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New Jersey Defense

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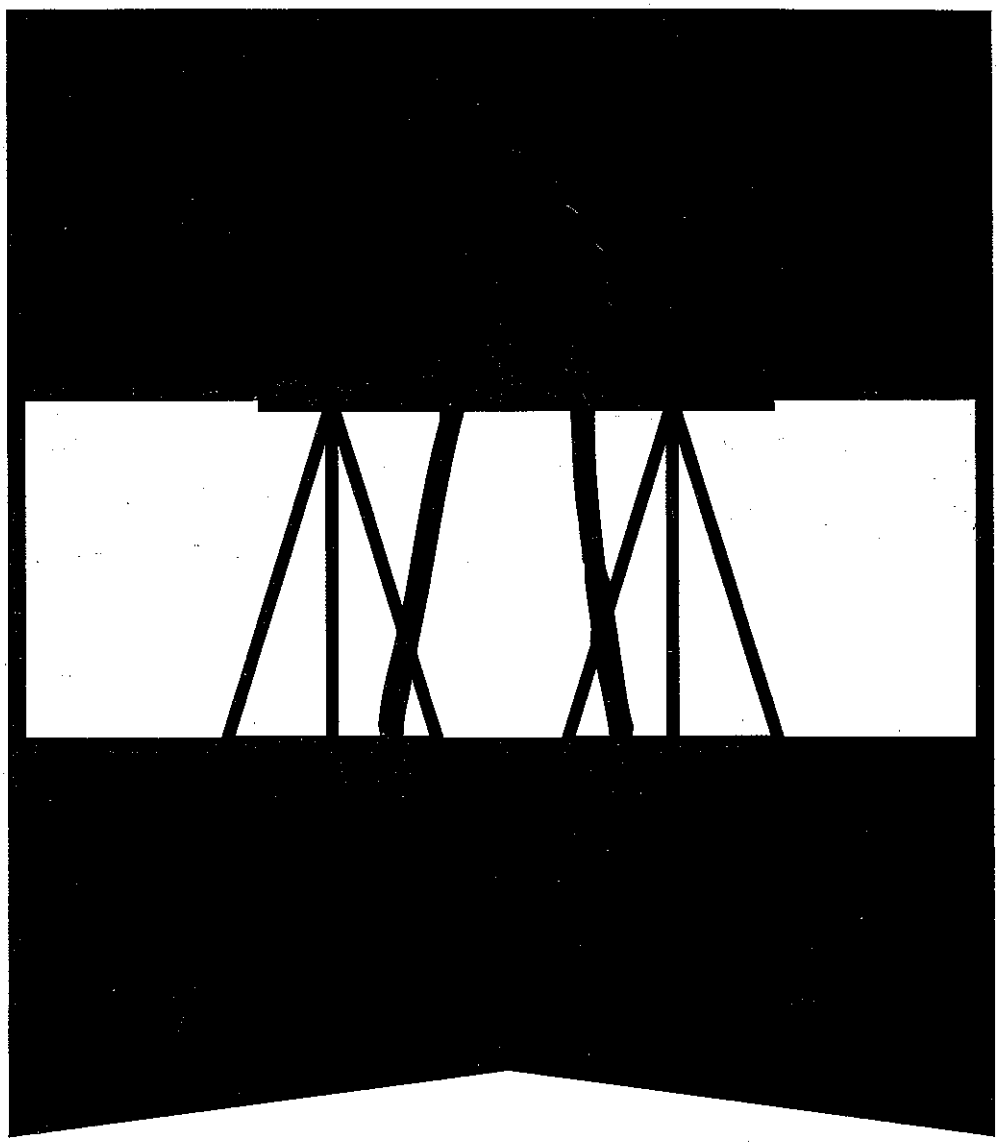

Celebrating the 20th year of New Jersey Defense

inside...

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PRESIDENT'S MESSAGE

Thomas B. Hight, Esq.

Work, Work, Work. If it isn't related to a specific case, it's got something to do with business. The coming of spring is nothing more than another reason to feel overworked and to have even less time to get outside and enjoy that part of your life which isn't work.

But all that work does have a function; as defense attorneys we are an integral part of the legal system which provides civil justice to society. It is easy to forget about rights and the function of our justice system. It's easy to forget because of all of the demands which are placed upon us in addition to our function as officers of the court. We serve many masters besides clients; Judges and their staff, assignment clerks, insurance companies adversaries, and even experts. All of these masters require different considerations which must be constantly and carefully balanced.

So, there is no surprise in the fact that it is not easy to be a defense attorney. There is not one active defense litigator I know of who complains about having too much free time. The demands upon our time are enormous, and constantly call for us to make choices, rearrange priorities and seek out resources.

Resources! The strength of the NJDA lies within the dedication of its members. Not just to the organization, but to the membership individually. Our membership represents some of the finest trial attorneys in the country, let alone the state. The value of the organization lies in the ability of each member to call upon each other for advice, assistance and support. As a member, you are losing a valuable opportunity by not reaching out to other members for their experience and expertise. Our NJDA website (NJDefense.com) provides an up-to-date listing of our general membership and substantive committees.

