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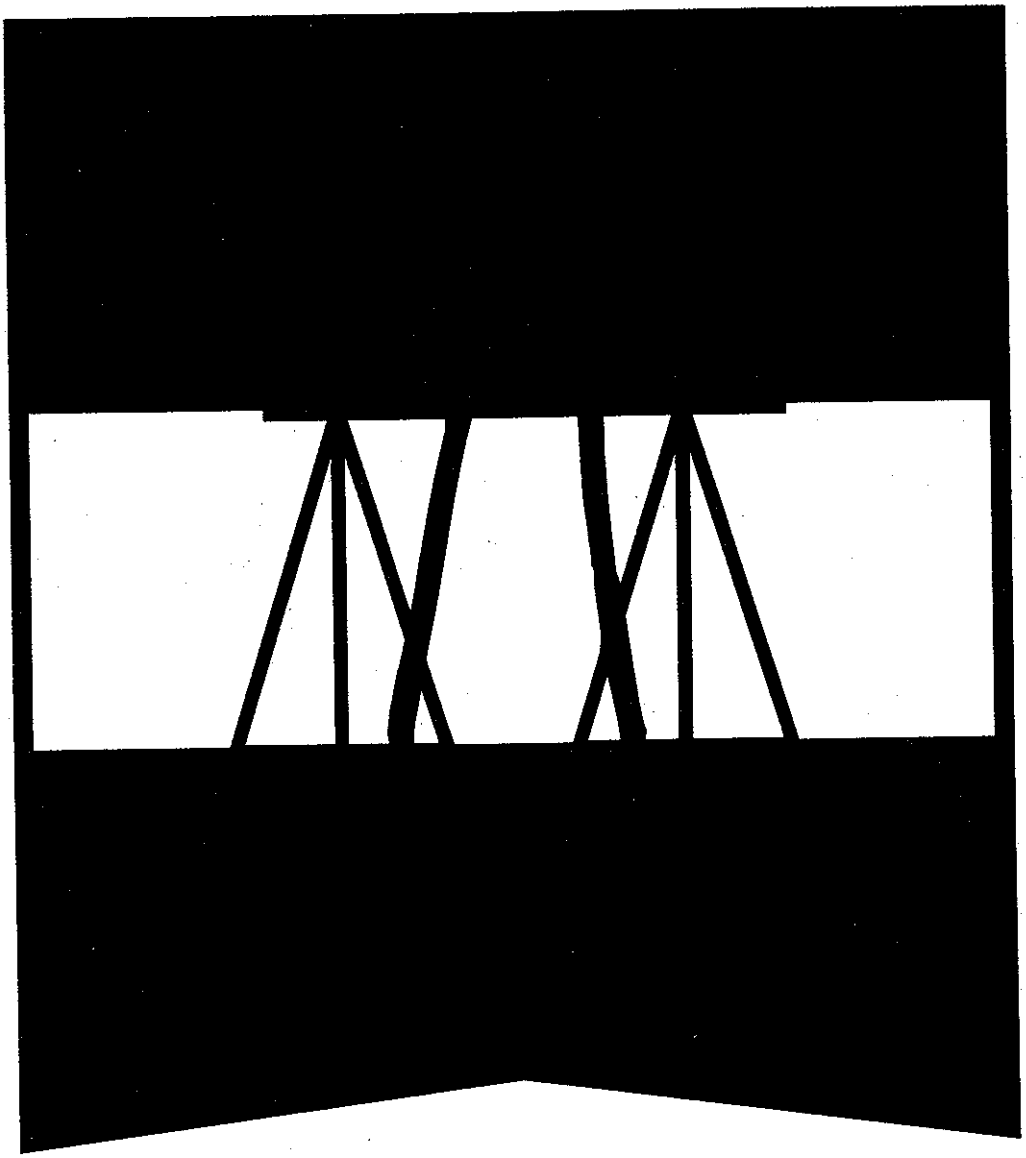

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1997-2000
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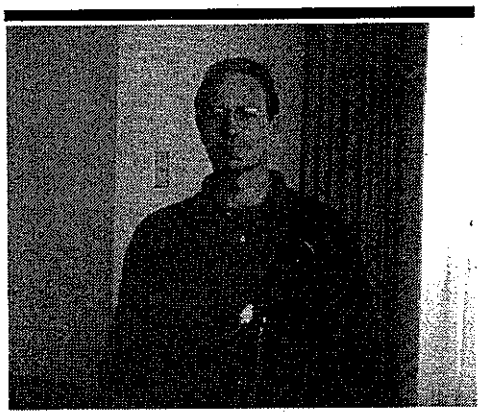
FALL SEMINAR DISCUSSES NEW JERSEY AUTO INSURANCE LAW

Bruce E. Helies, Esq.

