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NEW JERSEY DEFENSE

PRESIDENT'S LETTER

It is truly an honor to serve as the 55th President of the New Jersey Defense Association. I take the helm during what is likely to be the strangest and most challenging time of our legal careers. The last six months have created unprecedented upheaval in all of our lives. In particular, our civil litigation practices have been turned upside down. The normal events of a work week, such as attending trial calls and scrambling through New Jersey traffic to get to the next appearance have all but vanished for the time being. Phrases like virtual appearance and working remotely now dominate the weekly agenda. Now, more than ever, we need each other and the NJDA.

In a normal fall, we would be discussing an upcoming golf outing and starting to think about attending one or more of the flagship seminars of the fall season, with distant thoughts of a fun night at the holiday party. Sadly, we are unlikely to see each other at any of those events in 2020. However, the NJDA is committed to continuing to provide members with as much support as possible in these trying times. Regular favorites such as Women and the Law and the Automobile Seminar will proceed at their normal times as virtual events. We regularly host afternoon webinars to feature sponsors and provide CLE credits. The listserve has been an excellent addition to the membership tools, and it is heartening to see the increasing traffic on a weekly basis. We continue to host COVID conference calls to keep members informed about court updates and to compare ideas to meet the many challenges we face. We are taking a pro-active role to ensure that the Courts understand the concerns of our members regarding the resumption of jury trials. We have been invited by the AOC to participate in a conference call on this topic and we recently sent a letter summarizing member's concerns to the AOC.

The resumption of jury trials will prove to be one of the greatest challenges the Courts, and thus attorneys, will face in this pandemic. In that regard, we need your input to represent the Association. Many have reached out already to share their concerns about jury trials. Please continue to do so. Please join in on one of the COVID conference calls or email me at **jvmallon@chasanlaw.com** to share your thoughts and concerns. Once trials do resume, please share your experiences. It is our desire to work with the Courts to ensure that a safe and fair process is established.

I look forward to a return to the "normal" practice of law and seeing you at a live seminar or reception later in the term. Until then, please be safe.

JOHN V. MALLON, ESQ.

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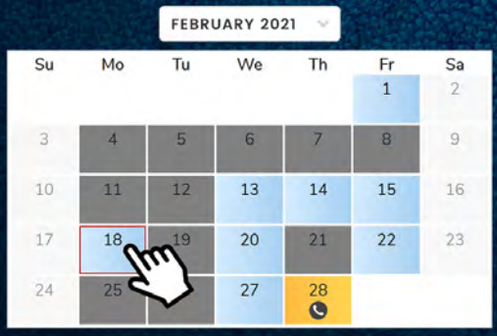

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"FLATTENING THE CURVE" ON THE COMING WAVE OF COVID-19 LITIGATION

BY HERBERT KRUTTSCHNITT III, ANTHONY COCCA & KATELYN CUTINELLO

If it seems a bit odd to begin an article on COVID by quoting a New Jersey Supreme Court Justice who has been deceased for almost 60 years, indulge us. The late great Justice Wilfred Jayne, very early in his judicial career once began a matrimonial decision, "Mrs. Reilly was the sort of wife who stood by her husband through all the trials and tribulations he would not have experienced – had he not been married to Mrs. Reilly". Let us hope that the relationship between the State of New Jersey and the New Jersey Long Term Care industry will have similar attributes.

New Jersey may be second only to New York in the number of confirmed COVID cases and COVID deaths; and it is estimated that as many as 50% of the COVID deaths in New Jersey have occurred in long term care facilities. We hear those statistics almost daily, and it is a harbinger of what is likely to be a tidal wave of COVID litigation.

Yet, there are a few less known details of the terrible statistic. Can anyone dispute that COVID has proven to be a disease that hits the elderly and the infirm the hardest? Can anyone dispute that the population of long term care residents tend to be the elderly and the infirm? In retrospect, then, it appears to be a foregone conclusion that COVID had the potential to affect the long term care population with great force, and in greater numbers than the general population.[1] Ordinary people were told every day to stay at home, to isolate, to wear masks, to use hand sanitizer after touching any common surface. All good measures to, as they said, "flatten the curve".

So, let us quote from a letter written by the State of New Jersey Department of Health to "Nursing Home and Comprehensive Rehabilitation Hospital Administrators, Directors of Nursing and Hospital Discharge Planners" on March 31, 2020. "In order to respond to the increase in positive cases there is an urgent need to expand hospital capacity to be able to meet the demand for patients with COVID-19 requiring acute care. As a result this directive is being issued to clarify expectations post-acute care settings receiving patients/residents returning from hospitalization and for accepting new admissions." The letter continues that, "No patient/resident shall be denied re-admission or admission to the post-acute care settings solely based on a confirmed diagnosis of COVID-19".

Said plainly and simply, post-acute care and long term care facilities were prohibited from testing people being readmitted from acute hospital admissions, or newly admitted patients to the long term care setting for COVID-19. And, they were required to readmit patients with COVID-19 once they no longer required hospital ICU level care. The New Jersey Department of Health was able to mandate

that because they have direct, and very strong regulatory oversight over post-acute and long term care facilities. Thus, in an effort to lessen the threat of exhausting the availability of acute care and ICU level beds, the State of New Jersey Department of Heath directed the unleashing of a highly contagious pathogen into buildings all over the State that, by definition, housed the most susceptible and most vulnerable population.

