NEW JERSEY DEFENSE

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President's Message

Mario Delano, Esq.

I realize that the older I get the faster time seems to go by, but in the blink of an eye my term as President is about half over. So far it's been very busy, but I am fortunate to be surrounded by professional and incredibly dedicated board and committee members who make my job much easier.

We have had 3 very successful seminars over the past few months and I would like to thank everyone for attending. On October 13, 2014 Past President, Marie Carey chaired the annual Trial College. Attorneys who were looking to experience the feel of being in trial, making opening and closing statements and examining witnesses got the chance to do so under the watchful eyes of seasoned trial attorneys. As if she were not busy enough, Marie than chaired the sold out 5th Annual Women and the Law Seminar on November 11, 2014. She assembled one of the most impressive speaking panels I have ever heard, and the interaction with the attorneys who attended was lively and informative. Thank you, Marie for all your hard work on these two seminars and thanks to all the speakers who gave up their well earned day off to help us. On November 25, 2014 Robert Luthman chaired the annual Automobile Liability Seminar which had one of largest turnouts we have ever seen. The seminar was co-sponsored by our friends at the Insurance Council of New Jersey. Rob did a great job putting together a program of interesting topics and informative speakers. Thank you to Rob and his panel of speakers for a great presentation. We look forward to seminars from some of our other committees after the first of the year.

On November 10, 2014 Aldo Russo represented us in front of the New Jersey Supreme Court for the hearing on *Maida v Kuskin*. Aldo prepared the Amicus brief on behalf of the NJDA and wrote an article on the case in our Summer 2014 issue.

I am very proud to announce that on October 22, 2014 Past President, Stephen J. Foley, Jr., was recognized as one of the recipients of Professional Lawyer of the Year, presented by the New Jersey Commission on Professionalism in the Law.

Continuing in my efforts to plug the 2015 Annual Seminar at the Bedford Springs Resort and Spa in Bedford Springs, PA, I would like the membership to know that this year we intend to recognize individuals as Lawyer of the Year and Young Lawyer of the Year. The convention committee will be accepting nominations some time after the first of the year. Stay tuned to our website for details on how to make a nomination.

Finally, I would like to wish you and your families safe and very Happy Holidays. In our business, we seem to spend more time at the office and less time at home than we did in the past. At least at this time of year, I would like to quote an attorney friend of mine who found me at the office on a Sunday morning. "In the end you will not lament that you could have billed more hours, but you will regret not spending enough time with family." Enjoy your time with friends and family this Holiday Season.

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2014 - 2015

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Equipment Manufacturers' Liability For Injuries Caused By Replacement Component Parts: Elbert Hughes v. Goulds

Steven F. Satz, Esq. and Richard J. Mirra, Esq.**

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A worker services a piece of equipment that was manufactured many years before. He removes the existing asbestos gaskets and packing from the equipment (which had been serviced in a similar manner many times before), and replaces it with new asbestos gaskets and packing purchased from a vendor unrelated to the equipment manufacturer. He is subsequently stricken with an asbestos related disease. The manufacturer and seller of the asbestos containing components, installed after the piece of equipment in which they are incorporated left the factory, but before the injured claimant worked on it, cannot be identified. Is the manufacturer of the equipment in which these components were installed well after it left the factory liable?

Notwithstanding that the courts in numerous states, including the Supreme Courts of California and Washington, have weighed in on this issue; there were no published decisions in New Jersey until the Appellate Division decided this unconsolidated group of four appeals in April 2014. The Supreme Court of New Jersey denied Plaintiffs' Petition for Certification on October 17, 2014.

The Scope of the Replacement Parts Issue

This case (referring to the consolidated group) is distinguishable from "assembler's liability" cases, in which a manufacturer incorporates in its finished product a defective component part. Plaintiffs in this case conceded that there was no evidence that they were exposed to asbestos from the original asbestos-containing parts incorporated into the pumps they serviced years after they were manufactured. Nor was any evidence presented that the Defendant specified or required that asbestos-containing components be used when the pumps were serviced subsequent to their manufacture. Lastly, there was no proof that any of the replacement components were placed into the stream of commerce by the equipment manufacturer. Instead, Plaintiffs alleged that the equipment manufacturer was strictly liable because it was **foreseeable** that asbestos-containing replacement gaskets and packing would be used in its pumps during the lifespan during their lifespan.

Plaintiff also argued in two of the four cases in the group that in addition to being strictly liable, Defendant was liable on common law negligence grounds. The alleged basis was that the equipment manufacturer either knew, or should have known, that individuals would in the future service install asbestos containing gaskets and packing when they performed service or repair work.

