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NEW JERSEY DEFENSE

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PRESIDENT'S LETTER

Dear Members of the New Jersey Defense Association and to New Jersey's esteemed Judiciary,

As we come together with family, friends and loved ones during this Holiday Season, my wish is that you are surrounded by peace and love and reasons to be grateful for all the people and gifts in your life.

NJDA is a connected group of individuals who, throughout the year, bring kindness and support to those less fortunate. The holiday season is a time to remember the power we have to change lives around us with a simple act of kindness.

As President, I am grateful to be part of this special group. Half way through my term, I am pleased at the progress and changes that we have made. From the addition of seminars to the expansion of our food drive, to the invitations we receive from the New Jersey Supreme Court to submit amicus briefs, NJDA is being recognized as a leader in the legal community.

Our organization has recently completed a number of successful seminars, namely our Trial College, Women and the Law and the Auto Seminar. NJDA will also be hosting its first ever Civil Trial Seminar on December 14, 2018 where attendees can receive 4.7 CLE Credits, including 1 Ethics Credit. The topics for this year end event, includes Trial Technology, Trial By Ambush and a panel discussion of the New Jersey Supreme Court's landmark decision In Re: Accutane. In the new year we will be looking to continue last year's networking events with other bar and industry associations where we all can network and mingle or simply enjoy a night out with friends and colleagues. I am also planning to hold a spring golf outing that will compliment our successful fall outing. Events such as the ones mentioned above cannot take place without you. As we close out the year, I want to thank you for your dedication and continued support of this organization. I also want to remind everyone that our annual food drive is now "virtual" and can be accessed through the New Jersey Defense Association's web site. We are half way to our year end goal of $1,000.00.

Lastly, I encourage all to not only join a committee, but to become actively involved. A list of committees can be found on the NJDA web site as well. If you are interested in serving as a leader in any committee you can do so by reaching out to the committee chair or myself.

Peace and Happiness to all this holiday season and I look forward to seeing everyone in 2019.

ALDO J. RUSSO, ESQ.

NJ SUPREME COURT ISSUES ANOTHER LANDMARK DECISION IN *IN RE ACCUTANE*, THIS TIME REGARDING CHOICE-OF-LAW AND THE PRESUMPTION OF ADEQUACY FOR FDA-APPROVED WARNINGS

BY EDWARD J. FANNING, JR.; DAVID R. KOTT; NATALIE H. MANTELL & STEVEN H. DEL MAURO

Nearly two months to the day after the New Jersey Supreme Court issued a landmark decision in the *In re Accutane® Litigation* incorporating the *Daubert* factors into New Jersey law, the Court issued another major decision in the same litigation that left no doubt about the strength of the presumption of adequacy for FDA-approved warnings in the New Jersey Products Liability Act (PLA), and applied New Jersey law on the issue of warning adequacy, rather than the laws of plaintiffs' home states, which had been typical in multicounty products liability litigation.

ABOUT THE CASE

In *In re Accutane*, the trial court granted summary judgment for Roche under New Jersey law in 532 cases in which plaintiffs alleged that Accutane caused their inflammatory bowel disease (IBD) and that Roche failed to provide adequate warnings regarding the known risks of that medication. *In re: Accutane Litig.*, (A-26/27-17) (079933) (*slip op. at 2*) (N.J. Oct. 3, 2018). Only 18 of the 532 plaintiffs were New Jersey residents, and the remaining 514 were from 44 other jurisdictions. (*Slip op.* at 2.) The Appellate Division reversed, and the New Jersey Supreme Court granted Roche's petition for certification. The two issues before the Court were (1) "what law governs whether Roche's label warnings were adequate – the law of each of the 45 jurisdictions where plaintiffs were prescribed Accutane or the law of New Jersey where the 532 cases are consolidated for MCL purposes"; and (2) "the adequacy of the label warnings for the period after April 2002." (*Id.*) Natalie H. Mantell, NJDA Chairperson of the Board and Immediate Past President, was counsel of record and a member of Roche's litigation team. Edward J. Fanning, Jr., Past President of NJDA, and David R. Kott represented The HealthCare Institute of New Jersey, co-authoring the amicus curiae brief which Ed Fanning argued before the state Supreme Court.

Although many medicines have only a single physician label or package insert containing risk information, Roche had generated a variety of warning materials for physicians, pharmacists and patients related to Accutane, all of which were FDA-approved: (1) a physician package insert, (2) a Best Practices Guide, (3) a Patient Safety Packet and attached informed consent form, (4) a Medication Guide, and (5) the medicine's blister packaging. All of these materials warned of a risk of IBD in medical terminology or lay language. (*Id.* at 9-13).

If New Jersey law governed the adequacy issue, Roche would have been entitled to a

strong presumption that its FDA-approved warnings were adequate as a matter of law. Indeed, the PLA contains a rebuttable presumption of adequacy when a manufacturer's warnings are approved or prescribed by the Food and Drug Administration (FDA), which our Supreme Court has previously described as "virtually dispositive" and a "super presumption." N.J.S.A. 2A:58C-4; *Rowe v. Hoffmann-La Roche, Inc.*, 189 N.J. 615, 625-26 (2007); *Kendall v. Hoffmann-La Roche, Inc.*, 209 N.J. 173, 195 (2012). If the laws of each of the 45 jurisdictions applied, however, the PLA's presumption of adequacy would not govern every claim and the standard would vary by state. (*See In re Accutane*, slip op. at 35).

In analyzing choice-of-law under the most significant relationship test set forth in *Camp Jaycee*, and the *Restatement (Second) of Conflicts of Laws* §§ 145, 146 and 6, the New Jersey Supreme Court found that weighing the § 145 contacts yielded mixed results (id. at 40), and emphasized the importance of two § 6 factors to this MCL matter: § 6(f) ("certainty, predictability, and uniformity of result") and § 6(g) ("ease in the determination and application of the law to be applied"). (*Id.* at 44.) The Court noted that applying one state's law on the issue of adequacy to all 532 cases at issue in this MCL appeal "will ensure predictable and uniform results" (*id.*), and stated, "[t]here can be no question that administrative ease and efficiency favor the application of New Jersey's PLA," (*id.* at 45). Roche's status as a New Jersey-based corporation, which manufactured and labeled Accutane in New Jersey, also influenced the Supreme Court's decision. (*Id.* at 2, 40.) Consequently, the PLA applied to all 532 cases. (*Id.* at 46.)

