NEW JERSEY DEFENSE

NEW JERSEY DEFENSE ASSOCIATION

SUMMER 2011

PRESIDENT'S MESSAGE
BY EDWARD J. FANNING, JR., ESQ.

I am extremely honored and proud to represent the family of defense trial attorneys who make up the New Jersey Defense Association -- the leading organization of civil defense attorneys in New Jersey. I look forward to a busy year advocating for improvements in our civil justice system and overseeing our continuing legal education seminars as well as our legal periodical, New Jersey Defense. We will be speaking out on behalf of the New Jersey defense bar and our clients in a variety of avenues, including amicus briefs and argument on important cases, legislative efforts, and involvement in the court rule-making process. I am hopeful that I can live up to the high standards set by our immediate past president, Joe Garvey. Like a good Navy man, Joe kept a steady hand at the helm and conducted himself with honor, courage and commitment in his leadership of the NJDA in the past year. Joe capped off his successful year as President with a wonderful convention at the beautiful Sagamore Resort on Lake George. I look forward to working with Joe, other members of the Board and our Executive Director Maryanne Steedle as we embark on another ambitious year.

As President, I plan to focus on reinvigorating our Young Lawyers Committee, the farm system that brought several of our current and past NJDA leaders, including me, to the organization. I will also focus on continuing to provide topical and valuable CLE to our members while helping our members continue to build their practices in these challenging economic times. I am looking forward to exciting seminars, including our Women and the Law seminar, organized by Marie Carey and scheduled for November 11; our Auto Liability seminar organized by Chad Moore and his committee, scheduled for November 22; a seminar from our products liability committee in the Spring 2012; and our Trial College, which thanks to Marie Carey and our instructors has grown to one of the premier trial advocacy training programs in the state.

With your support, I am committed to guiding the NJDA through another successful year, culminating in our annual convention in Boston on June 28-July 1, 2012.

Ed Fanning

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N.J.S.A. 39:6A-4.5—THE STATUTE THAT REALLY DOESN'T SAY WHAT IT SAYS[1]

BY HERBERT KRUTTSCHNITT, III, ESQ.

It does not seem that long ago, though it has actually been several years. I was reading an amendment to a statute that was pertinent to my area of practice (medical malpractice) and I noticed that the statutory cap on damages that could be recovered in a suit against a hospital, which had been $10,000 for as many years as I could remember, had been raised to $250,000.

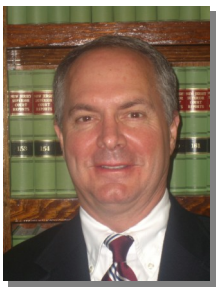
As ironic as it may have sounded, the change had actually been passed as part of a bill entitled "The Health Care Cost Reduction Act" (1991). One might ask (and it would be a fair question), How does increasing by 2,500% the amount a hospital could be forced to pay as a result of a lawsuit serve to reduce healthcare costs? Looking at the legislative statements, there were a few illogical reasons given - but that really did not matter. The debate was over; the law had been enacted.

To my knowledge, nobody has since appealed a verdict against a hospital by making the argument that a $250,000 statutory cap (as opposed to the prior $10,000 cap) really does not serve to reduce healthcare costs. The statute, once passed, said what it said. Fast forward this many years and consider the recent decision of *Voss* v *Tranquilino* & *Tiffany's Restaurant*, 206 N.J. 93 (2011).

Apparently, a clearly written statute can no longer be counted on to say what it says. In *Voss,* the Supreme Court considered what N.J.S.A. 39:6A-4.5 (quoted below) clearly says but interpreted the statute based upon whether it actually advanced its legislative aim given the facts of the *Voss* case (*i.e.*, did the statute really mean what it said).

Mr. Voss is a young man who was riding a motorcycle, intoxicated, and ran into a car. He subsequently pleaded guilty to driving while intoxicated. His blood alcohol level (.196) was more than twice the legal limit.