The Trial Court's Decisions

Defendant moved for summary judgment in two of these cases (Hughes, Greever) in August 2011. It moved for summary judgment in the Fayer and the Mystrena cases in November 2011. The basis was that Plaintiffs failed to present any evidence that any Plaintiff was exposed to asbestos from asbestos-containing replacement gaskets or packing manufactured, distributed, sold, or supplied by the Defendant pump manufacturer.

The trial court granted summary judgment in all four cases. It issued an unpublished Memorandum Decision in the latter group of two cases, it framed the issue as the liability of the equipment manufacturer for failure to warn regarding exposure to replacement parts that contained asbestos that the manufacturer did not manufacture, sell, specify or require. The basis of the court's decision was that a plaintiff in New Jersey has long been required to

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prove that a defect existed in a product when it left the manufacturer's control, and that only those in the chain of distribution of the replacement components may be found liable. The record was devoid of any evidence that the pump manufacturer placed into the stream of commerce any asbestos-containing component which exposed any of the Plaintiffs to friable asbestos

The First Published Decision on this Issue in New Jersey

The Appellate Division framed the issues in this case in terms of the classic elements of tort law – the establishment of a duty; its breach, and proximate causation. Like the Courts in several other jurisdictions that have addressed the issue of component parts replacement liability, the Appellate Division arrived at the same conclusion when it affirmed the trial court's entry of summary judgment in all four cases. It did so, however, in a manner that differed from those other court's analyses.

The Scope of the Duty to Warn

The Appellate Division initially noted that the New Jersey Product Liability Act (PLA) does not apply to environmental tort matters. N.J.S.A. 2A:58C-6. It therefore analyzed this case based on common law principles.

The Court first devoted a substantial portion of its opinion to the fundamental issue of whether the manufacturer of a "bare metal" piece of equipment need place a warning on its product regarding potential dangers associated with exposure to friable asbestos.

The Court noted that the starting point in the analysis, given that the PLA is inapplicable, is whether the action sounds in strict liability (which presumes that the manufacturer/seller knew of the dangers associated with its product), or negligence (which requires a plaintiff to prove what the manufacturer/seller knew, or reasonably should have known). The Court noted that the absence of a warning by itself render the equipment or machinery defective. In the toxic tort context, New Jersey courts (i.e. Becker v. Baron Bros., 138 N.J. 145, 159-61 (1994)) have held that it cannot be presumed that all asbestos-containing products are pose an equal threat of harm. Therefore, there can be no blanket requirement to warn. Instead, the focus must be on the unique aspects of the particular product that allegedly caused the harm complained of.

The Court's analysis then moved to the underlying purpose of a warning. It noted that fundamentally, it is designed to reduce as much as possible the product's risk without interfering with its intended use. (Beshada v. Johns-Manville Prods. Corp, 90 N.J. 191, 201 (1982). It requires the product's manufacturer or seller to take reasonable measures to communicate the warning to those who will probably use it. That duty can expand the audience of those who may be expected to receive the warning, depending on the context. The Court noted by way of example that a pharmaceutical company has a duty to communicate the warning not only to the health care provider to whom it is sold, but as well to that provider's patient or consumer. (Davis v. Wyeth Labs, Inc., 399 F.2d 121,131 (9th Cir. 1968). As well, the duty may even extend to products that the manufacturer itself did not manufacture or sell (citing Molino v. B.F. Goodrich Co., 261 N.J. Super 85, 93 (App. Div. 1992), certif. denied, 134 N.J. 482 (1993). There, a tire manufacturer was found to have a duty to warn of dangers posed by a wheel rim it did not make, because its tire could not function in the absence of the wheel on which it was mounted to form an assembled unit).

Applying that analysis to the facts of this case, the Court noted that the pump in issue incorporated asbestos-containing components when it left its control. It held that plaintiffs were therefore entitled to an inference that those who replaced the gaskets and packing during the course of maintenance or repairs, or others in close proximity, would be exposed to a risk of exposure to the asbestos in those replacement parts. The Court therefore

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held that it may be presumed that the manufacturer knew of any danger posed by the asbestos-containing components in its equipment, and that it was reasonably foreseeable that those components would be periodically replaced over the lifetime of the pump.

Notwithstanding the fact that the manufacturer never required or specified the use of asbestos-containing components, the Court held that the paucity of widespread alternatives at the time the pumps were sold made it reasonable to conclude that the components encountered by those who worked on them once they were in the field would in all likelihood contain asbestos. Thus, the Court held that not only were those who encountered the original asbestos-containing components that were installed during the manufacturing process in the class of foreseeable users for the purposes of this analysis, but so too were those who would encounter the components during routine maintenance, servicing or repair.

The Court then turned to a risk - utility analysis of the duty to warn. It held that imposing a duty to warn on an equipment manufacturer would only minimally impact the utility of the product, citing Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 206 (1984).

