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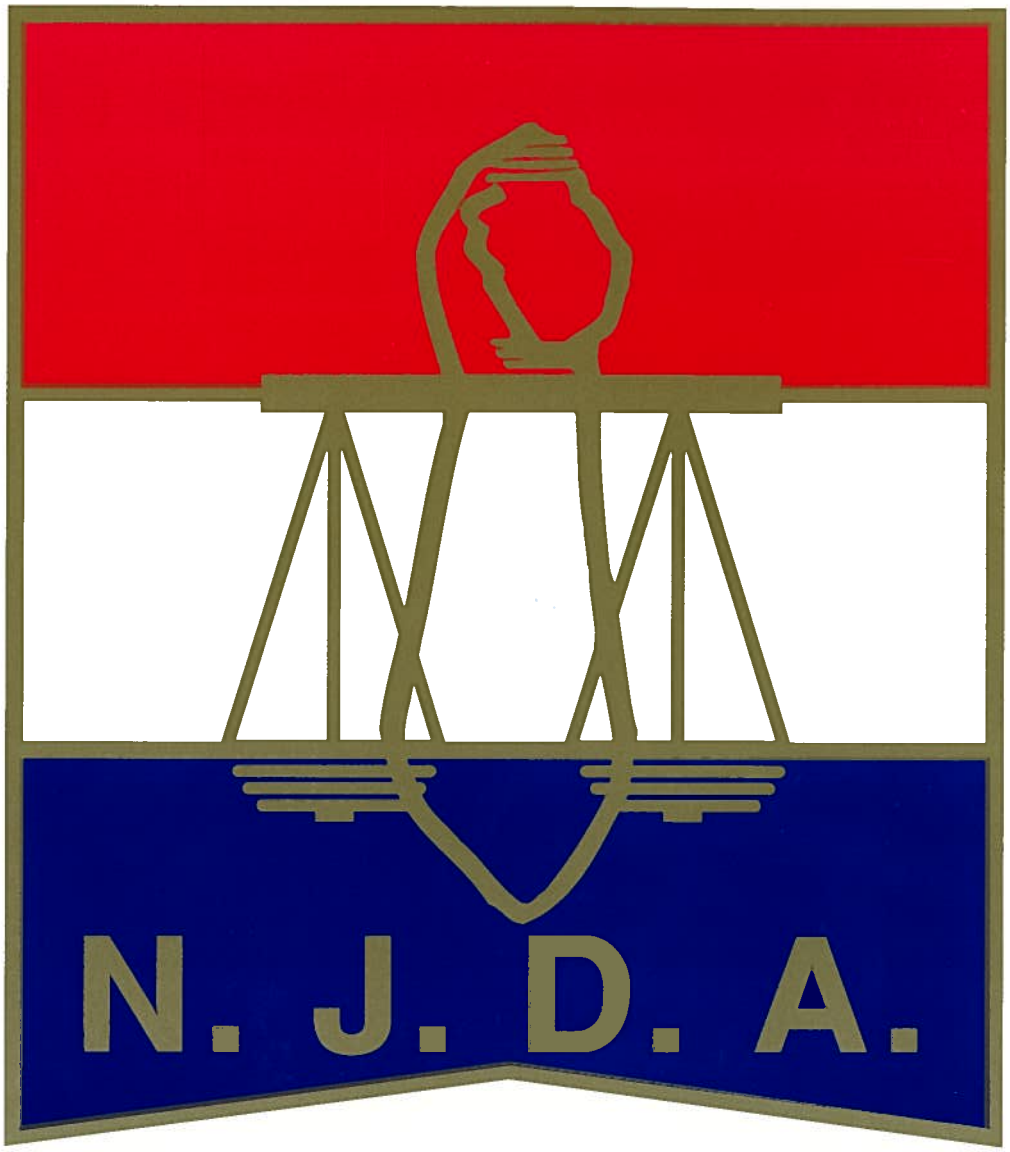
New Jersey Defense

~~A Publication of The New Jersey Defense Association~~



inside...

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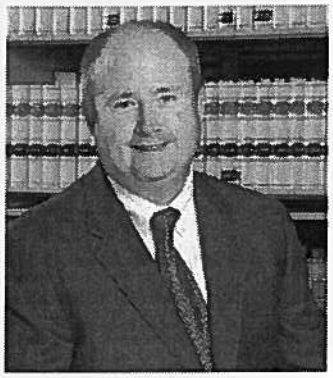
PRESIDENT'S MESSAGE

Michael J. Leegan, Esq.



Nearing the end of my term as President of the New Jersey Defense Association, I would like to provide a brief summary of what we have been able to accomplish as an organization.

Our annual insurance coverage seminar on November 20, 2007 was another great success. The attendees were given a comprehensive presentation regarding New Jersey's new UM/UIM statute, potential coverage of punitive damages and the various issues surrounding the impact of contractual indemnification clauses, with additional insured coverage. The oral presentations were bolstered by the written materials provided by our panel of speakers. This seminar is just another example of how our organization provides the most up to date continuing legal education on the issues facing the civil defense bar in New Jersey.

Our annual Trial College was conducted on February 12, 2008 at the Union County Court House. The Trial College provides a unique opportunity for both our newest members and our veterans to brush up on their trial skills. In today's practice, the opportunities to gain trial experience, especially for young attorneys, are becoming few and far between. The Trial College provides this experience, under the mentoring of our Association's most experienced trial attorneys.

The Association's legal education component will continue with a seminar presented by our Employment Law Committee on April 4, 2008. The seminar's agenda addressed damages issues and included a panel of accounting and medical experts.

The Association continued with our efforts to represent the voice of the civil defense bar and insurance industry in opposing the proposed amendment to the Wrongful Death Act, allowing for the recovery of "grief" damages. The organization's efforts in opposing the amendment played a critical role in educating members of the State Legislature, and the Governor himself, on the effects the proposal would have had in creating claims with unlimited and unpredictable damages. Although passed by the Legislature, the bill was pocket vetoed by the Governor.

In the remaining months of my term, I will concentrate on providing our membership with services that will enable them to work in an ever changing legal environment. To achieve this endeavor, please feel free to contact me through our Executive Director with any suggestions, concerns or thoughts on how I or the Association can best serve your needs.

Mike Leegan

NJDA FILES AMICUS BRIEF: HISENAJ v. KUEHNER

On November 13, 2007, the New Jersey Supreme Court heard oral argument in Hisenaj v. Kuehner. The Appellate Division's decision in that case is published at 387 N.J. Super. 262 (App. Div. 2006). In its decision, the appellate court overturned a $50,000.00 award and granted plaintiff a new trial based upon its determination that the trial court improperly permitted the defendant's biomechanical expert to testify that the low-impact collision involved could not have caused the three cervical and one lumbar disc herniations alleged. By its verdict, the jury found that plaintiff had sustained a non-permanent, type 8 injury under the pre-AICRA threshold. The Appellate Division concluded that the jury's rejection of plaintiff's permanent injury claims arose from its acceptance of the biomechanical expert's opinion testimony. Plaintiff did not present any biomechanical testimony at trial.

Prior to permitting the defense's expert to testify, the trial court conducted a Rule 104 hearing to ascertain the basis for the biomechanical opinions proferred. The expert testified that his opinions were based in part on the results of seventeen scientific studies conducted over the course of thirty-four years as well as the expert's own medical research. The Appellate Division conducted its own review of the studies relied upon by the expert and concluded that they were not scientifically reliable and could not support the proferred opinion. Reduced to its essence, the appellate court's opinion was based upon its determination that the subjects of the studies did not include enough individuals of plaintiff's age, sex and physical characteristics to permit any conclusion to be drawn regarding the probable impact of the accident upon her health.