Our seminars provide valuable information affecting the defense community. But our seminar presenters continue to serve as a valuable educational resource long after the seminar is completed. This year alone our seminar speakers have included Daniel Pomeroy, Francis Garrity, Richard Brennan, Honorable Lawrence Weiss, Honorable Douglas Hague, Skippy Weinstein, and Mark Saloman. Any of these individuals are available to the membership as a source of legal knowledge and expertise. In addition, the NJDA has played a valuable role as amicus curaie in several Appellate Division and Superior Court issues. These cases include In Re PPA Litigation, Maw v. Advanced Clinical Communications, Inc., Brodsky v. Grinnell Haulers, Inc. and Frankl v. Goodyear Tire & Rubber Company. The briefs submitted on behalf of the NJDA are available to all members and can be requested on line or by phone. The NJDA also sent a request to the Secretary, Committee on Opinions urging official publication of an unpublished opinion, New Jersey Citizen Action v. Schering-Plough Corporation, 2003 WL 22766152 (App. Div. July 15, 2003). The opinion was subsequently published.

As a member of the NJDA don't wait for your dues renewal notice to become "active". Participate in the organization by using the membership as a resource. In turn, offer your advice, experience and perspective to other members.

Thomas Hight

CRISIS IN THE MUNICIPAL COURTS

Brian O'Toole, Esq.

For approximately the last year, the Municipal Courts of this State have fallen prey to blatant attorney solicitation. There are services which offer to attorneys a complete list of all people who have municipal court summonses and their addresses. Of course, this service is offered for a fee. The attorneys who are utilizing this service are now bombarding municipal defendants with solicitations warning about the dangers of appearing in Court without representation. No defendant is spared, including those with summonses for tail light or seatbelt violations. The solicitation letter usually indicates that the attorney is expert in the handling of municipal matters and makes regular appearances in that particular court. Over this past year, the Hanover Township Violations Bureau has been inundated with calls about who these attorneys are and how the attorney learned of their summonses. The overwhelming majority of these people are upset that their privacy has been invaded. As the Judge in Hanover Township, I have received many calls from defendants demanding to know why this is happening. Many of them believe that some member of Hanover's staff has leaked this information. In short, there are a lot of dissatisfied municipal defendants.

The AOC has taken various steps to make sure that the solicitation letters meet ethical requirements and the Committee on Attorney Advertising has rendered a written opinion, but this still leaves us with the basic dilemma of whether municipal defendants should be solicited and whether such solicitation leads to further erosion of the trust the public has in the legal profession.

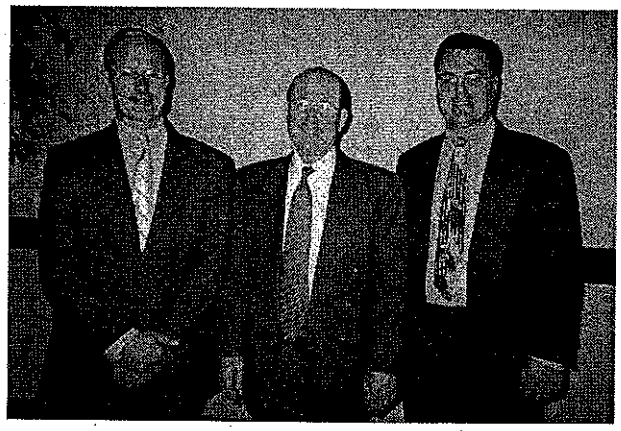
I believe the question that must be asked is, do we need direct solicitation to the public when there is absolutely no evidence that the public is unable to obtain competent representation without such solicitation. If this type of solicitation is allowed, why can't a company provide lists of all recently admitted people to emergency rooms or hospitals? These people could then be directly solicited by attorneys who hold themselves out as experts in the field of personal injury. After all, there really is no difference between these two types of intrusion in the public's privacy. Why draw the line there, why not allow lists to be sold of married couples who are involved in incidents of domestic violence so that they could then be directly solicited by the matrimonial bar? Lists could be obtained of people receiving deficiency or audit notices from the IRS so that they can be directly solicited by the tax bar and on and on.

In an age of lawyer advertising, the public is fully capable of securing competent counsel, without being inundated with unwanted legal solicitation. Many of the people who are being solicited would probably qualify for the services of the Public Defender, but this opportunity will vanish as soon as they respond to a solicitation letter. Many of the people really have no need for a lawyer due the deminimus nature of their offense. Sadly, the people least in need of this solicitation, those on the bottom of the economic spectrum, will be most victimized. Recently a woman with a parking violation showed me four solicitation letters she received but luckily she decided to come to Court first, before deciding on a lawyer. Most other members of the public may not be as fortunate.

