrongful death action, a decedent's estate sought damages for increased tax liabilities based upon the decedent's premature death. The decedent, a 93-year-old man with substantial assets, was killed in a car accident in 2008, and his estate was liable for nearly $1.2 million in estate taxes. According to his estate, had the plaintiff died in 2009, his estate's tax obligation would have been only approximately $600,000, and had he died in 2010, the estate would have paid no taxes. The decedent's estate filed a wrongful death claim against the operator of a vehicle in the collision, and as an element of its pecuniary damages sought recovery for the difference in the estate taxes paid by the decedent's estate, under the theory that the decedent's heirs had suffered a "lost inheritance" caused by the decedent's premature death. During the litigation, the Economic Growth and Tax Relief Reconciliation Act of 2001 was set to expire in 2010.

The Law Division granted the defendant's motion to dismiss, holding that the estate's lost inheritance damage claim was too speculative. The court noted that mortality tables predicted the decedent would have likely lived beyond 2010, and at the time, the political future of the tax situation the decedent's estate would have faced was uncertain. The Appellate Division noted that only two reported decisions (in Florida and New York) had dealt with this issue, and although both decisions had held increased tax obligations to not be a recoverable element of pecuniary damages in a wrongful death action, the Appellate Division distinguished both. The Appellate Division reversed the Law Division, and held that the estate's claim for increased tax liabilities based on the decedent's premature death could be maintained, provided it was supported by a competent expert opinion.

In Re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012)—June 1, 2012

In this multicounty litigation, the Appellate Division reversed a trial court's order barring the defendants from retaining any expert who had formerly treated any plaintiff, holding that such an order would unfairly impede the defendants' access to qualified experts.

The defendants manufactured and sold pelvic mesh medical devices used to treat incontinence. In 2008, several lawsuits were filed against the defendants, and in 2010, a total of 78 cases were assigned for joint case management. By 2011, there were more than 220 actions. In late 2010, the defendants' counsel discovered several of their consulting experts had formerly treated various plaintiffs in the litigation. The defendants' counsel proposed a protocol that would have allowed them to retain as experts physicians who had formerly treated plaintiffs in the litigation, but would not allow them to use any such expert in any case brought by a specific plaintiff the expert had treated. The trial court issued an order barring defendants' counsel from consulting with or retaining any physician who had, at any time, treated any plaintiff. According to the defendants' estimates, the trial court's order effectively barred more

than 1,000 physicians from serving as defense experts, and there were between 1,000 and 3,000 qualified experts available.

The Appellate Division reversed the trial court's order, and engaged in a broad analysis regarding the physician-patient privilege, the American Medical Association's Code of Medical Ethics, and whether any public policy should bar a treating physician from serving as an expert witness against his or her former patient's "litigation interests." Citing Supreme Court decisions allowing defense interviews with treating physicians and rejecting any type of duty that would be imposed upon physicians to offer their blanket support to their patients' claims in litigation, the Appellate Division found no authority for the trial court to categorically exclude a physician who had previously treated a plaintiff in the litigation from testifying against other plaintiffs.

Concurring with the majority, Judge Jack Sabatino agreed with the result but would have decided the issue on narrower grounds, arguing the trial court's order was overbroad, and unduly burdened the defendants in light of the number of claims and treating physicians that had been implicated by the trial court's order. Judge Sabatino's concurrence argued the majority had gone too far in its analysis of "the crossroads of law, medicine, and ethics," and that the decision could have "potential wide-ranging consequences that could affect more than the soundness of [the trial court's case management order]."

Bessemer v. Novartis Pharmaceuticals Corp., 2012 WL 2120777 (App. Div.)—June 13, 2012

In this products liability action, the Appellate Division affirmed the lower court's ruling, which had applied the learned intermediary doctrine to grant partial summary judgment in the defendant's favor, holding that the manufacturer of a prescription drug had no duty to warn the plaintiff's treating (and non-prescribing) dentists of potential side effects.

The plaintiff was a breast cancer patient with bone metastases, and underwent intravenous treatments of Aredia and Zometa to reduce skeletal fractures, bone degeneration and alleviate bone pain. The plaintiff began to develop osteonecrosis of the jaw (ONJ), which occurs in approximately five percent of those treated with these medications. The plaintiff sought treatment from dentists and oral surgeons as a result of the ONJ, and argued that undergoing invasive dental procedures worsened her condition. She sued under both the New Jersey Products Liability Act and the New Jersey Consumer Fraud Act, arguing the drug's manufacturer had a duty to warn not just the prescribing physician, but also treating dentists and their patients, about the risks of ONJ.