One can only imagine the scene when Mr. Voss woke up in the hospital, having sustained serious injuries in the accident. As a rational, reasonable member of society—if not the night before, at least on occasion—Mr. Voss might have been heard to mutter something akin to, "So I went out on my motorcycle last night, stopped at a bar, got drunk, got back on my motorcycle, ran into something - and here I am in a hospital." But then Mr. Voss did what everybody seems to do these days when they suffer an injury and can not figure out who but themselves to blame. He found a lawyer who explained to him that he is actually the victim. "We'll just sue the bar where you were forced to consume all that alcohol. They will pay for what they did to you." One small problem—in enacting N.J.S.A. 39:6A-4.5, our legislature clearly said that if you get drunk and get on a motorcycle or behind the wheel of a car, suffer an injury, and are found or plead guilty to DWI, do not expect that behavior to increase your net worth.



The attorneys representing Tiffany's Restaurant moved to dismiss Mr. Voss' complaint by citing to N.J.S.A. 39:6A-4.5(b). Not a complicated argument. The statute states that any driver who is convicted or pleads guilty to DWI "shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident." Sounds pretty straightforward. If you are hurt in a motor vehicle accident, and are either convicted or plead guilty to DWI, you cannot recover money damages "as a result of the accident."

Tiffany's lost the motion for summary judgment. On appeal, they lost again, and then the Supreme Court took a look at it - and Tiffany's lost again. How could N.J.S.A. 39:6A-4.5(b) be clearer? The Court saw a conflict between that statute and N.J.S.A. 2A:22A-1 and chose to apply the statute which saved Mr. Voss's claim.

Several years before passing N.J.S.A. 39:6A-4.5(b), our legislature passed NJ.S.A. 2A:22A-1, *et seq.,* entitled the "New Jersey Licensed Alcoholic Beverage Servers Fair Liability Act." That bill codified what previously had been a collection of common law "dram shop" cases.

In the 1987 "Alcoholic Beverage Servers Fair Liability Act," the legislature actually preserved the

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right of an intoxicated person to sue a tavern for his or her own injuries as a result of becoming intoxicated. Let the truth be known, however—that did not happen without a debate. The original bill that passed the legislature and was presented to then Governor Kean for signature eliminated the cause of action for injuries sustained by an intoxicated adult against a tavern. The original "Fair Liability Act" provided "[a] person who becomes intoxicated and sustains personal injury or property damage as a result of his actions while intoxicated shall be prohibited from instituting a civil action for damages against an alcoholic beverage server." Governor Kean, however, issued a conditional veto. In his letter to the legislature, he wrote, "Rather than wholly eliminate liability to adult patrons [who get drunk and are injured] I believe a better public policy would be to temper the licensee's liability to all potential claimants by applying comparative negligence principles . . .".

Theretofore, courts had even refused to allow the concept of comparative negligence to limit the recovery of the intoxicated patron against the bar. Governor Kean pointed out that the case law on that point was at least inconsistent, and probably in need of a change. Under prior case law, in a suit by an innocent third party against a drunk driver, as well as the tavern which had served the drunk driver, the jury *was* permitted to apportion negligence between the tavern and the intoxicated patron. Said simply, when the injured person was not the intoxicated patron, both the bar and the intoxicated person could be found negligent.

However, when the plaintiff was the intoxicated patron, the jury was not permitted to diminish the recovery by applying comparative negligence. In sum, under the case law (prior to the "Fair Liability Act"), the drunk could be found negligent when he injured someone else, but not when he managed to only hurt himself.

Thus, the final version of the "Fair Liability Act" does not include the complete prohibition on the part of the drunken patron to sue the tavern, and simply contains the language, "The provisions of 2A:15-5.1 and 2A:15-5.2 shall apply in all civil actions instituted pursuant to this act." The net result under the "Fair Liability Act" is that the intoxicated patron is not barred from suing a tavern for first party injuries, but the jury is allowed to apply common sense and hold the drunk at least partly responsible for the consequences of his own questionable behavior. Call it half a loaf, but in the business of legislation, frequently lawmakers have to take what they can get – and live to fight another day.

Several years later, having another opportunity to revisit the issue in the context of amending Title 39, the legislature spoke once again. The language is worth repeating before discussing how the *Voss* decision managed to circumvent it. N.J.S.A. 39:6A-4.5(b) states that any driver who is convicted or pleads guilty to DWI "shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident."

Students of constitutional law might pause to reflect on two important concepts of statutory interpretation. When faced with two laws that appear to conflict, they should be read, if possible, in a way that preserves them both. No less significant is the concept that, when the legislature passes a law, it is presumed to already know the other laws which then exist. Can N.J.S.A. 39:6A-4.5(b) truly not be reconciled with NJ.S.A. 2A:22A-l? And, is there any indication that when the legislature amended Title 39, it was not aware that there was a statute already on the books that governed suits against taverns?

