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PRESIDENT'S MESSAGE

Kevin J. DeCoursey, Esq.

Dear Members:

My term as your President draws to a conclusion. I want to thank all of you for a very successful year.

We started with a workers' compensation seminar sponsored by our Workers' Compensation Committee. It was an informative discussion on medical testimony during a workers' compensation trial. Included in this seminar was a panel discussion on legislative issues governing the Workers' Compensation court system.

Our annual Thanksgiving seminar dealt with closed head injuries and ethical issues that arise as defense attorneys during the course of litigation.

NJDA sponsored our Trial College on February 12th, 2009. I am pleased to announce that we had a record turnout at the Union County Court House. Recently, our Spring seminar dealt with insurance issues in the tripartite relationship between client, carrier and the attorney. Part of the seminar focused on jury selection and presentation.

As your President, I continued the tradition of informative lectures and seminars. I couldn't have accomplished this without the hard work and dedication of our membership.

I urge those members who have not joined one of our committees to do so. We are a diverse, hard-working organization that serves our membership with quality educational experiences. To our young lawyers, please get involved. I know of no other organization that gives young lawyers the same opportunity to publish and lecture at seminars.

For the first time in our history our New Jersey Defense publication went "Green". I was not sure how this would be received. I am happy to report it was an unqualified success.

I thank all who have helped me this year. I wish to congratulate our incoming President, Ms. Joanne Vos.

I am anxious to meet many of you at our annual convention this year, June 25th though June 28th, 2009 at The Hotel Hershey in Hershey, Pennsylvania.

Thank You,

Kevin J. DeCoursey

O'Toole & Couch LLC

DOES CONTINUOUS TRIGGER THEORY APPLY WHEN MULTIPLE PROPERTY OWNERS ARE RESPONSIBLE FOR ENVIRONMENTAL CONTAMINATION?

Jacob S. Grouser, Esq.

On April 17, 2009, the Appellate Division, in Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company, determined how the "continuous trigger" theory, first adopted by the New Jersey Supreme Court in Owens-Illinois, Inc. v. United Ins. Co., is applied when contaminated property changes ownership during the period of its contamination. 2009 N.J. Super. Lexis 79 (App. Div. 2009). See also 138 N.J. 437 (1994). Generally, under the "continuous trigger" theory of Owens Illinois, insurance coverage for certain environmental claims is based upon the time period for which each insurer is on the risk. The available insurance coverage is then prorated accordingly and capped by applicable policy limits. A continuous trigger is defined as the time period between the date of the first discharge of the hazardous material at issue or exposure, through the date of discovery of the discharge. Each policy in effect during the discharge period is triggered and treated as a separate occurrence. As the body of case law applying the continuous trigger only dealt with multiple insurance policies of a single insured/property owner, as opposed to insurance policies of multiple property owners, the issue in Franklin Mutual was one of first impression.

The facts of Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company are as follows: the underlying matter was a declaratory judgment action brought by Franklin Mutual. Franklin Mutual insured a residential property owned by Tsairis when oil contamination was discovered. Age dating of the soil revealed that the discharge first began eighteen to nineteen (18-19) years before it was discovered. Prior to being insured by Franklin Mutual, the Tsairis' were insured by Metropolitan Property & Casualty. They were also uninsured for some period of time. Metropolitan insured Tsairis for thirty-six (36) months; Franklin Mutual insured Tsairis for thirty-two (32) months; and the Tsairis' were uninsured for forty-eight (48) months. Before Tsairis owned the property, it was owned by Clark. Neither Franklin Mutual nor Metropolitan insured Clark and neither pursued Clark for any portion of the cleanup costs. Thus, Tsairis' insurers sought to allocate the cleanup costs amongst themselves. Ultimately, Franklin Mutual funded the remediation of the Tsairis property and filed suit against Metropolitan for reimbursement of a portion of the cleanup costs.

Ultimately, the parties could not agree on the method of allocation to be utilized. Metropolitan sought an allocation amongst all policies of insurance and against each homeowner for periods during the discharge period, regardless of who owned the property. Conversely, Franklin Mutual argued that only the insurance policies for Tsairis, the common insured, should be considered in determining coverage. Essentially, Franklin Mutual's position was that the Owens Illinois formula did not create an allocation scheme among multiple parties responsible for an environmental tort under the New Jersey Spill Act. As such, it contended that when multiple parties/

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CONTINUOUS TRIGGER THEORY

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property owners were responsible for contamination, each party's share of liability should be assessed separately before an Owens Illinois allocation is made and obligations of common insurers are defined.

The Trial Court agreed with Franklin Mutual's methodology in determining allocation and concluded that the Owens-Illinois formula applies separately to each individual insured. The Appellate Division concurred, and held that, "allocation is only among insurers that provide coverage to the same insured, to indemnify that insured for its share of the cleanup costs." Franklin Mutual at 3. The Court based this statement on the reasoning set forth in Owens Illinois and upon the fact that the line of subsequent cases only focused, "on the allocation of an individual insured's proportionate share of liability for cleanup costs for environmental contamination among that insured's carriers." Id. at 9. Thus, the Appellate Division refused to extend the Owens Illinois allocation formula to environmental claims involving multiple property owners. Therefore, the Owens Illinois formula is only to be applied in determining an insurance carrier's percentage of responsibility when a property owner is insured by multiple insurance carriers during the discharge period.

[1] The discharge period was defined as eighteen to nineteen (18-19) years (216-228 months). Tsairis owned the property for one hundred and sixteen months (116) of those months and Clark, a prior owner, owned the property the remainder of the time.

COBRA SUBSIDIES UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: HOW WILL THEY IMPACT BUSINESSES?

Suzanne M. Cerra, Esq. and Katherin Nukk-Freeman, Esq.*

The American Recovery and Reinvestment Act of 2009 ("ARRA" or the "Act"), enacted on February 17, 2009, will enable thousands of workers who have lost or will lose their jobs during the period September 1, 2008 through December 31, 2009 to continue health care coverage at more affordable rates. While the benefit of affording more attainable health care coverage for many is indisputable, the impact of this Act on businesses of all sizes will be significant.

Financial Impact of COBRA Subsidies Under ARRA: What is the Subsidy and WHO Pays It?

The subsidy requirements discussed in this article apply to employers with group health plans that are covered by the Consolidated Omnibus Budget Reconciliation Act (COBRA). [1] Though ARRA also applies to group health plans that are subject to similar health care continuation requirements under state law, as well as group health plans sponsored by unions, the requirements for the subsidy under those plans apply only at the insurer or union plan level (not at the employer level).