Causation: The Ultimate Issue

The establishment of a duty to warn was only the starting point, and was not dispositive. The Court shifted its focus to the threshold requirement in tort law that every claimant prove exposure to the product in issue in a manner sufficient to establish liability. The courts in New Jersey have consistently rejected efforts to eliminate that bedrock principle. For example, an attempt to substitute "alternative liability" or "enterprise liability" theories have been rejected. (Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 21-25 (App. Div. 1981).

In the toxic tort context, the court in Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989) rejected the concept of "market share" liability. That seminal opinion established that a claimant must establish exposure to asbestos either sold or supplied by the defendant. Id. at 30 – 31. In a subsequent case involving a claimant stricken with mesothelioma, the court reiterated that it was incumbent on the claimant to establish whose product allegedly caused the injury complained of. Kurak v. A.P. Green Refractories Co., 298 N.J. Super. 304, 322 (App. Div. 1997).

In our case, the Court cited the requirement in Sholtis that Plaintiffs establish exposure to a particular manufacturer's friable asbestos with sufficient intensity and frequency in order to withstand summary judgment. Given the difficulties inherent in direct proving such exposure, the Court noted that a plaintiff may meet the burden by circumstantial proof of sufficiently intense exposure, generally supported by expert proof. The bottom line for the Court in this case was that Plaintiffs were required to establish exposure with sufficient frequency, regularity and proximity to asbestos from a product made or sold by Defendant (citing Sholtis, supra, 238 N.J. Super. at 29). Here, Plaintiffs encountered the pumps manufactured by Defendant many years after the original components were replaced. They therefore failed to prove that they were exposed to any such asbestos-containing component made or sold by the pump manufacturer, and summary judgment was therefore warranted.

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Left to Right: Natalie Watson, Patricia Adams, Nancy Erika Smith, Marie Carey

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November 13, 2014

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How To Select A Corporate Respresentative For A *Rule* 30(b)(6) and *Rule* 4:14-2 Depositions In Products Liability Actions

*Eric Probst, Esq.**

Federal Rule of Civil Procedure 30(b)(6) and New Jersey Court Rule 4:14-2 require a corporation to designate a witness in response to a deposition notice that describes with "reasonable particularity" the topics upon which the witness will testify. More specifically, *Rule* 30(b)(6) provides:

> In its notice or subpoena, a party may name as a deponent a public or private corporation, . . . and must describe with *reasonable particularity* the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify . . .The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(6).

Rule 4:14-2 provides that an organization "so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated the matters on which testimony will be given. The persons so designated shall testify as to matters known or reasonably available to the organization." *R*. 4:14-2(c).

The Rules have three purposes: (1) to reduce the difficulty a deposing lawyer encounters in determining, before the deposition, who should be deposed; (2) to curb the practice of "bandying," where an entity's officers or managing agents are deposed in turn, but each denies knowledge of facts that are clearly known to people in the organization; and (3) to assist entities that find an unnecessarily large number of their officers and agents being deposed by a party uncertain of who in the organization has the relevant knowledge. *See Fed.R.Civ.P.* 30(b)(6) advisory commn. to 1970 amendments. Further, corporate representative depositions "serve[ ] the convenience of both parties by assuring that the noticing party deposes an authorized person with appropriate knowledge and by avoiding, in the interests of the noticed organization, the attendance at depositions by officers and directors who may have no relevant knowledge." Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:14-2.

The potential trial implications of a corporate witness' testimony require counsel to understand his client's product, carefully examine the deposition notice topics, help to identify the proper corporate designee(s) to testify, and thoroughly prepare the designee to testify on the notice topics, among others. This article will address the first two topics of the corporate representative deposition process.

The Deposition Notice

The starting point is the deposition notice. *Rule* 30(b)(6) and *R*. 4:14-2 deposition notices are different than fact-witness deposition notices, and must be treated that way. The deposition notice must be carefully examined to determine whether the client can even produce a witness with knowledge to testify on the listed topics. Counsel must not misinterpret the threshold question. The question is not whether counsel understands the scope of the deposition topics, but rather whether the client's designee understands what he or she will testify about. Descriptions that are vague, ambiguous, and overly broad must be objected to, in writing, and well in advance of the deposition. Vagueness is always a concern. When objecting, advise plaintiff's counsel that your client will produce a witness to testify based on *its understanding* of the deposition topics.

Timing is key. Once the notice lands on your desk, immediately consult with your client to determine whether it has a witness (or witnesses) who can testify on the topics. In product cases, it often takes counsel and the client considerable time to identify the correct corporate designee(s) who will testify. There is often a long delay between receipt of the notice and identification of the witness, who has to be shown the notice to ensure that he or she has the knowledge to testify. Do not wait until two weeks before the deposition to locate a witness because that leaves very little time to either object to the notice and to prepare the witness. Likewise, you cannot assume your client will be able to produce any witness or only one witness on each of the topics. Multiple witnesses may be involved, including former employees, which may take your client even longer to identify.