Turning to the merits, the Court set forth the standards for overcoming the PLA's rebuttable presumption of adequacy. It reiterated the two existing pathways for overcoming the presumption: (1) establishing "deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects" from the FDA (*id.* at 56 (citing *Perez v. Wyeth Labs., Inc.*, 161 N.J. 1, 25 (1999)); or (2) proving "economically driven manipulation of the post-market regulatory process." (*Id.* at 58 (citing *McDarby v. Merck & Co.*, 401 N.J. Super. 10, 63 (App. Div. 2008).) The Supreme Court, however, added a third pathway for overcoming the presumption that had not yet been articulated in any New Jersey case law – a plaintiff can rebut the presumption if he or she "presents clear and convincing evidence that a manufacturer knew or should have known, based on newly acquired information, of a causal association between the use of the drug and 'a clinically significant hazard' and that the manufacturer failed to update the label accordingly." (*Id.* at 62 (citing 21 C.F.R. §§ 201.57(c). 314.70(c)).)

Critically, the New Jersey Supreme Court emphasized the heightened nature of the clear and convincing evidentiary standard, and specifically included the definition contained in the Model (Civil) Jury Charges: "[I]t is evidence so clear, direct, weighty in terms of quality, and convincing as to cause [one] to come to a clear conviction of the truth of the precise facts in issue." (*Id.* at 62 (quoting N.J. Model Civil Jury Charges 1.19).)

In establishing this elevated hurdle for plaintiffs to overcome, the New Jersey Supreme Court acknowledged the preeminent role of the FDA in regulating drugs and medical devices. (*Id.* at 48.) Indeed, the Court spent considerable time detailing the federal regulations that govern a pharmaceutical company's New Drug Application, (*id.* at 49-54), and made clear that its decision incorporated the "general directive that federal regulations are of the utmost significance in determining whether 'a manufacturer satisfied its duty to warn the physician about potentially harmful side effects of its products,'" (*id.* at 59 (quoting *Perez,* 161 N.J. at 24).) Notably, the Court added "one caveat" to the third pathway for overcoming the presumption of adequacy, which expressly incorporates compliance with FDA regulations into the PLA: "A manufacturer that acts in a reasonable and timely way to update its label warnings with the FDA, in accordance with its federal regulatory responsibilities, will receive the protection of the rebuttable presumption. If not, it cannot seek shelter behind it." (*Id.* at 62.)

Applying the PLA to the facts of these cases, the Supreme Court found that "plaintiffs have failed to show any of those bases for overcoming the presumption of adequacy" (*id.* at 65), and Roche's warnings were therefore adequate as a matter of law. The Court rejected plaintiffs' arguments that three company documents overcame the presumption and entitled them to trial. The first was a 1994 memorandum in which a Roche physician noted that Accutane "may induce or aggravate a preexisting colitis." (*Id.* at 67.) The second was another internal document where colitis was identified as a "possible" side effect of the medication. (*Id.* at 67) Finally, plaintiffs pointed to a 2000 regulatory report in which a physician stated that Accutane "has been found to be causally associated with inflammatory bowel disease, including colitis." (*Id.* at 68.) As to the first two documents, the Supreme Court found that the memoranda were "far from clear and convincing evidence that the language 'Accutane has been associated with [IBD]' was an inadequate warning." (*Id.* at 67.) The Court similarly found the 2000 regulatory report insufficient; the statement was made by a single physician while analyzing a single patient's medical history, and there was nothing to suggest "a consensus by other Roche physicians or employees about a causal connection between Accutane usage and IBD." (*Id.* at 68.) Finally, the New Jersey Supreme Court found no evidence that Roche deliberately withheld information from the FDA or that it engaged in economically driven manipulation of the regulatory process. (*Id.* at 68-69.)

In light of these findings, the New Jersey Supreme Court dismissed all 532 cases. (*Id.* at 70.)

WHAT HAPPENS NOW?

The decision sets a very high standard for overcoming the presumption of adequacy for FDA-approved warnings, providing significant support for pharmaceutical and medical device manufacturers defending against failure-to-warn claims in New Jersey. Indeed, the Court reaffirmed the long-standing principle that FDA review and approval of a product's warnings is virtually dispositive of whether the warnings are adequate as a matter of law. Further, when faced with a complex choice-of-law issue, particularly one that would require a trial court to analyze 44 other states' laws in deciding a single motion, our Supreme Court paid particular attention to efficiency and uniform results in the MCL context.

NEW JERSEY COURTS CONTINUE TREND OF INVALIDATING ARBITRATION AGREEMENTS[1]

BY JAMES A. PAONE, II, ESQ.; BRIAN J. CHABAREK, ESQ.

It is well-settled that "arbitration...is a favored method of dispute resolution." *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265, 276 (2013). In New Jersey, an employment arbitration provision is enforceable where "an employee has agreed clearly and unambiguously to arbitrate the disputed claims." *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302 (2003).

"Arbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 441 (2014). "A clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124 (2001). " An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." *Atalese*, 219 N.J. at 442.