How does the subsidy work? Under ARRA, if an "assistance-eligible individual" (AEI) elects to continue healthcare coverage under COBRA, the federal government will subsidize 65% of the "applicable premium" for the continuation coverage for up to 9 months. [2] Under the Act, an AEI is generally an individual (1) who is a qualified beneficiary as the result of an involuntary termination during the period September 1, 2008 through December 31, 2009, (2) who is eligible for COBRA continuation coverage at any time during that period, and (3) who elects such coverage.[3] The COBRA subsidy applies to the premium for the covered employee, as well as any dependents who were covered immediately prior to the qualifying event.[4]

A recent Internal Revenue Service Notice defines "involuntary termination" as "severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employee, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services."[5] This includes individuals who elect retirement packages "if facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's services and the employee had knowledge that [he or she] would be terminated."[6] It also includes individuals who lose coverage due to temporary furloughs or layoffs with a right of recall.[7] It even includes employee-initiated terminations if the termination "constitutes a termination for good reason due to employer action that causes a material negative

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change in the employment relationship for the employee."[8] Under all of these scenarios, AEIs would be eligible for the premium reduction.

Though the employer initially is responsible for submitting the 65% COBRA subsidy directly to the insurer, the full amount of the subsidy is refunded by the US government via a payroll tax credit. Although the subsidy is ultimately paid by the government (in the form of an offset in tax liability to the employer), employers who sponsor group health plans subject to federal COBRA rules may now need to reallocate funds to cover these subsidy "advances." For some employers, particularly those laying off a significant percentage of their workforce in order to cut costs and stay in business, advancing the COBRA subsidy payments may be especially challenging.

While it is impossible to predict how many AEIs will choose to elect subsidized COBRA coverage, it is likely that far more employees will elect coverage under this new structure because it will be far more affordable than the alternatives. According to a recent study, monthly COBRA premiums for family coverage average $1,069 per month.[9] With the ARRA provisions in effect, the family cost could be reduced to approximately $374 per month (with the employer, and ultimately the government, subsidizing the remaining $695).

It should be noted that the COBRA subsidy is not available to all involuntarily terminated employees. Individuals whose annual gross income exceeds $125,000 ($250,000 for those filing joint returns) begin to phase out of eligibility for the subsidy and increase their tax liability if they choose to accept it.[10] Nevertheless, employers are still required to subsidize premiums for those individuals if they elect coverage and do not waive assistance.[11]

Employers May Not Receive Immediate Credit for Subsidizing COBRA Premiums Under ARRA

Employers will be reimbursed for the premium subsidies they advance by claiming a credit on their quarterly federal tax return (Form 941), which has been revised accordingly.[12] The Form 941 is a quarterly return used to report income tax and social security withholdings. The IRS has released question and answer pages for employers explaining how to claim the tax credit.[13] The amount of the COBRA subsidies an employer pays during a quarter will be treated as a payroll deposit as of the first day of that quarter and will be applied towards the employer's payroll deposit liabilities for that quarter.[14]

The effect of this is that the COBRA subsidy payments an employer makes will reduce the amount the employer is required to deposit. For example, if an employer normally has a $75,000 payroll deposit liability, but advanced $5,000 in COBRA subsidies, the employer's payroll deposit liability will be reduced to $70,000. If the total amount of COBRA subsidies advanced exceeds the employer's payroll deposit liabilities, the employer may elect to have the excess payment refunded or applied to offset the following quarter's liabilities.[15] Once a quarterly return is filed declaring an overpayment, it is currently unclear as to how quickly the employer will be reimbursed. Thus, while there is a process for employers to recoup the COBRA subsidies they are required to advance, they are nevertheless faced with the task of accounting for the subsidies in addition to their general payroll practices.

ARRA Creates Significant Administrative Burdens for Employers

While cash flow may only be a burden for some employers, the administrative costs and burdens of implementing the subsidy requirements imposed by ARRA will affect many. Initial notification requirements, as well as the additional administrative burden of tracking premium submissions and claiming subsidy credits, all add to employers' ever expanding obligations.

One of the more onerous administrative

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requirements of the COBRA subsidy program is identifying and notifying AEIs who were terminated since September 1, 2008 and who are eligible for an extension of the COBRA election period. Under ARRA, AEIs who were involuntarily terminated between September 1, 2008 and February 17, 2009 – who did not elect COBRA or who elected COBRA but chose to discontinue payments before the end of the coverage period – now have a second chance to elect coverage. Once the employer or plan administrator has identified these individuals, it must provide them with a new election period that ends 60 days after the date on which the notice of the new election period is provided. The type of notice to be distributed depends on whether the employee was terminated before or after February 17, 2009, and whether they have elected and/or discontinued COBRA coverage. The penalty for COBRA notice violations will cost employers $110 per day per violation.[16]

While the subsidy payments are not retroactive to September 1, 2008, AEIs who have been paying full COBRA premiums for coverage periods beginning on or after February 17, 2009 (which, in many cases, will be March 1, 2009) will be entitled to either (1) a reimbursement of 65% of their premium from the employer within 60 days or (2) a credit towards future payments.[17] These initial subsidies and reimbursements may strain the operating budgets of some businesses.

In addition to these onerous notification requirements, the process of tracking premium payments and claiming subsidy credits also creates an additional administrative burden for employers. In order to claim a subsidy credit for premium payments advanced on behalf of AEIs, employers will need to submit information to the IRS, including (1) involuntary termination dates, (2) dates when payments were received, (3) dates when subsidies were paid, and (4) corresponding beneficiary information including social security numbers and whether the subsidy was for one or two or more individuals.[18]

Systems will need to be updated to track the 9-month subsidy period and to inform individuals when the subsidy ends and whether they are eligible to continue COBRA with full premium payments. Additional systems should be implemented to track all premium payments made on behalf of AEIs and to ensure that all subsidy credits are claimed against employment taxes. For those employers who use outside COBRA administrators, they must coordinate responsibilities and procedures for sharing information. Although temporary, subsidizing COBRA premiums may raise multiple challenges for employers in an already challenging time.

Employers Should Carefully Review the Terms of Their Separation Agreements Because ARRA Does Create Additional Coverage Options

Employers who are in the process of implementing workforce reductions and executing severance agreements should carefully review the ARRA provisions to ensure they are getting the maximum benefit of the government subsidy. Though on one hand ARRA requirements create additional burdens on employers, the government funded COBRA subsidies created by the Act offer some additional opportunities for employers when negotiating separation agreements. Employers need to evaluate their obligations under ARRA when determining how to structure these agreements to ensure they are obtaining the maximum benefit.

Employers who agree to pay a portion of an AEI's COBRA premium will be unable to take advantage of the full government subsidy provided under the Act. ARRA specifies that 35% of the "applicable" COBRA premium must be paid by the assistance-eligible individual - or a person other than the individual's employer - and the employer may not claim the subsidy credit until it has received the required 35%.[19] For AEIs terminated since September 1,

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COBRA

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2008, employers are required to subsidize 65% of the employee's *remaining share* of the health care premium, rather than 65% of the *total cost* of the premium, in order to receive the subsidy credit. Thus, if an employer has agreed to subsidize 50% of an employee's COBRA premium (of $1,000 per month, for example), the employee is only required to pay 35% of the non-subsidized portion ($500). In this scenario, instead of the employee paying $350 of the total premium and the government ultimately paying the remaining $650, the employee will only be required to pay $175 (35% of $500) and the government will only subsidize $325 (65% of $500). The employer, who could have passed the entire portion onto the federal government had it not agreed to subsidize any of the premium, is now responsible for paying $500 toward the premium. In those instances where an employer has agreed to fully subsidize an AEI's premium, the employee pays nothing and there is NO subsidy owed by the government.