The purpose of this article is not to debate the wisdom of that decision. In the face of the threat of running out of hospital beds, and especially ICU beds, desperate measures may have been warranted. Desperate times call for desperate decisions, and it is easy to Monday-morning quarterback the hardest of choices. That said, is it any wonder that what happened was probably going to happen. Long term care facilities are not hospitals, and post-acute care facilities, by definition, were not designed to provide the same level of care, infection control and clinical support as acute care facilities.

As certain as the fact that the Coronavirus was going to be widespread, there is also going to be widespread post-Coronavirus litigation. The steps we take to mitigate the damage will be key. It is fairly easy to predict how the claims will look.

In New Jersey, we are governed by a Nursing Home statute that has a provision called Rights of Residents. One of the resident rights is the right to "a safe and decent living environment". It would be easy to suggest that a pandemic is an unsafe environment. However, there is hardly a judge or a jury who would not say that a pandemic is an unavoidably unsafe environment, and through no fault of the facility.

The claims are going to focus on Infection Control Policy & Procedure, and whether the best precautions were in place to isolate infected patients and to isolate patients who did not have the virus. The Department of Health March 31 letter concludes, "As always, strict adherence to infection prevention and control measures and environmental cleaning must be made a priority during this public health emergency." There you have it. You are hereby Ordered to take these people into your facility, and at the same time maintain, "strict adherence to infection prevention and control measures." The infection control measures that are taken by post-acute and long term care facilities cannot compare with the infection control measures of an ICU setting at even a community hospital, no less a University Medical Center. Who is kidding whom?

Post COVID litigation will surely focus on claims that there was a failure of "infection prevention and control measures". Part of the proofs will be to compare the extent of outbreak from facility to facility, but the Holy Grail of a post-Corona virus claim will be whether there were Infection Control F-Tags. An F-Tag is a Department of Health Survey Deficiency. You can also bet that there will be many Complaints to the DHSS intended to trigger many Complaint Surveys. That curve needs to be flattened.

COVID-19 hit the long term care and nursing home population hard. Post-COVID-19 litigation will be the second wave. When this is all over for the population, it will be just the beginning for the post-Corona Litigation pandemic. In anticipation of this wave, the State has recently enacted legislation intended to at least level the litigation playing field in light of the extraordinary circumstances that we can all agree existed. We will now explore the legislation, and in the end, offer our own thoughts on how likely it is that the State of New Jersey will stand by post-acute and long term care facilities through all the trials and tribulations they would not have experienced – had they not been married to the State of New Jersey.

On March 9, 2020, in Executive Order No. 103, New Jersey Governor Philip D. Murphy declared a Public Health Emergency and a State of Emergency for the entire State of New Jersey due to the public health hazard created by COVID-19. On April 1, 2020, in Executive Order No. 112, Governor Murphy declared that health care professionals and healthcare facilities, including post-acute and long term care facilities, "shall be immune from civil liability" for any damages alleged to have been sustained as a result of acts or omissions taken in good faith "in the course of providing healthcare services in support of the State's COVID-19 response."

On April 14, 2020, New Jersey's P.L. 2020, ch. 18, was adopted, confirming that healthcare professionals and facilities are immune from civil liability for medical services, treatment and procedures relating to the COVID-19 emergency. The statute is retroactively effective beginning on March 9, 2020. Specifically, the law mandates that health care professionals and health care facilities "shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omissions by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020." The immunity provided extends to all "efforts to treat COVID-19 patients and to prevent the spread of COVID-19 during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020."

The immunity granted does not apply, however, to "acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct". As a result, any plaintiff bringing a COVID malpractice claim will need to plead and prove gross negligence or punitive damages in order proceed with the claim and to ultimately recover. The battleground is therefore set.

Due to the broad immunity granted for the COVID response, it is our recommendation that any and all COVID claims be evaluated at the outset to determine if the high threshold for a prima facie case is set forth in the plaintiff's complaint and, if not, motions to dismiss in lieu of an Answer for failure to state a claim should be freely granted. To proceed otherwise, would undermine the intention of the legislature and render the immunity a nullity. Such an approach is not novel and has been addressed by the Courts before.

Significantly, plaintiff will need to do more than just include words like "actual fraud, actual malice, gross negligence, recklessness, or willful misconduct" in order to survive dismissal of their COVID claim. It is well established that a complaint should be dismissed for failure to state a claim upon which relief can be granted where no cause of action is suggested by the facts. R. 4:6-2(e); Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). Significantly, a defendant's motion to dismiss a plaintiff's pleading for failure to state a claim may not, however, "be denied based on the possibility that discovery may establish the requisite claim; rather the legal requisites for plaintiff's claim must be apparent from the complaint itself." Edwards v. Prudential Prop.

& Cas. Co., 357 N.J. Super. 196, 202 (App. Div.), certif. denied, 176 N.J. 278 (2003) (citing Camden County, 320 N.J. Super. at 64). As emphasized in the affidavit of merit statute, "it is improper to assert a claim without any factual basis for that claim, particularly a malpractice claim." Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998).

In any case, "conclusory allegations" and use of normative adverbs such as "maliciously" and "arbitrarily" in a pleading are not sufficient to sustain a claim or "justify a free-wheeling discovery mission delving" into those matters. Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 308-09 (App. Div. 2015). The Appellate "Division reached this conclusion in circumstances very similar to those which likely will be presented in COVID-related litigation. In Hurwitz, the Court was confronted with a motion to dismiss in lieu of an Answer based on the applicable immunity from civil litigation for peer review determinations as set forth in the HCQIA and related New Jersey statute. The Appellate Division explained that the court may curtail discovery in its discretion if there are no reasonable indicia that a factual basis to surmount the immunities will be uncovered. In order to overcome the immunity in the context of the HCQIA, a plaintiff was required to show actual malice. Plaintiff's complaint, however, failed to plead a factual basis to support actual malice and, as a result, the trial court dismissed the case with prejudice. The Appellate Division affirmed and specifically held that simply including the adverbs "maliciously" or "arbitrarily" in the complaint was not sufficient to proceed with the claim and did not warrant additional discovery, thus, warranting the dismissal of the claim.