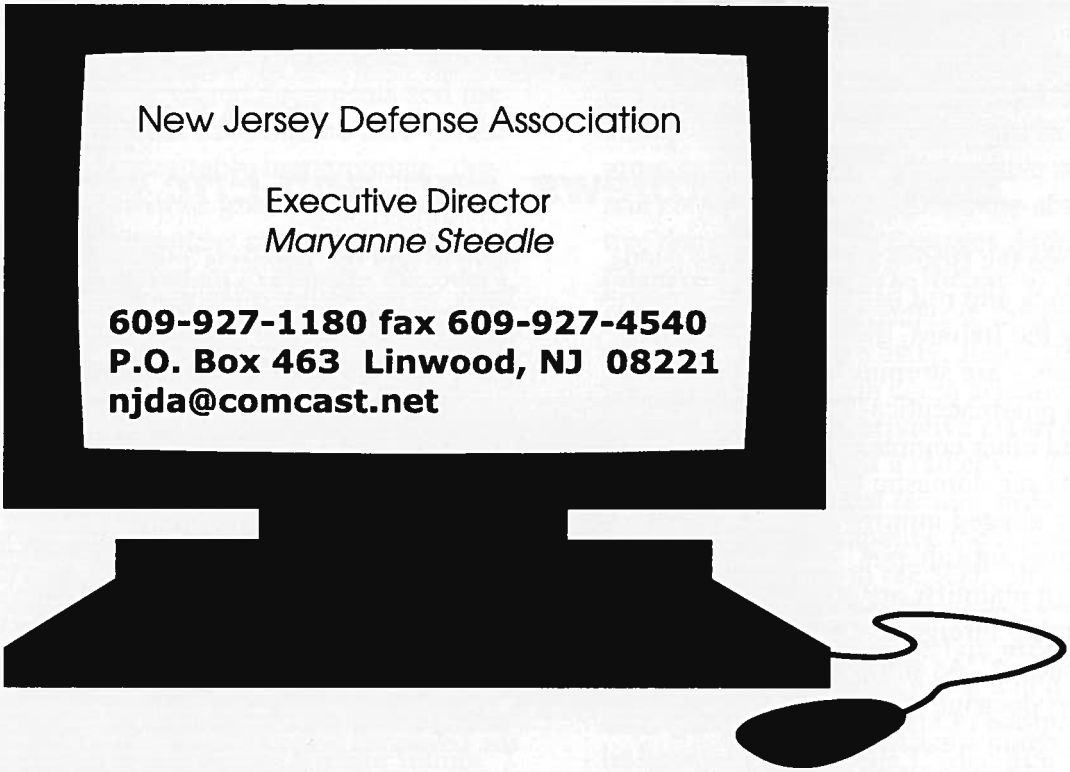
Upon the defendant's petition, the New Jersey Supreme Court granted Certification. Michael B. Devins, Esq. of McElroy, Deutsch, Mulvaney & Carpenter in Morristown represented the Petitioner. ATLA-NJ appeared as amicus curiae and filed a brief excoriating all biomechanical opinions offered on behalf of defendants as "junk science" and branding as "insurance industry propaganda" any suggestion that claims arising from minimal impact collisions be considered as suspect. NJDA also was permitted to appear amicus curiae and responded in a somewhat more temperate tone. In its brief, NJDA noted that although the Appellate Division acknowledged that "biomechanical engineering testimony may well be relevant and helpful in assessing issues in some cases," 387 N.J. Super. at 274, it set the bar for admissibility at an impossibly high level such that the failure to identify a test subject identical to the plaintiff would prohibit reliance upon any scientific study. NJDA also requested that the Court disregard the pejorative commentary offered by ATLA-NJ. NJDA's brief was filed by Stephen J. Foley, Jr. of Campbell, Foley in Asbury Park.

On March 6, 2008, the New Jersey Supreme Court reversed the Appellate Division's decision and held that the trial court did not abuse its discretion in admitting the defense's biomechanical expert testimony.

EMPLOYMENT LAW COMMITTEE

The Employment Law Committee is preparing for the annual New Jersey Employment Law Update, which will be presented at the 2008 NJDA Convention in Cooperstown, New York, presently scheduled to take place from June 26th through June 29th.

Any inquiries pertaining to the above should be directed to either Mark A. Saloman, Esq. or Brian J. Chabarek, Esq.



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THE SECOND BRITISH INVASION - FOREIGN NATIONALS IN UNITED STATES COURTS

Stephen Matthews, Esq. and Eric Probst, Esq.

When the British invaded in the 1960s, they came as rock and roll bands. Today, the British – joined by the Italians, the French and other foreign nationals – are storming America's shores as plaintiffs in pharmaceutical personal-injury class action and other complex litigation matters. These plaintiffs sue domestic United States corporations here for alleged injuries caused abroad by their international subsidiaries. In filing suits here, the foreign plaintiffs are attempting to circumvent favorable foreign law that protects the corporate defendant. As shown below, the *forum non-conveniens* doctrine is a viable defense to these suits in certain situations.

This article will highlight why foreign plaintiffs are retaining United States counsel to file suits across the pond. It will also explain the factors that a court must consider, and counsel must raise, when deciding the defendant's *forum non conveniens* motion. Finally, it will recap three recent New Jersey cases where defendants have and have not been successful in turning away the foreign plaintiff.

I. Foreign Nationals in U.S. Courts

Foreign plaintiffs have filed lawsuits in the United States to take advantage of the developed American legal system. For example, the significant discovery corporate defendants face in the United States is virtually absent in France, preventing the French citizen from obtaining the "smoking gun" corporate document. Moreover, the United Kingdom, France, and Italy do not permit contingency fee agreements, a significant disincentive to plaintiffs and their counsel in pursuing mass tort claims in those countries. Punitive damages also are unavailable. In addition, under the "loser pays" system in place in many European countries, plaintiffs undertake a substantial risk by commencing a suit there because they may have to pay the winner's costs and attorney's fees. Thus, plaintiffs are often discouraged from filing weak or problematic cases in their home countries.

Thus, the United States legal system offers foreign plaintiffs many advantages unavailable at home. Here, foreign plaintiffs can file class action lawsuits and recover punitive damages. Put another way, foreign plaintiffs and their attorneys can maximize their damages in U.S. courts. To justify the American suit, the foreign plaintiffs argue that the domestic U.S. parent is the tortfeasor. They contend that the U.S. parent dictated the corporate policy and conduct that resulted in the foreign tort. Typically, plaintiffs contend that the witnesses, and in turn the documents, that establish the defendants' liability are located in the U.S. Faced with these arguments, the corporate defendant should turn to the *forum non conveniens* doctrine.

II. The Forum Non Conveniens Defense

The *forum non conveniens* doctrine allows a court with proper jurisdiction and venue to dismiss the case in favor of a trial in a more convenient forum. This doctrine has served as a reliable defense in many actions brought in the United States by foreign, non-U.S. citizen plaintiffs against domestic transnational corporations.

To dismiss a complaint on *forum non conveniens* grounds, the court must find that an adequate forum exists to resolve plaintiff's claims. A plaintiff's choice of forum is ordinarily not to be disturbed except upon a showing that it is demonstrably inappropriate. However, a foreign plaintiff's forum choice receives less deference when the plaintiff is forum shopping and not a resident of the forum. The courts also examine several private and public interest factors, including the

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location of key witnesses and documents and the interest the forum has in deciding the case. If the forum choice is demonstrably inappropriate, the motion most likely will be granted. In the traditional *forum non conveniens* case, New Jersey courts require the defendant to conduct discovery to establish the inappropriateness of the forum. It is the rare case where the *forum non conveniens* motion can be granted on the face of the pleadings. *Kurzke v. Nissan Motor Corp., U.S.A.*, 164 N.J. 159, 168 (2000).