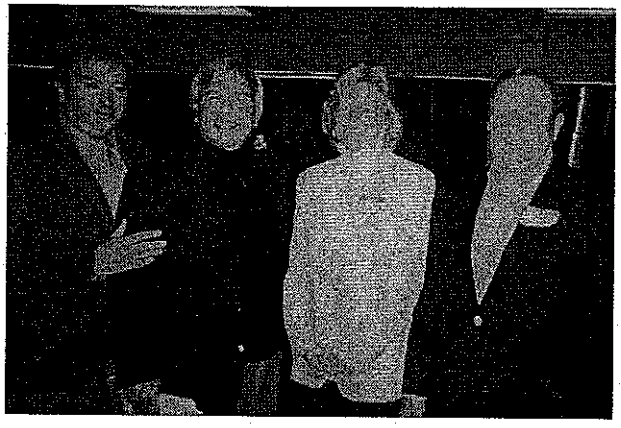
It is shameful that a small number of companies are utilizing the concept of "open public records" to profit at the public's expense. The New Jersey Supreme Court should put an end to this practice to avoid further erosion of confidence in the legal

Mr. O'Toole is a partner in the law firm of O'Toole & Couch, Whippany, NJ. He has served as a Municipal Prosecutor for 14 years and has been a Municipal Judge for 7 years.

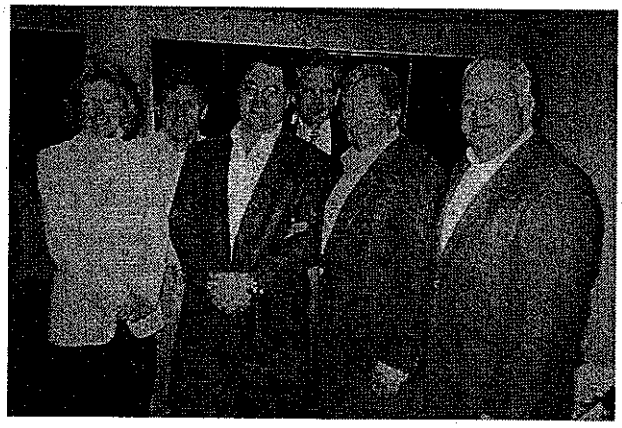
NJDA PHOTOS



Daniel Pomeroy, Francis Garritty and Thomas Hight
NJDA Seminar February 12, 2004
UM/UIM and Laidlow



Brian O'Toole, Skippy Weinstein, Marie Carey, Richard Brennan
NJDA Trial College March 20, 2004



Marie Carey, Stephen Foley, Jr., Thomas Hight, Bruce Helies,
Brian O'Toole and Steven Isaacson
NJDA Trial College March 20, 2004

APPELLATE DIVISION REJECTS "FRAUD ON THE MARKET" AND "ARTIFICIAL PRICE INFLATION" THEORIES ON RECOVERY UNDER THE NEW JERSEY CONSUMER FRAUD ACT

Linda Pissott Reig, Esq.

A successful claim under the New Jersey Consumer Fraud Act ("CFA") yields an attractive recovery of treble damages for plaintiffs and fees for plaintiffs' attorneys. So it is really not surprising that the plaintiffs' bar have engaged in a tireless effort to expand the CFA's reach. Critical to these efforts is plaintiffs' argument (upheld by the courts) that they need not show traditional "reliance," that is, that plaintiffs need not show that they directly relied on the fraudulent conduct at issue to recover CFA damages. Although the courts have upheld this argument, they still require plaintiffs to prove a causal nexus between the consumer fraud and an ascertainable loss.

A relatively recent phenomenon involves the use of the CFA in purported class action lawsuits that are filed on behalf of all consumers who purchased a product based on a claim that the purchase price for that product was artificially inflated. Plaintiffs claim that, although they did not rely upon the fraudulent conduct, they paid more for the product as a result of the fraud. The argument borrows the "fraud on the market" theory used in securities litigation (in which investors claim that fraudulent conduct resulted in artificially inflated stock prices) and seeks to apply it to the purchase price for consumer goods and other products. A popular type of product to target in these types of lawsuits has been prescription drugs even though those products are only available when a physician authorizes their purchase.

Plaintiffs' claims in these cases develop as follows. Plaintiffs allege that defendants engaged in fraudulent conduct, such as disseminating allegedly fraudulent ads by failing to warn adequately about product risks. The lawsuit is filed as a purported class on behalf of *all* consumers who purchased the products. Because plaintiffs need not prove traditional "reliance," plaintiffs argue that whether or not every plaintiff in the purported class saw the "fraudulent" ads is irrelevant. Instead, plaintiffs argue that as a result of dissemination of the ads, an increased demand for the product occurred, thereby inflating the product's price.

Plaintiffs' claim for damages is to recover the artificially increased amount paid for the product, which plaintiffs allege could not have been charged if defendants had not engaged in fraudulent conduct. Because the lawsuit is filed on behalf of all product purchasers and the CFA allows treble damages and attorneys fees, if damages are awarded under this theory, plaintiffs' recovery could be substantial.

In an opinion recently approved for publication, the Appellate Division rejected the "fraud on the market" theory of recovery under the CFA and affirmed the trial court's dismissal of a purported nationwide class action on behalf of all consumers of the prescription drug Claritin. *NJ Citizen Action v. Schering Plough*, 2003 WL 22766152, 2003 N.J. Super. LEXIS 413 (App. Div. July 15, 2003), *certif. denied*, 178 N.J. 249 (2003).

The Appellate Division held that plaintiffs failed to state a claim when they alleged that they were entitled to damages because fraudulent advertisements caused increased demand for Clari-

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tin that they then purchased at an artificially inflated price.