Affirming the Law Division's grant of partial summary judgment, the Appellate Division rejected the plaintiff's argument that the drug manufacturer directly marketed its product to the consumer, and reaffirmed the application of the learned intermediary doctrine.

Coundouris, et al. v. Wyeth, ATL-L-1940-10 (Law Div., Atlantic County, June 26, 2012)

In this multicounty litigation, Judge Carol Higbee held that the manufacturer of a brand-name drug could not be held liable under the PLA for failing to warn consumers of the generic version of the drug's risks.

The defendants manufactured and distributed metoclopramide (under the brand name Reglan), a drug approved by the FDA to treat gastroesophageal reflux. The plaintiffs all sued after ingesting generic metoclopramide manufactured not by the defendants, but by manufacturers of generic metoclopramide. The plaintiffs argued the defendants were aware of dangers associated with metoclopramide, and failed to disseminate accurate information about the drug, or failed to adequately warn doctors and patients of the drug's risks. The defendants argued that under the PLA, manufacturers of a brand-name drug may not be held liable for injuries caused by the generic version of the drug.

Noting that the plaintiffs' claims were governed by the PLA, the court granted the defendants' motions to dismiss, noting that the PLA did not intend for prescription drug liability to extent to the manufacturer of the branded drug, when it was the generic drug that had been consumed. Judge Higbee noted that the United States Supreme Court's decision in *Pliva v. Mensing*, 131 S.Ct. 2567 (2011), which held that FDA regulations applicable to manufacturers of generic drugs preempted state law failure to warn claims, did not go so far as to imply a duty on the part of manufacturers of brand name drugs in favor of consumers of the generic drug. As the plaintiffs admittedly did not ingest Reglan, they could not maintain a products liability action against the defendants.

Ford Motor Credit Company, LLC v. Mendola, 427 N.J. Super. 226 (App. Div. 2012)—July 24, 2012

In this negligence, products liability, and breach of express warranty action, the Appellate Division held that while a negligence claim involving the cause of

a car's engine failure must be supported by an expert opinion, the breach of express warranty claim need not. The defendant's Jaguar was involved in a serious car accident, and shortly after it was repaired, ran into engine trouble. The defendant continued to drive the car as the check engine light intermittently engaged. Several days later, the engine seized, and sustained serious damage when it overheated. The dealership refused to replace the engine, stating that it had overheated due to the defendant's misuse. The defendant stopped making the lease payments, and the lessor sued. The defendant filed a third-party complaint against the manufacturer, the dealership that serviced the car, and the dealership that sold her the car. The third-party claims sounded in both products liability and breach of warranty. At the close of discovery, the third-party defendants moved for summary judgment, on the grounds the defendant had not disclosed an expert report to support her claims. The defendant argued the third-party defendants had the burden of producing their expert reports first, because their defenses that it was her misuse of the car that caused the damage were affirmative defenses. The trial court agreed with the third-party defendants, and dismissed the third-party claims.

The Appellate Division partially affirmed the trial court's opinion, and held the defendant's failure to disclose an expert opinion doomed her negligence claim. The court noted there were many possible reasons the engine seized, and the defendant's negligence claim could not be supported by circumstantial evidence. Further, her products liability claim also failed, as liability under the Products Liability Act is only available for claims arising from personal injury or damage to property other than the defective product itself—not purely economic loss caused because of the defective product.

Reading the defendant's third-party complaint broadly, however, the court noted the defendant seemed to make allegations of breach of an express warranty, allegations for which the claimant need not establish the existence of a defect. The court noted that while the defendant still had the burden to prove proximate cause, summary judgment regarding her breach of express warranty claims was inappropriate, as all she had to do was establish the car failed to perform as warranted. The court noted that had the third-party defendants disclosed an expert report that connected the cause of the engine failure to misuse, the burden would have shifted to the defendant to disclose her own expert report.

D'Agostino v. Prudential Insurance Company, 2012 WL 3022140 (App. Div.)—July 25, 2012

In this products liability action, the Appellate Division affirmed the ruling of the lower court, finding the plaintiff failed to establish his exposure to two specific cleaning products distributed by a defendant, which was a substantial factor in causing his renal cancer.