Additionally, employers who wish to maximize the ARRA subsidy as leverage in negotiating separation agreements must be cautious about the coverage loss date. If an employer continues paying health care premiums after an employee's involuntary termination on the same terms as for similarly situated active employees, then the loss of coverage may be deferred if the Plan permits.[20] Thus, for example, an employee who is involuntarily terminated in November 2009 and receives three months of health care continuation (*i.e.,* through February 2010)[21] as part of a severance package, may not be eligible for COBRA subsidies under ARRA if the Plan defines the employee's loss of coverage date to be February 2010. To be eligible for the COBRA subsidy under ARRA, both the involuntary termination and the loss of coverage must occur between September 1, 2008 and December 31, 2009. Thus, under this scenario, neither the employee nor the employer could avail themselves of any ARRA subsidy money.

Additional cost savings for companies and employees also may be possible with the flexibility ARRA permits in allowing employers to offer different coverage options to AEIs. Under COBRA, a qualified beneficiary who elects coverage is required to continue the same coverage that he/she had received prior to the qualifying event. Under ARRA, an AEI may now enroll in a different plan with a lesser premium, so long as the plan is: (1) offered to active employees at the time the election is made, (2) does not provide only dental, vision, referral or counseling services, (3) is not a flexible spending arrangement, and (4) is not limited to treatment at certain on-site medical facilities.[22]

While COBRA subsidies under ARRA undoubtedly present many challenges for already overburdened employers, these government funded subsidies also present certain leverage opportunities at a time when employers are looking to reduce their costs wherever possible.

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COBRA ENDNOTES

[1] Federal COBRA applies to employers with more than 20 employees. However, health care continuation rights may also be applicable to small businesses (i.e., those with less than 20 employees) under state laws, including New Jersey, New York and Connecticut.

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[2] The premium reduction period ends sooner if the individual becomes eligible for coverage under another qualifying group health plan or for Medicare benefits. See Internal Revenue Service Notice 2009-27 at 18 (March 31, 2009).

[3] Public Law 111-5, §3001(a)(3).

[4] Id. at §3001 (a)(3); §3001 (a)(10)(E).

[5] Internal Revenue Service Notice 2009-27 at 5 (March 31, 2009).

[6] See id. at 5-6.

[7] See id. at 6.

[8] See id. at 5. According to Question 7 of IRS Notice 2009-27, an employee who resigns due to a "material change in the geographic location of employment for the employee" will be deemed involuntarily terminated and thereby eligible for the COBRA subsidy. Id. at 7.

[9] Familiesusa.org, COBRA Premiums for Family Health Coverage Consume 84 Percent of Unemployment Benefits (Jan. 9, 2009), available at http://www.familiesusa.org/resources/ newsroom/press-releases/2009-press-releases/cobra-premiums-for-family.html (last visited April 5, 2009).

[10] §139C.

[11] § 139C(b)(3).

[12] Internal Revenue Service Section on COBRA: Answers for Employers, COBRA Questions and Answers: Form Preparation, FP-9 (2/26/09), available at http://www.irs.gov/newsroom/article/0,,id=205373,00.html (last visited April 5, 1009).

[13] Internal Revenue Service Section on COBRA: Answers for Employers, available at http://www.irs.gov/newsroom/article/0,,id=204708,00.html (last visited April 5, 1009).

[14] IRS, COBRA Questions and Answers: Form Preparation, supra at FP-9.

[15] See id. at FP-11.

[16] Public Law 111-5, §3001(a)(7)(C).

[17] Id. at §6432(E).

[18] Internal Revenue Service, Section on COBRA: Answers for Employers, COBRA Questions and Answers: Reporting and Documentation, RD-1 (2/26/09), available at http://www.irs.gov/newsroom/article/0,,id=205376,00.html.

[19] Public Law 111-5, §3001(a).

[20] IRS Notice 2009-27, supra at 8-9.

[21] See id.

[22] Public Law 111-5, §3001(a)(1)(B)(ii).

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COURT PRESCRIBES NO OVERTIME FOR PHARMACEUTICAL SALES REPS

*Kerri A. Wright, Esq. **

From coast to coast, the judiciary has been prescribing a much-needed remedy to some of the nation's largest pharmaceutical companies that have been at odds with their sales representatives over the payment of overtime compensation. To date, lawsuits have been filed against major pharmaceutical companies in New York, New Jersey, Connecticut and California. The plaintiffs in these cases claim these companies violated the Federal Fair Labor Standards Act (FLSA), 29 *U.S.C.* 201, *et. Seq*. (2008) by failing to pay their sales representatives, or "sales reps," overtime compensation. Plaintiffs claim that they are forced to work 50 to 60 hours a week, check and respond to emails at all times, return phone calls while on vacation, and, in exchange, are not receiving fair compensation for that tireless work.

It should come as no surprise that this most recent round of litigation against the pharmaceutical industry comes directly on the heels of class action suits against other large U.S. companies based upon similar claims. The FLSA has proven to be a fertile ground for disgruntled employees in other sectors of the economy. However, the law does not treat all employees equally when it comes to overtime compensation. Pharmaceutical sales reps in particular have more than one obvious hurdle to clear in seeking overtime under the FLSA.

Under the FLSA, employers must pay their non-management ("non-exempt") employees one-and-a-half times their regular wages for all hours worked above 40 in a regular workweek (*i.e.,* they must be paid "overtime"). 29 *U.S.C.* 201. That seems fairly straightforward. What becomes difficult, however, is determining which employees must be paid overtime and which are exempt from this requirement, and thus not entitled to overtime compensation. The two most commonly cited exemptions for pharmaceutical sales reps are 1) "outside salesman;" and 2) "administrative" employees. 29 *U.S.C.* 213(a)(1). Even with only two possible exemptions, the determination is complex and fact-sensitive; unfortunately, a job title alone is insufficient to establish an employee's exempt status. 29 *C.F.R.* 541.2. What's more, the courts -- while seemingly able to agree that these employees are exempt -- have been unable to agree on why they are exempt.

To avoid paying overtime to one of its pharmaceutical sales representatives, a company must make certain that the sales rep meets the test for exemption. To qualify for the outside sales exemption, an employee's primary duty must be "making sales" or "obtaining orders" and the employee must be "customarily and regularly engaged away from the employer's place or places of business." 29 *C.F.R.* 541.500 (a).

The term "sales" is broadly defined by the regulations and includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 *C.F.R.* 541.501. Sales will be considered an employee's primary duty if it is the principal or most important duty the employee performs. 29 *C.F.R.* 541.700. This determination must be made on a case-by-case basis with an emphasis on the employee's job as a whole.