Not only was the "fraud of the market" theory rejected as a basis for CFA recovery, but the opinion also distinguishes between statements of fact, which may be actionable under the CFA, and "puffery", which is not actionable under the CFA. (The court ruled that the advertising claims at issue were puffery and this provided an alternative basis for the case's dismissal.) Additionally, the opinion provides important guidance on evaluation of direct-to-consumer advertising for prescription drugs, which are subject to Food and Drug Administration oversight.

By way of background, the *NJ Citizen Action* case involved the following allegations. Four non-profit consumer watch dog organizations and five individuals filed a purported class action lawsuit against a pharmaceutical company and its two advertising agencies claiming that fraudulent advertising had caused consumers (whether or not they had seen the advertising) to pay artificially inflated prices for a prescription drug. Defendants immediately moved to dismiss the complaint for failure to state a claim under the CFA.

To state a claim under the CFA, a plaintiff must allege (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiffs' ascertainable loss. *N.J. Citizen Action v. Schering Plough*, 2002 WL 32344594 (Law Div. 2002) (unpublished trial court opinion), citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 24 (1994).

The Appellate Division (Judges Pressler, Axelrad & Hoens) observed that under *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 416 (1995), *cert. denied,* 516 U.S. 1066, 116 S. Ct. 752, 133 L. Ed. 2d 700 (1996) for there to be consumer fraud, "the business practice in question must be `misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer . . ."

The direct-to-consumer advertising statements at issue were:

> " . . . with allergy control that doesn't make you drowsy, you and others in your family with allergies can lead a normal life again"
>
> "you . . . can lead a normal nearly symptom-free life again"

Plaintiffs argued that the word "you" without a statement that "results may vary" was misleading because it suggested that all patients using Claritin were promised efficacy even though in clinical trials *all* patients *did not* experience clinical benefit.

Plaintiffs argued that they suffered a loss as a result of that advertising (i.e. payment of an artificially inflated price that resulted from advertising because a subset of the plaintiffs had seen and relied on those ads) based on a "fraud on the market" theory of recovery. Plaintiffs argued that they need not prove causation or reliance in the traditional sense. Rather, plaintiffs need only show that defendants' conduct caused a "fraud on the market" that resulted in an artificially inflated price for Claritin.

In rejecting plaintiffs' attempt to extend the "fraud on the market" securities law theory of recovery to CFA claims, the Appellate Division noted that the New Jersey Supreme Court had

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already rejected this theory in a common law fraud case. *See Kaufman v. i-Stat Corp.*, 165 N.J. 94 (2000). Here, the Appellate Division concluded that adoption of a "fraud on the market" theory of recovery would "virtually eliminate" the "causal nexus" requirement of CFA claims. To state a claim, plaintiffs must prove that a causal relationship exists between defendants' unlawful conduct and plaintiffs' ascertainable loss. Were the court to accept plaintiffs' argument, "the relationship between the alleged misstatement and the ascertainable loss suffered would become so attenuated that it would effectively disappear." *NJ Citizen Action,* 2003 WL 22766152, 2003 N.J. Super. LEXIS 413. As a result, the CFA's distinction between a private cause of action and the Attorney General's CFA claims would cease to exist.

This is an important development in the case law interpreting the CFA. Plaintiffs from across the country select New Jersey as their forum to file CFA claims and have offered up seemingly limitless legal arguments and theories to trigger the treble damages and attorneys fees afforded by that Act. The Appellate Division's ruling is critical because it will help stem that tide. Significantly, the New Jersey Supreme Court denied plaintiffs' petition for certification of the Appellate Division's ruling. 178 N.J. 249 (2003).

Ms. Reig is chairperson of the New Jersey Defense Association's Product Liability Committee and Secretary/Treasurer of the Association. She is Counsel with Porzio, Bromberg & Newman in Morristown, New Jersey and New York, New York, where she defends pharmaceutical companies in product liability and consumer fraud cases and counsels pharmaceutical companies on, among other things, FDA promotional rules and liability risk prevention.

What's New...

The New Jersey Defense Association has filed Amicus Briefs in the following cases this year:

In re: PPA Litigation (whether ex parte Stempler interviews are preempted by HIPAA privacy law)

Maw v. Advanced Clinical Communications, Inc. (whether an employer may terminate an employee for refusing to sign a non-compete agreement or whether a claim may be made under the Conscientious Employee Protection Act because plaintiff alleges the non-compete agreement was overly broad and against public policy)

Brodsky v. Grinnell Haulers, Inc. (whether a jury may consider and compare the fault of the bankrupt driver with that of the defendant truck driver and his employer Grinnell Haulers, Inc. and whether the jury may be given an ultimate outcome jury charge regarding the legal effect of assigning 60% or more fault on a defendant)

Frankl v. Goodyear Tire & Rubber Company (NJDA to seek leave to appear as amicus on whether a non-party can appropriately challenge confidentiality designations and seek public disclosure of discovery documents after a case has been settled)

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THE LAIDLOW CLAIM- COVERED BY EMPLOYERS LIABILITY POLICY?

Francis X. Garrity, Esq.