During the October 24, 1998 N.J.D.A. seminar, the Association was fortunate to have Daniel J. Pomeroy, Esquire, a co-author of the New Jersey Auto Insurance Law, as a guest lecturer to discuss the present status of various issues involving auto insurance law in the State of New Jersey.

The seminar discussed that the cases of New Jersey Manufacturers Insurance Company v. Breen, 153 N.J. 424 (1998); Magnifico v. Rutgers Casualty Insurance Company, 153 N.J. 406 (1998) and Grant v. Amica Mutual Insurance Company, 153 N.J. 433 (1998) have essentially reversed the position adopted by the Supreme Court in Aubrey v. Harleysville Insurance Company, 140 N.J. 397 (1995). It would appear that in the three above referenced consolidated cases the Court, while doing its best to dodge the issue, unquestionably dealt a death blow to the 1995 mandate of Aubrey. Based upon the recent cases the following principles are now clear: (1) in seeking to gauge whether UIM coverage exists in a given situation, the prospective UIM claimant must compare the policy he/she "holds" with the policy insuring the tortfeasor; only where the UIM policy so held contains a limit greater than the liability limit held by the tortfeasor, does a UIM claim exist; (2) for the purposes of the standard ISO UM/UIM endorsement, and N.J.S.A. 17:28-1.1 (e) (and its use of the word held in this context) a prospective UIM claimant "holds" any policy that lists them as an insured, regardless of their status as an insured; (3) any policy insuring a prospective UIM claimant that also passes the threshold analysis when applied to the tortfeasor's liability policy is available for recovery subject to N.J.S.A. 17:28-1.1(c), and the "other insurance" provision contained with the standard endorsement; (4) with the standard "other insurance" clause contained in most ISO policies the UIM coverage insuring the host vehicle will normally provide primary insurance with any UIM coverage insuring other occupants of the vehicle providing excess coverage pursuant to N.J.S.A. 17:28-1.1(c) the highest applicable policy serving as a cap on any monies available to the injured UIM claimant; and (5) given the optional nature of the UIM coverage, insurers may limit the availability of the coverage to more narrow classes of insureds than are presently set forth in the standard ISO endorsement.

In applying the five referenced precepts, to the Magnifico case, provides an illustration of the present status of the law. The plaintiffs in Magnifico were passengers in a host vehicle afforded UIM coverage in the amount of $250,000.00 by CSC Insurance Company. The Magnifico's had their own coverage with Rutgers Casualty in the amount of $100,000.00. The tortfeasor insured by State Farm had $25,000.00 of liability coverage. The CSC and Rutgers Casualty "other insurance" clauses were identical to the extent that each provided that any other coverage would be excess for incidents occurring in vehicles not owned by the named insured and that in other respects the coverage would be pro-rata. The Supreme Court in Magnifico first decided that the claimants would not be limited to UIM



Daniel J. Pomeroy, Esq.

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FALL SEMINAR

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recovery capped by the limits of its own policy and held that the claimants could recover up to the $250,000.00 provided by CSC as the carrier for the host vehicle. The Supreme Court ruled that the policy of the host vehicle was one that was "held" by Magnifico as a permissive occupant of the host vehicle. The Supreme Court further held that since the "other insurance clause" of the Rutgers Casualty policy clearly indicates that it is excess with regard to incidents occurring in non-owned vehicles, Magnifico's first recovery would be from the total policy limits of CSC. The Court ruled, however, her recovery was capped by the higher limit and thus released the Rutgers Casualty coverage from exposure.

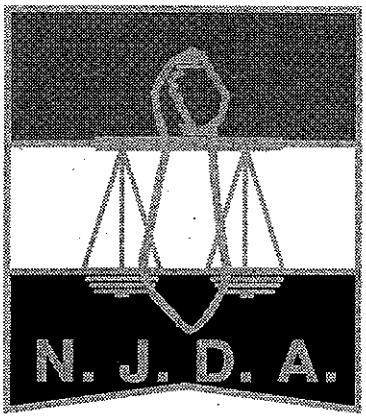
The Court also held that the 1996 insurance agreement on file with the Department of Insurance allows insurers to limit recovery in underinsured claims to the highest applicable limit of liability coverage under the policy in which the claimant is a named insured. Thus, the Supreme Court has provided insurers with the right to reduce their exposure with regard to UIM coverage in situations similar to Magnifico.

Likewise, in New Jersey Manufacturers Insurance Company v. Breen (supra), the Supreme Court ruled that Breen could obtain uninsured motorist coverage from the policy covering a vehicle owned by the unincorporated business of his parents since Breen was a resident relative of his parent's household. Coverage on that policy was not reduced by the mere fact that Breen himself had opted for only $15,000.00 of liability coverage on his own vehicle. The Supreme Court in Grant applied the same reasoning allowing the plaintiff to reach the UIM coverage on the policy of his brother under circumstances where Grant was a resident relative in his brother's household even where the Grant vehicle and the tortfeasor's vehicle had equal coverage and technically the tortfeasor vehicle was therefore not underinsured.

