NEW JERSEY DEFENSE

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President's Message

Mario Delano, Esq.

It's amazing how quickly time goes by. It seems like only last week that I was asked to take the position of Secretary/Treasurer and yet, that was more than two years ago. I am proud and excited to be the 49th President of the New Jersey Defense Association. For nearly a half century we have been an organization where civil defense attorneys could interact and share ideas. Regardless of whether from the smallest or largest defense practice in the state, all are welcome to be active participants in the NJDA. First, and foremost, I would like to thank Michele Haas for her leadership and wisdom during her time as President. Michele is one of the hardest working and level headed attorneys I know and it was my pleasure serving during her presidency.

The convention at the Hyatt Chesapeake in Cambridge, MD was a great time for all who attended, both from the educational and social aspects. On September 12, 2014 our Products Liability Committee held its annual seminar in Iselin, NJ. I would like to thank committee chair, Eric Probst and his committee for an informative seminar with outstanding speakers. Moving into the Fall of 2014, we have a few more seminars which we hope all members will look to attend. On October 13th our annual Trial College will be held at the Union County Courthouse. This seminar will focus on direct and cross-examination of a medical expert. Then, on November 11th we have our Women in the Law Seminar and on November 25th the Auto Liability Seminar, both at the Woodbridge Hotel in Iselin. All of these seminars are annual and historically very well attended, so we encourage everyone to go and register early. We anticipate having CLE accreditation for all these seminars.

This publication is the first for this year's editor and President-Elect, Greg McGroarty. Greg did a great job as the Secretary/Treasurer last year and I know this publication is in excellent hands. I would also like to welcome Secretary/Treasurer Chad Moore, who is more than up to the task of his new position.

Since it's never too early to start talking about next year's convention, we will be at the Bedford Springs Resort and Spa in Bedford Springs, PA from June 25 through 28, 2015. It is the NJDA's first time at this location and we know it will be a great time. If you've thought about attending a convention and never found the time, this is it.

Last, but certainly not least, I would like to encourage all members to sign up for one of our committees. As you can see, the committees are very active, but we are always looking for new members who are looking to get more involved.

Celebrating Our 30th Year of Publication

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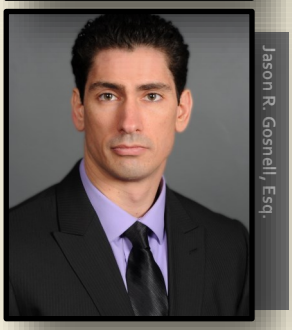
SUCCESSOR LIABILITY IN NEW JERSEY: AM I BUYING A LAWSUIT?

*Daniel R. Kuszmerski, Esq. and Jason R. Gosnell, Esq.**



Traditional Rule of Successor Liability

Before Jackson v. Diamond T. Trucking Co., 100 N.J. Super. 186 (Law Div. 1968), no New Jersey court had been called upon to make a comprehensive statement of the law in the area of successor liability. In Jackson, Plaintiff, George J. Jackson (Jackson) was an employee of Phillips Specials (Phillips), a trucking company wholly owned by Ujay, Inc. (Ujay). After Plaintiff sustained a compensable work-related injury for which he received a worker's compensation award against Phillips, Wallace T. Taylor (Taylor) entered into a contract with Ujay to purchase the capital stock and assets of Phillips for Diamond T. Trucking (Diamond T). Pursuant to the contract, Taylor was the buyer, although provisions were made for the assignment and transfer of the rights and assets covered by the contract to Taylor's corporate nominee, Diamond T. The contract included the following highlights: $100,000 consideration for the Phillips stock; $12,436 in consideration for its assets; an $80,000 promissory note executed or to be executed by Diamond T and guaranteed by Taylor individually; the creation of a seller's security interest in the Interstate Commerce Commission (I.C.C.) operating license; seller's permission to liquidate, merge or consolidate Phillips; resignations by Phillips' old officers and directors, and releases by them of any claims they might have against the corporation. Ujay further agreed to pay the debts and liabilities of Phillips of any kind, absolute or contingent, existing on the date of closing. Furthermore, Ujay agreed to indemnify and save Taylor harmless from all actions, suits, proceedings, demands, assessments, judgments, costs and expenses incident to any failure of Ujay in fulfilling any terms of the sale contract. Attached to the contract and made a part thereof was a list of certain outstanding obligations of Phillips. Included on this list was Jackoson's compensation claim beneath which Ujay declared its obligation to accept liability with regard thereto. After the franchise was transferred, the trucks and other operating equipment were registered in Diamond T's name. All operations performed by Phillips were thereafter performed by and under the name of Diamond T. Although Phillips was not statutorily dissolved it was left with no assets in New Jersey and no longer conducted any activities. Jackson, supra, 100 N.J. Super. at 188-90.

Jackson asked the court to render a judgment of liability with interest and costs against Diamond T for the worker's compensation award rendered against Phillips because Diamond T was a continuation in law and fact of Phillips. In rendering his decision Judge Pindar found where no statement of law existed the State would adopt the formulation set forth in *Fletcher Cyclopedia Corporations*. Per Fletcher's formulation:

> Generally where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. Jackson, 100 N.J. Super. at 192 (quoting 15 *Fletcher, Cyc. Corporations*, § 7122, p. 187 (1961 Perm. Ed.)).

Judge Pindar also relied on five older New Jersey equity cases from the New Jersey Court of Errors and Appeals and the Chancery Division. He ultimately ruled that Fletcher's formulation and the equity cases did not support plaintiff's proposition that a transferee corporation was responsible for the liabilities of its transferor whenever the transferee continued the business operations of the transferor with the latter's assets. Nor was he prepared to adopt such a sweeping statement, when, such a conclusion was unnecessary for what he believed was the

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correct disposition of the case. He therefore found Diamond T liable based on five elements which were common to the five older equity cases and fit Fletcher's formulation: (1) Phillips' transfer of corporate assets (2) for less than adequate consideration (3) to Diamond T a company with the same President (Taylor) (4) which continued the business operation of Phillips, (5) rendering Phillips incapable of paying its creditors. Jackson, 100 N.J. Super. at 196-97.