As presented to
NEW JERSEY DEFENSE
ASSOCIATION
February 12, 2004

INTRODUCTION

When the New Jersey Supreme Court decided Laidlow v. Hariton Mach. Co., 170 N.J. 602 (2002) setting forth the bases upon which an employer could be liable at common law for bodily injuries sustained by an employee in the course of employment, the issue of whether and where coverage would extend loomed large. Laidlow involved the use of a machine, for many years without an accompanying guard, that ultimately led to a serious hand injury to an employee. Clearly the employer did not subjectively intend to cause the injury to the employee, but in the context of workers' compensation, the Supreme Court determined that the employer's conduct raised a question of fact as to whether it fell within the exception to the exclusivity bar of workers' compensation for an "intentional wrong". Where would an employer look for insurance coverage for such liability? Could it be that such uncertain liability was uninsured? Inasmuch as the liability arises out of the employment relationship, understandably an employer would look to his Workers Compensation And Employers Liability Insurance Policy. Yet, that policy excludes from coverage bodily injury "intentionally" caused. Would such an exclusion apply where there was no subjective intent to injure on the part of the employer?

Having determined that a remedy exists for employees for conduct on the part of their employers qualifying as an "intentional wrong" under the Workers' Compensation Act, ultimately the Supreme Court must determine whether or not such claims are covered by the Workers Compensation And Employers Liability Insurance Policy. Clearly this is a contentious issue as insurers underwriting workers' compensation in New Jersey recognize the implications of a finding of coverage under their policies. The drafting history of the standard form Workers Compensation
And Employers Liability policy supports the conclusion that the insurance industry expected that common law claims by employees against employers would be covered by the Employers Liability provisions of the Workers Compensation And Employers Liability policy. However, the Employers Liability policy excludes coverage for bodily injury intentionally caused by the employer. Where an employer had no subjective intent to cause injury to an employee, could it reasonably expect to be covered by its Employers Liability policy? Independent of the insured's expectations, to the extent the New Jersey Legislature has already spoken to this issue in the Workers' Compensation Law and mandated the extension of coverage for such claims, would this include common law claims grounded in the "intentional wrong" exception? To the extent the "intentional wrong" exception to the Workers' Compensation Law encompasses employer conduct that, while substantially certain to cause an injury, is still not subjectively intended, should not this conduct be covered? Have these issues already been decided by the Supreme Court in its decision in Schmidt v. Smith, 155 N.J. 44 (1998)? Let us consider the arguments to be presented on these several issues.

Coverage is determined by laying the allegations in a complaint alongside the language of the policy, and if the two correspond, irrespective

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of the claim's actual merit, coverage extends. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992). Therefore, before addressing the covering language of the Employer's Liability policy and the "intentional act" exclusion contained therein, there should first be a firm understanding of the allegations potentially triggering the coverage. In other words, there must be an understanding of the conduct of the employer that gives rise to the potential liability to the employee in the first instance, and then there must be a comparison of the potential liability inducing conduct with the covering language of the policy.

THE "INTENTIONAL WRONG" EXCEPTION

The decision of the Supreme Court in Laidlow grew out of the Court's earlier decision in Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985). There the Supreme Court was called upon to determine whether an employer could be liable to its employees for fraudulently concealing diseases caused by workplace exposures discovered during company physical examinations. In considering the issue, the Court addressed the exclusive-remedy provision of the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-8. That provision immunizes employers from common law liability to employees who have elected workers' compensation benefits except for intentional wrong. The exception for "intentional wrong" was a 1961 amendment to the original Workers' Compensation statute passed in 1911. While the original statute immunized the employers, it did not bar common law claims for damages against co-employees or supervisory employees. With a view toward insulating co-employees, in addition to the employer, N.J.S.A. 34:15-8 was passed but with a qualification that neither would be insulated for "intentional wrong". See: Miller v. Muscarelle, 67 N.J. Super. 305, 321 (App. Div. 1961), certif. den. N.J. 140 (1961). The "intentional wrong" exception to the bar of workers' compensation was construed by the Appellate Division in Bryan v. Jeffers, 103 N.J. Super. 522 (App. Div. 1968), certif. den. 53 N.J. 581 (1969) as requiring a "willful intent to cause injury", or a "deliberate intention" to cause such injury as opposed to simply gross negligence. In adopting this standard, the Appellate Division applied the standard advanced by Professor Larson in his multi-volume treatise on workers' compensation law. 2A. Larson, The Law of Workmen's Compensation, §68.13 at 13-22 to 13-27 (1983). There, Larson suggested that the "intentional wrong" exception should be construed to apply only if the injury resulted from "deliberate infliction of harm comparable to an intentional left jab to the chin."

When the Supreme Court considered in Millison how it should construe the "intentional wrong" exception, it chose to deviate from the narrow construction adopted by the Appellate Division in Bryan and Professor Larson. Calling its construction a "logical development", the Court adopted a "substantial certainty" standard referring to the Restatement Second of Torts, § 8A wherein "intent" was defined as meaning that the actor "knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead." 101 N.J. at 177-178.