The plaintiff initially filed suit in November 2005, alleging he had developed renal and basal cell carcinoma due to exposure to various "inks, solvents and other toxic substances" during his employment in the printing industry from 1977 until 2003. The defendants initially included six previous employers, one of which was Unimac, who had employed the plaintiff from early 2000 until approximately October 2003. The plaintiff filed an amended complaint adding Deleet Merchandising Corporation as a defendant on Jan. 11, 2008, and identified three cleaning products distributed by Deleet, (Red Magic X, Blue Magic X, and Craft Wash #3), as products to which he was exposed. The plaintiff, however, later conceded the only period of time during which Deleet distributed any of the chemicals in question to any of his former employers while he was in their employ was a period from January through October 2002, when Deleet distributed Red Magic X and Clean Wash #3 to Unimac.

The plaintiff's expert's report, written before Deleet was a party to the litigation, named chemical components the expert believed to be a factor in the plaintiff's cancer, but did not name any products, and specifically did not name any products distributed by Deleet that contained those chemical components. Further, the material safety data sheets (MSDS) for both Red Magic X and Clean Wash #3 indicated both products were non-carcinogenic. Deleet moved for summary judgment (as did the manufacturer, whom Deleet had brought in as a third-party defendant) and the trial judge found in their favor, stating the plaintiffs had failed to show "the exposure to each defendant's product was a 'substantial factor in causing or exacerbating [plaintiff's] disease.'"

The Appellate Division affirmed the trial judge's decision, noting the lack of specificity in the plaintiff's expert's report, and the fact the plaintiff's expert had attributed the plaintiff's renal cancer to his nearly 30 years in the printing industry, and not to any specific period of exposure to a product distributed by Deleet. The Appellate Division also noted that while the expert had stated "[s]everal studies indicate an excess of kidney and bladder cancer in the printing industry," the expert

failed to identify those studies or expand upon what was meant by an "excess" of kidney cancer.

Marcus v. BMW, 687 F.3d 583 (3d Cir. 2012)—August 7, 2012

In this class action case, the Third Circuit vacated a district court's order certifying a class, holding that the district court abused its discretion in finding the numerosity requirement was satisfied, and held individual fact questions predominated over common questions that precluded certification as a class.

The plaintiff leased a BMW equipped with run-flat tires (RFTs), which allow the driver to continue driving the car even after losing all air pressure. After experiencing four tire failures during his lease, he sued the tire and car manufacturer, alleging the tires were defective, as they were highly susceptible to failure, could not be repaired, and were exorbitantly priced. The district court certified a state sub-class on behalf of all purchasers and lessees of certain BMWs sold or leased in New Jersey that were equipped with run-flat tires. The Third Circuit vacated the certification order and remanded the case back to the district court. First, the Third Circuit took issue with the district court's class definition, holding that it was too vague, and thus certification was improper.

While the Third Circuit found the district court's explanation of how the requirements of commonality and typicality was sufficient, it held the district court impermissibly speculated on the issue of numerosity. While the district court noted that out of the over 700,000 vehicle sold nationwide that met the class definition, "common sense indicates that there will be at least 40 [that would fit the state sub-class]." The Third Circuit, however, held that this analysis "crossed the line separating inference and speculation," and that the numerosity requirement had not been satisfied, as there was no evidence there were any members of the state sub-class other than the plaintiff himself.

The Third Circuit also held that evidence was lacking regarding whether common questions of proximate cause would predominate over questions affecting individual class members. Specifically, the court noted that tires (RFTs or standard tires) could "go flat" for any reason, and the issue of proximate cause would necessarily involve an individualized inquiry into each proposed class member's tire.

Finally, the court held that the predominance requirement was also unsatisfied regarding the plaintiff's claims that the defendants' violated the Consumer Fraud Act. The questions of whether each individual class member had knowledge of the alleged defect prior to purchase would overwhelm the common questions of law and fact.