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If you are going to object to the scope of the topics (and there are few occasions when you do not), you should object soon after receiving the notice to allow you and your adversary significant time to discuss your objections. If you cannot resolve your differences, plaintiff's counsel may file a motion to compel, or defense counsel may be forced to file a motion for a protective order. Certain topics may be so overly broad or vague that the scope will have to be refined for your client to properly identify a witness to testify. Court intervention may be required.

One of the keys to successfully limiting the scope of corporate representative deposition topics is to negotiate them in good faith and in advance with your adversary. Magistrates' scheduling orders typically require counsel to meet and confer before raising any discovery dispute. Though there are cases when it is nearly impossible to establish a good working relationship with your adversary, when you and your adversary get along, try to resolve scope and vagueness issues in the notice before the deposition begins. This should ensure that the deposition proceeds more smoothly for your witness.

Knowing and understanding the scope of the deposition notice is vital to determining who to select as the deposition witness.

WITNESS SELECTION

Choosing the correct corporate witness designee to testify is important because the witness is the face of the corporation and the deposition testimony (which is often videotaped) will bind the corporation at trial. Counsel wants to be sure that the witness designated to testify has knowledge of the deposition topics that not only satisfies the corporation's obligation under the *Rule*, but who also will make an excellent deposition and, in turn, trial witness. Therefore, several issues must be examined before selecting the corporate designee.

(1) *Prior testimonial experience*: The first question to ask is: "has the witness testified before?" If the answer is yes, the next question is: "is that a good or bad thing?" The answer to that question depends on the witness. Some corporate designees are skilled deposition witnesses. They do not require significant hand-holding or preparation, and can represent themselves and the corporation even against the most skilled questioner. However, numerous deposition transcripts will exist for the serial deponent, giving plaintiff's attorney ample cross-examination material—so read them first before designating the witness. On the other hand, the first-time witness requires more preparation time, which means more costs, a significant issue in today's world.

(2) *Jury appeal*: Even though most cases settle, defending counsel should always consider the deponent's potential jury appeal. The analysis is no different than when deciding whether to call a witness at trial. If plaintiff is alleging warning defect claims, evaluate whether the company's warning witness will be able to effectively communicate the reasons why the company chose to design the warning the way they did. Similarly, will the company's design engineer in a design defect case involving complex engineering issues be able to explain to a jury how the product was designed, what risks were considered, rejected, accepted, and how feasibility and alternative-design studies were conducted? If these witnesses are skilled communicators who can teach the jury about the product, designate them as corporate witnesses. However, if not, work with in-house counsel to identify the witness who can serve the role.

(3) *Temperament*: Similarly, the witness' temperament, appearance, and likeability should be evaluated. There are certain employees who you would never put on the witness stand for a variety of reasons—they are generally unlikeable, do not have jury appeal, are not good communicators etc. Therefore, they should not be designated as corporate representatives witnesses. If plaintiff's counsel is aggressive, consider whether the witness' personality will handle or succumb to his tactics, always remembering that the witness is potentially testifying before the jury. The last thing you want is for the witness to lose his cool and come across poorly during the deposition, especially if the depositions is videotaped.

(4) *Person with the most knowledge v. prepared knowledge*: In a products liability action, the knee-jerk reaction when deciding who to choose as the *Rule* 30(b)(6) witness is to select the engineer involved in the manufacture, design, or warning of the product. While a natural reaction, counsel should first re-read the deposition notice. Make sure that the plaintiff is actually seeking deposition testimony about the manufacture, design, and warning of the product that this witness can provide. It is important to note that the Rules allows the corporate defendant to designate more than one witness to testify on the noticed topics. *Rule* 30(b)(6) ("then designate one or more officers"); *R.* 4:14-2(c) ("The organization so named shall designate *one or more* officers[.]" (emphasis supplied)). It might be advisable to choose multiple witnesses to testify on the product's manufacturing or design history. Next, will the witness with the most knowledge—the engineer—make the most effective witness (see (2) and (3) above)? If the witness with the most knowledge (no matter their position) will not be an

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effective witness, then educate another corporate employee to testify, or have the engineer testify only on limited topics, thereby limiting the damage they might do because of their inability to effectively communicate what they know.

(5) *Witness involvement with the product*: Another compelling consideration is the witness' involvement, even if remote, with the product. Before selecting the witness, a thorough review of the relevant documents should be conducted to determine whether the witness authored any of the "bad company documents." The answer to this question may influence your witness selection decision. The author-turned-witness may be in a better position to explain the document than a non-author witness. However, the non-author witness may be better able to answer questions about the correspondence because they did not draft it and might feel less defensive about the contents of the correspondence, allowing the witness to testify more comfortably about it.