Product Line Exception

Notably, such was the law in New Jersey for almost fifteen years. Accordingly, absent the transaction falling into the four exceptions set forth in Fletcher's formulation, when one corporation sold or otherwise transferred its assets to another corporation, the latter was not liable for the debts and liabilities of the former. However in 1981, the New Jersey Supreme Court in Ramirez v. Armsted Industries, Inc., 86 N.J. 332 (1981), decided to reevaluate the traditional approach adopted by Judge Pindar in Jackson. In Ramirez, Efrain Ramirez (Ramirez) was injured while operating a power press manufactured by Johnson Machine and Press Company (Johnson). Through a purchase agreement, Amsted Industries, Inc. (Amsted) obtained Johnson's trade name, physical plant, manufacturing equipment, inventory, manufacturing designs, patents and customer lists. After discovery, Amsted moved for summary judgment on the ground that the mere purchase of Johnson's assets for cash did not carry with it tort liability for damages arising out of defects in products manufactured by Johnson. The trial court granted Amsted's motion for summary judgment, holding that pursuant to the traditional corporate approach, there was no assumption of liability when the successor purchases the predecessor's assets for cash and when the provisions of the purchase agreement between the selling and purchasing corporations indicated an intention to limit the purchaser's assumption of liability. Ramirez, supra, 86 N.J. at 335-36.

However, on appeal the Supreme Court reasoned that the traditional corporate approach was inconsistent with the rapidly developing principles of strict liability in tort and was unresponsive to the legitimate interests of the products liability plaintiff. It opined that the traditional rule of non-liability was developed not in response to the interests of parties to products liability actions, but rather to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor. Ramirez, 86 N.J. at 341.

It also found that strict interpretation of the traditional corporate law approach led to a narrow application of the exceptions to non-liability, and placed unwarranted emphasis on the form rather than the practical effect of a particular corporate transaction. Indeed, it held that the principal exceptions to non-liability outlined in McKee v. Harris-Seybold Co., Div. of Harris-Intertype Corp., 109 N.J. Super. 555 (Law Div. 1970), incorrectly conditioned successor liability on a determination of whether the transaction could be labeled as a merger or a de facto merger, or whether the purchasing corporation could be described as a mere continuation of the selling corporation. Ramirez, 86 N.J. at 341.

It reasoned that:

> To the injured persons the problem of recovery is substantially the same, no matter what corporate process led to transfer of the first corporation and/or its assets. Whether the corporate transaction was (1) a traditional merger accompanied by exchange of stock of the two corporations, or (2) a de facto merger brought about by the purchase of one corporation's assets by part of the stock of the second, or (3) a purchase of corporate assets for cash, the injured person has the same problem, so long as the first corporation in each case legally and/or practically becomes defunct. He has no place to turn for relief except to the second corporation. Therefore, as to the injured person, distinctions between types of corporate transfers are wholly unmeaningful. Ramirez, 86 N.J. at 3432-43 (quoting Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 878 (1976)).

Consequently, in an effort to arrive at the standard most consistent with the principles underlying the New Jersey law of strict products liability, the Court adopted the "product-line" approach to successor liability. In adopting this standard, the Supreme Court of New Jersey relied upon and incorporated the three policy consideration

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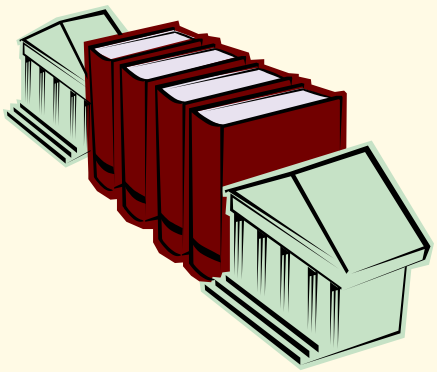
annunciated by the Supreme Court of California in Ray v. Alad, 19 Cal. 3d 22, 31 (1977). These three considerations, which stood as a justification for the imposition of potential liability on a successor corporation which acquired the assets and continued the manufacturing operation of its predecessor, included:

> (1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. Ramirez, 86 N.J. at 347 (quoting Ray, supra, 19 Cal. 3d at 31).



By adopting these three considerations the Ramirez court extended the already well-established principle that strict liability for injuries caused by defective products placed into the stream of commerce continued so long as the defective product is present on the market. Santor v. A.M. Karagheusian, Inc., 44 N.J. 52, 65 (1965). However, it found in contrast to traditional successor liability principles that where the original manufacturer is no longer viable, the corporation that acquired all or substantially all of the manufacturing assets of another corporation and undertook essentially the same manufacturing operation as the selling corporation, is strictly liable for injuries caused by defects in units of the same product line, even if these units were previously manufactured and distributed by the selling corporation. It reasoned where a successor received the benefits from trading its product line on the name of the predecessor and takes advantage from its accumulated good will, business reputations and established customers, it must, also bear the burden. Ramirez, 86 N.J. at 352-58.

Until today, the products-liability principles set forth in Ramirez are controlling in New Jersey. As such, in addition to making sure any purchase agreements clearly express that the purchaser will not assume any of the seller's liabilities, because of Ramirez, an additional indemnity clause within the purchase agreement should be included. Potential purchasers should also analyze potential sources of liabilities before the purchase in order to determine whether any product previously sold by the seller may give rise to post-purchase liability, in order to properly evaluate the purchase price. Once this information is gathered, purchasers should invest in insurance which will cover such products, and should require copies of the seller's historical liability insurance contracts. Purchasers, as a result of Ramirez, could in the purchase agreement also require the selling corporation to maintain their corporate existence post-purchase and to obtain additional post-purchase insurance policies or maintain future occurrences accounts for any post-purchase liability claims; therefore, continuing to render the original manufacturer viable.

*** Daniel Kuszmerski and Jason Gosnell are both associates of the law firm Hoagland, Longo, Moran, Dunst & Doukas, LLP in New Brunswick, NJ. This article is the first in a series which will discuss many of the issues they have encountered concerning successor liability including: intermediary successors, original manufacturer viability, product line continuation, and supplier successor liability. Should you wish to contact Daniel or Jason please do so at dkuszmerski@hoaglandlongo.com or jgosnell@hoaglandlongo.com.**

THE KINGS NEW CLOTHES: EXPERT OPINION, AT TRIAL, ON PROBABILITY AND CAUSE-IN-FACT

*Michael J. McCaffrey, Esq.**

Expert testimony at trial is ubiquitous, and specificity of its content is especially important since Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (expert opinion must be derived from application of sound scientific method). Most commonly the expert is an engineer or a physician. The expert is advised by the attorney to say that his or her opinion is one held to a "reasonable degree of probability" or a reasonable degree of "certainty." Rarely if ever has an expert been called to testify to probability theory in support of another expert's opinion. Rarely is the engineer or physician asked to explain what is meant by the phrase he has uttered or what is his experience or education in the arcane study of statistics and probability. Really, it's just something that has to be said so that we can get on with it, right? This article suggests that attorneys attack the expert on his use the phrase, that the jury may view the expert as a biased shill or reject the expert's premises and conclusions.