In the realm of pharmaceutical sales, the first portion of the test is easily met. Sales and promotion are generally the primary duty of sales representatives, and they generally spend

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the majority of their workweek out of the office. The part most heavily litigated is whether the sales rep is actually "making sales," and the courts have not taken a unanimous position on this.

Section 3(K) of the FLSA states that the term "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. Plaintiffs in several lawsuits have argued that pharmaceutical reps actually spend the majority of their time engaged in "promotion" not "sales" -- and are therefore entitled to overtime. The courts are split on this argument.

Over the past two years, courts have ruled on several cases where pharmaceutical sales representatives claimed their employers unlawfully withheld overtime compensation to which they were legally entitled. Fortunately for the pharmaceutical industry, the outcomes in these cases have been very pro-employer.

Several recent cases in California have held that, under California's labor laws, sales reps are exempt. In *Barnick v. Wyeth*, a pharmaceutical representative or "territory manager" brought an uncertified class action against his employer, Wyeth. 522 F. Supp. 2d 1257, 1258 (C.D. Cal. 2007). The plaintiff made every logical argument in support of his claim that he was not a "salesman." He claimed that he merely attempted to influence physicians to prescribe Wyeth products. His actions were more closely related to promotions, not sales. The patients, not the physicians, were the ultimate purchasers of Wyeth's products. He never consummated even an indirect sale because he never took any commitments from physicians to prescribe Wyeth products. None of these arguments were availing to the court. In applying a multi-factor test outlined in California's labor laws -- the factors of which are substantially similar to the test contained in 29 *C.F.R.* 541.504 -- the court found that the plaintiff was largely unsupervised, solicited new business, received sales training, and received commissions. Thus, in the eyes of the California judicial system, the plaintiff was an outside salesman. 522 F. Supp. 2d at 1263.

The Central District of California heard two other virtually identical cases in 2007 and 2008 and came to the same conclusion in each one: pharmaceutical sales representatives are exempt from overtime pay in the State of California. In *D'Este v. Bayer Corp.*, the plaintiff unsuccessfully claimed that she did not make sales, but only provided physicians with information. 2007 U.S. Dist. LEXIS 87229 at *13 (C.D. Cal. Oct. 9, 2007). The court once again focused on the general lack of supervision and the inability of her employer to control and/or monitor her hours. *Id*. at *15-16. In *Menes v. Roche Labs*., *Inc*., the plaintiff unsuccessfully claimed that there were no sales, but only individualized promotion or one-on-one marketing. 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008). Once again, the fact that the plaintiff had been recruited and trained to sell, solicited business, had little supervision and received compensation based on her sales, was key to a determination that she was exempt from overtime pay. *Id*. at *6-7.

Though these courts specifically found that the pharmaceutical representatives were exempt outside salesmen, these cases arose under California law and, therefore, are not directly applicable to other jurisdictions. While the ultimate decisions rested on California's comprehensive labor laws, the courts utilized FLSA analysis derived from federal jurisprudence. Therefore, the holdings in these cases, while not binding on other jurisdictions, may be persuasive.

Further to the analysis of the California courts, the FLSA provides employers with additional arguments against what might otherwise require them to pay out millions of dollars in overtime pay: the administrative exemption.

The judiciary in New York and New Jersey have both rejected the arguments that sales reps are exempt under the outside salesman ex-

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emption and, instead, in reaching the same overall conclusions, have applied the administrative exemption.

The Southern District of New York recently applied the administrative exemption to pharmaceutical sales reps. In *Amendola v. Bristol-Myers Squibb Co.*, the court found that pharmaceutical sales reps for Bristol-Myers Squibb were exempt from overtime as administrative employees -- not outside salespersons. 558 F. Supp. 2d 459 (S.D.N.Y. 2008). The court specifically rejected the company's claim that its sales reps were exempt as outside salesmen, instead finding that even a non-binding commitment would not constitute a "sale" under the FLSA. *Id*. Its analysis of the administrative exemption was closely followed by the most recent court to step foot on the pharmaceutical overtime battleground -- the District of New Jersey.

Like the *Amendola* court, in *Smith v. Johnson & Johnson*, the Federal District Court for the District of New Jersey specifically rejected the "outside salesman exemption" and instead found that, as a "professional sales representative," the plaintiff fell within the administrative exemption to the FLSA and was, therefore, not entitled to payment of overtime. 2008 U.S. Dist. LEXIS 104952, *36 (D.N.J. Dec. 30, 2008).

The administrative exemption covers any employee who fits the following criteria: (1) compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities; (2) whose "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;" and (3) whose "primary duty includes the exercise of discretion and independent judgment with respect to matter of significance." 29 *C.F.R.* 541.200.

In 2004, the U.S. Department of Labor promulgated new regulations relating to the FLSA, one of which explained that an employee can effect the "general business operations" of a company through "promoting sales." *Smith*, 2008 U.S. Dist. LEXIS 104952, at *26 (citing *Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,138 (Apr. 23, 2004)).

The *Smith* court found that the plaintiff's role was "an administrative advertising and marketing one with a substantial impact on J&J's business." *Id*. at *28. The court specifically found that although the marketing and promotion by the rep in this case, who was assigned one particular drug to promote, did not "dictate corporate marketing policy," it did "drive the market demand" and therefore substantially affected operation of a particular segment of the business. *Id*. at *30.

The court also found that the sales rep in this case exhibited a sufficient degree of discretion and independent judgment, as required for exemption under the regulations. *Id*. at *34. Some of the factors noted by the court were a representative's ability to determine how often to visit a physician, strategies to utilize on those calls, discretion in utilizing their promotional budget, ability to request permission to visit new physicians or update their annual marketing plan -- even if prior approval was needed for some of these things. *See Id*. at *33-34. While not addressing each, the court made note of the non-exhaustive list of factors included in the regulations. *Id*. at *32. Companies should be aware of these factors when determining whether to pay overtime compensation for pharmaceutical sales reps: (1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; (2) whether the employee carries out major assignments in conducting the operations of the business; (3) whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (4) whether the employee has authority to commit the employer in matters that have significant financial impact; (5) whether the employee has authority to waive or deviate

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from established policies and procedures without prior approval; (6) whether the employee has authority to negotiate and bind the company on significant matters; (7) whether the employee provides consultation or expert advice to management; (8) whether the employee is involved in planning long- or short-term business objectives; (9) whether the employee investigates and resolves matters of significance on behalf of management; and (10) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 *C.F.R.* 541.202. Courts will generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment. *Smith*, 2008 U.S. Dist. LEXIS 104592, at *32.

Employees may still qualify under the administrative exemption, however, "if more than one person performs a task, or if an employee receives meaningful supervision." *Id.* (citing 29 *C.F.R.* 541.202(c)-(d)). In fact, the regulations make it clear that an employee can exercise discretion and independent judgment by making "recommendations for action rather than actual taking of action" and "even if their decisions or recommendations are reviewed at a higher level." 29 *C.F.R.* 541.202(c).