On October 17, 2018 the Appellate Division decided *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (App. Div. Oct. 17, 2018). In its published opinion, the Appellate Division continued the recent trend in the New Jersey Courts of invalidating arbitration agreements. In *Flanzman*, the Plaintiff had been employed by Jenny Craig for 26 years. At some time during her employment she was required to sign an arbitration agreement. The arbitration agreement required all disputes between the parties to be resolved by final and binding arbitration in lieu of a jury or other civil trial. The Plaintiff, after her termination, sued Jenny Craig for violating the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 et. seq. In response to the lawsuit Jenny Craig moved to dismiss and enforce the arbitration clause. Plaintiff contended that the arbitration clause was not valid because it had no reference whatsoever regarding the process for selecting an arbitration forum such as the American Arbitration Association, and that the absence of the selection of an arbitration forum meant that there was no meeting of the minds or mutual assent as is required to form a contract.[2]

The United States Supreme Court in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. _____, 137 S. Ct. 1421, 1424 (2017) recently held that the Federal Arbitration Act (FAA) requires that courts place arbitration

agreements "on equal footing with all other contracts." Similarly, the United States Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) recently held that the savings clause which is contained in the Federal Arbitration Act, only subjected arbitration agreements to attack by allowing courts to refuse to enforce agreements "upon such grounds as exist at law or equity for the revocation of any contract." That is, "...the saving clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts. The clause 'permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* at 1622. "Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted" *Id.* at 1621 (citation omitted).

In *Atalese*, 219 N.J. at 441 the New Jersey Supreme Court previously held that an arbitration agreement could only be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." That is, the New Jersey Supreme Court acknowledged that "a state cannot subject an arbitration agreement to more burdensome requirements than other contractual provisions." *Ibid.* (citation omitted). The New Jersey Supreme Court required, however, that there be a clear mutual understanding of the ramification of each party's assent to an arbitration agreement. *Id.* at 442-43.

In the agreement which Plaintiff sought to invalidate in *Flanzman*, there was a complete failure to identify the process for selecting an arbitration forum or to otherwise identify a general method for selecting such an arbitration forum. That is, the parties "omitted any reference whatsoever to an arbitral forum." *Flanzman v. Jenny Craig, Inc.*, ___ N.J. Super. ___ (App. Div. 2018) (slip op. at 8). The court held that without any forum for the arbitration, the parties would be unaware about the rules and procedures to which they were agreeing in the arbitration clause.

In *Flanzman* the court held that by failing to identify the general process for selecting an arbitration mechanism, it deprived both the Plaintiff and the Defendant from knowing what rights replaced their right to a judicial adjudication. In concluding that there was insufficient information to provide the parties with some idea of what rights they were giving up, and what rules and procedures were replacing a jury trial, the court held that there was not the mutual assent that is required for the basic formation of a contract and thus the arbitration agreement was invalid. The court held that "[s]electing an arbitral institution informs the parties, at a minimum, about that institution's arbitration rules and procedures. Without knowing this basic information, parties to an arbitration agreement will be unfamiliar with the rights that replaced judicial adjudication." *Id.* at 9. The court further asserted that "[w]e are not talking about insignificant aspects of the arbitration process. The associated rights connected with the selection of an arbitral forum generally establish the substantive and procedural setting for the entire arbitration process." *Id.* at 10.

The court went on to assert that, "[f]or example, AAA uses certain procedures for arbitrating employment disputes. AAA adheres to procedural safeguards, which at a minimum meet the standards outlined in the National Rules for the Resolution of Employment Disputes. Ordinarily, when parties select AAA, they make AAA's rules part of the arbitration agreement. Such rules address, but are not limited to, notification requirements, the initiation of the proceedings, management conferences, discovery, the location of the hearing(s), the number of arbitrators, communication with the arbitrator(s), attendance at the hearings, dispositive motions, evidence, modification of awards, applications to court, fees, expenses, and costs. Picking AAA, for example, helps the parties reach a 'meeting of the minds' as to the rights that replace the right to a jury trial in court." *Id.* at 9-10. In fact, the court reviewed other jurisdictions and referenced a situation wherein the parties selected an arbitration forum which, unbeknownst to them, was non-existent. In that situation, the agreement identified a general process for selecting an arbitration forum if the institution that they selected became unavailable.

The court went on to state that there is no "magic language" that the parties were required to use in an arbitration agreement. There simply had to be sufficient information about the type of arbitration and the arbitration forum rules contained in the agreement in order to allow the parties to ascertain what rights they were waiving and what rights were replacing those waived rights. Indeed, the court asserted, "[t]he failure to identify in the arbitration agreement the general process for selecting an arbitration mechanism or setting – in the absence of a designated arbitral institution like AAA or JAMS deprived the parties from knowing what rights replaced their right to judicial adjudication." *Id.* at 12. Finally, the court asserted, "[i]f the parties do not identify an arbitral institution (such as AAA or JAMS), then they should identify the process for selecting an alternate forum. Without doing that, they have no realistic idea about the rights that replaced judicial adjudication because not all arbitration forums, mechanisms, or settings are alike." *Id.* at 14.

Once again, the Courts in New Jersey have closely and painstakingly interpreted each particular provision of an arbitration agreement and imposed the obligation on the drafter of the agreement to clearly indicate what the parties are actually agreeing to in the arbitration agreement. Thus, careful drafting and review of these provisions is essential when companies seek to bind employees to an arbitration agreement.

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[1] This article was prepared by James A. Paone, II, Esq. and Brian J. Chabarek, Esq. of Davison, Eastman, Muñoz, Lederman & Paone, P.A. with offices in Freehold and Toms River, New Jersey. James A. Paone, II, Esq. is an Equity Shareholder with the firm and chair of the Business Law and Litigation Department. Mr. Paone's practice concentrates on commercial, corporate, construction and general liability matters. Brian J. Chabarek, Esq. is a Partner with the firm whose practice is devoted to Labor and Employment Law as well as the representation of public entities.

[2] In *Epic Systems*, the plaintiffs argued that the Federal Arbitration Act contained a savings clause which removed the obligation to enforce an arbitration agreement if it violated some "other federal law". See 9 *U.S.C.* §2. The Plaintiffs argued that the arbitration agreement violated the National Labor Relations Act by "barring employees from engaging in the 'concerted activity' of pursuing claims as a class or collective action. *See 29 U.S.C.* §157. *Id.* at 1620. In writing for a 5 to 4 majority, Justice Gorsuch and the court held that Congress requires courts to respect and enforce agreements to arbitrate. Further, Justice Gorsuch wrote that the Act requires courts to "rigorously" enforce agreements according to their terms, including terms that specify with whom the parties choose to arbitrate.