Let us use a specific issue to illustrate the point. In a case of alleged damage to an intervertebral disc as a consequence of a single traumatic event, very commonly the plaintiff's expert will say that without imaging of the spine immediately before the accident for comparison to imaging immediately after the accident one cannot conclude that, say, a herniated disc was caused by that accident. The expert then will say that, nevertheless, "studies" and "experience" show that an asymptomatic herniated disc is not "probable" or common in one of plaintiff's cohort and that, therefore, to a "reasonable degree of medical probability" (or certainty) the accident caused the lesion now producing symptoms or clinical signs. The expert often says that only 20% of people like plaintiff has an asymptomatic herniated disc and that therefore, the expert reasons, the "probability" is 80% that plaintiff did not have said lesion before the accident. Makes sense, right?

The error in reasoning is to conclude that such statistics tell us anything about whether plaintiff did or did not have a herniated disc before the accident. In our example, without direct evidence that an event produced the injury of which plaintiff complains, the expert invariably relies upon his naive opinion of what is "probable." Without that opinion the expert's conclusion is unsupported and the plaintiff's proof must fail.

In deposition and at trial I have had an expert admit more than once that he does not know what is meant by those phrases, does not know the difference between "probability" and "certainty," and is mouthing those words because the attorney told him to do it. I have asked a Harvard-trained surgeon how he knows to a probability that plaintiff, before the accident, was "in the 80% and not in the 20%," and had the surgeon reply: "I can't answer that kind of question." I have had an expert admit that without pre-accident imaging he cannot know anything about the state of plaintiff's spine before the accident, but yet aver, regardless of the palpably obvious contradiction, that on grounds of "statistics" he concludes to a "medical probability" that plaintiff had enjoyed a virtually perfect spine.

Invariably those experts have been unable to engage in any authoritative or coherent discussion of probability theory or the reasoning, mathematical or otherwise, by which they arrived at their estimate of probability. They concede that they have no knowledge of probability theory, probability axioms, frequentist probability, propensity probability, prior probability distribution, risk assessment, Aristotelian logic, or any other similar body of knowledge as would be possessed one who had expert knowledge of such things. Yet the assertion of an opinion regarding "probability" is an essential premise to the conclusion of medical expert's opinion on causal relationship between an event and a purported injury.

Probability and statistics are related but separate academic disciplines. Probability theory entails mathematical calculations. Statistical analysis is essentially a compilation of facts. Probability is a measure or description of

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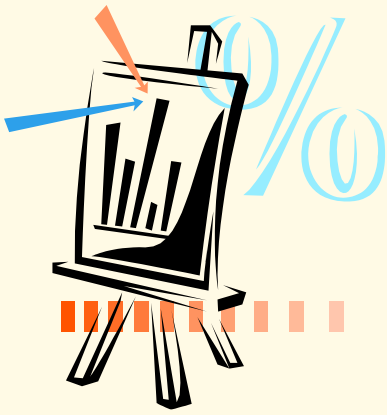
how often an event can be predicted to occur. An example is that the toss of a balanced coin is equally likely to result in "heads" as in "tails" and so the probability is 50/50. Some probabilists argue that an estimation of probability requires both expert knowledge and experimental data. Those who trade stocks engage in that kind of subjective assessment of probability. They form an opinion or a belief that a stock is likely to go up or that it is likely to go down. As those who work with symbolic logic, some probabilists have developed mathematical formuli to describe the probability of an event. Probability and statistical analysis are essential consideration in physics, mathematics, philosophy and, now, among other disciplines, law.



Probability theory does not answer the question of whether or in fact or not a specific plaintiff suffered a specific injury to a specific intervertebral disc in a specific accident. In other words, neither theory nor statistics enable the medical expert to conclude scientifically that, using our hypothetical statistical distribution, plaintiff was or was not one of the 20% who had a herniated disc before the accident. Such expert's opinion on probability is lay opinion, better described as nonsense.

We have found no case in New Jersey defining the legally essential phrase "medical probability," must less the phrase "medical certainty." In an (relatively) early case of Potts' Disease allegedly resulting from a fall on steps, the plaintiff lost because his expert had failed to "negative other possible causes" for the condition. See, Houston V. Traphagen, 47 N.J.L. 23, (1885). In a case of injury from an automobile accident, plaintiff lost her appeal because her expert witness also had failed to "negative other possible causes" for the accident other than the negligence of the defendant. See, Gribbin v. Fox, 130 N.J.L. 357 (1943). In a later case, in which plaintiff alleged that he was poisoned by a can of soup, the appellate court, invoking not a failure to "negative," ruled that medical-opinion testimony must be couched in terms of "reasonable medical certainty or probability…" but omitted any definition of the phrases and conflated "probability" with "certainty," words the distinction between which would be obvious to most precocious children (and so again the plaintiff lost). See, Jonancy v. Shop & Shop Companies, Inc., 174 N.J. Super. 426 (App. Div. 1980). See also, Bondi v. Pole, 246 N.J. Super. 236 (App. Div. 1991). Another court has written that "medical-opinion testimony must be couched in terms of reasonable medical probability," but the opinion suggests no consideration of the complex, multi-tiered definition of "probability" or what expertise is required in that field of study. See, Eckert .v Rumsey Park Associates, 294 N.J. Super. 46 (App. Div, 1996). No court in New Jersey since those cases has poured out the soothing water of clarity onto the analytical wound rent by that thorny definitional issue.

Attorneys should begin to think about attacking the absurdly crude probability analysis usually offered by a plaintiff's expert at trial. The defense attorney may easily image questions for the plaintiff's expert as would show the jury that the expert has no idea at all about whether the given plaintiff is "in the 80% or 20%" as a matter of fact. One should not be discouraged from such cross-examination by the fear that they jury would scoff at questions regarding the expert's knowledge of and reasoning from probability or statistics. Questions that incorporate images, the toss of a coin, the card drawn from a full deck, or the quick manipulation of cups and a hidden ball on a table, could well convey to the jury the impression that plaintiff's expert is engaging in sleight of hand and that plaintiff's expert is no better than a huckster on a street corner offering passers by a game of three-card Monte.