Thus, in adopting the "substantial certainty" test, the Supreme Court in Millison held that two types of conduct by an employer would qualify under the "intentional wrong" exception. The first type of conduct is that in which the employer subjectively acts and knows that the consequences are certain to result from his act, i.e., what Larson would refer to as an "intentional left jab to the chin". The second type of conduct that will qualify as an "intentional wrong" is conduct that can be characterized as enhanced risk, i.e., conduct that is willful or purposeful but the consequences are not certain but only substantially certain to result. Or, as the Court noted in Laidlow "acts that the employer knows are substan-

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LAIDLOW CLAIM

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tially certain to produce injury even though, strictly speaking, the employer does not will that result." 170 N.J. at 617. Recognizing that Millison and Laidlow construed the "intentional wrong" exclusion in the Workers' Compensation Act as meaning either a subjective intent to injure or conduct creating a substantial certainty of injurious consequences, the question arises as to whether such conduct would be covered by a standard form Employers Liability policy.

THE WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

The form Workers Compensation And Employers Liability policy was developed by the National Council on Compensation Insurance. Part I of the policy is captioned "Workers Compensation Insurance" while Part II is captioned "Employers Liability Insurance". Part I - Workers Compensation Insurance affords insurance coverage to the insured employer for benefits it is required to pay under the Workers' Compensation Law, i.e., elective benefits. Part II-Employers Liability Insurance affords coverage to the insured employer for bodily injury to an employee at common law, i.e., liability for which the employer has no immunity because of workers' compensation. Reference to New Jersey's Workers' Compensation Law will aid construction of the covering language and place it in context.

New Jersey's Workers' Compensation Law, in its entirety, is set forth in N.J.S.A. 34:15-1 to 142. The statute was originally passed in 1911, and before its passage, an employee could maintain an action at common law against his employer for recovery for bodily injuries. However, the action was subject to the various defenses available at common law, e.g., contributory negligence, assumption of risk, etc. As noted in Millison, various authorities have estimated that at common law up to 94% of industrial accidents went uncompensated. 101 N.J. at 174. In any event, Article I - Actions At Law of the Workers' Compensation Law recognizes that certain actions may still be maintained by an employee against an employer at common law notwithstanding the "elective compensation" provisions of the law. This would include persons, albeit rare, who elect to waive workers' compensation benefits (34:15-7), employed infants under the age of 18 (34:15-10), and employees injured as a result of the intentional wrongs of the employer. (34:15-8) Article II of the Workers' Compensation Law captioned "Elective Compensation" in multiple provisions sets forth the rights of employees to elective workers' compensation benefits. Those benefits are referred to as "elective" because the law creates a presumption that an employee has elected workers' compensation benefits at the commencement of employment unless the employee has executed a valid waiver of those benefits. (34:15-7) Of course, in exchange for having to provide workers' compensation benefits to employees that have so elected, the employer is granted immunity from common law liability. (34:15-8) However, again the immunity only extends to injury or death that is "compensable" under the article, and expressly excepts an act or omission that qualifies as an "intentional wrong".

Therefore, New Jersey's Workers' Compensation Law expressly delineates the circumstances under which an employee will be entitled to elective compensation, i.e., workers' compensation benefits, and barred from recovery against his employer at common law, and the circumstances under which an employer will not be immunized such that an employee may maintain a cause of action at common law.

Returning to the standard form Workers Compensation And Employers Liability Insurance Policy, it can be seen that Part I - Workers Compensation Insurance is expressly intended to cover an employer's liability to employees for elective compensation, i.e., workers' compensation benefits. On the other hand, Part II - Employers Liabil-

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ity Insurance is expressly intended to cover an employer's liability to employees at common law -- those not immunized by virtue of the employees' election of workers' compensation benefits. Clearly it is not happenstance, but rather by express design, that the drafters of the form policy addressed both employer liability for elective compensation and employer liability at common law. Our Supreme Court recognized the purpose of employers' liability coverage in Schmidt quoting from the Appellate Division's decision identifying this coverage as "a 'gap-filler' providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute". 155 N.J. at 44, 49-50 (quoting Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 927 (1986)).

THE COVERAGE ISSUE

Returning to the Supreme Court's construction of the "intentional wrong" exception in the Workers' Compensation Law in Millison and Laidlow, the issue arises as to whether or not common law actions brought by employees against employers grounded in this exception would be covered by the Employers Liability provisions of the policy. There is no question that actions brought at common law fall within the Employers Liability grant of coverage under the policy, however, the policy contains an exclusion for "intentional acts". It provides that the insurance does not cover "bodily injury intentionally caused or aggravated by you." In light of this exclusion, the question arises: Does this exclusion preclude coverage? To determine the answer the courts will look to case law construing the "intentional act" exclusion in other policy forms, the Workers' Compensation Law itself and its provisions relating to mandatory coverage, and case law construing these provisions of the Workers' Compensation Law.

As indicated, in Millison and Laidlow the Court construed the "intentional wrong" exception to the bar of workers' compensation in the context of the law itself. The Court concluded that an employee may maintain an action at common law against his employer if he can establish either (a) that the employer's conduct constituted a subjective intent to injure, or (b) the employer's conduct so enhances the risk of injury that injury is a substantial certainty even though the employer does not will that result. The difference between these two tests is significant. Under the former, the consequences are a certainty, while under the latter, the consequences are not a certainty but rather a risk that is so significant as to be a substantial certainty, but nonetheless still a risk. By analogy, it can be said that one can drive a car at 100 miles per hour down Broad Street in Newark one time and not strike anyone but to do so on multiple occasions is to elevate the risk of an injury to a substantial certainty. Both actions present a risk of injury not a certainty.