Two recent New Jersey cases at opposite ends of the state illustrate different courts' approaches to the *forum non conveniens* defense. While Merck successfully invoked the doctrine to dismiss British class action plaintiffs from the *Vioxx*® litigation, Citigroup failed in Bergen County to dismiss a lawsuit brought by an Italian national and chief executive of Parmalat, a major Italian corporation. These results highlight the fact-sensitive nature of the doctrine.

III. *Vioxx*®dismissal based on *forum non conveniens*

Merck successfully dismissed a class action filed by United Kingdom (U.K.) citizens in the New Jersey *Vioxx*® litigation. The class plaintiffs sued defendants Merck and its UK subsidiary, Merck Sharp and Dohme Ltd. ("MSD"). In granting the motion, Judge Carol Higbee found that the U.K. was an adequate forum to resolve plaintiffs' claims, and public-interest factors weighed in favor of dismissal. *In re: Vioxx®Litigation*, Case No. 619 (NJ. Superior Ct, Middlesex Cty. 2006). The plaintiffs argued that the U.K. did not provide an adequate forum because the U.K. employed a "loser pays" system and prohibited contingency-fee agreements and the recovery of punitive and loss of consortium damages. *Id.* at 3.

The court found the U.K. to be an adequate forum to resolve plaintiffs' claims. The "loser pay" system and lack of contingency-fee agreements did not render the U.K. legal system inadequate because they applied to *all* U.K. plaintiffs. *Id.* In addressing plaintiffs' punitive damages argument, Judge Higbee held that the availability of compensatory damages in the U.K. was more important to, and dispositive of, the *forum non conveniens* analysis than the absence of punitive damages: "These damages, independent of punitive damages, are sufficient to render the available damage remedies in the foreign court adequate." *Id.* at 5. Lastly, Judge Higbee rejected plaintiffs' consortium claim argument because the unavailability of a derivative claim did not "deprive a plaintiff of a remedy." *Id.* at 4.

Public-interest factors, rather than private-interest factors, compelled the dismissal of the complaint. Unlike in the MDL litigation, where the district court judge dismissed a similar class action lawsuit based in part on private interest factors, Judge Higbee concluded that discovery burdens (private factors) were in equipoise and could be handled in either the United States or the U.K. *Id.* at 7. However, certain public-interest factors required the dismissal of the class complaint. The court first recognized the difficulty a New Jersey jury would have applying U.K. products liability and pharmaceutical regulatory law on the failure-to-warn issue raised by plaintiffs. *Id.* at 8. Noting cultural differences as well, Judge Higbee did not doubt that the physician-patient relationship in the U.K. could affect the liability analysis. Moreover, wanting to avoid imposing an "American view" on a U.K. issue, Judge Higbee believed that the U.K. had a greater interest in compensating its citizens for injuries allegedly related to a defective prescription medication distributed in the U.K. *Id.* at 8-9. Finally, Judge Higbee noted the burden placed on the court system in handling "an enormous volume of cases" brought by U.K. citizens. In the end, the U.K. legal system could do a "better job of interpreting its laws and protecting its citizens." *Id.* at 10.

Plaintiffs appealed Judge Higbee's decision but did not find a sympathetic ear. In affirming Judge Higbee's decision, the Appellate Division held that the United Kingdom provided an adequate forum for the U.K. residents and New

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Jersey trials would be inconvenient. The court rejected plaintiffs' arguments that the "loser pays" system and absence of punitive damages deprived them of a fair trial. Further, the court noted that plaintiffs' expert conceded that the U.K. consumer protection law was closely analogous to the New Jersey Products Liability Act. Agreeing with Judge Higbee's public interest factor analysis, the court held that a New Jersey jury would have no interest deciding the U.K. plaintiffs' claims based on U.K. pharmaceutical product liability and regulatory law. Finally, the court noted that the U.K. court system was better equipped to handle the lawsuit than New Jersey's.

Plaintiffs had filed a petition for certification that the parties briefed when the Vioxx lawsuits were settled.

IV. The Parmalat decision shows that dismissal is not automatic

In many ways, the Parmalat case was a perfect candidate for a *forum non* dismissal. *Bondi v. Citibank, et. al.*, L-10902-04, N.J. Superior Court (Law Div: Bergen Cty.) (Jan. 22, 2007). Plaintiff Dr. Enrico Bondi, an Italian citizen and Commissioner of Parmalat, filed suit in Bergen County against Citibank, N.A., its parent Citigroup, Inc., and certain investment firms, on behalf of Parmalat, the Italian conglomerate recently involved in a massive financial scandal in Italy. Numerous actions already are pending by and against Parmalat in various jurisdictions, including the U.S. District Court for the Southern District of New York, foreign tribunals, and administrative agencies.

In the New Jersey litigation, Bondi alleged that Citigroup structured transactions that helped certain members of Parmalat's management hide mounting debt and manipulate financial statements. The suit charged Citibank, its affiliate Citigroup, and other investment firms structured transactions to enrich Citigroup at Parmalat's expense. The only tangible link to New Jersey was that Parmalat's former U.S. operations - Parmalat U.S.A. and a subsidiary, Farmland Dairies, (collectively "Farmland") – were located in Wallington, New Jersey. *Id.* at 4.

Judge Harris admitted that Farmland played a limited role in the litigation and he later recognized that substantive discovery material was located in New York and Italy, and not in New Jersey. *Id.* at 4. The court also recognized that complex choice of law issues compounded the difficulty of continuing the suit in New Jersey. *Id.* Moreover, the court agreed that at least one, if not several other, adequate alternative fora existed to resolve the dispute (including Italy, the U.K. and the U.S. District Court for the Southern District).

Despite these facts, the court did not grant the motion because defendants did not prove that New Jersey was a "demonstrably inappropriate" forum. *Id.* at 21. Judge Harris gave plaintiff's forum choice deference because of Parmalat's New Jersey headquarters. While the parties would be inconvenienced during discovery, inconvenience was slight, shared by both parties, and overshadowed by New Jersey's interest in resolving the dispute. *Id* at 21.

While an appeal likely will follow, Judge Harris' opinion illustrates that the *forum non conveniens* defense is very fact sensitive. The location of Parmalat's U.S. operation in New Jersey played a major role in the decision. However, the public and private interest factor analysis is necessarily subjective, and a foreign plaintiff may be able to convince a U.S. court that it should adjudicate the case.

V. Conclusion

The dismissals of the foreign nationals' claims in the *Vioxx*® litigation indicate that *forum non conveniens* continues to serve as a powerful weapon for defendants in the United States. Both the MDL and state *Vioxx*® cases

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reveal plaintiffs' continued strategy to argue that American courts should adjudicate their disputes because key decision-making regarding the products at issue occurred at the U.S. headquarters of the transnational corporation. With the increasing globalization of business, lawsuits by foreign nationals in U.S. courts are almost guaranteed to increase as well. At present, the American tort system presents foreign plaintiffs with some major advantages that they may not otherwise enjoy in their home countries. It is important to note that the legal landscape for class action litigation in Europe is starting to change, as individual European Union Member States are considering implementing the class action mechanism into their legal system. Therefore, defendants are urged to closely monitor these developments and research the laws of plaintiffs' home forum before seeking dismissal based on *forum non conveniens* grounds.

The motion to dismiss is aided when the defendant, as Merck did, agrees to subject itself to jurisdiction in the European court and to satisfy any judgment against it abroad. The third step to defeat foreign plaintiff lawsuits is more difficult – shift corporate decision-making and manufacturing responsibilities to the international subsidiary. A clear demarcation between the U.S. base of the corporation and its international subsidiaries will strengthen the argument that American courts should steer away from these disputes. For plaintiffs, a careful analysis of the private and public interest factors is needed to overcome the defendant's motion.

The *forum non conveniens* defense remains an effective method for dismissing these lawsuits. As the *Vioxx* and *Bondi* decisions demonstrate, the motions are extremely fact-sensitive, and generalizations about their success cannot be made. However, for defendants, lessons can be learned from Merck's strategy that can increase the defendant's chance of having the foreign plaintiff's claim dismissed.