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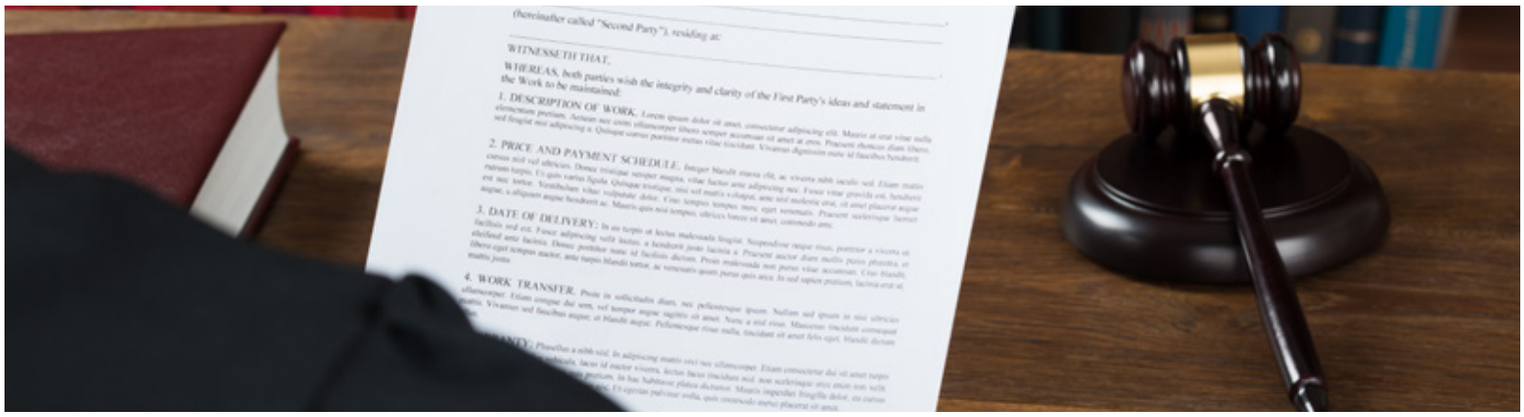

IF DRAFTING AN ARBITRATION AGREEMENT, TAKE YOUR TIME AND DRAFT WISELY[1]

BY MICHAEL J. NEEDLEMAN, ESQ.

Two months prior to *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (App. Div. Oct. 17, 2018),[2] on August 23, 2018 the New Jersey Appellate Division in an unpublished decision, *D.M. v. Same Day Delivery Service*, A-2374-17T3, approved a forced arbitration agreement in a sexual harassment case. In *Same Day Delivery Service*, the Appellate Division upheld a poorly worded form requiring a claim of sexual harassment and hostile work environment into arbitration.

THE FACTS

Plaintiff accepted a job driving for Same Day Delivery Service in June 2017. On her acceptance of employment, she was instructed to view and accept a set of documents online. One of these documents was an arbitration agreement. The agreement, which was executed after plaintiff's employment technically started, stated that in consideration of employment compensation, future pay raises, and other benefits, she agreed to arbitrate any claim related to her employment under the Federal Arbitration Act and New York law. Importantly, the last paragraph of the agreement stated:

> I also understand that I have a right to consult with a person of my choosing, including an attorney, before signing this document. I am agree to waive my voluntarily and knowingly, and free from any duress or coercion whatsoever to a trial by a trial judge or jury as well as my right to participate in a class or collective action.

[sic]

Plaintiff worked from June 11, 2017 through August 21, 2017. The circumstances of her separation are not known, nor are any details of her working condition. She filed a complaint on September 25, 2017 in which she alleged that she was subjected to a hostile work environment and sexual harassment under the New Jersey Law Against Discrimination. The employer's motion to dismiss and to compel arbitration was granted. Plaintiff appealed, and the Appellate Division affirmed. The Appellate Division found that the arbitration agreement was valid, that it was executed at substantially the same time as the commencement of plaintiff's employment and thus met the consideration test laid out in *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76 (2002). Finally, the Appellate Division found that the agreement was unambiguous in its most important function, even if it was not a "well-crafted document."

THE IMPLICATIONS

As an aside, the Appellate Division previously held that NJLAD cases were non-arbitrable. *See, EPIX Holdings Corp. v. Marsh & McLennan Companies, Inc.*, 410 *N.J. Super.* 453 (App. Div. 2009), *overruled in part, Hirsch v. Amper Fin. Servs, LLC, 215 N.J.* 174 (2013). The degree to which the *Same Day Delivery Service* alters that landscape, if at all, remains to be seen. It merits mention, too, that the agreement at issue in *Same Day Delivery Service* concluded with a paragraph that can only generously be considered the written word. It is well-settled that ambiguities in written documents are construed against the drafter and will invalidate an arbitration clause. *See, NAACP of Camden County East v. Foulke Management Corp., 421 N.J. Super.* 404 (App. Div. 2011). In *Same Day Delivery Service*, however, the Appellate Division opined, "while several sentences in the Arbitration Agreement are poorly drafted, those sentences do not make the agreement ambiguous because the remainder of the document is clearly written."

Trying to harmonize the Appellate Division's seemingly inconsistent decisions in *Flanzman* and *Same Day Delivery Service*, it seems clear that to have a fighting chance at enforcing an arbitration agreement, the agreement language must be clear. The decision in *Same Day Delivery Service* notwithstanding, it is not prudent to rely upon a poorly worded form.

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[1]Michael J Needleman, Esquire is a Partner with Reger, Rizzo & Darnall, LLP. He handles civil litigation and has tried cases almost everywhere in New Jersey. He is currently the Co-Chair of the ADR Committee of the New Jersey Defense Association, and is a member of the Fraud Committee of the NJDA.

[2] *Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1 (App. Div. Oct. 17, 2018) is addressed in the prior New Jersey Defense article entitled "New Jersey Courts Continue Trend of Invalidating Arbitration Agreements".

PENDING WORKERS' COMPENSATION LEGISLATION

BY GEORGE C. ROSELLE III, ESQ.

Several bills have been introduced in the New Jersey State Legislature during the current calendar year dealing with the New Jersey Worker's Compensation Act (the Act). Most of these bills have been introduced and referred to committee with one significant bill having passed both houses and awaiting the signature of Governor Murphy.