In *Smith*, the court found that the plaintiff satisfied at least two of the above factors. The plaintiff's work in driving the market for Concerta in her territory "affects business operations to a substantial degree," and she is involved with her manager "in planning long- or short-term business objectives" related to the marketing of Concerta within her territory. *Id.* at *34-35. In analyzing these factors, the court noted the lack of day-to-day supervision from her manager (who accompanied her only monthly on promotional visits), the requirement that she create an annual marketing plan, and the fact that she was able to request permission to visit new physicians or update her marketing plan to be more effective in her territory. *Id.* at *34.

In specifically rejecting Johnson & Johnson's argument that the plaintiff fell within the "outside salesman" exemption, the *Smith* court admitted that the plaintiff's position fell within "a somewhat ambiguous zone under the FLSA." *Id.* at *15. However, the court was unconvinced that this zone was wide enough to find that these reps actually "make sales." The plaintiff, like the typical pharmaceutical sales rep, could only provide useful information to physicians, and the regulations require more than a nonbinding declaration of intent by a physician to prescribe a drug in response to promotional inducements of sales reps. *Id.* at *21. The court noted that physicians "do indeed present a chokepoint in the sale of pharmaceuticals, but the nature of the prescription system insulates them from being amenable to "sales" within the definition of the FLSA." *Id.* at *19. The court, compelled by prior Third Circuit precedent to narrowly interpret any exemption to the FLSA, found that the kind of pharmaceutical sales representative presented in this case had no capacity to "actually makes sales" and, therefore, was not covered by this exemption. *Id.* at *19.

There is no universal solution to the issue of exemption from overtime compensation for pharmaceutical sales representatives. Therefore, pharmaceutical companies should carefully analyze the duties and functions of their sales reps with an eye toward what duties and/or factors might entitle them to overtime. This is especially important since, if litigation ensues, it is the employer -- not the employee -- that has the burden of demonstrating that the exemption applies. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

***** *Kerri A. Wright, Esq, an associate in the Employment Law Department at Porzio, Bromberg, & Newman, P.C.***

Young Lawyer's Committee

Update from
Jessie Christine Basner, Esq.

As the incoming chairperson of the Young Lawyer's Committee, I am looking forward to a very exciting year, which is already off to a great start. Before I discuss this year's Young Lawyer's Committee events, I must thank last year's chairperson, Greg McGroarty, who provided outstanding leadership to the Committee. In addition, I look forward to working with Committee Vice-Chair, Scott Glennon, on this year's upcoming events.

Save the Date! On June 16, 2009, the Young Lawyer's Committee will host the Annual NJDA Summer Associate Luncheon at Tumulty's Pub, located at 361 George Street in New Brunswick, NJ at 12:30 p.m. We had an excellent turnout last year and we hope are that we will have an even larger turnout this year. The cost to attend is $25.00 per person. Please RSVP by Friday, June 5, 2009 to Scott Glennon at (973) 428-4433 or stg@otoole-couch.com.

In anticipation for the upcoming NJDA Annual Convention in Hershey, PA, I would like to remind everyone that several young lawyers will be speaking on a variety of topics. As in year's past, this year's presentation promises to be both informative and educational. Additionally, attendees will be eligible to receive continuing legal education credits.

Finally, the holidays will be upon us sooner than we think. We are currently planning the Annual NJDA Holiday Party & Charity Drive hosted by the Young Lawyer's Committee. Look for details to be e-mailed and published in upcoming newsletters. I look forward to seeing you all at this fun and worthy event. Please feel free to contact me at jcb@pehli.com with any inquiries regarding getting involved with the Young Lawyer's Committee.

THE LILLY LEDBETTER FAIR PAY ACT'S RETROACTIVITY PROVISION: IS IT CONSTITUTIONAL?

Vincent Avallone, Esq. and George Barbatsuly, Esq.*

When analyzing possible defenses to discriminatory pay claims under federal law, it is common for counsel to consider the applicable statute of limitations. With the passage of the Lilly Ledbetter Fair Pay Act of 2009 ("FPA") on January 29, 2009, some counsel may be questioning whether the FPA's retroactivity provision eliminated the statute of limitations defense that was once available for certain claims. This article will address the constitutional concerns raised by the FPA's retroactivity provision

The FPA overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that paychecks issued within the applicable statute of limitations period cannot provide the basis for challenging a pay-setting decision that took place before the limitations period. Under the new law, the statute of limitations for a federal employment discrimination claim restarts when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to the decision or other practice, or when the individual is affected by application of the decision or practice, including each time compensation is paid. By its terms, the FPA provides that it is to be treated as if it had been enacted on May 28, 2007, the day before the Supreme Court issued its *Ledbetter* decision, and applies to all claims pending on or after that date.

The Timely EEOC Charge Requirement

Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") require an aggrieved person to file an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discriminatory act, or within 300 days if the employee worked in a state that has an administrative agency that investigates claims of employment discrimination. *See* 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 2000e-5(e) (Title VII); 42 U.S.C. § 12117(a) (ADA). A claimant who does not file an EEOC charge within the limitations period is barred from maintaining a civil action under these statutes arising out of the alleged discriminatory practice. The Supreme Court has held that the limitations period for a "discrete act" of alleged discrimination—such as a termination, failure to hire, failure to promote, or denial of a transfer—begins to run when these acts occur. They are "not actionable if time barred, even when they are related to acts that are alleged in timely filed charges." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

The *Ledbetter* Decision

In *Ledbetter,* the plaintiff, a 19-year former employee of Goodyear, alleged that supervisors throughout her career had given her poor evaluations because of her sex. However, she waited until shortly before taking an early retirement from her employer before filing an EEOC charge of discrimination. In her lawsuit

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filed after her retirement, she alleged, among other claims, pay discrimination under Title VII. She claimed that long-past pay decisions continued to affect her pay throughout her career, and by the end of her employment she was paid significantly less than her male counterparts. Following a trial, the district court awarded Ledbetter back-pay and damages, but the Eleventh Circuit reversed, holding that her Title VII claim was time barred. The Eleventh Circuit reasoned that her claim could not be maintained because no discriminatory acts took place in the 180 days prior to the filing of her charge.

The Supreme Court affirmed in a 5-4 decision. The majority held that a discriminatory pay-setting decision constitutes a "discrete act" of employment discrimination, and the time for filing an EEOC charge begins to run when that pay-setting decision occurs. *Ledbetter,* 127 S. Ct. at 2165. The Court distinguished its earlier decision in *Bazemore v. Friday,* 478 U.S. 385 (1986), which involved an action against a state agency that had segregated employees according to their race, with white employees receiving more pay. In that context, the *Bazemore* Court stated, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." 478 U.S. at 395. The *Ledbetter* Court rejected the plaintiff's claim that *Bazemore* called for a "paycheck-accrual" rule. The Court distinguished the intentional carrying forward of a discriminatory pay structure at issue in *Bazemore* from a long-past discriminatory pay-setting decision with continuing adverse effects at issue in *Ledbetter.* 127 S. Ct. at 2174. In the latter situation, the Court held, paychecks issued during the limitations period cannot provide the basis for challenging an allegedly discriminatory pay-setting decision that took place before the statutory period. *Ledbetter*, 127 S. Ct. at 2169.