*** Michael J. McCaffrey has been certified by the Supreme Court of New Jersey as a Civil Trial Attorney since 1982. He specializes in civil litigation, with special emphasis on cases involving catastrophic personal injury, sever cognitive impairment, commercial contract disputes and alleged construction defects. He received his B.A. from Rutgers University in 1978 and a J.D. in 1982 from the Indiana University School of Law, where he served on the Indiana Law Journal.**

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THE EVOLUTION OF THE MODE OF OPERATION

*Edward L. Thornton, Esq.**

Last year I tried a case in Morris County before a retired judge on recall, involving an older female plaintiff who fell on a rubber mat while leaving a store. The incident was captured by a security camera, so there was no question as to how the incident occurred. 30 seconds before the plaintiff fell, a customer had walked over the mat, slightly upturning one corner on the previously flat surface. This was not noticed by store personnel, who were behind a nearby counter. The plaintiff, exiting the store, then tripped on the upturned corner, fracturing her shoulder and eventually undergoing a total reverse arthroplasty.

The plaintiff asked for and received a "mode-of-operation" charge. The Court modified slightly the standard Model Jury Charge 5.20 F(11), and eventually the jury returned a no cause verdict. Frankly, I was stunned when the plaintiff asked for the mode-of-operation charge, but floored when the Court granted it over objection. The case was really nothing more than a standard fall down case inside a business premise. Since then, the Appellate Division has weighed in on two cases that hopefully put this issue to rest, or at least put it in its proper perspective.

The mode-of-operation charge is familiar to all personal injury practitioners. The charge states, in pertinent part, the proprietor of a business has the duty to provide a reasonably safe business premise and if the jury should find that the hazardous condition was either caused by defendant or customers and if the jury finds that the condition was likely to result from the particular manner in which the defendant conducted business and that the defendant failed to take reasonable precautions to prevent the hazard, then defendants are liable. This liability would hold even if the defendant did not have actual or constructive notice of the particular unsafe condition.

From one perspective, the key issue is determination of exactly what type of business is being conducted in order to give rise to the charge. In my case, my client was operating nothing but a local drug store and while certainly self-service is part of the business model, the fall had nothing to do with self-service of goods from a shelf.

The first case to recognize what evolved into mode-of-operation can be debated, but generally Courts point to Francois v. American Stores Company, a 1957 Appellate Division case. In that case, cans of merchandise fell off stacks, tumbled under a customer's feet, throwing her off balance. This case and following cases never used the term "mode-of-operation", and actually the case was decided under res ipsa loquitur. The case seems to be more of a result looking for a rationale, since clearly the facts did not fit squarely into res ipsa loquitur, but nonetheless the Court took judicial notice that in self-service stores a customer is invited to handle and examine articles of merchandise and, if deciding not to make the purchase, to put them back. The defendant, having established a business of that nature, was found to be under a duty to take reasonable measures to guard against injuries to customers due to falling or stacked merchandise.

The mode-of-operation train really got its momentum in 1964, when the New Jersey Supreme Court decided Bozza v. Vornado Incorporated. The defendant operated a self-service cafeteria. Plaintiff slipped on a slippery floor. Although she could not identify the exact substance, her familiarity with the store allowed her to state that the store cafeteria sold sodas, hotdogs, hamburgers, and the like. Food was carried away from the counter with or without trays to nearby tables and beverages were served in paper cups without lids. Justice Schettino approached the case as one of notice, again not using the term "mode-of-operation", holding that plaintiff had shown circumstances such as to create a reasonable probability that a dangerous condition would occur, therefore relieving the plaintiff from proof of actual or constructive notice of a specific condition. Factors bearing on the existence of such reasonable probability would include the nature of the business, the general condition of the premises, and a pattern of conduct or recurring incidents. In essence, the case shifted the burden, after an examination of such factors, to the defendant.

The other well known early case on this subject, Wollerman v. Grand Union, decided in 1966 by the Supreme Court, Chief Justice Weintraub, held that when a customer slipped on a string bean in the vegetable aisle and submitted proper proofs, the store operator then had the burden of explaining what reasonable measures were taken commensurate with the risk of a bean falling from an open bin. If the burden was not met by the defendant, the jury could infer fault. The Chief Justice held that a customer's carelessness could be anticipated and therefore no notice of the specific condition nor constructive notice would be required. Indeed, Ms. Wollerman could not show how the bean fell to the floor or how long it was there, prompting the trial Court to dismiss the case.

These two similar cases, decided in a similar timeframe, show that the term "mode-of-operation" was not used, but instead the cases act as a springboard for later cases to confuse mode-of-operation with notice or the business mode of operation; indeed, some Courts have tried to extend the theory to any type of self-service operation, although no Court has gone as far as my trial Court in extending the concept to an incident that has nothing to do with customer service.

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MODE OF OPERATION

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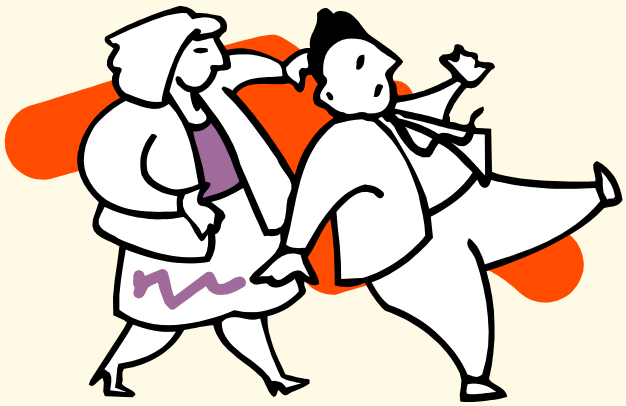
Mode-of-operation generally sat dormant until these three recent cases, Nisivoccia, Arroyo, and Prioleau.

Nisivoccia, decided by a unanimous Supreme Court in 2003, held that plaintiff, who slipped and fell on some loose grapes approaching a supermarket checkout, was entitled to the mode-of-operation charge even though she could not show how long the grapes were on the floor or how they had come to be there. It was undisputed that in the produce section of the store grapes were displayed in open top vented plastic bags that permitted spillage. The specific question before the Court, Justice LaVecchia, is whether plaintiff would be entitled to an inference of negligence because the store should have anticipated that careless handling of grapes was reasonably likely during customer checkout. The trial Court did not allow such inference, the Appellate Division affirmed, and the Supreme Court reversed.

In 2013 the Appellate Division had occasioned to consider the theory again in Arroyo v. Durling Realty. The Appellate Division, Judge Sabatino, affirmed the trial Court's grant of summary judgment to a convenience store sued by a patron who slipped on a discarded telephone calling card on the sidewalk near the store entrance.