ENVIRONMENTAL LAW COMMITTEE FORMED

The New Jersey Defense Association is pleased to announce the new Environmental Law Committee. This committee was created in response to the needs of the New Jersey defense bar and the ever-expanding practice areas of our members. Environmental laws, rules, and regulations are subject to a wide breadth of interpretation and as such, it is playing a significant role in the ways in which we, as defense counsel, represent our clients, now more than ever. Whether you represent a homeowner, a carrier, a real estate developer, environmental professional, or a small business owner, you now need to have a working knowledge of New Jersey's environmental rules and regulations to adequately protect your client's interests. The NJDA Environmental Law Committee is looking for a few good men and women to identify the pertinent issues, educate the membership, and participate in amicus considerations when appropriate. If you are interested in becoming a member of the committee or obtaining information about the committee, please contact the Chair, Joanne Vos of Greenbaum, Rowe, Smith & Davis in Woodbridge.

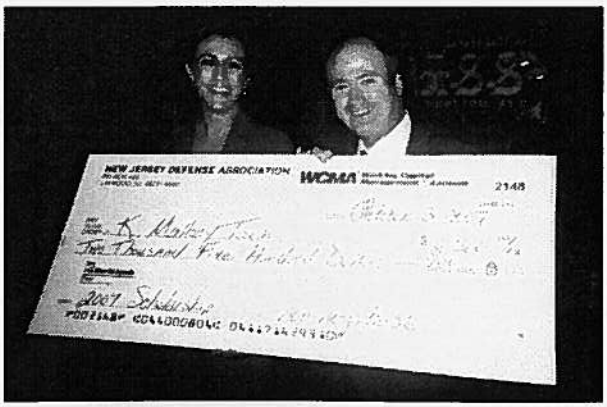
NJDA HIGHLIGHTS

2008 TRIAL COLLEGE INSTRUCTORS
1st Row: Mario Delano, Stephen Foley, Jr., Marie Carey, Brian O'Toole, Steven Isaacson
2nd Row: Joseph Garvey, Thomas Hight, Bruce Helies, Kevin DeCoursey

DRI ANNUAL MEETING OCTOBER 2007
Joanne Vos & Michael Leegan, accepting on behalf of the NJDA, the DRI Diversity Award at the Annual Meeting in Chicago, Illinois

INSURANCE COVERAGE SEMINAR NOVEMBER 20, 2007
Gerard Hanson, Michael Leegan, Francis Garrity

EMPLOYMENT LAW SEMINAR APRIL 4, 2008
George Carnevale, Ph.D., Hubert Klein, CPA/ABV, CFE Mark Saloman, Rob Kleeger, Brian Chabarek, John Sarno, Michael Leegan



NJDA Scholarship Award presented to K. Mallory Tosch by President Michael Leegan

IMPORTANT WORKERS' COMPENSATION CASES AND PROPOSED LEGISLATION FROM 2007

Stephen Banks, Esq. and Michele G. Haas, Esq.

In 2007, several Workers' Compensation legal issues were brought to the forefront for review by the New Jersey Supreme Court and the Appellate Division.

CASE LAW:

This year provided another challenge to whether a carrier properly cancelled coverage in the case, Srocynski v. John Milek Construction, N.J.Super. __ (App.Div. 2007) (citation pending). The specific issue in this case was whether an insurance carrier failed to comply with the "like notice" requirement of N.J.S.A. 34:15-81 (b), when it sent a policy holder cancellation of coverage by certified mail, but the like notice sent to the Commissioner of Banking and Insurance was electronic and failed to contain the certified statement. The Workers' Compensation Court refused to accept that cancellation occurred because "like notice" was not established as this procedure was beyond a "clerical error" and instead a deliberate refusal to comply with the language of the Statute. Although this decision was affirmed by the Appellate Division and argument is being scheduled before the New Jersey Supreme Court, the present holding is a reminder to the defense bar to review their client's cancellation protocol and assure that one's intention to utilize technology and shift to a paperless system still must conform with the law.

The compensability of tinnitus, often described as a "ringing in the ears," in the absence of a compensable hearing loss, was addressed in Schorpp-Replogle v. New Jersey Manufacturers Insurance Company, 395 N.J.Super. 277 (App.Div. 2007). The inherent difficulty in defending allegations of tinnitus is that it is highly subjective. In his review, the Court noted that tinnitus does not qualify as an occupational hearing loss under the OHLA, N.J.S.A. 34:15-35.10 to -35.22. The Court found, however, that it would qualify as a compensable partial disability under N.J.S.A. 34:15-36 as long as it "is supported by appropriate proofs meeting" the criteria, irrespective of whether the individual suffers from an accompanying compensable hearing loss under the OHLA. Likewise, it must meet the Perez v. Pantasote, 95 N.J. 105 (1984) requirements. The Court also acknowledged that despite the subjectivity of tinnitus, it may have certain objective manifestations, and the mere subjectiveness of the condition did not eliminate its potential compensability as an occupational disability.

On the issue of medical treatment, two cases strengthened a carrier's protection from paying for unauthorized treatment and from being subject to a third party action when an independent medical examiner is negligent. The exclusivity bar was also addressed in two cases.

Handchuh v. New York Daily News, (2001-39058 (2007)), a Reserved Decision, dealt with a photojournalist, who suffered injuries from falling debris from the South Tower on September 11, 2001. Although the Workers' Compensation Court found the Petitioner's injuries suffered in this case were related to work and compensable, the Court refused to require the employer to repay outstanding medical bills and out of pocket expenses of the claimant because a prior request for medical treatment and refusal to provide the same by the employer was not proven at trial as required by N.J.S.A. 34:15-15. This decision extended the protection available to a carrier under Section 15 regardless of the full issue of causation and disability are determined until after trial.

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WORKERS' COMPENSATION

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In Basil v. Wolf, 2007 WL 4302777 (N.J.), the New Jersey Supreme Court decided a claim by the widow of an injured worker, who died from an unrelated cancerous tumor, that was not diagnosed by the expert of the insurance company performing an independent medical exam. The Estate argued the right an injured worker would have to sue the insurance company in common law as a third party. The New Jersey Supreme Court affirmed the decision of the Appellate Division, finding that although the doctor was not an employee and therefore not subject to co-employee immunity, the carrier could still not be sued as a third party because it did not shed its statutory immunity under the Workers' Compensation Act, because it was complying with the Act by sending the injured worker to a medical doctor. The only way to find liability beyond this would be through vicarious liability. Here, the mere scheduling of a limited exam, with no specific evidence of a controlled outcome, was not enough to establish the definition of a carrier exerting control to establish a separate action and evade the protection of the Workers' Compensation Act. The question of just how high the protective walls of exclusivity would go to protect a carrier was commented upon in the case of Flick v. PMA Insurance, 394 N.J.Super. 605 (App.Div. 2007).

In Flick, the Court addressed the issue of sanctions against a workers' compensation carrier in dealing with a claim against an insurance carrier which failed to provide recommended treatment and failed to honor prior Court Orders. The interesting point in this case is not its holding, which failed to allow a Petitioner to seek an automatic action in Superior Court before first exhausting all available administrative remedies before the Workers' Compensation Court. It is instead the footnote in this decision, which is a clear warning that the protection of limited damages afforded a carrier under the Workers' Compensation Act "may not extend" to benefits owed and not provided. From this case, a clear warning has been made against a carrier testing the patience of the Court as it is the first opinion to recognize that a cause of action "may exist" at common law for an injured worker, who suffers a separate injury when a carrier, refuses to provide Court Ordered benefits.