Congressional Response: the FPA

Congress found that the *Ledbetter* decision "unduly restrict[s] the time period in which victims of discrimination can challenge and recover for discriminatory compensatory decisions and other practices," and therefore, the FPA amends Title VII, the ADA, the ADEA, and the Rehabilitation Act of 1973. Pub. L. No. 111-2, 123 Stat. 5 (2009). Under the new law, an "unlawful employment practice" occurs when a "discriminatory compensation decision or other practice" is adopted, when an individual becomes subject to the decision or "other practice," or when the individual is "affected" by application of the decision or practice, including each time compensation is paid. Pub. L. No. 111-2, § 3-4, 123 Stat. at 5-6. The FPA allows an aggrieved individual to recover back pay for up to two years preceding the filing of an EEOC charge. *Id.*

Retroactive Effect

A unique feature of the new law is its retroactivity provision. In general, courts will not construe statutes burdening private rights retroactively unless Congress clearly intends this result. *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). This presumption is rooted in "the unfairness of imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270. This presumption can be overcome where "Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The FPA appears calculated to rebut the presumption against retroactivity. By its terms, the FPA takes effect "as if enacted on May 28, 2007" and applies "to all claims of discrimination in compensation ... that are pending on or after that date." Pub. L. No. 111-2, § 6, 123 Stat. at 7.

Retroactive Retroactivity?

Questions remain, however, as to the scope of Congress's intent. Did Congress, in providing that the FPA takes effect "as if enacted on May 28, 2007," merely provide that alleged discriminatory conduct or EEOC charges filed before May 28, 2007 remain sub-

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ject to the *Ledbetter* decision and not the FPA? Or, did Congress more broadly intend to allow claims based on conduct and EEOC charges filed before this date? The legislative history suggests that Congress intended a broad application. The House Report accompanying the law as originally introduced states that Congress chose a May 28, 2007 effective date to "ensure[] that no pending or future claims, not yet finally adjudicated, are affected by the Ledbetter ruling," which was issued on May 29, 2007. H.R. Rep. No. 110-237 at 19, 110th Cong., 2d Sess. (2007). Under this broad approach, courts would first need to treat the statute as if it had been the law on May 28, 2007. From that date, courts would then need to apply the FPA to conduct and EEOC charges filed prior to May 28, 2007. In essence, such an approach calls for a form of *retroactive* retroactivity.

The few cases that have considered the retroactive reach of the FPA to date appear to have adopted this broad form of retroactivity and allowed suits to proceed based on alleged discriminatory conduct that occurred, and EEOC charges filed, long before May 28, 2007. *See, e.g., Rehman v. State Univ. of N.Y.*, Civ. No. 08-0326, 2009 U.S. Dist. LEXIS 12897, *14-15 (E.D.N.Y. Feb. 6, 2009) (allowing plaintiff to proceed on wage discrimination claims based on actions as early as April 13, 2005, two years before the filing of his EEOC charge on April 13, 2007); *Vuong v. New York Life Ins. Co.*, Civ No. 03-1075, 2009 U.S. Dist. LEXIS 9320 (S.D.N.Y. Feb. 6, 2009) (allowing plaintiff to proceed on compensation discrimination claim based on pay allocation decision that occurred in February 1998, where EEOC charge was filed on August 2, 2002); *Gilmore v. Macy's Retail Holdings*, Civ. No. 06-3020, 2009 U.S. Dist. LEXIS 7894 (D.N.J. Feb. 4, 2009) (acting on own motion mid-trial to hold that FPA allows plaintiff to pursue pay discrimination claim under Title VII based upon paychecks issued as early as July 7, 2003, two years before she filed her EEOC charge on July 7, 2005).

Separation of Powers Concerns

This broad retroactivity raises a number of constitutional questions. Separation of powers is one such concern. Can Congress, through retroactive legislation, declare that the law was something other than what the Supreme Court said it was when it decided a case interpreting that law? Such legislation would appear to run contrary to the long-settled rule that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803).

The Supreme Court provided a partial answer to this question in *Plaut v. Spendthrift Farm Inc.,* 514 U.S. 211 (1995). There, the statute at issue overruled the Supreme Court's prior holding as to the statute of limitations for certain private causes of action under the Securities Exchange Act. The Court held that such legislation violated separation of powers to the extent that it directed the reopening of final judgments in suits that had been dismissed with prejudice by virtue of the Court's prior holding. *Plaut,* 514 U.S. at 217. The Court stated, "[h]aving achieved finality ..., a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Id.* at 227 (emphasis in original). Based on *Plaut*, the FPA's retroactivity provision appears to violate separation of powers to the extent that it requires courts to reopen suits dismissed with prejudice, and no longer on appeal, as of the FPA's enactment on January 29, 2009. This is so even if the suits had been pending as of the statute's stated effective date of May 28, 2007.

Whether separation of powers bars retroactive application of the FPA to pending cases is less clear. The *Plaut* Court stated that separation of powers would not necessarily be offended by applying a new statute of limitations

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to a pending case, since "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly." *Plaut*, 514 U.S. at 226-27. On the other hand, separation of powers would be offended if Congress attempted to prescribe rules of decision for pending cases. *See United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871). This prohibition means that Congress may "compel changes in law, not findings or results under old law." *Robertson v. Seattle Audobon Soc'y,* 503 U.S. 429, 438 (1992). The *Plaut* Court explained, however, that the *Klein* prohibition "does not take hold when Congress amends applicable law." Thus, *Klein* was no bar to the retroactive application of a new statute of limitations to pending cases. *Plaut,* 514 U.S. at 218.

The FPA's retroactivity provision is arguably distinguishable from the statute at issue in *Plaut*. It does not merely lengthen a pre-existing statute of limitations but purports to dictate, retroactively, the circumstances under which causes of actions accrue under the statutes it amends. It is conceivable that a court may conclude that in so providing, the FPA impermissibly seeks to dictate the outcome under prior law in pending cases. *Robertson,* 503 U.S. at 438. Absent case law directly on point, however, the viability of a *Klein*-based separation of powers challenge to the FPA as applied to pending cases remains uncertain.

Fundamental Fairness Concerns

The FPA's retroactivity provision also implicates fundamental fairness principles embodied in other constitutional provisions because of its potential to revive claims that would otherwise be time-barred. Proponents of the FPA have argued that the law does nothing more than restore the paycheck-accrual rule set forth in *Bazemore.* H.R. Rep. No. 110–237, at 6, 11-13 (Statement and Committee Views). Opponents have countered that before *Ledbetter*, "federal courts had come to vastly differing conclusions about whether and how the paycheck rule was the proper application of law." *Id.* at 38 (Minority Views). Opponents have also noted that the FPA extends beyond pay-setting decisions and broadly applies to any "other practice" relating to discrimination in compensation. *Id.* at 41. The FPA does not define the term "other practice," allowing for the possibility that otherwise time-barred discrete employment actions—such as denials of promotions, transfers, and hiring decisions—may be revived if they are alleged to have affected an individual's compensation. Thus, the question remains—may Congress revive such time-barred claims, even in pending cases?