The Court held that the sale of telephone calling cards was not an integral feature of the retail stores operation; that the phone card was not found inside the store but instead outside; the facts did not fit an appropriate case for imposition of the mode-of-operation charge; that the plaintiff could not prove actual or constructive notice; and that mere existence of an alleged dangerous condition is not constructive notice of it. This case can be seen as standing for the modern trend, that merely because a customer slips on an object that is for sale, even a self-service item, constructive notice must still be shown. Judge Sabatino stated that the necessary nexus between the self-service rack and eventual presence of the card on the sidewalk was extremely attenuated and what the purchaser chose to do with the card after leaving the store (and even on the assumption that it was a card bought at the store) was not an integral feature of the method of operation. Indeed, a customer buying a card would have to interact with a store employee to present it for payment. Although this may seem to be a distinction without a difference to some people, I would submit that the case really stands for the proposition that the tide of "mode-of-operation" had to be stemmed somewhere or the exception would swallow up the rule. The key, then, was really a subjective examination of the defendant's business model ("an appropriate case").

That may seem to be the ultimate lesson of Prioleau v Kentucky Fried Chicken, a 2014 Appellate Division case. Plaintiff slipped on a slippery substance outside the restroom at a fast food restaurant. The trial Court charged mode-of-operation and the Appellate Division, Judge Lihotz reversed. Again, this case may be seen as an instance where the Court simply was not going to allow the trend of the exclusion swallowing up the rule. The Court held that the mere existence of a dangerous condition did not in and of itself establish actual or constructive notice. Although the premises liability rule for self-service operations in proper cases may relieve the plaintiff of notice proofs, just because a business is a fast food restaurant or had self-service facilities does not prompt the mode-of-operation charge. Instead, the patron was left with the burden to show a causal nexus between the fast food or other type of business operation and the harm. In this particular case, the fact that the fast food restaurant used cooking oils and grease which conceivably could have been tracked to the front of the restroom did not prompt a shifting of the burden of proof. The Court states at least three times in its opinion that the concept of mode-of-operation is an exception and is not one of broad application. Indeed, the focus of a Court should be on the business model that encourages self-service, not merely the type of business which may be cafeteria, fast food, shelf, display, etc.



Since one judge dissented in Prioleau, there is a right of automatic appeal to the Supreme Court, where the matter now lies. Stay tuned.

*** Edward L. Thornton is a partner in Methfessel & Werbel. Mr. Thornton has handled liability defense trials and appeals on behalf of insurance companies. He specializes in catastrophic injury, legal malpractice as well as dental and medical malpractice cases, and the defense of lead poisoning and product liability matters.**

Civil Litigation and Other Nontraditional Union Tactics in Labor-Management Disputes; Legal Protection Available to "Secondary Targets"

*Kevin C. Donovan, Esq.**

Traditionally, unions seeking to organize an employer's workforce will petition the National Labor Relations Board (NLRB or the Board) for a secret ballot election in which a company's employees make their wishes known. Some unions, dissatisfied with the traditional approach, seek alternative methods of workforce organization, such as mandatory employer recognition of unions on the basis of signed authorization cards alone.

Other times, a union targeting one employer will seek to exert pressure against a second employer. The goal is to persuade that secondary entity to pressure the primary employer into agreeing to union demands. That pressure may come in the form of the union filing civil lawsuits or taking other legal action against the secondary, forcing it to expend valuable time and resources fending off the litigation.

One recent case illustrates what such "secondary" employers can do to fight against the use of litigation as a tool in labor disputes, while another recent case provides a cautionary note to such employers who resort to litigation in their own defense against nontraditional union pressure tactics.

Waugh Chapel South Case: We (Unions) Can Sue You, But You Cannot Sue Us

The dispute leading to *Waugh Chapel South, LLC v.United Food & Commer. Workers Union Local 27*[1], arose from the fact that Waugh Chapel South (WCS), a commercial real estate entity, was developing a shopping center. One of the tenants was to be Wegmans Food Markets, a non-union supermarket chain. Intense union opposition to Wegmans spilled over to WCS. As recounted in the complaint that WCS subsequently filed, a union executive threatened WCS that if Wegmans did not unionize, "we will fight every project you [WCS] develop where Wegmans is a tenant."

According to WCS, the unions involved thereafter "directed and funded a barrage of legal challenges at every stage of the projects' development." While not brought in the name of the unions, alleged surrogate plaintiffs brought a total of 13 legal challenges against the shopping center project. These included claims based on environmental or tax issues and claims asserting common law nuisance, as well as numerous challenges to building permits granted to WCS. Most of the legal actions were dismissed by the challengers before the merits were reached, a number of them after WCS subpoenaed union financial records (apparently seeking evidence that the unions were funding the legal actions).

As noted, the real union target was not WCS, but the non-unionized Wegmans chain. WCS was simply being dragged into the dispute to pressure Wegmans, albeit at significant cost to WCS and a real threat to its development plans. The key, however, is that in labor law parlance, WCS was a "secondary" target of the unions' efforts.

Union action against a so-called secondary employer implicates the "secondary boycott" provisions of the National Labor Relations Act (NLRA). That law applies to efforts to "exert pressure on an unrelated, secondary or neutral employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union's goals indirectly."[2] Significantly, federal law permits a civil action for damages against a labor organization that is found to have engaged in unlawful secondary activity.

Title 29, § 187 of the United States Code ("Unlawful activities or conduct; right to sue; jurisdiction;

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limitations; damages") provides that:

> ext(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [the secondary boycott section].
>
> ext(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

In response to the union litigation barrage, WCS commenced a § 187 action.

The unions claimed that WCS's lawsuit had to be dismissed, arguing that their legal efforts against the developer were protected by the First Amendment. Indeed, long-settled federal law protects activity that can be characterized as citizens petitioning their government for redress. That protection encompasses litigation brought before courts and administrative agencies.

Relying on that principle, a federal district court dismissed WCS's complaint as barred by the right of the unions to petition government.

Constitutional protection does not, however, extend to "sham" litigation, such as is found when a party can show "a pattern of baseless, repetitive claims … emerge[s] which leads the fact finder to conclude that the administrative and judicial processes have been abused."

Relying on the sham litigation exception, the Sixth Circuit reversed the lower court's dismissal, reinstating WCS's claims against the unions. In finding evidence of sham litigation, the appeals court noted that the "vast majority" of the legal challenges had failed, suggesting that they had been filed without regard to the merits and simply for harassment against a secondary employer (WCS) in violation of federal labor law.