The bill awaiting the Governor's signature, S2145, concerns the award of attorneys' fees in workers' compensation matters. *N.J.S.A.* 34:15-64 provides:

> When, however, at a reasonable time, prior to any hearing compensation has been offered and the amount then due has been tendered in good faith or paid within 26 weeks from the date of the notification to the employer of an accident or an occupational disease or the employee's final active medical treatment or within 26 weeks after the employee's return to work whichever is later or within 26 weeks after employer's notification of the employee's death, the reasonable allowance for attorney fee shall be based upon only that part of the judgment or award in excess of the amount of compensation, theretofore offered, tendered in good faith or paid.

N.J.S.A. 34:15-64 (1)(c).

The voluntary offer and tender of permanent disability compensation within the time period established by the above section of the statute offered an incentive to the respondent to pay permanent disability benefits to an injured worker despite the fact that permanency had yet to be fixed and determined. Often when there are issues regarding temporary disability that need to be addressed, the offer of a payment of permanency compensation is utilized to somewhat alleviate any financial issues the petitioner may be experiencing. Also, when the issue is not whether the petitioner has suffered a permanent injury but the extent of that injury, the offer of a portion of anticipated permanency is made to serve the same purpose.

As the respondent is not required to pay permanent disability benefits prior to a resolution of the nature and extent of that alleged disability either by way of settlement or judgment, the Act provides an incentive for the respondent to do so. The consideration for making an early offer and payment of permanent disability benefits is that the award of counsel fees at the conclusion of the case is based upon that compensation paid in excess of the voluntary offer and tender rather than the entire amount of the compensation paid.

Senate bill S2145 virtually eliminates that incentive. The bill that is currently on the Governor's desk provides:

> When, however, at a reasonable time, prior to any hearing compensation has been offered and the amount then due has been tendered in good faith or paid within 26 weeks from the date of the notification to the employer of an accident or an occupational disease or the employee's final active medical treatment or within 26 weeks after the employee's return to work whichever is later or within 26 weeks after employer's notification of the employee's death, the reasonable allowance for attorney fee shall be based upon [only that part of the judgment or award in excess of] **the amount of compensation, theretofore**

offered, tendered in good faith or paid after the establishment of an attorney client relationship pursuant to a written agreement, and the amount of the judgment or award in excess of the amount of compensation, theretofore offered.

S2145 (emphasis added).

The direct effect of this bill is to allow a petitioner's attorney to obtain a fee on the entire amount of compensation paid to the worker whether any portion was paid on a voluntary basis by the carrier within the time prescribed by *N.J.S.A.* 34:15-64. The only condition that would not allow a counsel fee to be based on the amount paid in a voluntary offer and tender would be if the amount was offered or paid prior to the establishment of an attorney-client relationship.

The practical effect of this amendment to the statue is that the respondent will have no incentive to make a voluntary offer and tender. The result will be fewer, if any, such payments of compensation in the future. What this bill achieves is guaranteeing that the attorneys' fee will be maximized to the detriment of those workers who might have benefited from receiving funds earlier than they were statutorily entitled.

Update: The bill was signed by Governor Murphy on August 24, 2018 as P.L 2018, c.105

Senate bill S818 seeks to amend *N.J.S.A.* 34:15-36 (1) by expanding the employer's responsibility to provide workers' compensation benefits to employees that are injured off-premises. In what appears to a response to the New Jersey Supreme Court's opinion in *Hersh v County of Morris*, 217 N.J. 236 (2014), the proposed amendment provides:

> Employment shall also be deemed to commence, if an employer provides or designates a parking area for use by an employee, when an employee arrives at the parking area prior to reporting for work and shall terminate when an employee leaves the parking area at the end of a work period; provided that, if the site of the parking area is separate from the place of employment, an employee shall be deemed to be in the course of employment while the employee travels directly from the parking area to the place of employment prior to reporting for work and while the employee travels directly from the place of employment to the parking area at the end of a work period.

S818

Hersh, supra, involved a situation wherein the County of Morris provided parking for its employees in a parking garage that the County did not own or control. The parking garage was located some distance from the building in which the petitioner worked. While walking across a public street from the garage to the location where she worked, petitioner was struck by a motor vehicle and was injured. *Hersh v County of Morris* 271 *N.J.* at 239.

The Court held:

> …that in the circumstances of the case, an employee who is injured on a public street, not controlled by the employer, is not entitled to compensation under N.J.S.A. 34:15–36. The statute provides exemption for injuries occurring in "areas not under the control of the employer."

Even though the "premises rule" is not limited to the four walls of an office or plant, the concept of "employer control" to determine the compensability of an employee's injury is limited, and depends on the situs of the accident and the degree of employer's control of the property. The Act, thus, does not invite expansive interpretations that would resurrect the "going and coming" rule.

Id. at 149-150.

The proposed amendment would add to the area for which the employer is liable under workers' compensation the route that the employee takes to travel between the place of employment and the area where parking is provided. Under the proposed amendment, it would appear that Ms. Hersch's accident would likely be found to be compensable.

S818 was referred to the Senate Labor Committee.

Senate bill S1420 seeks to amend *N.J.S.A.* 34:15-7 (1) to add a subsection (b). This subsection would create a presumption that if an employee was intoxicated at the time that the injury occurred, the injury was caused by the intoxication thereby barring the employee from receiving workers' compensation benefits.

The bill is in response to the holding in *Tlumac v. High Bridge Stone*, 187 *N.J.* 567 (2006), wherein the Supreme Court affirmed the rule that the intoxication must be the sole cause of the accident before the employee will be denied benefits.

S1420 was referred to the Senate Labor Committee.

Senate bill S782 seeks to amend *N.J.S.A.* 34:15-12 (1) (c) (8) and (1) by increasing the amount of compensation for injuries to the hand and foot. Currently, injuries to the hand are based on 245 weeks of compensation and injuries to the foot are based on 230 weeks of compensation. The proposed amendment would increase the schedule for hand injuries from 245 weeks to 300 weeks and foot injuries from 230 weeks to 275 weeks of compensation.