In Kibler v. Roxbury Board of Education, et als., 392 N.J.Super. 45 (App.Div. 2007), the Appellate Division affirmed dismissal of a third party action by a schoolteacher against the defendant School Board for alleged failure of the Board to maintain her safety in the school workplace. Plaintiff, a teacher, was knocked down from behind during an altercation between two students. She alleged that the student had a history of behavioral problems and had previously been adjudicated as a delinquent. Defendants moved for Summary Judgment, which was granted based upon the exclusivity bar pursuant to N.J.S.A. 34:15-8 and the "context" prong of Laidlow v. Hariton Machinery Co., 170 N.J. 602 (2002). The Appellate Division noted the circumstances of this case were entirely different than those in Laidlow and its progeny depicting intentional wrongs. They agreed that student fighting, while undesirable, was within the circumstances that the Legislature would have envisioned occurring occasionally in schools and are not unusual or extreme enough label the incident an intentional wrong. Additionally, the Court noted that schools have other incentives to ensure the safety of their teachers and staff apart from the threat of common law tort liability.

The issue of the payment of attorneys fees where a bona fide offer of permanency was made pursuant to N.J.S.A. 34:15-64(c) was addressed in Menichetti v. Palermo Supply Company, __ N.J.Super. __ (App.Div. 2007) (citation pending). Pursuant to Section 64(c), if any employer makes an offer of and tenders compensation in advance of any hearing, the attorney's counsel fee would be calculated only on the difference between the employer's offer and the eventual award. In this case, the employer made

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WORKERS' COMPENSATION

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and tendered an offer to the employee before it had him examined by their expert. Usually an offer is made after the employer's expert has examined the individual and rendered an opinion on a percentage of disability and that percentage is typically offered. In this case, the offer and payment predated the evaluation and the percentage of disability offered by the employer was even higher than its expert's estimate of disability. A settlement was later reached between the employee and employer. There was disagreement, however, on the calculation of the attorneys fees and whether the original tender was a bona fide offer under N.J.S.A. 34:15-64(c). The Court found the payment was a bona fide offer and that the statute can deprive petitioner's attorneys of fees for work already performed in some cases but that any remedy for same should be left to the Legislature.

Another noteworthy case addressed by the Appellate Division was that Cruz v. Central Jersey Landscaping, Inc., 393 N.J.Super. 34 (App.Div. 2007) involving the retroactivity of the amended (increased) rate of compensation for dependency benefits. Before the January 14, 2004 amendment of N.J.S.A. 34:15-13(a-e), death benefits payable to the dependents of an eligible, deceased worker varied according to the number of dependents: 50% of wages for one dependent N.J.S.A. 34:15-13(a); 55% of wages for two dependents N.J.S.A. 34:15-13(b) ; 60% of wages for three dependents(N.J.S.A. 34:15-13(c) ; 65% of wages for four dependents N.J.S.A. 34:15-13(d); and 70% of wages for five or more dependents N.J.S.A. 34:15-13(e). Conversely, the amendment provided for a benefit of 70% of wages for one or more dependents. The Cruz case involved four consolidated cases and whether the revised formula should be applied to determine the amount of the benefit on a claim that arose prior to the effective date. All of the decedents died prior to the January 14, 2004 amendment. The dependents were entitled to a death benefit based on less than 70% of the decedent's wages under the provision of the Statute in effect when the death occurred. The dependents contended that they are entitled to a benefit of 70% of wages from January 14, 2004 and thereafter. The employers maintained that the benefit rate was set at the rate in effect on the date of the former employee's death. The Appellate Division agreed with the dependents, based upon the legislative history and beneficial purpose of the Act. We have been advised that this decision has been appealed to the New Jersey Supreme Court to address the retroactivity and application of this provision.

LEGISLATION:

In January 2007, the Governor signed into law two new amendments to the Workers' Compensation Statute. N.J.S.A. 34:15-28 shortens the time limit before interest can be attached to the payment of an Order or judgment to 60 days from 90 days and amended N.J.S.A. 34:15-40 to change the expenses of suit from $200 to $750.

Without discussing legislation that have been proposed in previous years and remain in Committee, Bills introduced in 2007 for consideration by the Legislature were:

- A3903 and S2452 Propose re-naming Temporary Disability Benefit Law as the Temporary Disability and Pregnancy Benefits Law
- A4412 Proposes the Workers' Compensation Court have jurisdiction of medical bills of an injured worker
- A4657 Proposes the establishment of a 17 member Workers' Compensation Review Commission to review the present system to determine a faster way to provide benefits, reduce costs and permit the disposition of settled cases by affidavit.
- A4656 Proposes an increase in the amount of compensation as defined in N.J.S.A 34:15-12
- A4655 Proposes increasing dependency benefits to 100% of wages
- S2996 and A4662 Propose that the burden of

(Continued on page 13

WORKERS' COMPENSATION

(Continued from page 12)

proof by shifted to the employer in showing that an injury is not compensable and not the traditional standard of an employee having to prove a compensable claim, when a public safety worker suffers an injury, when responding to an emergency.

- A4427 Proposes that public employees not be required to repay workers' compensation if they receive a retirement pension after they have received workers' compensation.

With few exception, these Bills, if successful, will increase the responsibility and costs of a defense carrier operating in this State and can be downloaded from the New Jersey Legislative Page for further review.

If you have any questions, comments or suggestions, please feel free to contact Stephen Banks, Chair, and Michele G. Haas, Vice Chair, of the Workers' Compensation Committee.

New Jersey Defense Association
42nd Annual Convention
June 26 – June 29, 2008
The Otesaga Resort Hotel
Cooperstown, New York

Please join us at our Annual Convention at the lovely Otesaga Resort Hotel.

The resort is located on the southern shore of Lake Otesego and is a magnificent Federal-style structure. Selected as a member of the prestigious Hotels of America by the National Trust for Historic Preservation. The Otesaga is reminiscent of a genteel era when a gracious welcome was the standard. The Otesaga continues to receive the coveted AAA Four Diamond Award for providing exceptional accommodations, excellent service and an elegant atmosphere. Cooperstown's attractions include The National Baseball Hall of Fame and Museum, Fenimore Art Museum, The Farmer's Museum and the town itself.

Our educational programs will be held on Friday and Saturday. The Young Lawyers Committee will present several topics covering New Jersey Employment Law, Environmental Law, Workers' Compensation Law and Special Civil Practice on Friday, June 27, and our Annual Case Law Update will be presented on Saturday, June 28. Our golf and tennis tournaments will be held on Saturday, June 28, and the President's Reception and Annual Banquet on Saturday evening.

Our convention is an excellent opportunity to gain continuing legal education, socialize with colleagues and friends and to take a break from the ever hectic practice of law.

Please contact our Executive Director Maryanne Steedle, (609) 927-1180 or our website www.njdefenseassoc.com for registration materials.

Michael J. Leegan
President

"PROTECTING THE CORPORATION" SEMINAR A GREAT SUCCESS

On October 12, 2007, the Products Liability Committee of the NJDA partnered with the New Jersey Corporate Counsel Association to present a seminar on "Protecting the Corporation." Over forty (40) attorneys attended the seminar which reviewed and discussed recent developments in class actions, current case law affecting the corporation, and provided guidance for preparing and appearing as a corporate witness and how best to handle and organize global litigation.

Generously hosted by Norris, McLaughlin & Marcus, PA, and monitored by Products Liability Committee Chairperson Carolyn O'Connor (Wilson Elser) and NJCCA Board Member Joseph Aronds (Hartz Mountain), the event featured presentations from both the NJDA and the NJCCA, including Anne Patterson (Riker Danzig), John Chester (Porzio, Bromberg), Curtis Michael (Hartz Mountain), Ted Margolis (Norris McLaughlin), Eric Probst (Porzio, Bromberg), Charles Cohen (Hughes, Hubbard), Kelly Waters (Wilson Elser). The audience participation was lively and the reviews from all involved were spectacular! Applications for CLE credits in NJ, NY and PA for all attendees have been filed.