Similarly, in the context of the applicable COVID immunity, plaintiff will need to do more than plead ordinary negligence. Gross negligence occurs on the continuum between ordinary negligence and intentional misconduct. The continuum runs from (1) ordinary negligence, through (2) gross negligence, (3) willful and wanton misconduct, (4) reckless misconduct to (5) intentional misconduct. "Gross negligence" refers more specifically to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise even ***slight*** care or diligence. Whereas, "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission. N.J.S.A. 2A:15-5.10. "Actual malice" is an ***intentional*** wrongdoing in the sense of an evil minded act. (Ibid.) A factual basis for these heightened claims must be clearly set forth in the initial pleading in order to survive a motion for dismissal and, without such a foundation at the outset, discovery should not be permitted to proceed.

Factual support for conclusory terms, such as "actual malice", "gross negligence", "recklessness", or "willful misconduct", will need to be included in any COVID complaint in order to survive a dismissal motion. If these principles are followed, COVID related litigation should be limited, as the legislature intended when granting sweeping immunity to the healthcare providers and facilities who answered the call to provide care in unprecedented times without regard for their own health and safety.

These issues are already being confronted in our Courts. In examples alleging extreme conduct, plaintiff's lawyers have filed at least twenty-eight (28) Notices of Tort Claims against veteran's homes in Menlo Park and Paramus run by New Jersey State Department of Military and Veterans Affairs. See, https://www.law.com/njlawjournal/2020/06/15/state-faces-140m-in-claims-for-failure-to-contain-covid-19-at-veterans-homes/?LikelyCookieIssue=true. "According to the claims notices, the Menlo Park facility's administration directed staff not to wear masks or gloves because it might frighten the residents. Management also waited more than a month after the first patient was diagnosed with COVID-19 to isolate those residents, and continued to permit residents to congregate in common areas of the building, the notices said. In addition, management at the Menlo Park facility allowed staff who were infected or presumed to be infected to continue working, prevented staff from gaining access to personal protection equipment, and recklessly endangered the safety and well-being of patients and staff by failing to promptly implement appropriate measures, such as infectious disease outbreak plans, the tort claims state."

On August 14, 2020, the New Jersey Law Journal published another article addressing the plaintiff's motions for pre-suit discovery arising out of those veteran's homes claims. See, "Race Against Time: Judge Poised to Allow Pre-Suit Discovery Over Nursing Home COVID-19 Deaths", NJ Law Journal, Aug. 14, 2020 https://www.law.com/njlawjournal/2020/08/14/race-against-time-judge-poised-to-allow-pre-suitdiscovery-over-nursing-home-covid-19-deaths/. In a series of motions, plaintiff's counsel were looking to depose twenty-three (23) people. The article noted that Middlesex County Superior Court Assignment Judge Michael Toto would consider granting a narrower version of the request to allow pre-suit discovery in connection with the handling of COVID-19 at the veterans' homes in Menlo Park and Paramus including, depositions of one resident and three employees, if lawyers for the prospective plaintiffs can show the judge what sort of information they are seeking and why it cannot be obtained elsewhere. According to eCourts the Court granted some of the relief sought, allowing counsel pre-suit requests for documents and a limited number of depositions.

While the merits of motions for pre-suit COVID discovery and the quality of the COVID lawsuits that are filed could be the subject of debate, the issues involved offer the perfect example of why COVID claims must be evaluated at the outset for not only merit, but to officiate requests for pre-suit discovery. Ultimately, the COVID immunity statute is only as strong as its weakest component. To be sure, claims of "bad faith", "gross negligence" and even intentional conduct are destined to surface. The proposed screening mechanisms could be the only thing that gives the COVID immunity statute its intended effect – complete immunity.

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[1]Of course, that begs the question of whether COVID-19 would have affected the elderly as it did if long term care facilities were not put in the position of not being able to test for the virus while at the same time being required to introduce COVID-19 positive patients in a closed setting to an already susceptible patient population.

SUN CHEMICAL V. FIKE: NJ PRODUCT LIABILITY ACT CLAIMS CAN BE PAIRED WITH NJ CONSUMER FRAUD ACT CLAIMS

BY DAVID KOTT, JEAN PATTERSON, THERESA DILL AND JUSTIN MIGNOGNA

The New Jersey Supreme Court recently ruled that claims under the New Jersey Consumer Fraud Act ("NJCFA") relating to the sale of a product are not per se subsumed by the New Jersey Product Liability Act ("NJPLA"), leaving open the possibility that a defendant who engages in fraudulent practices in connection with the sale of a product could face a NJCFA claim, a NJPLA claim, or both. The opinion, however, is limited in scope and does not overrule other important decisions in the NJCFA/NJPLA context, which prevent such claims from co-existing under many other circumstances.