This bill also calls upon the Commissioner of the Department of Labor and Workforce Development to:

> Study, in consultation with the Commissioner of Banking and Insurance, the State's workers' compensation system and make recommendations that will help foster and maintain an efficient, effective and well-balanced workers' compensation program that is equally responsive to the needs of both the State's workforce and the employer community, and submit a study, with recommendations, to the Governor and the Legislature not later than one year after the effective date of P.L. , c. (pending before the Legislature as this bill), and every five years thereafter;

S782 (2)(K).

This bill was referred to the Senate Budget and Appropriations Committee on May 10, 2018.

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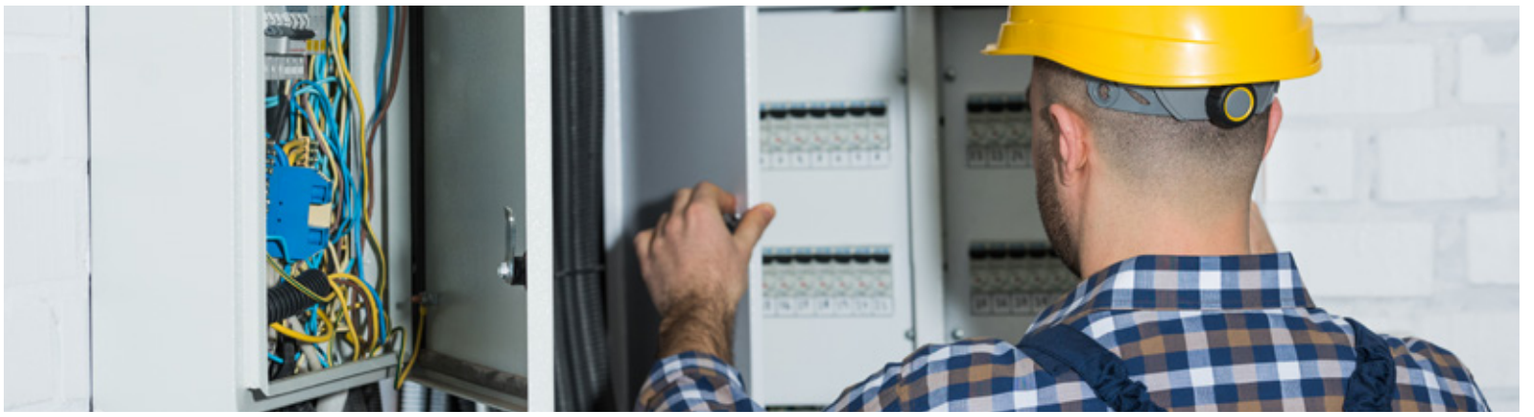

OSHA: LEGAL DEVELOPMENTS AND DEFENSE STRATEGIES

BY MICHAEL RUBIN AND MICHAEL J. LEEGAN

OSHA AND HAZARD ASSESSMENTS: ELECTRICAL HAZARDS IN THE WORKPLACE

OSHA requires that employers "instruct each employee in the recognition and avoidance of unsafe conditions" and the regulations applicable to the workplace "to control or eliminate any hazards or other exposure to illness or injury." This broad directive underscores the necessity of conducting a hazard assessment—determining the hazards present in the work environment. Indeed, one of the "root causes" of workplace incidents is the failure to identify or recognize hazards that are present, or that could have been anticipated.

Take, for example, electrical hazards. Many workers are unaware of the potential electrical hazards present in their work environment, which makes them more vulnerable to the danger of electrocution. Such hazards include contact with power lines, lack of ground-fault protection, improper use of extension and flexible cords, and equipment not being used in the manner prescribed.

DANGER: ARC FLASHES

Arc flashes are one of the most dangerous electrical hazards. In less than a fraction of a second, an electric arc can hit temperatures of up to 35,000 degrees Fahrenheit—four times hotter than the surface of the sun. The extreme temperature and force caused by an arc flash can spray vaporized metal and shrapnel throughout the area at high speed. Severe injury and burns are likely, and death is possible. Preventing this type of hazard requires a careful assessment of the working environment, job planning, and coordination of work. Equally important is the selection and use of adequate personal protective equipment (PPE).

WEAR PROPER PPE

Article 130 of the National Fire Protection Act (NFPA) 70E requires that all workers within the arc flash boundary wear arc flash rated PPE. PPE must cover all clothing that can be ignited, and must not restrict visibility or movement. Four categories of arc-rated equipment and clothing exist—the categories are rated according to the ability to protect against a minimum energy exposure (measured in cal/cm2). PPE must be labeled with its minimum rating to ensure that it is proper for the particular circumstances and work. Additional equipment includes a hard hat, hearing protection, eye protection, heavy-duty leather gloves, and leather footwear. Arc rated clothing generally consists of an arc-rated shirt and pants, with the addition of high-rated coveralls and/or an arc flash suit at the highest category.

Although four categories of arc-rated PPE are available, a common practice is to provide clothing rated at category 2, with a minimum rating of 8 cal/cm2 and category 4 with a minimum rating of 40 cal/cm2. This allows for the simplification of equipment at a jobsite while also providing adequate protection in all four categories.

MAINTAIN CARE OF PPE

The care and maintenance of arc flash PPE are just as important as its selection. Arc flash PPE should be inspected before each use and should be discarded if visibly damaged or contaminated with a potentially flammable substance such as grease. The PPE must also be cleaned and stored pursuant to the manufacturer's instructions. Employees should be trained not only in how to use the PPE, but also in how to recognize when it must be repaired or replaced.

While PPE is not a substitute for the strict implementation of safe work practices in preventing arc flashes, it can provide a substantial measure of protection in the event one does occur. Therefore, when performing a hazard assessment on arc flash exposure, employers and supervisors must ensure that adequately rated PPE is available. If, despite all precautions, an arc flash does occur, the correct PPE can mean the difference between a close call and a tragedy.

CONCLUSION

As the above shows, the first step in ensuring OSHA compliance—and, more generally, a safe workplace—is to conduct a hazard assessment. Only once the hazards are identified can the hierarchy of hazard controls be considered and implemented, including appropriate PPE.