In deciding *Voss,* the Court seems to have avoided those two established principles of legislative interpretation in favor of deciding whether the statute advances its overall statutory aim, in the context of the fact pattern before the Court, If not, then maybe the statute does not really say what it very clearly says.

What the Court did in *Voss* was hold that because N.J.S.A. 39:6A-4.5(b) had been passed in order to control the cost of auto insurance, and because N.J.S.A. 2A:22A-l had been passed to control the cost of tavern insurance, Tiffany's Restaurant should not benefit from Title 39. Said simply, precluding Mr. Voss from suing Tiffany's Restaurant did not line up with the statutory underpinnings of N.J.S.A. 39:6A-4.5(b) because a suit against a bar does not have any impact on the cost of auto insurance. Yet, since when does every provision of every bill have to line up with the overall statutory scheme? N.J.S.A. 30:6A-4.5(b) was probably not en-

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N.J.S.A.39:6A-4.5

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acted to benefit bars insomuch as it was passed to discourage drunken driving.

Even if N.J.S.A. 30:6A-4.5(b) was not enacted to benefit Tiffany's Restaurant, does it not clearly say that people in Mr. Voss' position should not be compensated for injuries sustained in motor vehicle accidents? The Court nonetheless held that Tiffany's Bar should not be placed in a better position as a result of Title 39 than it is as a result of N.J.S.A. 2A:22A-1. Respectfully, N.J.S.A. 2A:22A-1 and NJ.S.A. 39:6A-4.5(b) are not absolutely inconsistent. In order for the latter statute to apply, there are preconditions not found in the former. Mr. Voss was guilty of DWI. The "Fair Liability Act" does not even mention DWI.

In the author's view, *Voss* could have been decided without going through the machinations of determining who was intended to benefit by the passage of which bill-Title 39 versus N.J.S.A. 2A:22A. The Court could have read both statutes consistently and decided that being convicted of, or pleading guilty to, DWI is the game changer and that there is nothing offensive about both statutes coexisting. Despite the clear language of N.J.S.A. 39:6A-4.5. Mr. Voss' cause of action was saved because the older of the two statutes had not completely eliminated it.

Had he been governor in 1987, would Governor Christie have vetoed the "Fair Liability Act," as it originally passed the legislature? Though *Voss* is, on its face, a choice between two (not necessarily conflicting) statutes, it could just as easily be read as a choice between rewarding drunken behavior and discouraging it. Hopefully, once it has read *Voss,* the legislature will take another look at the original version of NJ.S.A. 2A:22A-1.

Postscript: Since writing this article, a bill has since been introduced which will, if passed, overrule *Voss.* Let us keep an eye on A-4228 as it hopefully works its way though this legislature to the desk of this governor.

[1] Title courtesy of Francis "Yogi" Berra

Herb Kruttschnitt is a Senior Litigation Attorney and Staff Counsel for CNA, specializing in the defense of medical negligence claims, and is Chair of the NJDA's Professional Liability Committee

CONGRATULATIONS

Arthur F. Leyden, III, Esq.
Past President of the NJDA
on his installation as
President of the Ocean County Bar Association

IN MEMORIAM FRED W. JUNG, JR., ESQ. 1918—2011

BY ROGER C. STEEDLE, ESQ.

Margie and Fred Jung

Fred W. Jung, Jr., a practicing lawyer in Newark, was the leader among a small group of top New Jersey insurance defense lawyers and insurance executives who formed the New Jersey Defense Association in 1966, with encouragement from the Defense Research Institute, then a young national organization of insurance defense lawyers and insurance executives, in recognition of the need to organize a defense bar in the state to advance defense concepts. The state was then dominated by well organized, funded and powerful plaintiff bar groups—but not defense groups.

He was the Association's first President, serving two terms as President in the Association's start-up years. In 1984, in recognition of his work in the defense field and in recognition of his creation of the Association, he received the Association's Outstanding Service Award. During his years of service to the Association, he organized and managed many memorable and successful annual business meetings, seminars and conventions at diverse locations including Bermuda, Hershey, Virginia, Lake George and a number of wonderful places in the Poconos. Those Association members who attended those annual conventions remember Fred making sure the Association got the best deal, zealously attending to every small detail and ensuring that the convention hotel bestowed every possible benefit on the Association's members.