In other related areas, it was discussed that Einweichter v. Marciano 311 N.J. Super. 492 (App. Div. 1998) has held that per quod claims are in fact covered by the standard ISO UM/UIM endorsements which permit recovery "to any person who is legally entitled to a recovery because of bodily injury sustained by an insured".

In DeAlmedia v. General Accident Insurance Company 314 N.J. Super. 312 (App. Div. 1998) the Court held that a claimant satisfied the definition of an occupant of his employer's vehicle when he was injured while outside of the vehicle loading barrier cones onto the vehicle from the highway.

Concerning the ability to appeal from UIM arbitrations, the matter of Barnett v. Prudential Property & Casualty Insurance Company 304 N.J. Super. 573 (App. Div.) Cert. Denied 154 N.J. 610 (1998), deals with a case where an arbitration award in the amount of $100,000.00 was entered in the favor of the claimant. The award was less than the maximum optional UIM limits set forth in N.J.S.A. 17:28-1.1(b) and thus the Appellate Division panel headed by Judge Pressler found that the "de novo" language in the defendant's policy was not applicable. It would appear that a close reading of this case would indicate that it incorrectly defines N.J.S.A. 17:28-1.1 since the New Jersey Financial Responsibility Law is not codified in that statute but rather is codified under N.J.S.A. 39:6A-23 et seq. It is felt that the maximum and minimum coverages required under the New Jersey Financial Responsibility Law as set forth in Title 39 should have controlled this decision and the defendant carrier should have been allowed to de novo the award.



New Jersey Defense Association

As a service to the membership the NJDA is interested in helping members publish their trial and other successes in area newspapers. New Jersey Lawyer, The New Jersey Law Journal, Jury Verdict Review and Analysis, and New Jersey Defense. Below for your convenience is a form for making such a submission. Please also consider submitting a brief biographical sketch along with a press release photo. By submitting this form you are certifying to the veracity of the information herein and authorize the NJDA to release this information to the newspapers listed below and for publication in "New Jersey Defense".

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PRESIDENT'S MESSAGE

Charles P. Hopkins, II, Esq.

As the Holiday Season winds down it is perhaps an opportune time to reflect on the blessings we enjoy and the gifts we have been given. We all know of the benefits of belonging to an organization such as ours. We know of the seminars, the access to publications such as New Jersey Defense, the Medical Directory, Committee Activities, the Annual Convention, etc. What is sometimes overlooked, however, is one of the most important, less tangible, aspects, of membership. That is the camaraderie enjoyed by close association with fellow members of the Defense Practice.

It is with great frequency that fellow NJDA members seeking help and advice on a myriad of issues contact me, and other members of the Board. It is with equal frequency that there are great numbers of their NJDA colleagues who are more than willing to give of their time to help in any way they can.

Many of our members good works go but little noticed in this regard. The time and energies put into the Rookie Seminar alone is but one example of this. Here, year after year, experienced NJDA Attorneys from all over the State give up their valuable time pro bono to help teach and instruct our younger members on the subtleties of the defense practice.

Each year the Organization has provided a scholarship to a deserving law student. In giving this scholarship the Scholarship Committee labors long and hard to review applicants and to make their best decision in rendering the award.

In the spirit of encouraging this shared camaraderie this year we are sponsoring the Mid Winter Festival Dinner at the PNC Arts Center. This promises to be a time when members can get together in a relaxed atmosphere without a formal agenda. I sincerely hope you can attend.

In closing, on behalf of the Officers, Board of Directors, and myself, all the best to your and your families for a Happy Holiday Season and a prosperous and Healthful New Year.

Chuck Hopkins

President – New Jersey Defense Association

CONTRACTUAL INDEMNITY FOR PRODUCT MANUFACTURERS

Steven A. Karg, Esq.

In the present environment of inflated jury awards, product manufacturers must search for ways to reduce their products liability risk. Although the reduction of product defects is obviously a manufacturer's best risk reduction strategy, shifting the products liability risk to others can be an additional strategy in a manufacturer's overall risk reduction plan. After all, even the most diligent of manufacturers cannot protect against unknown defects.

Manufacturers can transfer their risk to others by obtaining products liability insurance, but they can also shift the risk by obtaining contractual indemnities from their financially sound product purchasers.[1] Although contractual indemnities may not be practical for all situations, such as those involving the direct sale of consumer products to an ultimate consumer[2], they can be useful where a sophisticated commercial purchaser is willing to accept the risk due to the prevailing market or need. Of course, prior to asking for a contractual indemnity, your client must first determine that the positive benefits of an indemnity outweigh the potential negative impact on customer relationships and sales.