Sager v. Hoffman-LaRoche, Inc., 2012 WL 3166630 (App. Div.)—August 7, 2012

In this products liability action involving the acne drug Accutane, the Appellate Division considered whether to overturn the Law Division's decision on three separate complaints on two issues. First, whether the plaintiffs' claims were barred by the statute of limitations given the equitable tolling restrictions set forth by the New Jersey Supreme Court in *Kendall v. Hoffman La-Roche*, 209 N.J. 173 (2012) (discussed above), and second, whether the defendants were entitled to summary judgment on the failure to warn claims under Florida's law of proximate causation (the plaintiffs' treating physicians all testified they would have prescribed Accutane even despite stronger warnings). The Appellate Division affirmed the Law Division's order holding the plaintiffs' complaints were timely filed, but overturned the trial court's decision to not apply recent Florida precedent, and dismissed the three complaints.

The three plaintiffs all took Accutane over the course of several years, two beginning in 1998 and one in 1999, and all three developed gastrointestinal conditions. All three of the plaintiffs' treating physicians testified they did not discuss irritable bowel disease (IBD) as a potential side effect with their patients, because the FDA-approved warning at that time stated Accutane was "temporally associated with inflammatory bowel disease." None of the three physicians believed the term "temporally associated" was the equivalent of causation, so they did not believe a warning was necessary.

The Law Division heard the statute of limitations issue again on remand, so it could apply the recent standard enunciated in *Kendall*, which held that products accompanied by FDA-approved warnings created a rebuttable presumption that the claimant was aware of that potential hazard in the context of a discovery rule analysis. Even with that rebuttable presumption, the Law Division found there was ample evidence that a reasonable person in each of the three plaintiffs' positions would not have been aware of the connection between Accutane and IBD. The Appellate Division affirmed the Law Division's order.

On the second issue, however, the Appellate Division reversed the Law Division, which had refused to apply the ruling of a Florida appellate panel in *Hoffman-La Roche, Inc. v. Mason*, which was issued while these matters were pending. In *Mason*, which had a remarkably similar fact pattern to this group of cases, a Florida appellate panel had issued a *per curiam* opinion, finding that where a stronger warning would not have prevented the treating physician from prescribing Accutane, there could be no proximate cause. Florida has a learned intermediary doctrine similar to New Jersey's; however, the physician's duty to warn patients of potential side effects is not absolute under Florida law. As such, where the physician still would have prescribed Accutane, and it is uncertain whether the physician would have warned of that particular side effect, a plaintiff cannot prove it is "more likely than not" that the manufacturer's inadequate warning was a substantial factor in bringing about the injury.

The Law Division refused to apply the *Mason* decision, finding it to be an outlier, and criticizing it as a terse *per curiam* opinion. The Appellate Division, however, noted *Mason* was binding Florida precedent, both sides had agreed that Florida law was controlling, and all three dermatologists had testified, identical to the facts in *Mason*, that they still would have prescribed Accutane even with a stronger warning. As such, the Appellate Division held it was bound to apply Florida precedent, and dismissed all three cases for being unable to establish proximate cause.

Cornett v. Johnson & Johnson, 211 N.J. 362 (2012)—August 9, 2012

In this multistate products liability action, the New Jersey Supreme Court affirmed, with some modification, the Appellate Division's ruling dismissing one of the 49 consolidated actions as untimely under the Kentucky statute of limitations, and finding all but three of the claims in the other 48 complaints were preempted by the Medical Device Amendments of 1975 (MDA) to the Food, Drug and Cosmetic Act (FDCA).

The defendants manufactured and sold the Cypher® stent, which applied for and received pre-market approval (PMA) from the Food and Drug Administration (FDA) as a Class III medical device. On April 24, 2003, the FDA approved the pre-market application of the Cypher® stent for "use by physicians in patients with atherosclerotic obstructive coronary disease for whom the device is not contraindicated and in accordance with physicians' clinical judgment." The decedent, who was diabetic in addition to having coronary heart disease, underwent implantation of the stent. Since the plaintiff was diabetic, the use of the stent was considered off-label, but not contra-indicated. Five months after surgery, the plaintiff developed a sub-acute stent thrombosis in the area of the implant, and died on May 18, 2005. The plaintiff filed an action in the Law Division on Sept. 15, 2008.