NJCFA AND NJPLA CLAIMS PRIOR TO *SUN CHEMICAL V. FIKE*

In *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008), a product-liability class action, the New Jersey Supreme Court addressed the issue of whether a claim seeking medical monitoring costs could be brought under the NJCFA. The class in *Sinclair* alleged that a prescription drug manufactured by Merck caused certain cardiovascular injuries, which required medical monitoring for possible latent injuries. *Id.* at 54-55. The New Jersey Supreme Court determined that the claim fell clearly within the scope of the NJPLA and reasoned that "[t]he language of the PLA represents a clear legislative intent that, despite the broad reach we give the CFA, the PLA is paramount when the underlying claim is one for ***harm cause by a product***." *Id.* at 66 (emphasis added). *See also Hindermyer v. B. Braun Med. Inc.*, 419 F. Supp. 3d 809 (D.N.J. 2019) (holding that plaintiff's fraud claims arising from alleged injuries from a medical device were subsumed by the NJPLA); *Schraeder v. Demilec* (USA), LLC, 2013 U.S. Dist. LEXIS 97515 (D.N.J. Jul 12, 2013) (dismissing a NJCFA claim against the manufacturer of allegedly defective spray polyurethane foam insulation as subsumed by the NJPLA); *DeBenedetto v. Denny's, Inc.*, 2011 N.J. Super. Unpub. LEXIS 63 (App. Div. Jan. 12, 2011) (affirming dismissal of a NJCFA claim against a restaurant as subsumed by the NJPLA); *Nafar v. Hollywood Tanning Sys.*, 2010 U.S. Dist. LEXIS 65183 (D.N.J. Jun. 30, 2010) (dismissing a NJCFA claim against a tanning salon franchise for failing to warn of alleged risks of cancer as subsumed by the NJPLA).

For more than a decade since *Sinclair*, courts have relied on *Sinclair* in dismissing NJCFA claims as subsumed by the NJPLA when the underlying harm was caused by a product. There was very little room, if any, to distinguish a NJCFA claim from a NJPLA claim, especially in the pharmaceutical and medical device industries. However, in *Sun Chemical v. Fike*, the New Jersey Supreme Court recognized a narrow exception to the NJPLA subsumption doctrine as it pertains to NJCFA claims.

THE *SUN CHEMICAL V. FIKE* DECISION

In *Sun Chemical v. Fike*, the Supreme Court addressed the following question from the Third Circuit: "whether a Consumer Fraud Act claim can be based, in part or exclusively, on a claim that also might be actionable under the Products Liability Act." *Sun Chemical Corporation v. Fike Corporation*, A-89-18 (Jul. 29, 2020). The Supreme Court answered that question in the affirmative.

The case involved a fire that occurred in an explosion isolation and suppression system purchased by Sun Chemical Corporation ("Sun Chemical") from Fike Corporation ("Fike"). Sun Chemical asserted a single claim against Fike in the District of New Jersey under the NJCFA, alleging that Fike made various oral and written misrepresentations regarding the system. Sun Chemical did not assert a NJPLA claim. In particular, Sun Chemical alleged that Fike represented the suppression system would prevent explosions, would have an audible alarm, and that it complied with industry standards. Additionally, Sun Chemical alleged that Fike represented that the suppression system had never failed. The District Court granted Fike's motion for summary judgment, finding that the NJPLA subsumed Sun Chemical's claims. Sun Chemical appealed, and the Third Circuit certified the question to the New Jersey Supreme Court.

In holding that NJCFA claims could coexist with NJPLA claims, the Supreme Court reasoned that the two statutes govern different conduct and that there is no conflict between the NJCFA and the NJPLA. While the NJPLA encompasses (and subsumes) claims for design defect, manufacturing defect, and warning defect, it does not encompass claims for deceptive, fraudulent, or misleading commercial practices – claims governed by the NJCFA. The Supreme Court explained that claims for fraud and misrepresentation require unique remedies to prevent such conduct. Thus, "a [NJ]CFA claim alleging express misrepresentations – deceptive, fraudulent, misleading, and other unconscionable practices – may be brought in the same action as a [NJ]PLA claim premised upon product manufacturing, warning, or design defects."

The Supreme Court confirmed, however, that where a claim is "premised upon a product's manufacturing, warning, or design defect, that claim must be brought under the [NJ]PLA with damages limited to those available under that statute; [NJ]CFA claims for the same conduct are precluded." In other words, "aside from breach of express warranty claims, claims that sound in the type of products liability actions defined in the [NJ]PLA must be brought under the [NJ]PLA." For example, failure-to-warn claims continue to fall squarely within the ambit of the NJPLA and therefore may not be cast as NJCFA claims. The Supreme Court, in a departure from *Sinclair*, explained that the "theory of liability" underlying a claim determines whether the cause of action falls under the NJCFA or NJPLA—not the nature of the plaintiff's damages.

THE POST-*SUN CHEMICAL V. FIKE* LANDSCAPE

The *Sun Chemical v. Fike* decision allows for the co-existence of the NJCFA and NJPLA in limited situations, e.g., where a plaintiff plausibly frames his "product" claim as arising from a fraudulent misrepresentation. Thus, manufacturers that once could be confident that their potential liability arising from the sale of products would be confined to the NJPLA, now face the possibility that they will be subject to the broad array of available remedies under the NJCFA – including treble damages and attorneys' fees. Because of this, there is likely to be an uptick in product liability claims alleging that manufacturers' and sellers misrepresented the efficacy or benefits of their products – allegations that could allow NJCFA claims to exists where they otherwise would have been barred pre-*Sun Chemical*.