***Michael Rubin and Michael J. Leegan are both with Goldberg Segalla. Mr. Rubin is chair of Goldberg Segalla's OSHA and Worksite Safety Practice Group.**

CONGRATULATIONS FOR THE DEFENSE WINS!

NEW JERSEY SUPREME COURT VICTORY

Congratulations to NJDA Past Presidents and Officers, Edward J. Fanning, Jr. and Natalie H. Mantell, on their defense win in the New Jersey Supreme Court's October 3, 2018 decision In re: Accutane Litigation.

APPELLATE DIVISION VICTORY

Congratulations to Patricia W. Holden and NJDA Secretary-Treasurer John V. Mallon, on their defense win in the New Jersey Appellate Division's October 16, 2018 decision Jeffrey E. Scholes v. Stephen M. Hausmann, et al.

TRIAL COURT VICTORIES

Jeff Czuba, Partner at Hoagland, Longo, Moran, Dunst & Doukas, LLP, recently prevailed in a personal injury trial involving the Verbal Threshold. On October 4, 2018, Jeff completed a four day trial before Hon. Philip Paley at the Middlesex County Courthouse. Plaintiff alleged she had satisfied the Verbal Threshold in that she sustained two cervical disc herniations and one lumbar disc herniation with cervical and lumbar radiculopathy. After 27 minutes of deliberation the jury unanimously found that plaintiff failed to meet the Verbal Threshold as she failed to prove she sustained a permanent injury caused by the accident and rendered a verdict in favor of the Defendant.

Nicole M. Downs, Partner at Hoagland, Longo, Moran, Dunst & Doukas, LLP, recently prevailed in a personal injury trial. The matter arose out of a motor vehicle accident that occurred in Mays Landing, New Jersey. Plaintiff alleged that he sustained permanent injuries to his lumbar spine and also sought to recover unpaid medical expenses. Plaintiff underwent treatment with a pain management physician and had invasive procedures. Plaintiff also treated with a neurosurgeon surgeon who recommended surgery. Plaintiff pursued a claim for economic loss in connection with pain management treatment. After a week- long trial, the jury deliberated for less than thirty minutes and returned a verdict in favor of Defendant finding Plaintiff did not sustain a permanent injury. The jury also found Plaintiff was not entitled to economic loss in the form of unpaid medical expenses.

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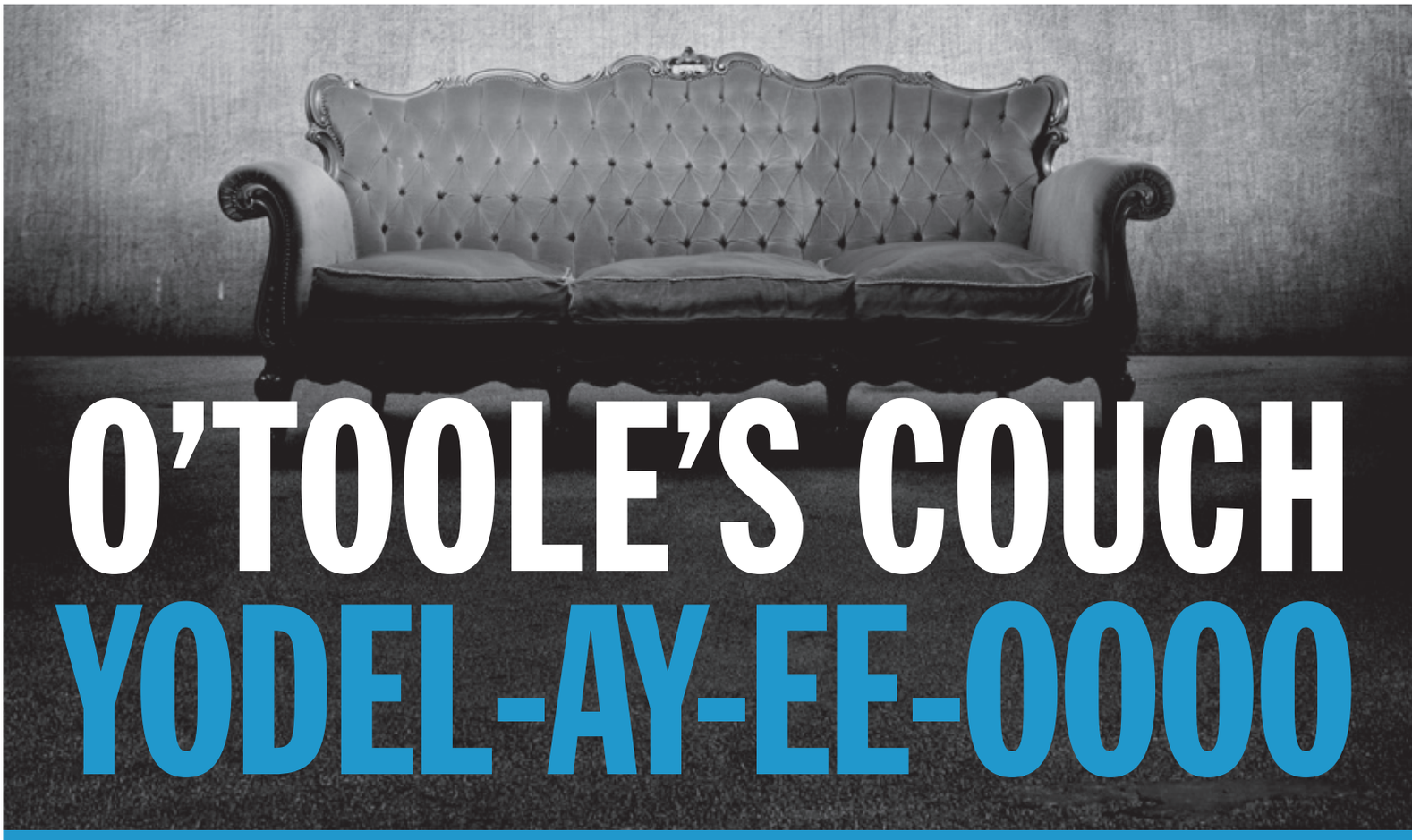

O'TOOLE'S COUCH YODEL-AY-EE-OOOO

Ever since Sunny was a little girl, she has been enthralled with the story of "Heidi" and the Swiss Alps. Although we often spoke of such a trip, finally this summer we took the vacation of Sunny's childhood fantasy.