Courts in a number of states have concluded that retroactive extensions of statutes of limitations violate state constitutional due process protections. *See, e.g., Waller v. Pittsburgh Corning Corp.*, 742 F. Supp. 581, 583 (D. Kan. 1990) ("[m]ost of the state courts addressing the issue have held that legislation which attempts to revive claims that have been previously time barred impermissibly interferes with vested rights of the defendant, and thus violates due process"); *M.E.H. v. L.H.*, 685 N.E. 2d 335, 339 (Ill. 1997) (due process clause of state constitution prevents legislature from reviving previously time-barred claims). This principle has not firmly caught on at the federal level. The *Plaut* Court, while declining to reach the issue, noted in *dicta* that a statute of limitations "can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired." *Plaut*, 514 U.S. at 229 (citing *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945)).

In *Stogner v. California*, 539 U.S. 607 (2003), the Supreme Court signaled that it might be receptive to a future fairness-based challenge to a retroactive extension of a statute of limitations. There, the Court held that a criminal statute of limitations in sexual abuse cases enacted after expiration of a previously applicable limitations period violated the *Ex Post Facto* Clause

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when applied to revive a time-barred prosecution. 539 U.S. at 632-33. The *Stogner* Court reasoned that it would be unfair to allow the State to retroactively withdraw a defense to prosecution after it had already attached. *Id.* at 632. While *Stogner* arose in the criminal context, at least one justice has opined that the *Ex Post Facto* Clause on which *Stogner* relied should apply in the civil context. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) (noting that he has "never been convinced of the soundness of this limitation" of the *Ex Post Facto* Clause to criminal cases, and in an appropriate case a retroactive civil law could be found unconstitutional under the *Ex Post Facto* Clause). At present, however, there appears to be limited judicial support for such a blanket extension to civil cases.

Even absent a blanket rule, employers may have viable constitutional challenges where the FPA as applied to them produces extremely unfair retroactive results. In *Eastern Enterprises*, the Supreme Court considered a challenge under the Fifth Amendment's Due Process and Takings Clauses to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722, which retroactively imposed financial liability on a former employer to contribute funds to a coal industry retirement and health fund. The Coal Act purported to impose liability on the former employer for events as long as 35-years earlier, long after the employer had left the coal industry. A four-justice plurality found that this statute violated the Takings Clause as applied to the employer, in part, because it "placed a severe, disproportionate, and extremely retroactive burden" on the employer. *Eastern Enterprises,* 524 U.S. at 538. A fifth justice concluded that the "unprecedented scope" of the retroactivity provision as applied to the former employer violated the Due Process Clause. *Id.* at 549 (Kennedy J., concurring). Insofar as the FPA as applied to a particular case purports to resurrect claims that have long been time-barred, and for which key witnesses and evidence are no longer available, employers may have a basis for bringing a constitutional challenge under the *Ex Post Facto*, Takings, and/or Due Process clauses. Indeed, it is not hard to imagine in this day of employee mobility and changing workforces due to increases in productivity, outsourcing, or labor cost reductions, that an employer could be faced with a claim regarding an employee about which no present employee has any knowledge.

Conclusion

The FPA has made sweeping changes in the calculation of the statute of limitations for employment practices affecting compensation challenged under Title VII, the ADEA, and the ADA. In purporting to make these changes retroactive to May 28, 2007, and then, applicable to employment practices that arose well before that date, Congress has provided for a peculiar form of *retroactive* retroactivity. Under the new law, statutory claims that otherwise have long lapsed under the 180/300 day limitations period can now be revived by the FPA and made part of a new lawsuit. Such an approach raises a number of constitutional issues, including separation of powers concerns and fundamental fairness principles embodied in various other constitutional provisions. It remains to be seen whether employers will succeed in convincing the courts to impose constitutional limits to the FPA's scope.

**** Mr. Avallone is a Member of the law firm of K&L Gates LLP and Mr. Barbatsuly is Of Counsel with the firm.*** ***The authors wish to thank K&L Gates associate Angela Kopolovich for her invaluable assistance in the preparation of this article.***

SELLER BEWARE! A TIMEBOMB COULD BE TICKING WITHIN YOUR GOOD FAITH BUSINESS PRACTICES

Steven A. Karg, Esq. [1]

The New Jersey Consumer Fraud Act (the "CFA") is a powerful tool consumers can use against sellers. Consumers can recover for economic[2] losses that result from 1) a seller's innocent or intentional misrepresentations in an affirmative statement, 2) a seller's intentional omissions of material fact, or 3) a seller's innocent or intentional violation of applicable regulations.[3] In addition to the powers the CFA gives to the Attorney General to penalize such conduct, consumers can recover treble damages and attorney's fees in a direct civil lawsuit.[4] These heavy damages, coupled with the potential for class action status[5], have the potential to wipe out a small business even in some cases where the business acted in good faith.

The New Jersey Supreme Court's recent interpretation of the CFA in *Bosland v. Warnock Dodge*[6] compounds the problem for all sellers of consumer products or services. The *Bosland* Court held that a consumer is not required to ask its seller for a remedy (e.g. refund or fair compensation) before suing the seller for treble damages and attorneys' fees under the CFA. In *Bosland*, a car dealer sold a vehicle to the plaintiff and charged a $117 fee. The fee was described on the Retail Buyer's Order as a "Registration Fee".[7] Plaintiff asserted that the charge included a "fee that was neither disclosed nor itemized as required by the applicable automobile sale regulations."[8] Instead of asking the dealer to refund the improper portion of the fee, Plaintiff filed a putative class action lawsuit against the dealer for treble damages and attorneys' fees, three years after the purchase. The issue before the New Jersey Supreme Court was whether the CFA would permit such a lawsuit to continue, even after Plaintiff failed to tell the dealer about the problem prior to bringing the lawsuit.