The *Sun Chemical* decision does not, however, completely erode the subsumption doctrine. As noted above, where the theory underlying a claim is that a product is *defective*, that claim continues to fall squarely under the NJPLA – not the NJCFA. Thus, while *Sun Chemical* may invite crafty pleading intended to circumvent that general rule, product defect claims couched as NJCFA remain subject to dismissal. And importantly, even if a product-related claim is properly pled as an NJCFA claim, that claim – unlike claims asserted under the NJPLA – will be subject to a heightened pleading standard. *See, e.g., Levinson v. D'Alfonso & Stein*, 320 N.J. Super. 312, 315 (App. Div. 1999) (affirming dismissal of a fraud claim for failing to meet the proper pleading standard); *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (explaining that *Rule* 4:5-8(a) imposes a heightened pleaded standard on allegations of fraud).

Moreover, *Sun Chemical* did not involve a pharmaceutical or drug, or another highly regulated product, and therefore does not upset the long line of decisional law declining to apply the NJCFA to activities that are comprehensively regulated by federal or state agencies. *See, e.g., N.J. Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 14 (App. Div. 2003).

In *Schering-Plough*, a group of not-for-profit organizations and individuals brought a consumer fraud class action against the pharmaceutical manufacturer alleging that certain allergy medications were not efficacious and therefore sold at artificially inflated prices. *Id.* at 11-12. The trial court dismissed the action for failure to state a NJCFA claim, finding that the company had not made any actionable statements of fact and instead used only puffery, which did not result in any ascertainable loss to any class member. *Id.* at 12. The Appellate Division affirmed the trial court's ruling, but added that the pharmaceutical industry is heavily regulated by the FDA. *Id.* at 14. The Appellate Division reasoned that because drug companies' advertising is subject to FDA oversight, it is not actionable. *Id.*

Thus, while *Sun Chemical v. Fike* allows for the coexistence of NJCFA and NJPLA claims, it does so only in limited circumstances. That is, on its face, the decision creates only a narrow exception to the NJPLA subsumption doctrine. Of course, as with all Supreme Court decisions, it will take years of decisional law to fully understand the true impact and significance of *Sun Chemical v. Fike*.

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Photo Credit: Otesaga Resort Hotel

LEGAL ARGUMENTS FOR YOUR PRETRIAL MOTIONS KEEP REPTILE THEORY OUT OF THE COURTROOM

BY DAVID R. KOTT, NATALIE H. MANTELL, AND MEGHAN MCSKIMMING

Originally published in *For the Defense* in September 2020

David R. Kott is a partner in the Newark, New Jersey, office of McCarter & English LLP and focuses his practice on defense of product liability cases involving consumer products, industrial equipment, pharmaceuticals, and medical devices. He is the only attorney in New Jersey to be named a Fellow of the American College of Trial Lawyers and of the American Academy of Appellate Lawyers. Natalie H. Mantell is also a partner in McCarter's Newark office. She is one of the state's leading pharmaceutical and medical device mass tort defense attorneys and regularly handles appellate matters for clients in various practice areas. Ms. Mantell currently serves as DRI's State Representative for New Jersey, and is a past President of DRI's SLDO, the New Jersey Defense Association. Meghan McSkimming is an associate in McCarter's products liability, mass torts & consumer class actions practice group, who represents a wide range of clients in state and federal court litigations.

As defense attorneys, we need to expose the reptile theory. We need to educate the judiciary as to why these tactics are improper before trial so that jurors decide cases based on facts, not fear.

To attorneys who defend personal injury or product liability claims, reptile theory is all too familiar. Plaintiffs' counsel across the country have used this tactic at trial to elicit an emotional "fight or flight" response from jurors to invite them to decide cases based on their desire to protect themselves, their loved ones, or the larger community from danger, instead of the evidence presented and the law governing the claims at issue. Put another way, reptilian tactics cause jurors to make decisions using the part of the brain used to survive, rather than the part used for intelligent thought.

Much has been written about defending against this strategy during opening statements and closing arguments, and through witness examination, but little has been written about using legal arguments to prevent these tactics from entering the courtroom in the first place. As defense attorneys, we need to expose the reptile theory. We need to educate the judiciary why these tactics are improper before trial so that jurors decide cases based on facts, not fear. This article offers some legal arguments that defense attorneys can include in pretrial motion practice to keep reptile theory out of our courts of law. Because these arguments are based on state law, and reading a fifty-state survey is a drag, we have provided key *American Law Reports* articles, federal rules, and a few cases as resources for you to make the same arguments using the applicable law from your own jurisdiction.

REPTILE THEORY IN A "NUTSHELL"

The reptile theory, first articulated by David Ball and Don C. Keenan in their book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, is based on the idea that humans have a primitive portion of the brain, similar to reptiles, that is conditioned to pursue safety and survival. Plaintiffs' attorneys attempt to influence the jury's decisions, and hopefully achieve a successful verdict, by speaking to that "reptilian" portion of the jurors' brains. Some reptilian arguments paint the defendant as hazardous, dangerous, or as a menace to society. Others are more subtle, but they can still affect the jury's ability to remain impartial. For example, plaintiffs' counsel may argue that a defendant failed to heed a "red light" or "stop sign" during product development. Counsel may also use "we" or "us" to connect the jury with the plaintiff (or even counsel), and to distance themselves from the impliedly dangerous defendant.

Some trial courts have resisted precluding the use of reptile tactics pretrial because this theory can be viewed as obscure. *See, e.g., Phillips v. Dull*, No. 2:13-cv-384-PMW, 2017 U.S. Dist. Lexis 90020, at *7 (D. Utah June 12, 2017) ("With regard to arguments based on the 'reptilian brain,' the court finds that Defendants have not shown with sufficient particularity what Plaintiff's counsel should be precluded from saying at trial."); *Dorman v. Anne Arundel Med. Ctr.*, No. MJG-15-1102, 2018 U.S. Dist. Lexis 89627, at *17 (D. Md. May 30, 2018) (denying the defendant's motion because it "is premature and presents vague challenges to Plaintiffs' style of argument rather than to any evidence that Plaintiffs intend to introduce").