Warning defect cases are especially difficult. The potential witness with the most knowledge is the engineer who designed the warning. Before producing this witness, every document, including electronically stored information, should be located and reviewed to determine whether the witness can be cross-examined with damaging documents. Does the engineer have notes, diagrams, etc. that did not make it into the project file? Are they damaging? Remember, the client will have to produce them if it relies upon them to prepare for the deposition (assuming they are not already responsive to a plaintiff document request).

Similarly, does the potential witness have "product pride?" All corporate witnesses will have a certain pride in the product, and believe that the company "did no wrong," and that the plaintiff misused (and maybe even recklessly used) the product in a non-foreseeable manner and disregarded the product's warnings. This "pride" issue can become problematic when a witness fights with opposing counsel during the deposition. Always admonish the witness during preparation that the goal of the deposition is not to win the case, just to get in the car at the end of the day without having torpedoed the case. Because you do not want the witness' pride getting in the way of a successful deposition, do not hesitate to be firm with the witness during deposition preparation.

(6) *Current or former employee*: The witness, at times, may be a former employee if the information the former employee possesses is "reasonably available" to the corporation and no current employees possess the former employee's knowledge base or can be sufficiently educated to testify. Certain issues are associated with designating a former employee to testify—compensation, costs, expenses, relationship with former employer, and "pride in the product," are just some. These issues must be addressed before the former employee can be selected to testify.

(7) *Other factors:* Consider several factors before deciding which witness to select. Today, deposition preparation legal fees and expenses are significant concerns for in-house counsel. Selecting the witness with the "most knowledge" typically results in less preparation time, and therefore, less cost because the witness does not have be educated about the product. On the other hand, selecting a witness who will testify based on "prepared knowledge" will require more deposition preparation sessions and result in more legal fees. Time, or a witness' schedule, is another factor, as well as other resources that affect deposition preparation sessions—location of the witness, location of the product, location of the accident scene (do you want to prepare the witness at a location so the witness can inspect the accident scene), etc. All of these have to be balanced, however, against whether the witness will be an effective witness. This factor is the most important of all.

Conclusion

Rule 30(b)(6) and *R.* 4:14-2 depositions are important events in products liability cases. The uncertainty of whether the correct corporate witness has been selected, the witness has been sufficiently prepared, and the conduct of the deposition itself can lead to sleepless nights. A successful corporate representative deposition in federal and state court cases—meaning, the case has not been torpedoed—starts with a careful examination of the deposition notice, raising appropriate objections when necessary, and continues with a careful examination and identification of who will be the voice of the corporation.

*** Eric L. Probst is a Principal at Porzio, Bromberg & Newman, P.C., and a member of its Litigation Practice Group. He focuses his practices on commercial products liability, transportation, and construction defect litigation. He is a member of DRI and NJDA, and is the Central Region Vice President of NJDA and immediate past chair of NJDA's Products Liability Subcommittee. Eric also serves as Acting General Counsel of Anthony & Sylvan Pools Corp.**

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EMPLOYERS STRIKE BACK [1]

*Christopher Leddy, Esq.**

New Jersey is widely known for being progressive in its development and implementation of employment laws favorable to employees. Due to this favorable nature, attorneys representing employees typically look to file in state court as opposed to federal court to ensure their clients receive the protection and application of New Jersey's laws. Likewise, many attorneys who defend employers will tell you they prefer to be in federal court as federal law is perceived to be more favorable to employers.

This past summer, however, the Appellate Division of the State of New Jersey dealt employees what could be, if utilized by employers correctly, a major obstacle in filing and sustaining an adverse employment action against their employers in New Jersey. For the first time, a New Jersey Appellate Court ruled employers could reasonably shorten the time period in which an applicant/employee may bring an adverse employment action against an employer through the use of a waiver executed during the application process, subject to certain limitations. This came as a shock to many in the legal profession as the state courts are known to be very protective of employees.

In Rodriguez v. Raymour Flanigan[2], the applicant/employee signed a waiver reducing the statute of limitations to six months. The subject waiver was entitled "Applicant's Statement" (in bold, with oversized lettering). The document stated, in pertinent parts:

> **Applicant's Statement – READ CAREFULLY BEFORE SIGNING – IF YOU ARE HIRED, THE FOLLOWING BECOMES PART OF YOUR OFFICIAL EMPLOYMENT RECORD AND PERSONNEL FILE**
>
> …
>
> I AGREE THAT ANY CLAIM OR LAWSUIT RELATING TO MY SERVICE WITH RAYMOUR & FLANIGAN MUST BE FILED NO MORE THAN SIX (6) MONTHS AFTER THE DATE OF EMPLOYMENT ACTION THAT IS THE SUBJECT OF THE CLAIM OR LAWSUIT. I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

Years after signing the waiver, the applicant/employee was terminated as a result of a purported reduction in force. Nine months after the termination, the applicant/employee filed a lawsuit against Raymour & Flanigan alleging disability discrimination under the New Jersey Law Against Discrimination and retaliation for filing a worker's compensation claim.