The Products Liability Committee of the NJDA sponsors a joint seminar with the NJCCA every two years to address topics of interest to both groups. The NJDA Liaison to the NJCCA, Ed Fanning (McCarter & English), was instrumental in developing the concepts of interest to be addressed in the seminar.

The Products Liability Committee of the NJDA is a substantive committee which meets quarterly to discuss current case law and legislation effecting product liability law in the State of New Jersey. The Committee meets in a central location after hours and is comprised of preeminent defense attorneys in the State. If you are interested in becoming involved in this Committee, we welcome your participation. Please contact Carolyn O'Connor at **carolyn.oconnor@wilsonelser.com** for additional information as to the next meeting and to be placed on the notification list.

Seated Left to Right: Anne Patterson, Carolyn O'Connor, Kelly A. Waters
Standing Left to Right: John Chester, Curt Michael, Joe Aronds, Theodore Margolis, Steven A. Karg, Eric Probst

GOVERNOR VETOES WRONGFUL DEATH BILL

In the final act of the New Jersey Legislature's lame duck session, sweeping amendments to the Wrongful Death Act were passed. They required only the Governor's signature to become law. Governor Corzine, however, stunned the bill's backers and refused to sign. His pocket veto killed the measure.

The New Jersey Defense Association weighed in against the bill. President Michael Leegan and Philip Lezenby, past president and chairperson of the NJDA's Legislative Committee forwarded a letter to all State Senators setting forth the basis for the Association's opposition. The text of their letter is set out below.

December 14, 2007

RE: Proposed Amendment to the Wrongful Death Act
S - 176
A - 1511

Dear Senator:

We are writing on behalf of the New Jersey Defense Association to express opposition to the proposed amendment to N.J.S.A. 2A:31-5, known as the "Wrongful Death Act." The New Jersey Defense Association is an organization of approximately 800 members of the civil defense community, most of whom are attorneys who represent people being sued in civil actions.

Since its initial passage, the Wrongful Death Act has permitted recovery by relatives for pecuniary damages resulting from the death of a close relative (spouse, parent, or child), as the result of another's negligence. The proposed amendment would allow jury-awarded damages for "mental anguish, emotional pain and suffering, loss of society and loss of companionship," in other words for the "grief" of the surviving relatives.

I. It is submitted that the effect of this amendment will exponentially increase verdicts and the risk to the personal assets of people who are sued, with negative consequences to New Jersey residents.

New Jersey residents are insured for automobile liability and are insured for general liability under homeowner's or tenant's insurance policies. Thousands of state residents have automobile and homeowner's policies with liability limits below $250,000.00. The minimum automobile liability limit is $ 15,000.00. Insurance is not inexpensive, and people buy what they can afford. If "grief" damages are allowed without limitation, these policy limits will be inadequate to protect people's savings and their homes. The insurance carrier will provide a defense and may well tender its liability limit. The defendant, however, would then be on his own.

In New Jersey, the comparative negligence law allows a decedent's beneficiaries to recover damages from a defendant if the decedent was fifty percent (50 %) or less at fault. A jury faced with demonstrative evidence of a widow's, parent's, or child's grief may reach a "compromised" verdict on liability, to assure a monetary recovery for the family. The following examples illustrate the scenario:

A) There is a two-vehicle accident at an uncontrolled intersection. The plaintiff dies as a result of the accident, leaving behind a spouse and child. The defendant driver is a single mother with children of her own. She has little savings, and lives in a modest house with some equity. She has $ 250,000.00 in automobile liability insurance. The jury will hear nothing about her circumstances; it will, however, hear everything about the decedent and of the great emotional pain of his family. The jury will also know that the family will not recover if it finds the decedent to be more than fifty percent (50%) at fault. The emotional

GOVERNOR VETOES WRONGFUL DEATH BILL

pressure is to ensure a recovery. The likely verdict - how much do you put on the value of a life - would be far in excess of $ 500,000.00. The insurer will pay, or will have already tendered, its $ 250,000.00 policy limit. The plaintiffs would then have the right to seize any and all personal assets of the single mother.

B) A salesman who is married with a child visits the home of an elderly couple. He falls on a stairway, hits his head, and dies. The plaintiff's attorney will present a claim that the steps were hazardous. Frequently cases have made this claim based upon alleged looseness of a carpet, absence of a handrail on both sides of a stairway, inadequate lighting, icy patches on outside stairs, wetness or stickiness on inside stairs, and a plethora of other allegations. Again, it is likely and common that the couple would have less than $ 250,000.00 to $ 300,000.00 in homeowner's insurance. Again, everything they have would be at risk.

With the current law's limitations on recoverable damages, cases of difficult liability are less likely to be brought. With the possibility of dramatically increased potential recoveries, more of these suits will be filed.

II. The current Wrongful Death Act's structure is both fair and logical.

All of us have experienced the overwhelming sense of loss and grief from the death of a 'close and dear loved one - spouse, parent, child.' That grief is not lessened when the death was caused by illness, injury for which there is no one to blame, certainly if sustained in combat, than if the death occurred in an accident or event for which there is some possibility of assessing fault to someone else.

The loss is the same. What is different about a "wrongful" death is that the person died earlier than he or she otherwise would have. The survivors have sustained pecuniary loss that they would not have suffered. Our courts have defined "pecuniary loss" as including the value of companionship, advice, emotional support and counseling, as well as income support. It makes sense and is fair to recompense the survivors for these losses suffered from a "wrong."

As currently written, the Wrongful Death Act achieves the legal goal of placing the surviving relatives of the decedent, into the same financial position they would have been in, but for the death of their loved one. The proposed amendment to allow "grief" damages, will now result in the unintended reality of transforming all wrongful death claims for compensatory damages, into actions for punitive damages, no matter if there is a factual or legal basis for same. We submit such a transformation will expose every citizen within the state of New Jersey to punitive claims, no matter if their actions legally warranted the same.

The proposed amendment for "grief" damages will expose every citizen within New Jersey to a financial risk, which for all practical purposes will not be insurable. Additionally, the proposal would compensate some families for their grief and emotional anguish, while all others who have the same grief and anguish are not compensated since they can find no one to blame for the loss. This is a random consequence, and not a fair one.

For the foregoing reasons, we respectfully request that the proposed amendment to the Wrongful Death Act be rejected.

Sincerely,

Michael J. Leegan, Esq.
President of the NJDA

Philip A. Lezenby, Esq.
Chairperson of the NJDA
Legislative Committee

CASE SUMMARY: NATURAL RESOURCE DAMAGES

Joanne Vos, Esq.

In a case of first impression decided in June 2007, the Appellate Division held that the remedial purpose of the New Jersey Spill Compensation & Control Act, N.J.S.A. 58:10-23 et seq., vests the Department of Environmental Protection with such "broad implied powers" that it may seek to impose strict liability against "polluters" for natural resource damages. In a follow up to New Jersey Department of Environmental Protection v. Exxon Mobil Corporation, 393 N.J. Super. 388 (App. Div. 2007), the validity of the State's formula for the calculation of such damages was considered. The Court, delivering an opinion on August 24, 2007, stated that the formula used by the State was not "vetted in the rule-making process" or otherwise grounded in any particular rule or regulation. Accordingly, the formula was deemed to be devoid of a basis and the State's claims for natural resource damages were dismissed with prejudice. The Court noted that the expert offered by the State to prove its claim for natural resource damages based his opinion only upon the "surrogate groundwater formula that the Department has used in its settlement program." The Court determined that such formula lacked the requisite scientific support and further explained that where the Department purports to rely upon a formula which is not vetted in the rule-making process, as generally mandated by the Administrative Procedure Act, the Department must "support each aspect of the formula" with appropriate evidence and expert opinions. A copy of the opinion may be obtained by contacting the court transcriber at (609) 586-2311.

New Jersey Defense Wants You!