Some manufacturers of sophisticated heavy equipment demand indemnities from purchasers because the equipment is manufactured to purchaser specification or because the equipment may pose particular dangers which require keen supervision and expertise. In the case of integrated products, a manufacturer who sells a component part to another manufacturer for integration into its customer's product might require an indemnity from its manufacturer/ customer. In many situations, a purchaser's use of a product is out of the manufacturer's control. Sometimes a purchaser is willing to accept the risk due to prevailing market conditions, its need for the product, its desire for an exclusive distributorship, or an advantageous price.[3] Here, a contractual indemnity can be an effective tool for reducing products liability exposure.

New Jersey courts have approved indemnity provisions in contracts between equipment manufacturers and their buyers, even where the provisions shift the risk for the products liability of the manufacturer to the buyer.[4] In *Berry v. V. Ponte & Sons*,[5] the manufacturer/seller sold an industrial machine to a buyer pursuant to a contract which included an indemnification provision. The provision required the buyer to indemnify the manufacturer from liability "arising from injury or damage to property or person, caused in any manner by the possession, use or operation" of the machine. Plaintiff, who was employed by the buyer, lost an arm while using the machine and brought suit against the manufacturer for its products liability. After the suit settled, the manufacturer sought to enforce its rights under the indemnity provision against the buyer/employer. Despite the buyer's arguments that the indemnity provision was unenforceable, the trial court granted indemnity to the manufacturer.

On appeal, the Appellate Division affirmed the trial court's decision and observed that:

> It has long been the law of this State that in the commercial setting, where there is potential for multi-party liability based on multi-party participation in an overall transactional chain, the parties in that chain are free to allocate among themselves, as a matter of business convenience or necessity, the overall insurance burden in respect of coverage for claims of third

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parties arising out of the transaction as a whole. The technique for such allocation is, of course, indemnification agreements, and such indemnification agreements may, provided the parties so agree, indemnify one in respect to his own negligence. We perceive no reason why this principle should not apply to equipment sales transactions as well as to building construction contracts, the typical context in which contractual indemnification issues are raised. Such an indemnification provision does not, in either situation, abridge the right of the claimant either to sue all who may be separately liable to him or to ultimately recover his damages. It merely determines which of the potentially responsible parties defends and pays.

Nor do we find any offense to public policy in the enforcement of a broad and all-inclusive indemnity agreement in the products liability field where liability of the indemnitee is predicated on strict liability in tort. We are unpersuaded by the suggestion that manufacturers will be deterred from fabricating safe products because they can shift to another the financial consequences of liability for injury. *** We perceive, moreover, no essential difference, in terms of public policy, between permitting a manufacturer to indemnify himself and permitting the general contractor of a construction project to do so. *** Furthermore, if ordinary negligence, which connotes a modicum of active culpability on the part of the tortfeasor, may be the subject of an indemnification, we are satisfied, *a fortiori*, that strict liability in tort, which does not so connote, may also be subject to indemnification.[6]

Under *Berry*, at least in some situations in New Jersey, manufacturers can enforce contractual indemnities for their own products liability against

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their purchasers.

A manufacturer can even enforce an express indemnity agreement against a purchaser for a product-related workplace injury to the purchaser's employee, [7] notwithstanding the workers' compensation bar.[8] In *Ramos v. Browning Ferris Industries,*[9] the Supreme Court stated that "Nothing in the [Workers' Compensation] Act precludes an employer from assuming a contractual duty to indemnify a third party through an express agreement."[10]

There has been some debate over the level of "express agreement" required by *Ramos*. In one unreported case, a seller proposed to sell its product to a buyer under its standard terms and conditions of sale, which contained an unambiguous provision requiring indemnification from the buyer. The buyer accepted the seller's proposal by delivering an unconditional purchase order. When the buyer's employee was later killed while using the product and his estate brought suit, the buyer claimed that it lacked any knowledge that it might be obligated to indemnify the manufacturer for the death of its employee. The trial court, citing *Ramos*[11], refused to enforce the indemnity clause against the buyer/employer only because it found a lack of clear and convincing evidence that the buyer had actual knowledge of its obligation to indemnify.[12] In essence, the trial court found that the circumstances surrounding the formation of the contract between the parties were insufficient to rise to the level of the "express agreement" required by *Ramos*.

Although the *Ramos* Court required that contractual indemnities be expressed in unequivocal terms, it did not expressly require a showing of anything more than an express and otherwise binding contract of indemnity. There is no language in *Ramos* exempting parties to an indemnity contract from the general duties to read and inquire as to the terms of the contract. Absent other factors such as unconscionability or formation problems, express contractual indemnities should be enforceable under *Ramos*.