As a result of the valid waiver executed during the application process, the Law Division of the Superior Court of New Jersey dismissed the applicant/employee's claims as time barred and the Appellate Division affirmed. Specifically, because the waiver only permitted employment claims to be filed within six months of the event giving rise to the claim(s) and the applicant/employee filed the lawsuit nine months after his termination, his claims were deemed to be out of time.

Thus, employers are now permitted to seek an applicant/employee's knowing and voluntary waiver of the statute of limitations in matters involving employment actions in New Jersey. This is groundbreaking news for employers seeking to limit their exposure to employment-related lawsuits. This ruling has the potential to provide employers with a potent weapon to combat lawsuits brought by former and current disgruntled and litigious applicants/employees.

The following are examples of the effect of the above-described waiver:

- No waiver executed: A former employee wishes to institute litigation against an employer based on allegations that s/he was terminated because of her/his race, religion, disability, and gender. Under the

(Continued on page 12)

 (Continued from page 11)

New Jersey Law Against Discrimination this employee has two years to bring a claim against her/his employer.

- Waiver Executed: Same scenario as above, however, this time the employer had the employee execute a legally proper waiver of statute of limitations reducing to six months the time period in which the employee could file a claim under the New Jersey Law Against Discrimination against the employer . This is a 75% reduction of the time period permitted under the law.

When reviewing a waiver, such as the one described in this article, it is important to keep in mind certain aspects of the court's decision and ask the following questions:

1) Is the waiver a free-standing document?
2) Is the language clear and uncomplicated?
3) Is the print conspicuous (i.e. bold oversized print and capital letters)?
4) Does it allow the applicant/employee time to read over the waiver?
5) Does it allow for any questions the applicant/employee may have?
6) Was the waiver executed freely and voluntarily?
7) Is the statute of limitations reduced to no less than at least six months?
8) Is it written in a language in which the applicant/employee is fluent?

It is, however, important to note that claims for administrative remedies (i.e. EEOC complaints), employers are not permitted to reduce the statute of limitations.

Finally, you should be aware a petition for certification has been filed with the New Jersey Supreme Court. The New Jersey Supreme Court decided on December 5, 2014 to hear the case.

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[1] This article is not intended to provide legal advise. You should consult with your attorney when drafting any legal documents, including, but not limited to, the waiver described herein.

[2] Rodriguez v. Raymoures Furniture Company, Inc., a corporation, t/a Raymour & Fanigan, 436 N.J.Super. 305

* **Christopher Leddy is a member of the Corporate/Commercial and Civil Litigation Department. He is one of three attorneys at the firm with a Masters of Law Degree (LL.M.). Chris is experienced in all matters concerning the employee/employer relationship including those involving New Jersey Law Against Discrimination (LAD) (discrimination / harassment / hostile work environments / retaliation), the Conscientious Employee Protection Act (CEPA), Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), New Jersey Family Leave Act, New Jersey Paid Family Leave Insurance, Unemployment, Department of Labor audits, Fair Labor Standards Act, New Jersey Wage and Hour laws, Age Discrimination in Employment Act, Genetic Information Non-Discrimination Act, Equal Pay Act, Title VII, and the Pregnancy Discrimination Act.**

Continuing Education Seminars

Auto Liability Seminar
November 25, 2014 at the Hotel Woodbridge, Iselin, NJ

Left to Right: Thaddues Hubert, III, John Weir, II, C. Robert Luthman, John Mallon

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Products Liability Seminar
September 12, 2014 at the Hotel Woodbridge, Iselin, NJ

Left to Right: H. Lockwood "Chip" Miller III, Christopher Birkheimer, Natalie Mantell, Michelle Molinaro Burke, John Chester, Eric Probst, Charles Cohen, Dr. Jacob Fisher, Robert Cook, and Jodi Rosenzwieg

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NJDA Trial College
October 13, 2014 at the Union County Courthouse

Left to Right: Herbert Kruttschnitt, Steven Isaacson, Kevin DeCoursey, Marie Carey, Mario Delano, Arthur Leyden III
Left to Right Back Row: Brian O'Toole, Bruce Helies, Thomas Hight, Joseph Garvey

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Christmas Trimmings

Brian O'Toole, Esq.