The buyer-plaintiff in *Bosland* argued that the Legislature did not expressly or impliedly require a pre-lawsuit demand for CFA claims. It urged the Court to interpret the CFA broadly in favor of a remedy. Finally, it expressed a concern that a pre-lawsuit demand requirement would "subvert the CFA's purposes, because the merchants would be free to violate the CFA, providing refunds only to those consumers savvy enough to request them while reaping unfair profits from unconscionable practices committed against all other consumers without fear of reprisal." [9]

The dealer-defendant argued that, absent a pre-suit demand, Plaintiff could not demonstrate any resulting "ascertainable loss" as required by the CFA. It urged the Court to conclude that the alleged loss was *de minimus* in relation to the cost of the vehicle. Finally, it asserted that, absent a demand requirement, consumers would have incentive to run into Court and file suit for treble damages and attorneys' fees, "rather than simply asking for a refund that would make them whole."[10]

The *Bosland* Court felt constrained to interpret the CFA in light of its language and legislative history. It concluded that, at least under the circumstances of the *Bosland* case, the CFA did not require a pre-suit demand.[11] Although it commented on the public policy arguments of both parties, the Court left any public policy con-

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siderations for the Legislature.[12]

As a result of the *Bosland* opinion, New Jersey merchants must be extra vigilant in creating and monitoring their business practices and documents. This advice is even more critical for merchants dealing in volume. A ten-dollar honest mistake made on ten-thousand transactions might result in a bet-the-farm class action where Plaintiffs are seeking much more than a refund – treble damages and attorneys fees, totaling in the millions. With a six year limitations period and no demand requirement, the CFA under *Bosland* might let a merchant go unwarned for years while a problem compounds. The resultant accumulation of trebled damages and a recovery of attorneys' fees have the potential to destroy some businesses. In such an environment, New Jersey merchants need to be extra vigilant to protect against potential catastrophe.

SELLER BEWARE! ENDNOTES

[1] The author, Steven A. Karg, is member of the Bridgewater, New Jersey office of Norris, McLaughlin & Marcus, PA, where he defends product manufacturers, distributors and sellers. The author thanks William A. Dreier for his contribution to this article.
[2] Economic losses, as opposed to losses deriving from personal injury or property damage claims are the proper subject of the CFA. New Jersey and Federal cases have also held that physical property damage or even the cost of a product that was found defective because of warning defects otherwise remediable under the Products Liability Act are not the subject of consumer actions under the CFA. *See Sinclair v. Merck & Co., Inc*., 195 N.J. 51, 66 (2008) and *McDarby v. Merck & Co., Inc*., 401 N.J.Super. 10, 94-98 (App.Div. 2008).
[3] *Bosland v. Warnock Dodge*, 197 N.J. 543, 556 (2009); *N.J.S.A.* 56:8-1 to 20.
[4] *N.J.S.A.* 56:8-19.
[5] *See Bosland,* 197 N.J. at. 561.
[6] *Bosland v. Warnock Dodge*, 197 N.J. 543 (2009).
[7] *Id*. at 548.
[8] *Id.*
[9] *Id*. at 551.
[0] *Id*. at 550-551.
[11] *Id*. at 562.
[12] *Id*. In its discussion of public policy, the Court expressed concern that merchants could overcharge their customers "at no risk, and [plan] to refund the overcharges only when asked." *Id*. at 561. The Court was concerned that a demand requirement would let merchants go unchecked because nobody would bring lawsuits. It should be noted, however, that the imposition of a demand requirement for a civil suit would not affect the Attorney General's strong powers to deal with such sharp practices. *N.J.S.A.* 56:8-1, *et seq*. The Attorney General has broad powers to stop a merchant who is repeatedly overcharging its customers. The Legislature should take the Attorney General's existing powers into consideration if it reviews the civil demand requirement of the CFA as suggested by the New Jersey Supreme Court. *Id*. at 562.

THE CENTER

Brian O'Toole, Esq.

As a kid, I remember those golden summers that seemed to last forever. I grew up in Irvington, New Jersey and summer meant hanging out in Irvington Center. There were no malls, but the Center had everything we needed; three movie theatres – the Sanford, Liberty and Castle. There was a Woolworth's Five and Dime, Loft's Candy Shop, Dairy Queen, Kless' Diner, Bernice's Pizza, the Camptown Bowling Alley and the Soda Shop. (That's right, our own malt shop!) The first stop on a Friday night was always to "Big Bill," the pretzel man. Bill's outdoor stand was literally right in the middle of the Center, and his oversized soft pretzels cost a dime. If we got to Bill's too late, we might be out of luck because "Big Bill" liked to sample his own inventory and was dressing down in the 400-pound range.

All of the movie theaters ran summer specials, and one of our favorites was the "Circular Advertising Campaign." The theaters hired high school kids to distribute circulars of different colors during the week, and on Saturday afternoon they would post the winning color at the box office. If we had that color, we got in for free! Since my brother, Joe, worked for the Sanford Theater, we always had the right color.

In those days, every show was a double feature with cartoons between shows. They even had a special Saturday where we'd see 24 cartoons in a marathon. My cousin, Lee, and I were extremely lucky to have a fabulous grandmother who loved the movies and took us nearly every Saturday. She paid the 50-cent admission for us and bought us popcorn and soda. (She was a wonderful woman who looked remarkably like the actress, Irene Dunn, who starred in the television series, "I Remember Mama.") The very first movie I recall seeing was "Shane," starring Alan Ladd. We also saw "The Day the Earth Stood Still," with Michael Rennie, and "Invaders From Mars" with Richard Carlson, as a double feature. Despite the fact that Grandma assured me on our way home that there were no green men from Mars, I still didn't sleep for a week.

My most vivid memories of the Center, however, were at Christmastime when it was decked out in all its splendor. The merchants tried to outdo one another with wonderful window displays. There were strings of brightly-colored lights strung across Springfield Avenue, and all the lamp posts had lighted wreaths. There were two lots on either end of the Center that sold Christmas trees. The week before Christmas, my family would walk to buy our tree. We always went to the lot run by the Irvington Jaycees. My father wanted to buy the biggest tree, but my mother would always caution, "Walter, isn't that too big for our tiny sun parlor?" (That's right, we had a sun parlor!) I remember how jovial and warm the Christmas tree men were and how we would warm ourselves next to their small fire. Before we left, they gave my brother and me lollipops and my father would always drink some mysterious brown liquid from a bottle inside a brown paper bag. I'm sure my memory is playing tricks on me, but somehow I remember it always snowed on the walk home with our treasured Christmas tree.

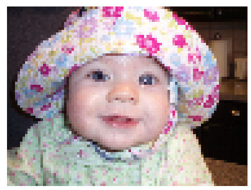
I realize that this all seems like it is right out of "A Christmas Story," but it really was that way back in the 50"s. (We did not, however, triple dog-dare each other to plant our tongue on a frozen pole.) It seemed like a kinder and gentler time then. We didn't have very much, but we needed even less.

Although the Center is a far cry now from what it was in the 50s, when I drive through I can still imagine Big Bill's pretzel stand and Bernice's smile as big as the pizza she served. I know you can never go back, but I am warmed by my memories, almost as much as that kettle fire warmed my hands at the Jaycee Christmas Tree stand.

Irvington Center – Thanks for the memories!

Member Announcements

Joanne Vos and EJ Kilpatrick proudly announce



the birth of their daughter, Penelope Ann,
on October 3, 2009

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NJDA is Going Green

We are proud to announce that we are going green! All future newsletters will be provided to you via e-mail. To ensure that you continue to receive the NJDA Newsletter, please contact our Executive Director Maryanne Steedle, to confirm that we have been provided with your most current e-mail address. Ms. Steedle may be reached by e-mail at njda@comcast.net or by phone at 609-927-1180. Thank you in advance for making our transition to green successful!

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