Given the room for debate over the *Ramos* express agreement requirement, a conservative manufacturer should carefully negotiate and specifically bargain for an indemnity provision, and then carefully document the buyer's acceptance of the contract with a proper signature affixed to the actual document containing the indemnity clause. Where this level of negotiation and formation is not practical, a manufacturer might still prevail in litigation over such an indemnity with an otherwise binding, express and unequivocal contract containing the indemnity, even where the contract was created as the result of an exchange of forms.[13] This appears to be consistent with the intent of the Supreme Court when it wrote the *Ramos* opinion. Because this issue remains unsettled formally, manufacturers who seek indemnities should always use the more conservative approach.

In addition to carefully forming indemnity contracts, manufacturers should carefully draft the language comprising them. "Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee. Thus, a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms."[14]

Considering the unusual[15] case here of a manufacturer seeking indemnity from its customer for the manufacturer's own products liability, manufacturers must draft indemnity clauses with extreme clarity. For example, equipment manufacturers should be careful to include language expressly stating indemnity coverage for the manufacturer's own products liability and/or negligence whether the injuries or damages

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resulted from the sole actions of the manufacturer, from the actions of the manufacturer combined with others, or from the actions of others.[16] Indemnity provisions should further expressly require indemnity for the specific types of actions that may result in the manufacturer's liability including, but not limited to, liability arising from injury or damage to property or person, caused in any manner by the training, instruction, warnings, possession, use, control, sale, transport, design, manufacture, repair, modification, maintenance or operation relative to or of the equipment.[17] If the indemnity is to cover workplace injuries, it is also suggested that the provision specifically provide indemnity for claims of any nature whatsoever by the job site workers, employees, agents, or contractors of the ultimate buyer, among others. Finally, if the indemnity will cover attorneys fees and defense costs for the underlying products liability defense and/or the enforcement of the indemnity, the provision should clearly indicate such obligations.

Once a manufacturer is given notice of a pending products liability action, it should immediately notify its contractual indemnitor. The indemnitor may volunteer a defense and admit the obligation to indemnify the manufacturer. Moreover, an indemnitor who is provided with adequate notice of an action and who fails to defend the indemnitee cannot later challenge the reasonableness of the resulting damages.[18] Therefore, advance notice to the indemnitor is important.

Although contractual indemnities cannot help in every situation, they can help shift the risk and responsibility for products liability to others in the appropriate situation. To help clients successfully use contractual indemnities, counsel must carefully guide them through all of the considerations and steps to implement them, such as an analysis of potential customer reaction and suitability, the drafting of enforceable clauses with appropriate coverages, the formation of binding contracts, and the enforcement of the indemnity clauses. If your client is careful, it can start to reap the benefits of shifted risk.

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By Steven A. Karg
NORRIS, McLAUGHLIN & MARCUS
A Professional Corporation
722 Rt. 202-206
Bridgewater, N.J. 08807
Voice (908) 722-0700
Fax (908) 722-0755
E-Mail SAKARG@NMMLAW.COM

Endnotes

1 The soundness of an indemnity can result from the financial health of the indemnitor or from the indemnitor's procurement of special insurance coverage. It should be noted that many insurance policies exclude coverage for contractual liabilities, but such coverage can be added to most. A manufacturer may wish to confirm the soundness of any indemnity through inquiry.

2 Although a manufacturer may not successfully enforce a contractual indemnity against a consumer purchaser of a consumer product, a manufacturer could enforce a contractual indemnity obtained from an intermediate commercial distributor to whom it first sold the product.

3 Indemnities are worth bargaining for since they can reduce expensive insurance premiums.

4 *Berry v. V. Ponte & Sons*, 166 N.J. Super. 513, 517-8 (App. Div. 1979), *certif. den.*, 81 N.J. 271 (1979).

5 *Id.*

6 *Id.* at 517-518 (multiple citations omitted).

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7 *Ramos v. Browning Ferris Industries*, 103 N.J. 177 (1986).

8 *N.J.S.A.* 34:15-8.

9 103 N.J. 177 (1986)

10 *Id.* at 191.