The court also noted that many of the suits were withdrawn "under suspicious circumstances":

> ext[I]n the nine appeals of the building and grading permits, plaintiffs voluntarily dismissed their suits – according to WCS – to avoid complying with subpoenas of financial records that would have revealed that the unions were directing and paying for the litigation.[3]

The court of appeals thus allowed WCS to pursue its own litigation against the unions in an attempt to win damages for the union's alleged use of the legal system to pursue a campaign of unlawful secondary activity against it.

Allied Mechanical Services Case: If You (Employer) Fight Back Against Secondary Activity with a Lawsuit, the NLRB May Punish You

While WCS has won its day in court, employers must be aware that filing litigation against unions can lead to a claim that the employer's lawsuit is actually retaliation against the union in violation of the NLRA. Labor organizations are protected under the NLRA for a variety of actions that are deliberately designed to cause economic harm to employers. Care must be taken to ensure that any litigation against unions is well founded and reasonably based.

This caution is highlighted by a case decided in October 2013. While in the *Waugh Chapel South* case we saw the unions claiming a First Amendment right to file litigation against an employer, in the recent case an employer

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had been found guilty of violating federal labor law for filing a defensive suit against unions, and only won vindication on appeal.

In *NLRB v. Allied Mechanical Services, Inc.*,[4] Allied, a construction company, believed that it was being blackballed by several unions because it had not entered into a collective bargaining agreement acceptable to one particular local union. The blackballing, according to Allied, came in the form of the other unions shutting Allied out from the benefits of a job-targeting fund that subsidized chosen contractors, allowing them a competitive advantage when bidding for construction jobs.

Using § 187, Allied sued the unions under the secondary boycott provisions of the NLRA. Allied's claims were subsequently dismissed by a federal district court that found that none of the claims stated a viable cause of action. The Sixth Circuit Court of Appeals affirmed that dismissal. That did not end the dispute, however. Once they had prevailed in court, the unions went before the NLRB, filing an unfair labor practice (ULP) charge alleging that Allied had violated the NLRA by the mere fact of filing its federal suit.

It is of note that, unlike the unions involved in the *WCS* case, Allied had not embarked on a campaign of numerous lawsuits nor filed its suits then dropped them after its target had been forced to significant legal expense, actions suggesting that they had only been designed to harass and impose costs upon it adversaries. Rather, Allied had filed a single suit, raising what it argued were legitimate claims against unlawful secondary activity targeting it.

Nevertheless, in considering the unions' ULP charge against Allied, the Board stressed, among other things, (1) Allied's contentious history with the local union that had been pressing it for a labor agreement, (2) Allied's history of unfair labor practices against the unions involved, and (3) a past statement by an Allied executive that he intended "to get even" with the unions. The Board acknowledged that Supreme Court precedent limited the situations in which employers could be held liable under the NLRA for civil suits filed against unions, due to First Amendment protections. Nevertheless, the Board decided that Allied's civil action had no reasonable basis, concluding that it was filed in retaliation for the unions' past protected activities. The Board ordered Allied, among other things, to reimburse the unions for their expenses, including attorneys' fees, incurred in defending Allied's suit.

The same court of appeals that had previously affirmed dismissal of Allied's civil action refused to uphold the NLRB's sanctions. Just as the court in the *Waugh Chapel South* case had recognized, the *Allied* court stressed that the First Amendment protects a litigant's right to file a lawsuit as part of citizens' rights to petition government for redress of their grievances. Significantly, the *Allied* court refused to afford the Board the judicial deference traditionally granted to its determinations when deciding labor law matters. The court ruled that the Board's acknowledged expertise in labor law did not extend to deciding essentially constitutional law issues. The court appeared to be somewhat uncomfortable with the idea of an administrative body making decisions that could punish what might be constitutionally protected resort to the judicial system.[5]

Reviewing the record on its own, then, the court of appeals examined Allied's original complaint and the legal theories and facts supporting it. The court reasoned that just because Allied had lost in court on a motion to dismiss did not mean that its theories of recovery were so unreasonable as to be objectively baseless. In addition, while acknowledging the ill will between Allied and the unions that had arisen during a contentious relationship, the court was not convinced that the evidence of retaliation relied on by the NLRB was persuasive. Citing the Supreme Court's warning in another case, in which the Board had found an employer liable for damages for filing a civil action against a union, that "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred,"[6] the court of appeals found that the record indicated that any "retaliatory motive" arose from the normal ill will that is not uncommon in litigation.

> extThe evidence cited by the Board may have proved that there was such ill will between Allied and Local 357 as to rise to the level of "hatred." But none of the evidence offers

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support for the proposition that Allied's reasonably based suit was filed without regard for the merits and was instead only intended to cost the unions money.

The court thus refused to enforce the Board's findings against Allied. The fact remains, however, that Allied had no doubt been put to significant expense in fighting the ULP charge and subsequent Board order all the way to the court of appeals, and quite possibly was chilled from filing any future civil actions in defense of its rights under the NLRA

CONCLUSIONS

These cases illustrate, first, that employers are not defenseless in the face of unconventional union tactics, including union-inspired lawsuits that may be designed to impose burdensome costs on their target. At the same time, however, employers wishing to fight back by themselves using the courts against perceived unlawful union tactics, especially those targeted against secondary employers must proceed cautiously, ensuring that their complaints have a reasonable basis under the sometimes complicated principles of the NLRA. Employers also must seek to ensure that they have not placed themselves in a position in which a union can claim that the lawsuit has nothing but a retaliatory motive behind it. Such situations call for careful analysis of the facts and legal theories supporting any lawsuit. That being said, the NLRA's prohibitions on certain actions targeting secondaries should be kept in mind by employers who face unlawful union threats to their businesses.

ENDNOTES

[1] 728 F.3d 354 (4th Cir. 2013).

[2] R.L. Coolsaet Constr. Co. v. Local 150, Int'l Union of Operating Eng'rs, AFL-CIO, 177 F.3d 648, 655 (7th Cir. 1999) (internal quotations omitted).

[3] Waugh Chapel South, 728 F.3d at 365.

[4] 734 F .3d 486(6th Cir. 2013).

[5] The five Board members are appointed by the President with the consent of the Senate. It should be noted that the traditional partisan wrangling over the perceived "leanings" of Board nominees – pro–management versus pro-union - has been accompanied in recent years by allegations of some that the current Obama-appointed Board has adopted an unusually aggressive pro-union stance. See President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate, Staff Report, U.S. House Of Representatives, 112th Congress Committee on Oversight and Government Reform December 13, 2012. Union supporters disagree, but the fact remains that the Board is the subject of sharply divergent perception within the two camps (management and labor).

[6] BE&K Constr. Co. v. NLRB, 536 U.S. 516, 534 (2002) (quoting Garrison v. Louisiana, 379 U.S. 64, 73-74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)).