Though he dearly loved the New Jersey Defense Association, he was not engaged in its activities alone. He was an active and visible supporter and participant of the Defense Research Institute, the Federation of Insurance Counsel (now the Federation of Insurance and Corporate Counsel), and the Association of Insurance Counsel (now the Association of Defense Trial Attorneys), then all young, growing organizations spreading their influence and the mission of the defense viewpoint. There were few seminars, meetings or conventions of those organizations in that era that did not find Fred as a panelist, speaker or organizer of the event. Wherever you went in the insurance defense world, there was Fred and his wife, Margie, helping to run the show.

One of his last attendances was in1996 at the 30th Annual Business Meeting and Convention in Baltimore, coinciding with the Association's installation of its first female President, Marie Carey, and with the establishment of the Association's Fred W. Jung, Jr. Scholarship for New Jersey law students. He was Fred, as always, animated, irascible but lovable, and he entertained us with stories of old about legendary judges, lawyers and personages in the law that he practiced with and knew well. His last Association Convention attendance was at the Amelia Island Resort in 2006. Despite his advanced age, he was the same energetic Fred. At his 80th, 85th and 90th birthdays, a number of his long-time friends from the Association traveled to Florida for those celebrations at the Vero Beach Country Club.

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IN MEMORIAM FRED W. JUNG, JR., ESQ.

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Fred moved his practice to Chatham and later retired to his home in Lake Mohawk, from which he relocated to Vero Beach, where he lived and thrived in retirement for many years. As you might expect, retirement from the practice of law was not a retirement from life for Fred. He joined, and in short order became president and ran many local organizations in the Vero Beach area, building yet again another large group of friends and admirers. The funeral home email messages of sympathy contain postscripts from many who knew him there reflective of the same kind of character notes of admiration and love as were the outpourings of his friends and associates in New Jersey.

Fred's talents were many. His faults were few and forgivable. If he had a persevering fault, it was his love of the Association he founded and his guidance of it to make it the lasting and important organization it is today. 45 years later it exists essentially in the format designed by Fred, independent and strong. Its success is directly the result of Fred's work for which we owe him a great debt. His talent, intelligence, integrity and experiences were only tempered by his keen sense of justice and only surpassed by his sense of humor. You could always count on a "Fred joke" to punctuate and loosen up even the most serious of conversations.

To round out the history, Fred was born in Newark in 1918 and passed into the defense bar eternal on June 21, 2011 at age 93. In life, he was a Lt. Commander in the U.S. Navy in World War II, a graduate of the University of Alabama and Rutgers law School, and he was a 32nd degree Mason and Shriner. He is survived by his supportive and lovely wife, Margie, his two sons that he dearly loved, Fred W. Jung, III and John Jung, his many friends and associates, and the Association he created.

Fred's death coincidentally occurred only a few days before the opening of the Association's 45th Convention at the Sagamore Hotel at Lake George. I could not help but reminisce about his life of achievements and the lasting monuments of his time here as I felt his imprint on the convention format, seminars, meetings and at the annual banquet. In the end, Fred thoroughly enjoyed his long life and his productive efforts and left the New Jersey Defense Association as the thriving and prosperous organization he always dreamed, hoped and planned that it would be.

NJDA TRIAL COLLEGE

Monday, February 13, 2012

Union County Courthouse

NJDA 45TH ANNUAL CONVENTION

BY JOE GARVEY, ESQ.
CHAIRMAN OF THE BOARD

We traveled up the Hudson Valley for our annual convention to the Sagamore Resort for a weekend of swimming, boating, golf and legal education. Although not blessed with the best weather, all convention attendees voiced satisfaction with the accommodations, activities, and the opportunity to become current with new legal cases and to discuss current legal issues.

A great highlight was the cocktail party on the boat. The rain relented for a brief period of time for everyone to get to the second deck to take in the beautiful scenery and views of Lake George. The golf tournament was equally successful and enjoyable despite a few intermittent downpours.