New Jersey Defense is the now quarterly publication of the New Jersey Defense Association. It is distributed to each of the association's seven-hundred-fifty members as well as to all Judges of New Jersey's State and Federal Courts. The Editorial Board welcomes the submission for publication of articles and news items of interest to the civil trial bar.

For information on publishing schedules, contact Editor-In-Chief Steve Foley at (732) 775-6520 or through his electronic caretaker rschick@campbellfoley.com

NEW ERA IN PRESCRIPTION DRUG LIABILITY:

THE LEARNED INTERMEDIARY DOCTRINE IN THE WAKE OF WEST VIRGINIA'S KARL DECISION

Linda Pissott Reig, Esq. and Avana Desai, Esq. *

With its absolute rejection of the Learned Intermediary Doctrine, West Virginia's Supreme Court has transformed the landscape for prescription drug companies in product liability failure to warn cases. *State of West Virginia ex rel. Johnson and Johnson Corp. v. Karl.*[1] The Learned Intermediary Doctrine recognizes that a patient does not have access to prescription drugs unless a prescriber has assessed the benefits and risks of the medication and concluded that the patient is an appropriate candidate. Because the prescriber has specialized knowledge and training and decides when a prescription drug is appropriate for a particular patient, the Doctrine provides that adequacy of the product's warnings is assessed from the prescriber's rather than the patient's perspective.

In 1998, the New Jersey Supreme Court restricted application of that Doctrine if the drug company has undertaken direct-to-consumer advertising in *Perez v. Wyeth Laboratories, Inc.*[2] For years, New Jersey remained the sole jurisdiction to reject application of the Doctrine in instances of such direct outreach to the patient. Now, however, West Virginia has gone even further by its outright rejection of the Learned Intermediary Doctrine even if no outreach to the patient has been made.

Out-of-state plaintiffs often file lawsuits in New Jersey courts because, among other reasons, so many drug companies have located their headquarters here. Under choice of law principles, the parties may be subject to West Virginia law. This article thus considers the shortcomings of the West Virginia ruling and discusses the substantial public policies that West Virginia tramples.

West Virginia's ruling was without a doubt a close contest. This is evidenced by the 1-2-2 decision: the Chief Justice wrote the so-called "majority" opinion, two of five justices wrote separate concurring opinions, while two others joined in a dissent.

The Learned Intermediary Doctrine issue was before the court on a writ of prohibition after the lower court rejected the drug company's summary judgment motion based on that Doctrine. The writ of prohibition is considered "extraordinary relief" that is only granted if it is determined that the lower court lacks jurisdiction or exceeded its legitimate powers. This context is significant because there is a high level of proof necessary to succeed with such a writ.

The undisputed facts reveal that on May 19, 1999, a primary care physician prescribed Propulsid® (cisapride) and provided drug samples. Three days after the patient began taking Propulsid she died suddenly. The prescriber and the drug company Janssen Pharmaceutica, Inc., a wholly owned subsidiary of petitioner Johnson & Johnson Corporation, were co-defendants. The drug companies' defense was that the physician should not have prescribed the drug to this patient due to pre-existing medical conditions and other medications she was taking.

In its opinion, the West Virginia Supreme Court quarrels with the drug company's claim that the overwhelming majority of jurisdictions have adopted the Learned Intermediary Doctrine. In the Court's view (after dismissing federal court opinions and states where the highest state court has not yet addressed the Doctrine), "a mere twenty-one states have expressly adopted" the Doctrine and one state, North Carolina, has adopted it through statute.[3] The Court admits that although together these states do represent the majority, they are not "the overwhelming majority that has so often been suggested by courts and commentators."[4]

The Court next outlines five primary justifications for supporting the Learned Intermediary Doctrine and concluded that these reasons are outdated and no longer apply. These justifications include: (1) the difficulty that pharmaceutical manufacturers would encounter in attempting to provide warning to the ultimate users of prescription drugs, (2) patients' reliance on their doctor's decisions and judgments in selecting appropriate prescription drugs, (3) the fact that doctors use their own professional judgment when making prescription

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drug decisions, (4) the belief that doctors are in the best position to warn patients of the associated risks of specific drugs, and (5) the fear that forcing drug manufacturers to warn patients would interfere with the doctor-patient relationship.[5] The Court found these reasons "largely outdated and unpersuasive."[6]

Although the opinion makes no mention of whether the drug that plaintiff ingested was widely advertised, the West Virginia Court addresses the "intense proliferation of direct-to-consumer advertising, along with its impact on the physician/patient relationship, and the development of the Internet as a common method of dispensing and obtaining prescription drug medication information."[7] Further, the Court highlights that manufacturers have spent more money on direct-to-consumer advertising than advertising to doctors in recent years.[8] To the Court, these changes in the prescription drug industry significantly impact a doctor's relationship with the patient. Thus, the Court holds that "under West Virginia products liability law, manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers" and declines to adopt the learned intermediary exception to this general rule.[9]

Justice Maynard concurs and presents a hypothetical in which patient John Doe visits his "small-town West Virginia doctor." This doctor prescribes a heavily advertised drug to John Doe that causes him injury. Justice Maynard asserts that it is unfair to hold the "small-town West Virginia doctor" solely responsible for the damages while "an out-of-state multi-million dollar drug manufacturer is off the hook."[10] It is unclear how this simplistic scenario so minimally detailed could be fundamentally unfair. Justice Maynard suggests that a deep pocket drug company should have to pay a share of damages even if the drug company could show "that it warned the doctor of the risks of injury associated with the drug."[11]

Justice Maynard also asserts that drug manufacturers should be held to the same duty to warn as product manufacturers, such as John Deere.[12] This simple analysis ignores the reality that a lay person can go down to the hardware store and purchase a John Deere lawnmower, while he or she cannot legally obtain prescription medication without first going to a licensed prescriber. It is the prescriber who assesses the patient's medical condition to determine which treatment is appropriate. Only physicians (or other prescribers) have authority to write prescriptions that enable patients to buy prescription drugs.

Justice Starcher similarly concurs, stating that the Learned Intermediary Doctrine is bad public policy and "a giant toothless tiger that causes great mischief, but accomplishes little good."[13] He observes that "[a]t its heart, the Learned Intermediary Doctrine is designed to artificially shift liability away from the careless manufacturer of a product, and onto an innocent intermediary who is responsible for distributing the defective product to the consumer."[14] Little mention is made of the allegation in this case that the drug company's warnings reveal that plaintiff was not an appropriate candidate for the drug.

Justice Starcher even acknowledges that in some instances there is "no conceivable way for a drug manufacturer to give instructions and warnings to the end-consumer," such as use of drugs in the emergency room or surgery where patients have little ability to read warnings.[15] Nonetheless, this concurring justice concludes: "In sum, I am entirely against adopting the Learned Intermediary Doctrine into our product liability law," as the law of "contribution and indemnity, of contributory negligence and of joint and several liability" allows for appropriate allocation of fault.[16]

Justice Albright dissents, stating that the "majority was exceptionally shortsighted in deciding that the [learned intermediary] doctrine has *completely* outlived its purpose."[17] Rather, in the dissenter's view, West Virginia should recognize the Doctrine, complete with exceptions for "prescription drugs that are not heavily marketed and in those circumstances where a physician's expertise is relied upon to make the all-important selection of which particular drug(s) to prescribe; to interpret contraindicative information; and to interpret the myriad of warning-related information distributed by a pharmaceutical manufacturer."[18] Further, Justice Albright acknowledges that, even with direct-to-consumer advertising, a physician's role is essential because the lay patient typically cannot "digest or comprehend the significance" of warnings "in a useful fashion."[19]

The West Virginia case is markedly distinct from New Jersey's *Perez* opinion. In *Perez*, the New Jersey Supreme Court addresses solely circumstances in which the drug company advertises directly to consumers. In such instances, pharmaceutical companies are required not only to continue to warn physicians,

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but have an additional duty to provide adequate warnings to consumers of potential risks associated with the advertised drug. But there is a "rebuttable presumption that the duty to consumers is met by compliance with FDA regulations" and "absent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive" of product liability failure to warn claims.[20]

In *Perez*, multiple plaintiffs brought suit against Wyeth for alleged injuries caused by the prescription contraceptive Norplant®. Although the Court focused on the effects of direct-to-consumer advertising on the pharmaceutical industry, the record revealed that the only advertisements the particular plaintiffs had seen were ads that plaintiffs' counsel placed seeking clients in Norplant lawsuits![21] Nonetheless, the New Jersey Supreme Court denied summary judgment and rejected the drug company's argument that the Learned Intermediary Doctrine applied so that it need only assess whether warnings to the physician were adequate.