*** Kevin C. Donovan, a partner at national law firm Wilson Elser, concentrates his practice on labor law and employment litigation and counseling, including certain employee health benefits issues facing employers. He may be contacted at kevin.donovan@wilsonelser.com.**

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ADR

Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

Automobile Liability

C. Robert Luthman, Esq.
Weir & Associates
108 Straube Center Blvd - Ste 17
Pennington, NJ 08534
Rluthman@weirattorneys.com

Construction Law

Michael J. Leegan, Esq.
Goldberg Segella
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Employment Law

Brian Chabarek, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
bchabarek@hoaglandlongo.com

Environmental Law

Joanne Vos, Esq.
Maraziti Falcon & Healy
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008
Jvos@mfhenvlaw.com

Jacob Grouser, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jgrouser@hoaglandlongo.com

Insurance Law

Jeffrey Bartolino, Esq.
NJM
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
jbartolino@njm.com

Kate Ro, Esq.
NJM
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
kro@njm.com

Philanthropy

Denise M. Luckenbach, Esq.
Sellar Richardson, P.C.
293 Eisenhower Pkwy Ste 170
Livingston, NJ 07039
973-992-6677
dluckenbach@sellarrichardson.com

Premises Liability

Jeff Maziarz, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jmaziarz@hoaglandlongo.com

Theresa Giamanco, Esq.
Bennett Bricklin & Saltzburg
6000 Sagemore Drive
Marlton, NJ 08053
856-751-5285
giamanco@bbs-law.com

Products Liability

John Chester, Esq.
Porzio Bromberg & Newman
100 Southgate Parkway
Morristown, NJ 07962
973-538-4006
jtchester@pbnlaw.com

Professional Liability

Herbert Kruttschnitt, Esq.
Law Offices of Gerard Green
200 Schultz Drive
Red Bank, NJ 07701
732-933-7900
herbert.kruttschnitt@cna.com

Public Entity Law

Natalie Watson, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

Aldo J. Russo, Esq.
Lamb Kretzer LLC
110B Meadowlands Pkwy
Seacaucus, NJ 07094
201-798-0400
ajr@lambkretzer.com

PIP

Robert Cappuzzo, Esq.
Chasan Leyner & Lamparello
300 Harmon Meadow Blvd
Seacaucus, NJ 07094
201-348-6000
rcappuzzo@chasanlaw.com

Workers' Compensation

Stephen Banks, Esq.
Dempster & Haddix
161 Gaither Drive Ste 201
Mount Laurel, NJ 08054
856-778-7841
Stephen.Banks.aig.com

George C. Roselle, III, Esq.
Lamb Kretzer LLC
601 Pavonia Ave.
Jersey City, NJ 07306
201-798-0400
gcr@lambkretzer.com

Vidya Prasad, Esq.
Dempster & Haddix
160 Gaither Drive
Mt. Laurel, NJ 08054
856-439-5422
vidyapras@gmail.com

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Throw That Flag

Brian O'Toole, Esq.

As we approach autumn, our fancy turns to high school football on Friday nights and Saturday afternoons. There is no greater thrill than to see your child run back a punt for a touchdown with the crowd cheering. Then a hush comes over the field as the crowd realizes there is a yellow flag on the ground thrown by a pudgy little guy wearing the stripes. That pudgy little guy is me! I have had the pleasure over the last sixteen years to be a high school football official in North Jersey. The very same incident I describe happened to me in a game between Metuchen and South Amboy on a crisp Friday night at Metuchen. Both teams were undefeated and the score was tied 7-7 a couple minutes before halftime. South Amboy punted to Metuchen and Metuchen's deep back took the ball at his own ten yard line, and swept up the left side for a 90 yard touchdown. Except Mr. O'Toole had a clipping flag on the 30 yard line. Instead of a touchdown, Metuchen got the ball at their own 15 yard line. A crescendo of boos and assorted foul language reigned down upon me, but I did learn a valuable lesson. When we were escorted off the field at halftime by the police, I realized that the angry fans did not know which of the five officials had made the offending call. I was able to bathe in anonymity and escape to the locker room.

When I was no longer able to play softball at 50 years old, I decided I needed a physical activity to replace it. A couple of my younger friends were starting to referee high school football and basketball and urged me to join them. I gave it a try but immediately realized basketball was out of the question because games were not played at one mile per hour. Football was a different story and I have always loved the game. The cadet program was two years and you had to officiate at least 12 freshman and J.V. games a year. You also had to sit for a two-hour exam and pass a mechanic's exam. Miraculously, I was able to get through all of this, largely because I got a tremendous break by being assigned to Harry Hicks' crew. Every cadet works with a crew and assists them on the chain gang on the sidelines for the varsity games. Harry was a bulldog; a no-nonsense guy who wanted every game he worked to be flawless. For some unknown reason he liked me and took me under his wing. Harry had no problem with chewing you out, but no one else better do it. I was under heavy fire for a call I had made on the sidelines and the entire coaching staff was on me. That is, until Harry got there. Without raising his voice, he quieted the rebellion, purely through the power of his presence. I believe Harry was the most respected official in our chapter and although he is now retired, I continue to consider him a close personal friend.

I can assure you that no one referees high school football for the money. We just got a raise and now a varsity game pays $85.00. That is for approximately six hours of work, including round-trip transportation. Sometimes you catch a break and get a nearby assignment, but not usually. Of course, you realize that it is important that we review game film after each game. It is vital that this review takes place at the nearest local watering hole, which adds another hour and a half to the day's assignment. After clearing our bar tab, you can imagine that there is not much left from our handsome salaries. My wife, Sunny, would say that maybe someday I'd make enough to pay for our uniform costs. I never want to get her hopes up on this, however.

One of my favorite assignments was reffing a Thanksgiving game. These games all involve traditional rivalries and the quality of play is always intense. Our morning would start out at a local diner at 8 a.m. and we would get to the field an hour and a half before kickoff. Most Thanksgiving games kicked off around 10 a.m. Sunny and I would host cocktail and hors d'oeuvres after the game, and then we would all proceed to

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our Thanksgiving repast. It was a nice tradition and suffice it to say no one went home hungry. Unfortunately, with the new playoff system, there are very few Thanksgiving games and that is a shame.