We had the pleasure of hearing great speakers who presented our continuing education programs. Cynthia Craig's and Dan Pomeroy's presentations on PIP and UM/UIM Case Law were most informative and provided a much need update for all. Especially interesting was the living interactive discussion of the ethical considerations for arbitrators in UM/UIM and court mandated arbitrations. Steve Foley and Joe Aronds presented their always helpful Annual Case Law Update. Steve Banks took care of Worker's Compensation, Marc Gaffrey addressed Environmental Law and Brian Chabarek addressed Employment Law. The speakers and their topics were interesting and informative. Lively discussion ensued with great questions and answers. We thank each of them for their hard work and dedication to the New Jersey Defense Association.

Although the plan was to have our annual dinner on the veranda overlooking Lake George, the weather forced us inside. But we didn't miss a beat with a great cocktail hour and dinner. The entertainment of a one-man band provided a great atmosphere to welcome our new President, Ed Fanning, President Elect, Mark Saloman and Secretary-Treasurer, Michele Haas. There was great food, interesting conversation and good entertainment. All we can do is to thank everyone who participated in making our convention a success. Special thanks to our sponsors for their contributions to the success of the convention: ExamWorks, Inc., Robson Forensic, Inc., CED Investigative Technologies, MCS Records and Reporting, National Forensic Consultants, David M. Mahalick, Ph.D., ABPN, John Desch Associates, State Shorthand Court Reporters and Richard Durik, CSR.

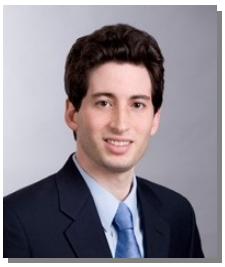
Now, we all look forward to the next year. The leadership is in place. There is no doubt that we will meet the challenges of representing the defense bar of New Jersey. We look forward to the culmination of another successful year with our next convention in Boston, Massachusetts.

THE STATUTE OF LIMITATIONS AS APPLIED TO LAD: AN EXAMINATION OF THE NEW JERSEY SUPREME COURT'S TRIUMVIRATE

BY: DANIEL L. SAPERSTEIN, ESQ.

The statute of limitations for New Jersey's Law Against Discrimination ("LAD") typically bars a claim filed more than two years after the date on which the cause of action accrued (hereinafter the "standard rule"). In 2010, however, the New Jersey Supreme Court rendered three decisions on the statute of limitations that challenged the standard rule and heightened the prospect that certain LAD claims will extend beyond the two-year filing period. Embracing the law or trend at the federal level (with minor variation), the Court endorsed the application of three well-known exceptions to the standard rule – the continuing violations doctrine, the paycheck accrual rule, and the discovery rule – all of which lengthen or renew the time in which an employee has to file a claim against his employer.

First, in *Roa v. LAFE*, 200 N.J. 555 (2010), the Court followed the U.S. Supreme Court's holding in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that "discrete" acts of alleged discrimination do not implicate the continuing violations doctrine, which makes timely otherwise untimely acts that are part of a continual, cumulative pattern of tortious conduct. Second, in *Alexander v. Seton Hall University*, 204 N.J. 219 (2010), the Court rejected the statutorily superseded U.S. Supreme Court decision of *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that the statute of limitations does not restart with each implementation of a discriminatory pay decision. Rather, the Court approved of the paycheck accrual rule, as codified by the U.S. Congress in the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"), which starts the statute of limitations anew with each paycheck stemming from a discriminatory compensation decision or other such practice. And, in *Henry v. New Jersey Department of Human Services*, 204 N.J. 320 (2010), the Court confirmed the trend of federal courts that continue to apply the discovery rule to LAD's counterpart, Title VII of the Civil Rights Act of 1964 ("Title VII"), whereby the statute of limitations does not expire until the employee knows or reasonably should have known enough facts to state a claim.



Given that employees frequently bring lawsuits with parallel federal and state discrimination claims, New Jersey employers should not only know how courts apply the statute of limitations to LAD, but to federal parallels as well. Employers can be fairly certain, however, that New Jersey state law will not diverge significantly from its federal equivalent for the near future.