We chose a Trafalgar Tour because it was done by train rather than bus, with magnificent views everywhere and a smooth, leisurely travel venue, free of traffic and noise. Definitely the way to go!

Landing in Zurich Airport, the first thing that attracted us was how immaculately clean everything was. The Swiss appear to be extremely organized and everyone looks so clean you would think they just stepped out of the shower. We were slightly disappointed that people weren't yodeling to us as we walked through town, so we had to visit several pubs in search of this entertainment.

Zurich gave us the opportunity to obtain the flavor of Swiss life, being a combination of a seaport and sitting in the valley of the incredible Swiss Alps. From here we headed to St. Moritz on the Glacier Express. Our train traveled through the expansive alps and for a substantial portion of the trip we were certain the drop was a thousand feet or more. The view out the large train windows was always magnificent – snow-capped mountains everywhere! (It actually reminded me of a toy train circling the mountains along my childhood train tracks.) Sunny and I have visited countries with beautiful mountainsides, Ireland and Scotland, of course; but nothing can compare to the snow-covered Swiss Alps climbing into the clouds with evergreen trees filling the hillsides as they approach the sky.

St. Moritz might be considered the "Manhattan of the Swiss Alps."

The word that comes to mind is "chic." It sits against the beautiful backdrop of Lake St. Moritz and is one of Europe's most fashionable ski resorts. Everyone we passed seemed to be wearing ski clothing or carrying ski paraphernalia. Some members of our tour skied the slopes, with the thought that you can't go to St. Moritz without skiing. Sunny and I enjoyed riding the ski lift up the mountains, taking in the breath-taking views, and then riding the ski lift back down again. Really? I have enough trouble walking let alone skiing.

Our next destination was Zermatt, which sits at the foothills of the imposing Matterhorn, Switzerland's most famous mountain. In order to reach Zermatt, the Glacier Express had to cross hundreds of bridges, including the Oberalp Pass, which is 2033 meters above sea level – truly magnificent views everywhere. Zermatt is a car-free

city ensuring maximum pedestrian pleasure throughout the town, enjoying restaurants, cafes, stores of every kind, (want to buy a music box?) and, of course, many small Swiss chocolate shops. While in Zermatt we took a cable car ride that took us to the top of the world, 3779 meters up. Upon reaching the top, everyone had to rest on the platform in order to adapt to the high altitude, which definitely made breathing difficult. At this point we were directly across from the Matterhorn and were able to observe the skiers going down the slope, looking like the size of small ants. We were also able to watch helicopters dropping off building materials for work being done on the slopes. It was shocking to see at first, but how else would you get supplies to this distant destination?

The night before we left Zermatt, we had the thrill of seeing Switzerland play Costa Rica in the World Cup on television. Believe me, this was a "happening" throughout the entire city. Restaurants and pubs had tables lining the main street with large-screen televisions outside. It was such a joyous atmosphere and you really couldn't help smiling to be part of it. The game ended in a 2-2 tie, but the crowd kept celebrating into the evening. It could have been New Year's Eve. (We will never watch the World Cup again without remembering this experience.)

From Zermatt it was on to Geneva, the home of the famous Flower Clock that pays tribute to the city's centuries-old watchmaking traditions. It is also famous for its restaurants, specializing in fresh fish caught at Alpine Lakes. We traveled through Interlaken, which is home of Switzerland's trio of famous peaks – Eiger, Monch and Jungfrau. We were blessed with a beautifully clear day so the majesty of the peaks could be appreciated to their utmost.

We couldn't leave Switzerland without getting a training course in how to yodel, so it was on to Lucerne. Here we visited the famous St. Adtkeller Pub, sampling their local bier, which had quite a bite to it. (My yodeling didn't get any better after a few biers, but I thought it did.) We also visited the famous Lion Monument, built in memory of the Swiss Guard who bravely defended Louis XVI during the French Revolution, being outnumbered 100 to 1. (This part of the trip is being included so you don't think all we did was eat and drink.) We did take a late- night dinner cruise along Lake Lucerne that included great food, good company and such beautiful views. (At the end of the cruise, Sunny insisted that I entertain everyone with one of my favorite Irish tunes, which seemed to be well received by all.)

Another Swiss specialty, along with chocolate, cheese and bier, is fondue. And we sought out a local pub specializing in this delicacy. The first course was fresh brown bread dipped in molten cheese; second course was various skewered meats that you cooked to your liking in the cheese; all of this topped off with fresh fruit dipped in chocolate (Swiss, of course.)

Although Sunny was disappointed that we never saw Heidi or her grandfather, we did take a horse-drawn covered-wagon ride through a farmer's expansive farmlands. The area was so beautifully undeveloped with farm animals grazing throughout. (The cows actually wore large cow bells so the farmer could locate them more easily.) At the end of the wagon ride, the farmer's wife served us cheese with home-made breads, fresh fruits and vegetables and home-made apple cider in their front yard. What a shame Heidi couldn't be there.

[Getting off the subject just a bit, no story about Heidi would be complete without mentioning the "Heidi Game" on November 17, 1968. The Oakland Raiders hosted the New York Jets of the American Football League. With 1:06 to play the Jets were leading 32-29. At the time NBC made the decision to switch to Disney's movie, "Heidi," which started at 7 pm. As a result, the entire East Coast missed the end of the game, which Oakland won, scoring two touchdowns in the last minute of the game. This set off a tidal wave of protests from the football fans that resulted in the NFL changing its policy with respect to runover games.]

Hopefully by reading this article you have gotten a taste of what a beautiful vacation spot Switzerland is. Need any help with picking an itinerary, give me a call. Yodeling lessons are, of course, an extra charge.

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