One thing that always astounded me was the way certain schools treated the officials. Invariably, I found that the poorer schools were much better to us. At halftime you would usually expect a bottle of water, and if you were lucky, a hot dog. At the less expensive schools you could count on hot dogs, pretzels and a soda. One Thanksgiving at Irvington High School, the halftime fare consisted of a mini-Thanksgiving dinner, including turkey, stuffing, mashed potatoes, vegetables and pumpkin pie. No kidding!! I'm sure this had nothing to do with the fact that I was born and raised in Irvington, but I always tried to convince the crew that it was because of me.

My position on the field is always umpire. He's the official that is usually positioned between the linebackers on the defensive side. While this is probably the easiest of the five positions, it's definitely the most dangerous. I would estimate that I have been knocked on my butt at least a dozen times over the years. For safety reasons, the NFL has now moved the umpires spot behind the offensive line across the field from the referee. On the plus side, you have a smaller area of responsibility and you really get a chance to talk to the kids. I have always found that when you have a dialogue with the defensive captain, things go a lot smoother.

Unfortunately, my 2013 season got cut short by an injury and my 2014 season is in jeopardy with another injury. Regardless, I'll be back on the field in 2015 and yes, I'll be moving even slower. Please remember, however, before you start screaming at a referee's call, we're outnumbered 22 to 5.

So get out there and support your local school and have a great time doing it!

Also, if you should see your officiating crew in your local saloon after the game, don't be bashful about buying them a round of drinks. On our salaries, we can use all the help we can get.

O'BOYLE V. LONGPORT

Edward J. Fanning, Jr., Esq.*

On July 21, 2014, the New Jersey Supreme Court adopted broad confidentiality protections for attorney-client communications and attorney work-product when they are shared with another attorney in furtherance of a common interest. In *O'Boyle v. Borough of Longport*, a case closely followed by the New Jersey legal community, the Court agreed with the New Jersey Defense Association's *amicus* arguments and adopted an expansive version of the common interest rule stating that the interest shared by the parties asserting the privilege does not have to be identical and, in fact, need not involve even the same case. New Jersey Defense Association President Mario Delano stated: "This is a great decision for the defense bar. It provides important protections for joint defense-type communications that are common in multi-defendant cases. It will help our members more effectively represent their clients 'interests. "

In the unanimous ruling (Justice Anne Patterson did not participate), the Court rejected Martin O'Boyle's Open Public Records Act and common law right-of-access claims against the Borough of Longport for documents shared by municipality's attorney and an outside attorney representing a former planning and zoning board member and two other Longport residents who were also sued by O'Boyle. Writing for the Court, Judge Mary Cuff found the case to represent a conflict at the "intersection of two well-recognized public policies": the need to maintain the attorney-client privilege and the desire to make government as transparent as possible. Upon analyzing the competing interests, the Court held that O'Boyle would not receive copies of letters exchanged by the two attorneys in connection with representation of their clients who were adverse to O'Boyle. According to Judge Cuff: "The common-interest exception to waiver of confidential attorney-client communications or work product due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest."

In embracing the rule spelled out by the Appellate Division in *LaPorta v. Gloucester County Board of Chosen Freeholders*, the Court stated: "The common interest exception to waiver of confidential attorney-client communications or work product due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties." Thus, the protected disclosure can occur even before litigation begins and the parties need not share an identical interest so long as they share a common purpose. Moreover, the attorneys involved do not have to be engaged in the same litigation.

The Court's opinion was informed by the policies underlying the common interest doctrine. As noted in the opinion: "The common interest rule is designed to permit the free flow of information between or among counsel who represent clients with a commonality of purpose." "It offers all parties to the exchange the real possibility for better representation by making more information available to craft a position and inform decision-making in anticipation of or in the course of litigation." However, for the rule to apply, the parties asserting the privilege must be drawn together by the common interest and act in a way that reflects the privileged nature of the material, such as taking steps to prevent opponents from accessing them. The Court further opined that while the protections offered by the doctrine "may intrude on the fact-finding function of litigation," the Appellate Division in *LaPorta* had struck an acceptable balance.

The NJDA's *amicus* brief to the New Jersey Supreme Court was authored by members Ed Fanning and Rocky Kaushik of McCarter & English, LLP.

*** Edward J. Fanning, Jr. is a Partner in the firm of McCarter & English. He has extensive experience in civil litigation, with particular emphasis on the defense of claims against manufacturers of pharmaceuticals, medical devices, consumer products and industrial equipment.**

Committee Chairs

2014-2015

Amicus Curiae
Stephen J. Foley, Jr., Esq.
Campbell Foley Delano & Adams
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
sfoleyjr@campbellfoley.com

By-Laws
J.R. Peter Wilson, Esq.

Convention
Mario Delano, Esq.
Campbell Foley Delano & Adams
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
mdelano@campbellfoley.com

Diversity Committee
Natalie Watson, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

Finance
Chad M. Moore, Esq.
Hoagland Longo Moran Dunst
& Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
cmoore@hoaglandlongo.com

Legislative
Herbert Kruttschnitt, Esq.
Law Offices of Gerard Green
200 Schultz Drive
Red Bank, NJ 07701
732-933-7900
herbert.kruttschnitt@cna.com

Long Term Planning
Kevin J. DeCoursey, Esq.
Cooper Maren & Nitsberg
959 Rt. 46 East
Parsippany, NJ 07054
973-257-2100
kDecour1@progressive.com

Medical Directory
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Membership
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Kevin J. DeCoursey, Esq.
Cooper Maren & Nitsberg
959 Rt. 46 East
Parsippany, NJ 07054
973-257-2100
kdecoursey@aol.com

***New Jersey Defense* Newsletter**
Gregory McGroarty, Esq.
Wildenhain Crino, PC
95 Mount Bethel Road
Warren, NJ 07059
908-757-3900 ext 208
gmcgroarty@wcpclaw.com

Public Relations
Joanne Vos, Esq.
Maraziti Falcon & Healy
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008
Jvos@mfhenvlaw.com

Technology
Charles P. Hopkins, II, Esq.
908-601-3100
Charles.hopkins.esq.bc.edu

Trial College
Marie Carey, Esq.
Law Offices of Kevin M. McGowen
325 Columbia Turnpike
Florham Park, NJ 07932
973-443-9100
marie.carey@usaa.com

Young Lawyers
Ryan Richman, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
rrichman@mccarter.com

Co-Chairs

Theresa Giamanco
Bennett Bricklin & Saltzburg
6000 Sagemore Drive
Marlton, NJ 08053
856-751-5285
giamanco@bbs-law.com

Michelle O'Brien
Graham Curtin
4 Headquarters Plaza
Morristown, NJ 07961
973-401-7155
mobrien@grahamcurtin.com

New Jersey Defense Association
P.O. Box 463
Linwood, NJ 08221

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