Continuing Violations Doctrine

As defined by the Court, the continuing violations doctrine acts as an equitable exception to the standard rule when an employee experiences a continual, cumulative pattern of tortious conduct under LAD, with the statute of limitations not commencing until the discriminatory action ceases. The premise underlying the doctrine is that such conduct only becomes actionable because of its synergistic nature. In *Morgan*, the U.S. Supreme Court addressed the continuing violations doctrine as applied to Title VII, where the employee alleged both discrete retaliatory and discriminatory acts, as well as a hostile work environment (*i.e.,* harassment). The holding of *Morgan* established a bright-line rule that, unlike the synergistic nature of a hostile work environment, *indi-*

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vidually actionable allegations (*i.e.,* discrete acts) cannot be aggregated.

In *Roa v. LAFE*, the Court considered whether, under LAD, a timely post-discharge retaliatory act can be the last act in a continuing violation, thus making the untimely discharge claim timely. Like in *Morgan*, the Court held that a timely discrete act does not sweep in a prior untimely discrete act. Employers should also note that the Court emphasized *Morgan*'s distinction between a discrete act and a continuing violation as a standard underpinning employment law. Thus, the importance of *Morgan* for the future of *LAD* jurisprudence cannot be overstated.

Paycheck Accrual Rule

In *Alexander v. Seton Hall University*, the Court reviewed the timeliness of a wage discrimination complaint brought under LAD, which the lower courts below dismissed based on the holding of the *Ledbetter* decision. The Court reversed the lower courts, finding that a wage discrimination claim under LAD is still actionable when the wage paid to the employee remains tainted by the original discriminatory action. Accordingly, the Court held that the employees' claims were timely with respect to the allegedly discriminatory wages paid during the two years immediately prior to the filing of the complaint.

Alexander represents an aligning of federal and New Jersey state law, for as with the Ledbetter Act, under LAD each payment of discriminatory wages constitutes a renewed separable and actionable wrong. Given this alignment, employers should also note the potential for New Jersey state courts to broadly define paycheck discrimination, as evidenced by some federal courts holding that a discriminatory compensation decision or *other* practice includes such adverse employment actions as failure to promote, demotion, denial of tenure, a temporary job assignment, and failure to grant a raise request. For instance, the District of New Jersey, in *Gilmore v. Macy's Retail Holdings*, No. 06-3020 (JBS), 2009 WL 305045 (D.N.J. Feb. 4, 2009), determined that the Ledbetter Act applied where the employee alleged that she was not allowed to fill in for certain absent associates on account of her race, thereby depriving her of the opportunity to earn bonuses on sales of more expensive products.

Discovery Rule

The discovery rule, as the Court defines it, seeks to remedy inequity when an injured person, unaware that he has a cause of action, does not seek judicial relief solely on account of his ignorance (if he is otherwise blameless). The discovery rule thereby delays the accrual of the action until the employee discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts that form the basis of a cause of action. In *Henry v. New Jersey Department of Human Services*, the Court, building on its decision in *Roa*, applied the discovery rule to LAD.

As noted earlier, the Court held in *Roa* that, although the employee's health benefits were denied more than two years before the employee filed his complaint, he was not aware that his insurance had been denied until a later date, which fell within the two-year period. Accordingly, the employee's post-discharge retaliation claim was found timely.

In *Henry*, the Court affirmed the use of the discovery rule in LAD cases, where the employee raised concerns with her employer about her status as an entry-level nurse and her desire for reclassification. The response that the employee received from her employer did not, on its face, evidence racial discrimination, which the Court stressed may have led the employee not to pursue the issue any further. The Court, therefore, held that the employee was entitled to assert that she had no reasonable suspicion of racial discrimination, even by the exercise of reasonable diligence, until the date when she ultimately learned that less qualified Caucasian nurses were hired for advanced positions and that there were other claims of racial discrimination at her employment.

The Court defined the discovery rule as *tolling* the statute of limitations when an employee is misled as to the real reason for the job action and, as a result, fails to act within the prescribed time limit.

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In other words, the Court classified the discovery rule as an equitable device, appropriating language typically used to justify the application of such equitable doctrines as fraudulent concealment. Employers should note that a number of other courts define the discovery rule as a rule of *accrual* – the very language employed by the statute of limitations of LAD.

Employers should also note that, at the federal level, the *Ledbetter* decision expressly stated that the U.S. Supreme Court has yet to rule on whether discovery rule applies to Title VII. Generally speaking, however, the vast majority of federal courts have expressly adopted the discovery rule, including the Third Circuit. Indeed, in *Oshiver v. Levin Fishbein*, 38 F.3d 1380 (3d Cir. 1994), the Third Circuit applied the discovery rule to discriminatory failure to hire and discharge claims. Thus, employers can expect the application of the discovery rule to continue.