The *Perez* decision, unlike *Karl*, acknowledges that the Learned Intermediary Doctrine "applies when its predicates are present."[22] With the *Karl* decision, the West Virginia Court has taken a significant step further. The *Karl* case creates substantial public policy concerns, including undermining the important role of the doctor in selecting appropriate treatment for a sick patient, inadvertently requiring more direct-to-consumer advertising to educate consumers of the risks of *all* prescription drugs and ignoring the positive benefits that direct-to-consumer advertising have on consumer health.

The Court cited the use of the internet to obtain prescription drugs as one factor for why it rejects the Learned Intermediary Doctrine. But the use of the internet to obtain prescriptions is under scrutiny by doctors. Indeed, the American Medical Association recently issued policy H-120.949, entitled "Guidance for Physicians on Internet Prescribing," which defines a valid patient-physician relationship as, including the following components:

The physician shall: (i) obtain a reliable medical history and perform a physical examination of the patient, adequate to establish the diagnosis for which the drug is being prescribed and to identify underlying conditions and/or contraindications to the treatment recommended/provided; (ii) have sufficient dialogue with the patient regarding treatment options and the risks and benefits of treatment(s); (iii) as appropriate, follow up with the patient to assess the therapeutic outcome ...[23]

The widespread perception that internet prescriptions may not require a doctor's in-person consultation is a matter that the medical profession is addressing. In addition, some states have consumer protection or other laws that may provide a basis for invalidating internet prescriptions when there is no meaningful physician involvement.

In addition, the rejection of the Learned Intermediary Doctrine even when there is direct-to-consumer advertising and an in-person consultation with a prescriber is troublesome. There are substantial difficulties associated with requiring drug companies to provide complete warnings in layperson language. The very reason that a drug is available by a prescription is because that drug may have significant medical risks or requires a doctor's monitoring for the drug to be used in a safe manner.

When the Learned Intermediary Doctrine is unavailable to drug companies, it leaves the drug company in a tenuous position. Prescription drugs are unavoidably dangerous products dispensed by pharmacists. The drug company does not distribute medications directly to patients. Indeed, pharmacists serve as an additional "check" to ensure that drugs are not given to patients who use other contraindicated drugs. The pharmacist decides what drug information accompanies the medicine and the packaging that the drug company develops (including the package insert that accompanies every drug package) is rarely passed on to the patient. The pharmacist often provides some information, but it is the information that the pharmacist chooses to supply. It is rarely the complete, technical medical information that the drug company provided.

As illustration of this point, the government will soon require consumers to receive information about how to report side effects directly to the FDA when they receive prescription drugs.[24] The FDA's research on this initiative is ongoing. Nonetheless, while most companies that market over-the-counter medications will likely need to update their packaging, and Medication Guides that accompany some prescription drugs will likely need to incorporate this information, for the vast majority of prescription drugs, it is the

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pharmacist who is in the best position to ensure that this information ultimately reaches the patient. Indeed, putting that information on the label of a large bottle of pills does not serve to inform the patient when the pharmacist is dispensing a smaller supply in a prescription drug bottle labeled by the pharmacist.

While direct-to-consumer advertising provides information to patients about available treatments, it was never intended to, nor can it, supplant the essential roles of the prescriber and pharmacist. A drug company should not be subject to liability when it has provided adequate warnings to medically trained individuals about known, unavoidable dangers. Imposing liability in such instances discourages innovation and the entry of new drug companies and new medicines into the marketplace. Indeed, it is unfair to subject drug companies to liability when a patient experiences a known risk that was addressed in the drug company's warnings to the physician, when that risk was simply unavoidable.

Requiring complete warnings to consumers also ignores the reality of television and radio advertisements. Can listing an extensive array of risks in a rapid monotone voice adequately convey risk information to the audience? What about the complexity of the subject matter? The average patient does not read the warnings that may already accompany their prescriptions, such as the information that the pharmacy may provide. Furthermore, to what extent are drug companies truly able to explain in a succinct and comprehensible fashion a risk such as "anaphylactic reaction" or a contraindication such as "not to be used with MAO inhibitors"? Both the *Karl* and *Perez* courts admit that complexity is a significant concern when requiring pharmaceutical manufacturers to explain risks to consumers, yet neither court presents a solution to this problem.

The dilution or outright rejection of the Learned Intermediary Doctrine also ignores the benefits that direct-to-consumer advertising has on patient health. As both the *Perez* and *Karl* Courts recognized, we are now in a new world of managed care where physicians have limited time to diagnose and treat each patient. In such a setting, is a better-educated patient a bad thing? Patients have an undeniable interest in their own health. Learning about different types of drugs and treatments through direct-to-consumer advertising serves to encourage them to seek medical care when new treatments are available.

Certainly, when DTC advertising is undertaken, it must be accurate and reliable. An extensive framework of statutes, regulations, guidances, and FDA violation letters provide substantial guidelines for what constitutes appropriate drug advertising. Safety information must be addressed along with the benefits. But all safety information is not currently required, nor do the high cost, and typically short length, of radio and television ads truly enable this to be accomplished.

The West Virginia Supreme Court's opinion, which completely ignores the physician's role in assessing extensive medical warnings, contraindications and potential adverse events, is an unfortunate and troubling development. In light of the fractured court that issued the opinion, we can only hope that the Court will soon revisit its flawed opinion and revise its approach to adopt a legal framework that treats pharmaceutical companies more fairly, recognizes the benefit of consumer outreach about the availability of new medicines, and acknowledges the critical and essential role that physicians play when prescribing drugs for their patients.

ENDNOTES

1 647 S.E.2nd 899 (June 27, 2007).
2 161 N.J. 1 (1998).
3 647 S.Ed.2d at 903.
4 *Id.* at 905.
5 *Ibid.*
6 *Id.* at 906.
7 *Id.* at 907.
8 *Id.* at 909.
9 *Id.* at 914.
10 *Id.* at 917. (Note that the page numbers in the LEXIS print-out of the case appear to be out of order, but the pagination accurately reflects the pagination of the original published document.)
11 *Id.* at 917.
12 *Ibid.*
13 *Id.* at 918.
14 *Id.* at 919.
15 *Id.* at 920.
16 *Ibid.*
17 *Ibid.* at 914.
18 *Id.* at 915.
19 *Ibid.*
20 *Id.* at 24-25.
21 This information is based on one author's participation in the briefing of *Perez*. See also 161 N.J. at 65 (acknowledging that, on this summary judgment motion, the facts must be viewed in a light most favorable to the claimants and that the court had no doubt that "substantial proofs will be marshaled to show" that the drug is sage and efficious "and that Wyeth's advertising, if any," was fairly balanced.) (Emphasis added.)
22 *Id.* at 21.
23 AMA Policy H-120.949, available at: http://www. ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc+policyfiles/H-120.000.HTM.
24 See the interim final rule at http://www.fda.gov/OHRMS/DOCKETS/98fr/E7-25426.htm (Fed. Reg., Vol. 73, No.2 at 402-404 (January 3, 2008)).

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