As with all families, my family has its share of traditions when it comes to Christmas. Our Christmas preparations began right after the last slice of turkey was consumed on Thanksgiving. My mother was always in charge of Christmas decorations, but my father had sole responsibility for putting the lights on the 30 foot pine tree that adorned a corner of our property at 70 Chapman Place in Irvington. I might add it is only recently that I've realized that our pine tree was only 30 feet tall and not bigger than the tree that sits in Rockefeller Center. While this assignment doesn't seem overwhelming at first blush, it is important to know something about Walter O'Toole before deciding just how momentous the task was. My father was an extremely intelligent man and probably the most well-read of anyone I have met in my life. At sixteen years old he started working for the Newark Evening News as a copy boy. Forty-five years later when the paper went out of business, he was State Editor who was third in command at the paper. He finished his career with a five year stint at the Newark Star Ledger where he was Night Editor. He had a vocabulary like Bill Buckley and was a voracious reader. One Christmas Eve my mom gave him William Shirer's "Rise and Fall of the Third Reich," which is 1200 pages. He finished it the night of December 26th. I tell you these impressive facts to contrast his pitiful performance in practical, everyday tasks. Of course, the first thing he did was recruit my brother, Joe, and me to help him. In preparation for stringing the lights, we spent well over two hours in the basement checking each bulb. The lights we had were the type that if one bulb was bad, the whole string would go out. Since we had about ten strings, it obviously required a great deal of precision. We never did figure out why certain strings worked in the basement, but didn't work outside. In any event, we dragged our ten-foot extension ladder onto the lawn (that's right folks, we actually had a ladder). My father wouldn't let my brother or me climb up, so he risked his life instead. He would climb to the top of the ladder and try to establish himself on one of the sturdier branches. At this point, he would start throwing the strands of lights upward in the hopes that they would catch onto the tree branches. You can imagine what this looked like with most of the lights on very few branches. My mother commented, "It looked like the tree was wearing a hat." The bottom 10 feet looked a lot better so all was not lost. The lights usually stayed on for couple nights, but as soon as we had heavy winds or bad weather, we would lose several strings. My father rationalized that this was our "patchwork quilt" design. Hey, you have to give the guy his due for trying.

Several weeks before Christmas my mother and my aunt would go down to the Newark freight yards to get our Christmas tree. The trees were really cheap, but you had to buy two trees that were wrapped together. When they got them home, we always had a coin flip as to who got first pick. My brother and I would spend time trying to determine which tree was fuller, but in the end, first choice probably didn't matter, because neither tree looked that great.

The week before Christmas, my father would always take the family for a ride to see the town lights. My grandmother always got to sit in the front passenger seat of my father's 1962 Pontiac and my mother, Joe and I sat in the back. Tucked between us was our cocker spaniel, Sandy. My father had his route all planned out, but we always wound up in South

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Orange. We would stop at Grunning's for a sundae with tutti-frutti ice cream. Grunning's always had tutti-frutti for the holidays. I wouldn't forget little Sandy who got a hot dog for patiently waiting. We finished our trip by singing Christmas carols all the way home. If you weren't ready for Christmas before our ride, you were filled with Christmas spirit after it.

One Christmas my brother invited his classmate, Ronald, home for Christmas. They both went to Seton Hall Prep. Ronald was an orphan who lived at the orphanage on South Orange Avenue in Vailsburg. At first, I was annoyed that we would have a stranger celebrating this sacred holiday with us. My feelings completely changed after only one day. Ronald was one of the sweetest and most sincere persons I have ever met. He was so appreciative of little things I completely took for granted. When my mother made his bed he was extremely grateful. When my father grabbed his plate at dinner to give him a second helping, he was smiling from ear to ear. He seemed so happy to be in my parents' presence that he couldn't contain his joy. I finally realized how extremely fortunate I was to have my parents and my home. It took the reaction of a boy who never had parents or a permanent home to make me see how lucky I was. After Christmas, I continually hounded my brother to invite Ronald to our house. I am happy to say that Ronald was a frequent guest and his example changed my life. Whenever I think of Christmas, I always think of Ronald.

To fast forward 20 years, I had three children, a girl, Erin, and two boys, Brian and Kevin. I wanted them to enjoy the spirit of Christmas and the magic of Santa Claus. I went out and bought a terrific Santa Claus suit with hair piece and beard. This cost me over $200.00 back in the 80's. The most important part is the hair and beard. Mine looked tremendous. Every Christmas Eve, I would be called to the Hanover police station to execute a warrant or set bail. During the period of my absence, Santa would appear in our back yard. After many years of experience I learned that you can never appear to the kids inside, you must be outside. Also, you can never get too close because they'll pick something up or recognize your voice. After many years I decided I would enlist someone to be Santa, so I could be inside next to them. Unfortunately, I forgot to check with our neighbors black Labrador, Rosco, before having John make his appearance. He looked great, but after only a couple of minutes Rosco was chasing Santa who was in full flight. Incredibly, the only observation the kids remembered was that Santa was wearing Reebok sneakers. The fact that his hat and hair had fallen off escaped them in the excitement of the moment. Thank God Rosco was really a playful dog and not vicious or Santa's Christmas Eve trek could have ended with "help, help, help" instead of "Ho-Ho-Ho." I am happy to tell you that my children continue this tradition with our grandchildren. Frankly, I think my kids really do believe in that Jolly Old Elf.