11 The trial court stated its opinion from the bench after oral argument and the opinion was never written or published.

12 For reasons unrelated to the merits, the manufacturer did not appeal the trial court decision.

13 Subject of course to other contract considerations such as unconscionability, *N.J.S.A.* 12A:2-302, and the battle of the forms. *See e.g. Matteo v. Winslow Township*, A-3037-96T5 (N.J. App. Div. May 22, 1998)(enforcing indemnity language found in a bid specification which was incorporated into a contract by reference); *Cozzi v. Owens Corning Fiber Glass Corp.*, 63 N.J.Super. 117 (App.Div. 1960)(enforcing an indemnity provision between a property owner ("indemnitee") and a paving contractor ("indemnitor") where the indemnity clause was "ARTICLE 20" of the "Terms and Conditions for Purchase Order Services" on the back of the indemnitee's form "Purchase Order for Services"); *Earl M. Jorgensen Co.v. Mark Construction, Inc.*, 56 Haw. 466, 540 P.2d 978 (1975)(in a UCC case, the Court found that a *form* quotation containing a limitation of remedy provision, which was combined among other provisions on the reverse side of the form, and which the offeree responded to with a purchase order not containing the same term, formed a contract between the parties and further found that enforcement of the clause was not unconscionable); *Willow Grove Ice Rink, Inc. v. Hartford Steam Boiler Inspection and Insurance Company*, 1994 WL 836328 (Pa.Com.Pl. 1994)(in a business transaction setting, "procedural unfairness cannot be established in agreements between businessmen"). *See also N.J.S.A.* 12A:2-204(1)("A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."); *N.J. S.A.* 12A:2-206(1)(a)("an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances"); *First Valley Leasing, Inc. v. Goushy*, 795 F.Supp. 693, 696-7 (D.N.J. 1992) (courts evaluate the parties' objective intent as manifested by their conduct to determine if the parties intended to make a contract).

14 *Ramos v. Browning Ferris Industries*, 103 N.J. 177, 191 (1986)(citations omitted).

15 A contractual indemnity running from a distributor to a manufacturer in a products liability case is contrary to the common law right of a downstream distributor to indemnity from upstream distributors and the manufacturer. *Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505 (1989). *See also N.J.S.A.* 2A:58C-9 (relieving distributors from strict liability claims when 1) the correct identity of the manufacturer is made known; 2) the manufacturer has a presence within the United States; 3) the manufacturer is generally not judgment proof; and 4) the distributor was not in a position to reasonably know of the defect and did not have any role in creating it).

16 It should be noted that indemnities in connection with certain improvements to real property or certain services provided by architects, engineers or surveyors are expressly limited in nature by *N.J.S.A.* 2A:40A-1 & 2.

17 To reduce the potential for being construed as limiting the scope of the indemnity by providing specific instances requiring indemnity but not

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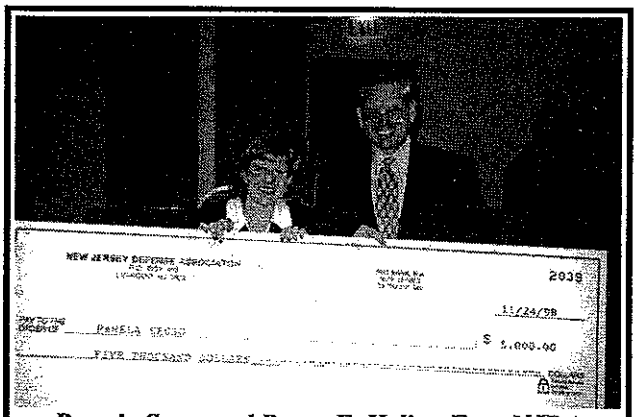
every possible instance, the draftsperson might consider adding language such as "The listing of specific instances requiring indemnity in this agreement shall not in any manner limit the scope of this indemnity and is not intended to be an exhaustive listing of all instances requiring indemnity. The parties agree that the language used herein shall be accorded the broadest possible interpretation in favor of indemnity."

18 *N.J.R.E.* 803(c)(26)(if the defendant in an indemnity action had notice of and opportunity to defend the first action, the resulting judgment from the first action is conclusive evidence in the later indemnity action as to the liability of the judgment debtor, the facts upon which the judgment is based, and the reasonableness of the damages recovered).

NEW JERSEY DEFENSE ASSOCIATION AWARDS $5,000 FRED W. JUNG, JR.,ESQ. SCHOLARSHIP AWARD TO RUTGERS UNIVERSITY SCHOOL OF LAW - CAMDEN STUDENT, PAMELA SESSO



Pamela Sesso and Bruce E. Helies, Esq., NJDA President Elect

A $5,000.00 scholarship was awarded to Pamela Sesso, a third year law student at Rutgers University School of Law - Camden, by the New Jersey Defense Association at its recent educational seminar November 24, 1998 held at the Brunswick Hilton & Towers, East Brunswick, NJ.

Ms. Sesso was selected from among numerous other candidates who were at the top of their respective law school classes. The scholarship criteria limited the award to second and third year New Jersey law school students whose academic, community and other service, and character ranked them at the tops of their classes.

Ms. Sesso received her B.A. from Lafayette College in 1996 and while attending law school has been employed part-time as a law clerk. Upon graduation in May of 1999, she will serve as a judicial clerk to The Honorable Jack L. Lintner, Superior Court of New Jersey, Middlesex County.

EMPLOYER DEFENSES FURTHER ERODED

Bruce E. Helies, Esq.