However, in a recent decision in the Northern District of Indiana in a wrongful death case, after a fatal trucking accident, the defendants successfully moved for a protective order to prohibit the plaintiff's attorneys from asking reptilian questions ("i.e., questions about the existence of and purpose for alleged 'safety rules'") during the company witness deposition. *Estate of Richard McNamara v. Navar,* No. 2:19-cv-109, 2020 U.S. Dist. Lexis 70813, at *1–2,

*5 (N.D. Ind. Apr. 22, 2020). The defendants argued that such questioning would be used to "create confusion around the defendants' applicable duty of care by attempting to replace it with safety rules" and that it lacked "any tangible connection to the scope of permissible discovery." *Id.* at *2, *5. In granting the defendants' motion, the court observed that the plaintiff merely made conclusory assertions that the line of questioning could yield discoverable information without indicating what evidence was sought and that the plaintiff failed to address issues raised in the defendants' motion, such as how reptile theory questions or questions that the plaintiff's counsel previously asked in a related deposition would lead to discoverable information.

Nevertheless, in light of the general dearth of precedent explicitly addressing reptilian arguments and some courts' unfamiliarity with the theory, invoking familiar legal arguments, such as seeking the exclusion of "golden-rule" arguments, speculation, evidence that will lead to juror confusion, and character evidence, may be helpful in a motion to bar reptilian tactics.

GOLDEN-RULE ARGUMENTS

"Golden-rule" arguments ask jurors to imagine themselves, a loved one, or members of the community in the plaintiff's shoes and to render a verdict from that personal, emotionally driven perspective. Courts preclude these arguments due to their prejudicial effect on a defendant's right to a fair trial because such tactics may persuade jurors to decide the case based on sympathy for the plaintiff, or prejudice or bias against the defendant, rather than based on the evidence and the law. *See* 33 Fed. Proc., L. Ed. § 77:268 (2019). *See also* Stein Closing Arguments, *Golden Rule*, § 1:83 (2018–19 ed.); L.S. Tellier, Annotation, *Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant or to Allow Such Recovery as They Would Wish if in the Same Position*, 70 A.L.R.2d 935 §§ 3[a] & 3[b] (1960 & Supp. 2019); 75A Am. Jur. 2d, *Trial*, § 540 (2019); Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. Fed. 333 (1984 & Supp. 2019).

Many reptilian arguments are improper golden-rule arguments, and as such, defense attorneys can, based on that ground, preclude some common reptile tactics, such as referring to a large group of people who are similarly situated to the plaintiff, or arguing that the defendant's product was used to treat a common illness that the jurors or their loved ones may easily suffer from, thereby triggering an emotional reaction. For example, in one recent trial, the plaintiff's counsel argued that the defendant was "deliberately putting [people] in danger, deliberately not telling the truth to doctors and patients when they knew" that the product would harm people, and the jury should deter the defendant "from doing that in the future." In essence, the plaintiff's counsel improperly alluded to the larger community who received the defendant's product, and implied that the jury should protect all of those people rather than focusing only on the plaintiff. Such statements not only tempt jurors to disregard the evidence presented and render a verdict based on their emotional ties to the community, they also trigger the jurors' reptilian brains because they instill a sense of imminent danger or harm. Because many reptilian arguments violate the golden rule, defense attorneys can rely on that legal principle to preclude them from trial.

SPECULATION AND HYPOTHETICAL NON-PARTIES

Similar to the Golden Rule arguments, sometimes plaintiffs' attorneys attempt to admit evidence or make comments regarding other members of the community who may have been injured by the defendant's product. Defense counsel can move in limine to preclude reference to such hypothetical nonparties. Although, as mentioned above, there is little case law addressing reptile theory directly, there is law supporting the contention that the jury's role as fact finder requires the jurors to analyze the evidence presented, determine the credibility of the witnesses, and reach a decision on liability and damages for the specific case at bar. *See, e.g.*, Model Civ. Jury Instr. 3d Cir. 1.1, 1.5, 1.6, 1.7, 1.10, & 3.1. Furthermore, defense counsel can emphasize that a plaintiff has the burden to prove his or her claim based on the facts and evidence at issue in the case, and not based on mere speculation and conjecture. *See* Fed. R. Evid. 602 (requiring witness testimony to be based on personal knowledge). To that end, a jury should not be permitted to speculate about hypothetical injuries to anyone, particularly an unknown, unnamed person other than the plaintiff.

There are also constitutional grounds that support preclusion of such improper reptilian tactics, particularly if plaintiffs' counsel claim that such "evidence" is relevant to punitive damages. Indeed, the due process clause of the Fourteenth Amendment, which provides a check on punitive damages awards, forbids plaintiffs from suggesting at trial that other hypothetical, nonparty plaintiffs be considered. The due process clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). To ensure that a defendant is not deprived of that constitutional right, the United States Supreme Court established three guideposts under which all punitive damages awards must be analyzed: (1) the reprehensibility of the defendant's conduct; (2) the punitive-to-compensatory damages ratio; and (3) the civil penalties that are authorized for similar misconduct. *Id.* at 418 (citing *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Courts must "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the *plaintiff* and to the general damages recovered." *Id.* at 426 (emphasis added).