In evaluating the statute of limitations claims with regard to the *Cornett* complaint, the court engaged in an extensive choice of law analysis, and found no great conflict between the laws of New Jersey and Kentucky. As such, the court found that applying Kentucky's discovery rule analysis, the plaintiff should have identified the stent as the cause by December 2006, and thus the plaintiff's complaint was time-barred under Kentucky's statute of limitations. In evaluating whether or not the claims in the complaint were pre-empted under federal law, the court examined the MDA in detail, seeking to determine exactly what types of statutory and common law claims Congress sought to exclude, and found that to permit the majority of the claims to go forward would directly interfere with the exclusive authority of the FDA to enforce the FDCA, and specifically cited the robust enforcement options available to the agency.

The court further noted that Congress had provided a safe harbor to manufacturers of Class III devices, allowing them to "disseminate" peer-reviewed articles and certain other materials to health care providers concerning the "safety, effectiveness, or benefit of a use not described in the approved labeling…" 21 U.S.C.A. §§ 360aaa, 360aaa-1.

The court's final analysis agreed largely with the Appellate Division, finding that failure to warn claims regarding approved and off-label uses were preempted by the MDA, except to the extent plaintiffs base their claims on allegations of deliberate non-disclosure or fraudulent representations apart from failure to comply with FDA requirements. The court also found the plaintiffs' breach of express warranty claims preempted, except to the extent the plaintiffs allege the defendants made voluntary statements to third parties differing from the information on the approved packaging.

Gannon v. American Home Products, Inc., 211 N.J. 454 (2012)—August 15, 2012

In this products liability action, the New Jersey Supreme Court held the dismissal of a federal products liability action would have collateral estoppel effect to bar a parallel New Jersey proceeding.

The plaintiffs' son developed brain cancer after receiving a series of polio vaccines as a child. The plaintiffs sued the United States in federal court, alleging that under the Federal Tort Claims Act the federal government was negligent in permitting the polio vaccine to be sold to the public. The plaintiffs' federal action was dismissed on account of a lack of evidence regarding general and specific causation. As the issue in the federal court concerned the liability of the United States for approving distribution of the vaccine, the identity of the vaccine's manufacturer was not the subject of much discovery. The dismissal was affirmed by the Third Circuit in 2008.

At the same time their federal action was ongoing, the plaintiffs commenced a products liability action in the Law Division against several vaccine manufacturers. Summary judgment was granted in the defendants' favor, on the grounds that: 1) the plaintiffs lacked evidence to prove the identity of the manufacturer of the vaccine given to the plaintiffs' son; and 2) the plaintiffs were collaterally estopped based on the federal court judgment of dismissal. The Appellate Division reversed the trial court, holding that equitable considerations militated against granting collateral estoppels effect to the federal court's judgment.

On appeal, the Supreme Court faced three important issues: 1) whether federal or state law principles of collateral estoppel should govern the analysis; 2) whether the plaintiffs had a full and fair opportunity in their federal court action to litigate the issues of general and specific causation; and 3) whether equitable considerations found in the Restatement (Second) of Judgments would permit the plaintiffs' claim to proceed. The Supreme Court reversed the Appellate Division, holding that federal principles of collateral estoppel—rather than New Jersey law—governed the analysis, the plaintiffs had a full and fair opportunity to litigate the issues of causation in the federal court action, and equitable considerations would not override the collateral estoppel argument to save the plaintiffs' claim.

As the Supreme Court's decision on the collateral estoppel issue was dispositive, it did not reach the issues regarding the trial court's dismissal of the action on the grounds that there was insufficient evidence of the identity of the vaccine's manufacturer.

Klimko v. Vinyl Works Canada, 2012 WL 5187919 (App. Div., Oct. 22, 2012)

In this products liability action, the Appellate Division held that a plaintiff's comparative negligence in constructing a product was properly put before the jury. The plaintiff sued for personal injuries after falling from a pool ladder and striking her arm on the ladder's safety gate latch. Prior to the accident, the plaintiff had skipped several critical steps in the assembly of the ladder, which affected its stability. The plaintiff sued the ladder's manufacturer, alleging the ladder had been defectively designed. The defendant asserted the defense of comparative negligence, and filed a counterclaim against the plaintiff and her mother for indemnification and contribution based upon their negligence in assembling the ladder. The trial court denied the plaintiffs' motion to dismiss the counterclaim at the close of the defendant's case. The jury found the ladder was defectively designed, but found the plaintiff's negligence was a proximate cause of the injury. The ultimate verdict held the defendant only 20 percent responsible.