Conclusion

In light of this triumvirate of New Jersey Supreme Court decisions, employers should understand the many ways in which a LAD claim can remain actionable or renewable beyond the two-year statute of limitations period. Indeed, the continuing violations doctrine, the paycheck accrual rule, and the discovery rule can prolong a LAD claim for an indeterminate period of years. Furthermore, even if a claim is stale, the facts undergirding such a claim may still be used as background evidence (and, therefore, practically speaking, may have the same effect as if the claim was independently viable). Thus, through its policies and procedures, employers must be prepared for legal actions that raise claims dating back years.

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SUPREME COURT: PARTIES HAVE THE RIGHT TO A JURY TRIAL IN BAD FAITH CASES

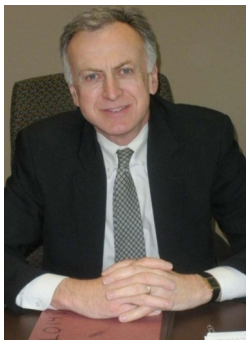
BY DAVID B. WRIGHT, ESQ.

Pursuant to Rova Farms Resort, Inc. v. Investors Ins. Co., New Jersey's Supreme Court imposed duties on an insurance company by holding that "an insurer, having contractually restricted the independent negotiating power of its insured, has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage." 65 N.J. 474, 496 (1974). The Court added that "an insurer should not be permitted to further its own interests by rejecting opportunities to settle within the policy limits unless it is also willing to absorb losses which may result from its failure to settle." *Id*. at 502. When an insurer makes a decision to pay or not to pay, it must act reasonably.

In a worst-case scenario, the insurer's decision-making process could wind up being examined in court in a bad faith/excess action. Yet when the final decision is made over whether the insurer's actions were reasonable, who makes it? A judge or a jury? In Wood v. New Jersey Mfrs. Ins. Co., --- N.J. ---, A-44-10, 2011 WL 2314954 (June 14, 2011), the Supreme Court ruled that there is a right to a jury trial in a bad faith claim.

Plaintiff Karen Wood was a mail carrier who was bitten by a dog owned by an insured of New Jersey Manufacturers Insurance Company ("NJM"). Wood sustained serious injuries that necessitated two surgeries. The dog's owner maintained a $500,000 liability policy with NJM. The case was submitted to nonbinding arbitration, where the award was $540,000 against the NJM insured and $60,000 against the condominium association where the dog owner lived and kept the dog. The defense rejected the award.

The claim was then considered by NJM's Major Claims Committee, an internal evaluation panel. That panel authorized settlement at $300,000, which Wood rejected. Prior to trial, Wood repeatedly stated that she would be willing to settle near or at the $500,000 policy limit. Just before the jury began its deliberations, Wood lowered her demand to $450,000.



The jury assessed liability 51% against NJM's insured and 49% against the condominium association and rendered a total verdict of $2,422,000. The trial judge molded the verdict against the NJM insured to $1,408,320.33—nearly three times the NJM policy limit. After unsuccessful post-trial motions, NJM paid its limit of $500,000 to Wood. She then took an assignment from the NJM insured and filed a declaratory judgment action against NJM.

Before discovery in that case was complete, Wood moved for summary judgment. NJM opposed, but the motion was granted. The trial court noted that the insurer has a positive duty to explore settlement possibilities and "a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage." *Id*. at *3. The court reviewed NJM's certifications in opposition to the motion and noted that NJM "took the position that plaintiff's claim was questionable, that her experts were unreliable, and never deviated from that position, despite indications from numerous sources, which included the attorney handling the case for [defendant], the adjustor, the arbitrator, and [a prior judge]." *Id*. The trial court added that NJM's actions were "cavalier" and described its settlement posture as "a take-it-or leave-it offer based on assumptions [defendant] never attempted to prove at trial." *Id*. As such, the trial court ruled that there were no issues of material fact and entered summary judgment against NJM.