In New Jersey our courts, like those in every jurisdiction, have struggled to balance the competing social policies of compensating the victims of intentional conduct through insurance while not condoning such conduct. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 180-181 (1992). Extending coverage to an insured for an intentional injury might encourage such conduct if the actor were aware that he was insured and would suffer no financial consequences. On the other hand, denying insurance coverage would result in the victim going uncompensated. Thus, in construing "intentional act" exclusions in liability policies, the courts have sought to strike a balance between these two social policies. Most recently, in SL Industries v. American Motorists, 128 N.J. 188 (1992) our Supreme Court established the test for determining when the "intentional act" exclusion would apply and when it would not.

Assuming the wrongdoer subjectively intends or

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> expects to cause some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was "accidental" and coverage will be provided.

128 N.J. at 212.

As can be seen, coverage would be denied for a subjective intent to injure, i.e., a knowing, deliberate intent to injure someone. This is the threshold determination and if it is lacking, coverage will extend. Even if there is a subjective intent to injure, if the injuries actually sustained are improbable, then coverage will extend. It is only conduct that presents itself as evidencing a subjective intent to harm, and the harm actually caused could reasonably have been anticipated, that is excluded.

Applying the "intentional act" test to the conduct qualifying under the "intentional wrong" exception in the workers' compensation law, it can be seen that a deliberate intent to injure an employee by an employer, i.e., "an intentional left jab to the chin", would fall within the "intentional act" exclusion. The requirement of subjective intent would have been met. On the other hand, arguably conduct by an employer that enhances the risk of injury, even to a substantial certainty, would not be encompassed by the exclusion because as a threshold matter the test requires a subjective intent to injure which is lacking because under these circumstances the employer does not "will the result".

Therefore, by isolating the type of conduct that qualifies under the "intentional wrong" exception to the Workers' Compensation Law, and by laying that conduct alongside the policy, the argument can be made that the "intentional act" exclusion in the Employers Liability policy only applies to a subjective intent to injure. It does not apply to conduct that involves an enhanced risk of injury, albeit a risk rising to the level of substantial certainty. As the Supreme Court itself recognized in Laidlow, that conduct does not rise to the level of subjective intent to injure as the employer does not "will the result". 170 N.J. at 617. As such, under existing case law, an argument can be presented that the "intentional act" exclusion has no applicability.

Beyond established New Jersey case law construing the "intentional act" exclusion, an additional argument can be made that the Workers' Compensation Law itself supports the conclusion that coverage extends for conduct meeting the "substantial certainty" test, and perhaps even for conduct meeting the "subjective intent to injure" test.

As indicated, the New Jersey Workers' Compensation Law encompasses both "Elective Compensation", i.e., workers' compensation benefits, as well as common law actions, i.e., "Actions
At Law". Article 5 captioned "Compulsory Insurance" of the Workers' Compensation Law is titled the "Employers Liability Insurance Law". The title is something of a misnomer as it suggests that it encompasses only common law causes of action such as we might think would be covered by the Employers Liability provisions of a Workers Compensation And Employers Liability policy. However, the Article is more encompassing.

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N.J.S.A. 34:15-71 mandates that every employer subject to provisions of Article 2 Elective Compensation must make sufficient provision for the "complete payment of any obligation which he may incur to an injured employee, or his dependents under the provisions of said Article 2, by one of the methods hereinafter set forth in sections 34:15-77 and 34:15-78 of this title." 34:15-77 sets forth the requirements for self-insurance while 34:15-78 identifies the requirement that every employer (not self-insured) "shall insure and keep insured his liability in any stock company or mutual association authorized to engage in workmen's or employer's liability insurance in this State." In other words, by virtue of 34:15-71 insurance coverage for an employer's liability under Article 2 Elective Compensation to its employees is mandatory, and that coverage must extend for the "complete payment of any obligation" to the employee. N.J.S.A. 34:15-72 addresses Article I Actions At Law and similarly mandates either approved self-insurance or insurance by an authorized insurer "for the complete payment of any obligation which he may incur to an injured employee or his administrators or next of kin under said article of this chapter." Thus, as with "elective compensation", the Workers' Compensation law mandates coverage for actions brought by employees at common law, i.e., "Actions At Law".

It was previously noted that the construction of the "intentional act" exclusion presents courts with the problem of balancing competing public policies, i.e., coverage to satisfy a victim's injuries or no coverage for the purpose of discouraging intentional conduct. With respect to injuries to employees in the course of their employment, arguably the Workers' Compensation Law, as an expression of public policy, reflects the Legislature's consideration of this balance and a decision in favor of victim compensation. 34:15-71 and 72 both speak in terms of an employer's obligation to make sufficient provision for the "complete payment" of any obligation under Article 1 Actions At Law and Article 2 Elective Compensation. In terms of mandating coverage for common law actions that fall within the exception for "intentional wrong", and involve enhanced risk, i.e., the "substantial certainty" test, the Legislature by virtue of 34:15-72 has arguably mandated the extension of coverage. In Schmidt the Supreme Court held invalid an Employers Liability exclusion for discrimination as violative of 34:15-72 to the extent that it purported to deny coverage for bodily injury sustained by an employee in the course of her employment. 155 N.J. at 52.