These cases require that the evidence presented to the jury must have a nexus to the plaintiff's injuries. In *State Farm*, the Supreme Court explicitly forbade counsel from arguing to the jury that a defendant should be punished based on harm to the community at large. It noted,

> A defendant should be punished for the conduct that harmed the Plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.
>
> *State Farm*, 538 U.S. at 423.

Similarly, in *Philip Morris USA v. Williams*, the Supreme Court held that a punitive damages award based on the jury's desire to punish the defendant for potentially harming other individuals in the community (not parties to the suit) violated the defendant's due process rights. 549 U.S. 346, 349, 353 (2007). It explained, "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge." *Id.* at 353–54. Furthermore, permitting punishment for poten-

tially injuring nonparty victims will force the jury to speculate. *Id.* at 354 ("How many victims are there? How seriously are they injured? Under what circumstances did injury occur?"). Critically, "[e]vidence of actual harm to nonparties" is relevant to reprehensibility because it "can help show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public." *Id.* at 355. However, "a jury cannot go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

In sum, defense attorneys can move in limine to preclude reptilian tactics by relying on law prohibiting references to hypothetical nonparties.

JUROR CONFUSION

Plaintiffs' attorneys often use reptilian tactics to confuse and mislead the jury regarding the proper legal standards that apply in any given case, which defense counsel can move to prevent before trial. Plaintiffs' attorneys may seek to introduce evidence of internal safety rules or standards, and even deposition testimony from corporate representatives that describe a more rigorous internal standard than the law requires. Such tactics improperly suggest that the defendant should be found liable because it violated its own internal safety protocols. However, a corporation's internal safety criteria may be more stringent than the applicable industry standards or the governing regulations, which provide the appropriate parameters for a jury to determine liability. Indeed, "liability is not predicated on a company's compliance with its own credos or rules; liability is instead predicated on the legal standards of the case." *In re Ethicon Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327, 2016 WL 4493685, at *3 (S.D. W.Va. Aug. 25, 2016). In *In re Tylenol (Acetaminophen) Marketing, Sales Practices, and Prod. Liab. Litig.*, a federal district court rejected an attempt by an expert witness to rely on the defendant's credo because it exceeded the applicable legal standards of care. MDL No. 2436, 2016 WL 807377, at *8 n.22 (E.D. Pa. March 2, 2016). The court in that case explained:

The defendants' own credo should not be held out as the legal standard by which it should conduct its affairs. *See Johnson v. Mountainside Hospital*, 239 N.J. Super. 312, 323 (App. Div. 1990) ("It was potentially misleading because it attempted to exalt the exhortatory statement in the by-laws of the Hospital into the legal standard for determining whether or not the defendant physicians committed malpractice. The relevant legal standard is defined by law.").

Plaintiffs' attorneys have also relied on overgeneralized safety rules as the threshold for proving a product-defect claim. For example, they may ask overgeneralized deposition questions, or argue before the jury that "a company should not disseminate a product that can put patients at risk." Attempting to ground their case in generalized "safety rules" that appeal to jurors' emotions and fears rather than the relevant legal standards is another reptilian tactic that courts should prevent. In seeking to preclude these arguments in their pretrial motions, defense counsel can rely on the above case law, and law within their jurisdiction that gives trial judges discretion to exclude evidence that will confuse the jury. *See, e.g.*, Fed. R. Evid. 403 (giving courts discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of juror confusion).

CHARACTER EVIDENCE

Plaintiffs' counsel often rely on the familiar "profits over safety" theme, which stems from basic reptile theory principles. Such statements target the reptilian portion of a juror's brain by creating a false sense that the defendant is driven solely by increasing profits and will sacrifice patient safety to make more money. Defense attorneys can assert in pretrial motions that such arguments amount to character evidence, which is typically inadmissible to prove liability under the Federal Rules of Evidence. *See* Fed. R. Evid. 404. Indeed, character evidence is not admissible to prove specific conduct, except when evidence of a person's character or trait of character is an element of a claim or defense. *See, e.g.*, *Am. Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Alaska 1982) (citing Alaska R. Evid. 404 & 405(b)) (holding that the trial court erred when it admitted evidence of the defendant's postaccident conduct and rejecting the argument in support of admission as an improper "attempt to use character evidence to prove specific conduct"). Particularly in product liability cases, a corporate defendant's character trait has no bearing on the plaintiff's claims and thus would only serve to confuse the jury and prejudice the defendant. *See, e.g.*, *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 784–86 (5th Cir. 2018); *In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, MDL No. 2545, 2017 WL 2313201, at *2–3 (N.D. Ill. May 29, 2017) (citing Fed. R. Evid. 404(b)) (excluding "evidence of [the defendant's] alleged improper conduct with respect to . . . another of its drugs [as] inadmissible evidence of [the defendant's] corporate character").

LITIGATION RISK MITIGATION: A CALL TO IN-HOUSE COUNSEL

In-house counsel have a unique opportunity to prevent plaintiffs' attorneys from relying on reptilian arguments, particularly those that attempt to transform internal corporate policies and procedures, sales training materials, and other product-related materials into evidence of the applicable legal standards. Long before litigation ensues, in-house counsel have the ability to advise their business clients to track industry standards and governing regulations as closely as possible in those internal documents.
If there is a desire to create more stringent requirements, as often occurs, language can be included to make clear that the company is going above and beyond what is required. Then, if litigation ensues, and despite defense counsel's efforts, a judge allows the plaintiff's counsel to rely on these documents to make reptilian arguments, defense counsel can rely on the very same evidence to assert that the company does care about safety and wants to do the right thing to help people. Having these types of statements in the documents themselves lends credibility to defense counsel's arguments, enabling jurors to feel safe, reject their emotional response, and use the intelligent portion of their brains to decide the case—hopefully in favor of the defendant.