On appeal, the plaintiff argued the issue of her comparative negligence was improperly put before the jury, as whether the product was defectively designed required an analysis of the product at the time it was placed into the market, not how it was assembled. The Appellate Division noted that a plaintiff's mere failure to discover a defect, or to guard against the possibility of its existence, is not a defense. The Appellate Division, however, affirmed the trial court, holding that as the plaintiff had actual knowledge of the danger posed by the defective product, and knowingly and voluntarily encountered the risk, the issue of the plaintiff's comparative fault was properly put before the jury. ■

Mark D. Shifton, the legislative coordinator of the Product Liability and Toxic Tort Section of the New Jersey State Bar Association, is a partner with Seiger Gfeller Laurie LLP in Princeton and New York. David S. Kostus, a member of the Product Liability and Toxic Tort Section, is a senior associate in the Jersey City office of Segal McCambridge Singer & Mahoney, Ltd., where he practices in toxic tort and products liability.

Legislative Report—2012

by Mark D. Shifton

An important facet of the mission of the New Jersey State Bar Association's Product Liability and Toxic Tort Section (PLTTS) is to review and comment upon bills pending before the New Jersey Legislature at the bar association's request. While events such as Hurricane Sandy and gun control measures in the wake of the Sandy Hook tragedy made for an active year for the Legislature, bills potentially affecting the products liability/toxic tort practice took a back seat, with most legislation sitting in committee as of the time of this writing. Accordingly, the PLTTS was not called upon to comment on any pending legislation. Nevertheless, the leadership of the PLTTS has been tracking several bills that could potentially affect the practice of its membership. The following bills may be of interest to PLTTS members:

A-763/S-2062 and A-3308/S-2207

A-763 and S-2062 sought to authorize the Judiciary to impose new (and increase existing) filing fees to fund the development of a statewide electronic filing system, as well as fund Legal Services of New Jersey. Both bills passed their respective houses, but were then vetoed by Governor Chris Christie on July 30, 2012.

A-3308 and S-2207 were subsequently introduced into the Assembly and Senate. Both bills are similar to A-763 and S-2062. S-2207 has passed the Senate, and it remains before the Assembly Judiciary Committee, along with A-3308.

A-801/S-761

This bill would have restricted access to motor vehicle accident reports to those appearing on the report, accident victims, their attorneys, vehicle owners, insurance company investigators, and certain governmental employees. Absent a court order, motor vehicle accident reports would not be made available to the general public until 90 days had elapsed from the date of the accident.

A-801 was passed by the Assembly and received in the Senate in October 2012, but since that time has not been acted upon. The Senate Judiciary Committee reported upon S-761 favorably, and the bill received a second reading, but to date a third reading has not been scheduled.

S-2340

This bill would expand the scope of N.J.S.A. 2A:15-59.1, the New Jersey frivolous litigation statute, by enlarging the definition of "pleadings" to "claims, motions, pre-trial affidavits or other pleadings," and would expand the definition of "frivolous" to include any pleading "commenced, used, or continued for the purpose of retaliation against the assertion of a legitimate claim..." Further, S-2340 would allow the recovery of expert expenses, counsel fees, prejudgment interest, and consequential damages, and would allow any party or attorney (as opposed to the non-prevailing party) to be sanctioned for a frivolous pleading.

S-2340 was introduced in the Senate and referred to the Senate Judiciary Committee in November.

A-2987

This bill would restrict attorney solicitation letters, and make violations subject to a petty disorderly persons offense. Should the bill become law, any attorney solicitation to a person whose name was obtained from a public record would need to be clearly marked as an advertisement, so as not to alarm the recipient.

A-2987 passed through the Assembly in June 2012, and was referred to the Senate Judiciary Committee, where it has since remained. The PLTTS was not asked by the New Jersey State Bar Association to vote upon or comment on the bill, although it should be noted that the Municipal Court Section did, and the section objected to the bill.

A-1496

This bill, which was introduced in January 2012, would restrict the ability of non-residents to bring tort

actions against other non-residents in New Jersey, where the tort was not committed within New Jersey. The bill also provides that if a non-resident brought a tort action against a resident, the law of the site of the tort shall control. This bill is currently before the Assembly Judiciary Committee.

Mark D. Shifton, the legislative coordinator of the Product Liability and Toxic Tort Section of the New Jersey State Bar Association, is a partner with Seiger Gfeller Laurie LLP in Princeton and New York.