On appeal, the Appellate Division reversed. The panel found that genuine fact-sensitive determinations needed to be made about the reasonableness of NJM's handling of the negotiations and that "that assessment of reasonableness will hinge, to some degree, upon the credibility and persuasiveness of fact wit-

(Continued on page 14)

BAD FAITH CASES

(Continued from page 13)

nesses" and expert witnesses "opining about what went wrong on the settlement front." *Id*. at *4.

The Appellate Division left open the question of who should make that ultimate determination at trial—a judge or a jury. The Supreme Court granted Wood's application for certification on that very narrow issue. She argued that there was no right to a jury trial while NJM argued in favor of one.

Before the Supreme Court, Wood essentially argued that the question of whether the carrier violated its fiduciary duty was "primarily equitable in nature" and that "there is no right to a trial by jury on equitable claims." *Id*. Furthermore, "whether the carrier breached its fiduciary relationship with its insured is based upon issues that are clearly outside the knowledge of the average juror." *Id*. NJM argued to the contrary that a bad faith claim is nothing more than a contract claim arising out of the implied covenant of good faith and fair dealing to which the right to a jury trial attaches. Not surprisingly, both the New Jersey Association for Justice and the Insurance Council of New Jersey chimed in on opposite sides of the argument.

The Supreme Court began its analysis by exploring the constitutional right to a jury trial. Such a right attaches in legal actions—such as when a party seeks compensation—but not always in an equitable action—such as when a party seeks to compel another party to act. For that reason, the right to a jury trial is not automatic in a declaratory judgment action. Instead, courts look to both the nature of the underlying controversy as well as the remedial relief sought by the plaintiff.

The Court found that the relief sought by Wood was primarily legal in nature because she sought money damages from NJM. The Court also pointed out that the label placed on the lawsuit by the plaintiff—for instance, captioning the case a declaratory judgment—does not necessarily define whether it will be heard by a jury:

> [N]o matter how plaintiff has couched her claim against defendant, it is undisputed that her Rova Farms bad faith claim is a garden-variety action at law that requires that she prove that defendant breached its insurance contract by its failure in bad faith to settle plaintiff's original personal injury suit against defendant's insureds. Despite language in the case law referring to the relationship between the insurer and its insured as something akin to a "fiduciary relationship," it remains unmistakable that, at its core, a Rova Farms bad faith claim is a simple breach of contract claim, one that perforce must assert that, by failing in bad faith to compromise a claim within the policy limits prior to a verdict, the insurer has breached the implied contractual covenant of good faith and fair dealing and, therefore, should be liable for the entire judgment and not just to the extent of the policy limits.
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> ***
>
> Fundamentally, and regardless of how it is couched or what label is affixed to it, a Rova Farms bad faith claim is and always has been a breach of contract claim, and it is beyond question that a breach of contract claim was at common law and remains today an action triable to a jury.

Id. at *7-8. Of course, as the Court pointed out, the parties are always free to waive the right to a jury trial if a hearing by a judge is more appropriate under the circumstances.

As noted above, any trial on bad faith is a worst-case scenario, whether before a judge or a jury. However, the Supreme Court has made it clear that carriers (and plaintiffs) have the option of taking their argument before a jury. Whether the carrier's internal decision-making process is something that is best analyzed by a judge or by a jury remains a case-by-case determination.

David B. Wright is an attorney with Amy F. Loperfido & Associates.

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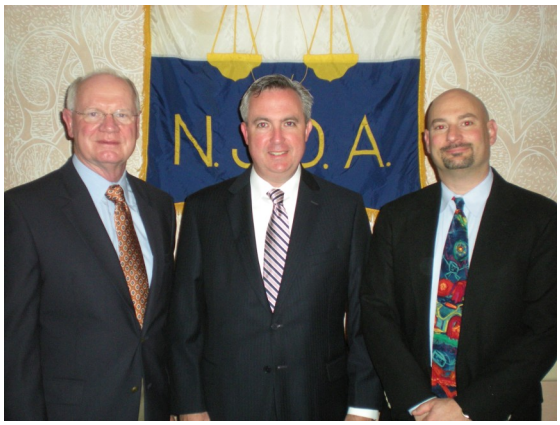
Joseph Garvey receiving the NJDA Distinguished Service Award from outgoing Chairman of the Board Joanne Vos

Joseph Garvey presenting the gavel to President Edward Fanning, Jr.

Outgoing President Joseph Garvey receiving the DRI Exceptional Performance Award from Michael Leegan



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