Recent Appellate Division decision of Mabee v. Borden, Inc. (A-1071-97T2F) follows closely on the heels of the Supreme Court decision in Schmidt v. Smith, 155 N.J. 44 (1998) to indicate a trend in the Court to further erode employer defenses.

In Mabee the plaintiff sued her employer, Borden Clam Products, Inc. for injuries sustained when her hand was pulled into the rollers of a machine owned by her employer while she was cleaning it. It appears the employer had disabled various safety mechanisms provided by the manufacturer. One device had been totally removed and a second was rendered useless by a by-pass mechanism. It appears the plaintiff was observed by a supervisor working in the area of her injury, shortly before the incident, and with knowledge that the safety devices had been rendered ineffective.

In her lawsuit against her employer and other defendants, the plaintiff alleged that the actions of her employer were "substantially certain to cause injury" and thus fell within the intentional wrong exception to the Worker's Compensation Act, N.J.S.A. 34:15-8. It appears that the additional safety devices which were now eradicated by the employer had originally been installed because another worker had sustained a similar injury previously.

Evidence submitted in the case indicated that because excess glue accumulated between the machines moving the parts it was necessary to clean the machine approximately 4 to 6 times during a single 8 hour shift. Borden representatives had complained that to shut off the machine during each cleaning would require the machine to be closed for approximately 1 hour out of every 8 hour shift. To alleviate the slow down, Borden inserted a by-pass switch on the machine which, when it was in by-pass position, would allow the machine to continue to operate while an employee was attempting to clean out the accumulated glue. The machine was apparently in that configuration when plaintiff sustained her injury. Additional facts indicated that the Borden plant was understaffed and had suffered substantial personnel turnover and that prior to plaintiff's accident there was workplace pressure and a management endorsed "hurry up" policy in place to improve production.

Plaintiff sued Borden alleging that Borden had substantially altered and modified the safety devices and mechanisms of the machine for the purposes of increasing production and thereby manifested a deliberate intention to expose the plaintiff to serious injury. A strict liability claim is also advanced against the manufacturer. The trial court denied the employer's motion for summary judgment and further granted the plaintiff's summary judgment on liability concluding as a matter of law that there was a virtual certainty or at least a substantial certainty that plaintiff's incident would occur especially since a prior similar incident had occurred.

In reviewing the trial court decision, the Appellate Division affirmed denial of Borden's motion for summary judgment but reversed the order granting the plaintiff summary judgment. The Appellate Division found the issue of "intent" was a fact question to be decided by a jury. The Court noted that since it's decision in Millison v. E.I. DuPont, 101 N.J. 161 (1985) no other case has found an employee's allegations of intentional conduct on the part of the employer to be sufficiently flagrant so as to pierce the exclusivity bar provided by the Worker's Compensation Act. In Marinelli v. Mitts Merrill, 303 N.J. Super. 61 (App. Div. 1997), the Court had ruled that an employer that had failed to provide material safety

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data sheets indicating the explosive nature of hair spray aerosol cans to employees who were assigned the responsibility to dispose of those cans was not sufficient activity to establish an intentional wrong exception; although there was a ruling that the injury was caused by gross negligence and an abysmal lack of concern for the safety of the employees. In Bustamante v. Tuliano, 248 N.J. Super. 492, the negligence of a co-worker was ruled not to be sufficient to go to a jury where a police officer was shot in the eye by a fellow officer during a training session. In Stephenson v. R.A. Jones & Co., Inc., 103 N.J. 194 (1986) the Supreme Court ruled that in circumstances where a manufacturer had sent a safety guard to the employer urging that it be installed, the employer's failure to install the guard, although bespeaking negligence, did not rise to the level of activity sufficient to remove the act from the immunity provided by the Worker's Compensation Act.

The Appellate Division in Mabee rejected plaintiff's argument that alteration or removal of a safety device presented a per se prima facie case of intentional wrong and held that product alteration in a workplace scenario is to be examined on a case by case basis. This examination is to be tempered by the Millison caution that the intentional wrong exception is to be applied narrowly in order to advance the goals of the Worker's Compensation Act. Further, the Court noted that in Millison, it was noted that occupational diseases were included in the Worker's Compensation Act and thus the legislature must have considered the anticipation that workers could be injured as a result of exposure to toxic products. The Court in Mabee indicated that it could not rule out that the legislature in its wisdom did not anticipate within the confines of the Worker's Compensation Act that workers could be exposed to injury as a result of employers removing guards from manufacturing machines for the purposes of enhancing production.

The Court concluded, therefore, that there was not sufficient evidence to demonstrate that Borden had committed an intentional wrong as a matter of law and held that the issue was to be submitted to a jury.

The Mabee case was resolved by settlement and thus fades into judicial history without providing us with the benefit of a final answer to the question that it posed.