O'TOOLE'S COUCH:

Growing up the word "vacation" to me was synonymous with "First Avenue in Manasquan." My parents would always rent a bungalow for the first two weeks of June. (We rented in June because it was less money.) These vacations started when I was about 5 years old. Throughout the years we rented at least 10 different houses. These less-than-spacious bungalows accommodated my parents, my brother and me, and my Aunt Jean. Let's not forget that Jean was accompanied by her parakeet, Perky. (Throughout Jean's lifetime she owned 8 parakeets, all named Perky.) She was a bit eccentric, but was a fabulous cook and baker, and loved by us all. Many years later, my parents finally bought a house on First Avenue; so, we are renters no more!

Growing up, the only time I left the State of New Jersey was to attend an occasional Yankees' game, and ultimately to attend Villanova University. My big adventure was when I was graduating from college. Another senior arranged a celebration trip to Puerto Rico. As I recall, the cost of the trip was about $500, which was all inclusive. (You can only imagine the high caliber of these accommodations.) The "Flamboyant" (really – that was the name,) was one step up from the street, but to our well-traveled gang it was the "Ritz.") It might have been a magnificent vacation, but unfortunately, I ran into some bad luck when I fell asleep poolside after enjoying several Margaritas. Of course, I didn't have a shirt on and my Irish skin received third-degree burns. I had to go to the San Juan Hospital, not particularly clean or sanitary, to say the least. I spent the duration of my vacation watching Johnny Carson in Spanish. I also met a guy named Paco who convinced me to play gin rummy with him for ten cents a point. That doesn't sound like much, but against a really good player it quickly added up to a $50 loss, which was a lot of money for me in 1968.

Fast forward to 1986 when Sunny and I took a seven-day cruise to the Caribbean. (This was totally Sunny's idea because she wanted a vacation, other than in a bungalow with my mother and our five kids. She was so demanding!) Once again, we couldn't resist a bargain. Our accommodations were very near the boiler room. Also, when I stood in the middle of our "State Room" I could reach out my arms and touch both walls. Of course, there were no portholes in our bargain cabin, so if you didn't have the lights on, you were in total darkness 24 hours a day. A good thing was, if you didn't remember where your room was, you could just follow the signs for the boiler room. We did have a nice table for dinner and enjoyed sharing stories with the other travelers. I convinced them that I was a New York City Homicide Detective. At the end of the trip I confided in them that this was a total fabrication, but when we got home one of the couples emailed us and asked whether I was or wasn't a cop.

WE'RE ON OUR WAY!

Sunny and I have now been married 31 years and our vacations have finally taken a step up. Our two most frequently visited destinations have been St. Thomas and Ireland. Frenchman's Reef in St. Thomas was made famous by the trial lawyer/author Edward Bennett Williams, which attracted me to it. Since we were not too big on tours, a resort with multiple restaurants, bars, pools and live entertainment was perfect for us. Our only excursion away from the resort was a ferry ride across the harbor to the island capital of Charlotte Amalie. Lots of little shops, quaint restaurants and much activity everywhere you looked satisfied our day out. Sadly, Hurricane Sandy destroyed Frenchman's Reef and it was never rebuilt.

Ireland is by far our number one vacation destination. We have stayed at several castles, including Dromoland and Ashford, both breathtaking. Believe me, you cannot head up the driveway to these castle entrances without being awed! We have had the good fortune to travel with the same group (most of whom are our friends and relatives,) for 25 years. The biggest attraction in Ireland is the people. They are absolutely "grand," and can pour a great pint of Guinness!

Over the years, we have extended our travels to include dog-sledding in Alaska; standing on top of the Eifel Tower in Paris; walking the cobblestone streets of Copenhagen; taking in the sights of Switzerland (which included a cable car ride up the Matterhorn,) and touring Scotland and Holland; to name a few.

This past summer we scheduled a family cruise for 17 people aboard Royal Caribbean's newest and largest ship. This included Grandma and Grandpa, our adult children and our grandchildren of various ages. It was a miracle to get everyone's schedules in-sync; and to book the appropriate rooms (doubles, triples, adjoining, balconies or not) dinner reservations and anticipated excursions. The planning was endless, and here the accolades totally go to Sunny. This was not an easy task. But wait – The Corona Virus hit and that was the end of our much-anticipated vacation. However, we're not giving up. We don't know when, but we will be taking this family vacation.

For our next trip Sunny really wants to go on an African Safari. This is not on my "must do" list. Imagine the site of me in a loincloth!

Now back to our roots. Our summers are still spent in Manasquan, New Jersey, watching the sunrise over the ocean and the seagulls lining the water's edge. A room on the second floor is filled with collage photos of our various vacations. We call this the "Travel Room." Our goal is to have the walls completely filled with these photos before our traveling days end.

We hope some of these vacation descriptions will tempt you to venture out. Until then, stay safe and healthy.

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UPCOMING EVENTS

NOVEMBER 11, 2020

WOMEN & THE LAW
9:30 a.m. – 12:30 p.m.

NOVEMBER 24, 2020

NJDA/ICNJ AUTO LIABILITY
9:00 a.m. – 12:00 p.m.

DECEMBER 11, 2020

CIVIL TRIAL SEMINAR
9:00 a.m. – 12:00 p.m.