I hope you have enjoyed these Christmas trimmings and that they brought a smile to your face. May you create your own Christmas traditions to warm your heart and those of your family.

Let me take this opportunity to wish you all a Merry Christmas and a blessed New Year.

**"And I heard him exclaim as he drove out of sight, Happy Christmas
To all and to all a good night"**

DRI'S 2014 ANNUAL MEETING - DRI FOR LIFE

*Edward J. Fanning, Jr., Esq.**

One of the truly exceptional benefits of serving as a DRI State Representative is the invitation to attend the DRI Annual Meeting. The Annual Meeting, year in and year out, is DRI's showcase event. This year's 2014 Annual Meeting -- "DRI For Life" -- was held on October 22-26 at the San Francisco Marriott Marquis. Special thanks to DRI President John Parker Sweeney and 2014 Annual Meeting Chair John Kuppens for organizing a fantastic meeting. As a lifelong baseball fan (New York Yankees) ,the timing could not have been better as the meeting coincided with the Word Series, ultimately won by the San Francisco Giants. The electricity surrounding the Giants' World Series run was coursing throughout the city throughout the DRI meeting. Of course, that was in addition to the normal allure of San Francisco, known for its spectacular scenery, cultural diversity and cosmopolitan flair, making it one of the top travel destinations worldwide. The meeting offered a perfect balance between top-tier educational programming, networking and social events, and enough free time to enjoy some of the city's favorite destinations, including Fisherman's Wharf, Chinatown, and Union Square. One of our trip's highlights was bicycling from Golden Gate Park, through the Presidio, across the Golden Gate Bridge into Sausalito, combined with a return ferry ride to the Embarcadero.

The stellar educational programming included an insightful presentation by Jeffrey Toobin, who provided a compelling analysis of the power, influence and politics driving landmark U.S. Supreme Court decisions; a thought-provoking discussion with David Drummond, Google's Chief Legal Officer, who shared his insights on the ever-changing business, legal and technology landscape that affects our everyday practice; as well as a variety of cutting edge substantive law presentations tailored to suit all of the diverse practice areas covered by DRI's membership.

The Thursday night networking event was shifted from AT&T Park, the home of the Giants, to the MLB Commissioner's reception at Pier 48 due to preparations for the World Series home games against the Royals, but the quality of the venue and the level of excitement were undiminished. We were treated to excellent food options and live music, took some swings in the batting cage, loosened our arms on the radar gun contest, and met a handful of former MLB players. (Who knew Eddie Murray had a slightly less famous brother, Rich, who played for the Giants in the early 1980's?) Of course, Friday night the Giants were in town and the entire city was riveted to the game. The Chieftan provided a great local venue to watch and become bandwagon Giants fans for the night. Even if you were just out enjoying the evening, there was no mistaking the ebbs and flows of the game as the Giants battled toward their eventual World Series victory.

Mary and I made time after the wrap-up of the Annual Meeting for a short visit to Napa -- only about an hour north of San Francisco. If you have not been there, you must go. The Napa Valley and the surrounding scenery are spectacular. Of course, it doesn't hurt that the valley is home to scores of exceptional wineries, restaurants, and boutique hotels. We are still enjoying "the fruits of our labor" from our visit to wine country.

If you have never been to a DRI Annual Meeting, do yourself a favor and mark your calendar now for the 2015 Annual Meeting, which will be held in Washington, D.C. from October 7-11, 2015 at the Marriott Wardman Park, in Washington, D.C. It promises to be a great event. I look forward to seeing you there!

*** 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.**

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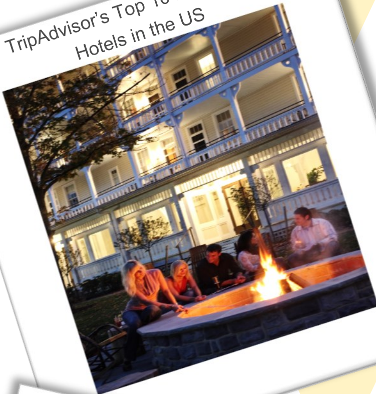

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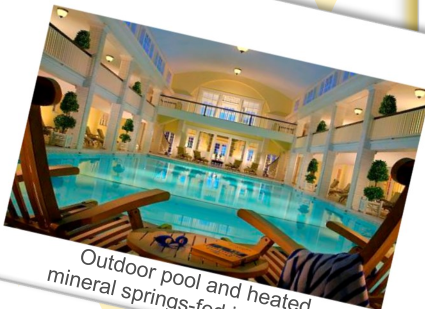

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