The lesson we do learn from this case, however, is that on an ever increasing basis it would appear as though employers could be named as direct defendants by employees under similar circumstances or most probably identified as third party defendants by product liability manufacturers

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EMPLOYER DEFENSES

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wishing to assert an additional affirmative defense of their products before a jury at the time of trial. Further, there is no indication that the concept of impleading an employer could not be carried over into construction litigation where plaintiff employees of sub-contractors or general contractors as third party plaintiffs could be allowed to implead sub-contractor employers on theories that the employers failure to provide their employees with the appropriate safety devices or conditions mandated by OSHA. Historically, employers, particularly in construction accidents, have been impleaded under theories of contractual indemnification for purposes of ascertaining whether they were negligent to a degree sufficient to trigger indemnification agreements. Of further interest is the question of where the employer would seek defense and indemnity for such claims. It appears a CGL carrier could invoke the employee exclusion of its policy in refusing to defend and/or indemnify while at the same time the compensation carrier could arguably invoke the policy consideration that it should not be compelled to defend and indemnify a claim that by definition had to involve an intentional act. In Schmidt supra, the Supreme Court ruled that the employer was entitled to a defense of the alleged intentional act of its employee since its liability was vicarious and not direct. Perhaps an employer under circumstances as in the Mabee case, could be entitled to a defense and indemnification under circumstances where alteration of safety guards on one of its machines was accomplished by an employee without employer approval. Although answers are not yet available, it appears clear that this area of the law is one that is burgeoning and deserves our close attention relative to subsequent developments.

NJDA e-mail address:
njdaemail@aol.com

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ASSOCIATION HOLDS PRODUCTS LIABILITY SEMINAR

Bruce E. Helies, Esq.

The Association was fortunate in having Retired Presiding Judge of the Appellate Division, William A. Drier, present lecture to it on the Law of Products Liability in New Jersey on November 24, 1998. Retired Drier is now a partner with Norris, McLaughlin & Marcus, P.A.

Mr. Drier based his comments in part on his article "The Restatement (Third) of Torts: Products Liability and the New Jersey Law of Torts – Not Quite Perfect Together" ___ Rutgers Law Review —— (1998).

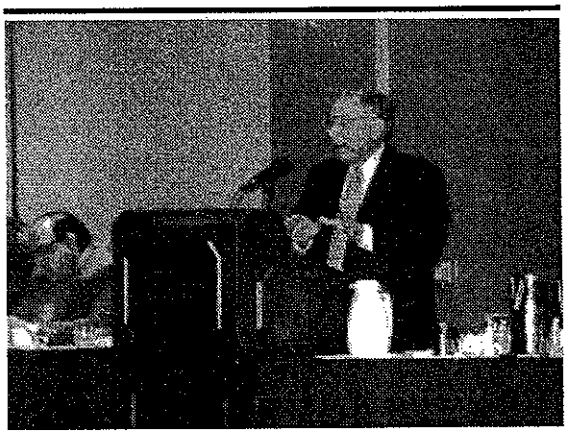
In discussing the relationship of the New Jersey Product Liability Statute, N.J.S.A. 2A:58c-1 et seq., and the Restatement of Torts: Products Liability (Third), it was discussed that New Jersey has three (3) absolute defenses to such claim whereas the Restatement has two, the state of the art and the unreasonably unsafe products defenses. New Jersey also has an obvious danger/ objective consumer expectation defense that is not present in the Restatement. The defense is codified that the N.J.S.A. 2A:58C-3A(2). Retired Judge Drier pointed out that in Warning Defect cases, New Jersey honors the heeding presumption which is not encompassed in the Restatement. Among the many additional items that were discussed by Retired Judge Drier were also the affirmative defenses available to distributors under N.J.S.A.2A:58C-8-9.

It was a privilege having Judge Drier appear before the Association. Now that he is in private practice it is hoped that he will be able to appear before us again.

As an additional part of the Products Liability Seminar, Robert Sachs, of Monte & Sachs, Sea Girt, New Jersey, provided those in attendance with an insightful discussion relative to the discoverability and admissibility of other similar accidents in products liability claims. Bob discussed the desire of plaintiff's counsel to get a history of prior incidents before the jury and the defense effort to preclude such evidence on the basis that it is unfairly prejudicial, misleading, confusing to the jury and causes undue delay.

In concluding the Esq., of the Harwood Lloyd law firm of Hackensack, New Jersey, who provided us from his vast experience in trying product liability cases, helpful hints and information as to the handling of issues of discovery in such cases to include the preparation for trial and utilization of experts.

The Association extends its thanks to all participants in this Seminar for their helpful information



Retired Presiding Judge of the Appellate Division
William A. Dreier

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$50 per person
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May 1 – 7th Annual Rookie Seminar

Annual Convention
June 24 - 27, 1999
The Grand Floridian - Walt Disney World, Florida
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Seventh Annual Rookie Seminar

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