Schmidt involved conduct by an executive officer, i.e., sexual assault and battery and harassment, however, there was no evidence that the employer "intended to harass" the employee. Thus, as the Supreme Court noted, the Workers Compensation And Employers Liability Insurance Policy was "a proper place for PAV [employer] to look for coverage." 155 N.J. at 51. As such, the Court expressed its agreement with the Appellate Division that the "intentional act" exclusion had no applicability. Id. However, where the employer subjectively intends the injury, i.e., the "intentional left jab to the chin", it might be argued that even with respect to this conduct, coverage is mandated under the statute. 34:15-72 speaks in terms of "complete payment of any obligation" which an employer may incur to an injured employee. Arguably, with its passage of the statute, the Legislature has made a qualitative judgment that victims should be compensated even in situations where the employer is guilty of a deliberate intent to injure. It may be argued that this is a risk that an Employers' Liability insurer undertakes when it issues coverage in compliance with the Workers' Compensation law. The insurer might be required to satisfy the employer's obligation in the first instance and then be subrogated to the rights of the employee against the employer so as to seek reimbursement for its pay-

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ment. See: Ambassador Ins. Co. v. Montes, 76 N.J. 477, 484 (1978).

The Supreme Court's construction of the "intentional wrong" exception to the exclusivity bar of the Workers' Compensation Law has been incremental. Millison involved corporate officers, i.e., physicians, of the employer fraudulently concealing asbestos-related diseases diagnosed during company medical examinations. In adopting the "substantial certainty" standard there, the Court indicated that it was not repudiating the earlier decision of the Appellate Division in Bryan in which the "deliberate intention" test espoused by Professor Larson was adopted. Rather, Justice Clifford wrote that the Court's decision in Millison was a "logical development in this sensitive field of the law." 101 N.J. at 178. In Laidlow Justice Long noted expressly that the Court had abandoned Larson's purely subjective approach of "actual intention" in favor of Dean Prosser's broader approach of "substantial certainty". 170 N.J. at 613-614. In her recap Justice Long noted that the "substantial certainty" standard, while not an outright repudiation of Bryan, nonetheless contemplated that an employer could be liable for an intentional wrong even though he did not "will that result". Suffice it to say, Laidlow represents a clarification of the Court's ruling in Millison.

Between the time Millison was decided in 1985 and Laidlow was decided in 2002, the Supreme Court in Schmidt in 1998 addressed the question of Employers Liability insurance in the context of an action brought against an employer for a corporate officer's assault and battery, intentional infliction of emotional distress, and hostile work environment sexual harassment. It was undisputed that the officer's conduct in this regard fell within the "intentional wrong" exception to the Workers' Compensation bar. As noted previously, the Supreme Court expressed its agreement with the Appellate Division that the "intentional act" exclusion in the Employers' Liability policy would have no applicability because there was no evidence that the employer intended to harass the employee. However, the Court's holding in Schmidt was sweeping and far reaching in terms of mandatory employers liability coverage. It held that the terms of an Employers Liability policy issued pursuant to N.J.S.A. 34:15-78 "***cannot conflict with the statutory mandate that there be coverage provided for all occupational injuries.***" 155 N.J. at 49.

While the underlying action in Schmidt did not involve application of the "substantial certainty" test, the Court's ruling was categorical and unequivocal. The terms of a policy issued pursuant to N.J.S.A. 34:15-78 cannot conflict with the statutory mandate that there be coverage provided for ***all occupational injuries***. Thus, arguably it can be said that Schmidt answers the question of whether the "intentional act" exclusion can apply to an occupational injury whether that injury arises from a hostile work environment unknown by the employer or conduct that creates a substantial certainty of injury.

After Millison was decided, but before the Supreme Court's decisions in Schmidt and Laidlow, the Appellate Division in N.J. Mfrs. Ins. v. Joseph Oat Corp., 287 N.J. Super. 190 (App. Div. 1995) had occasion to consider whether an Employers Liability policy would extend coverage for a claim brought at common law against an employer under the "intentional wrong" exception to the Workers' Compensation Law. It is this precedent that offers the strongest support for application of the "intentional act" exclusion to conduct of employers that have created a "substantial certainty" of injury to employees. However, in terms of precedent the continued viability of Joseph Oat is in question.

In Joseph Oat the insured argued that Millison, in construing the "intentional wrong" exception, created two tests, one based on a subjective intent to cause injury, and a second based upon intentional conduct with a substantial certainty that injury would occur. Just as outlined

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WORKERS' COMPENSATION

Edward H. Herman, Esq.

During the last few months, the Appellate Division has been busy deciding Workers' Compensation issues. In additional, three new Judges have recently been added to the Workers' Compensation Bench. Judge Michael Mullen is from Camden County while Judge Gorge Geist is from Gloucester County. Judge Jose LaBoy is from Cumberland County. Both Judge Geist and LaBoy will be sworn in February of this year.

Some of the more interesting issues to come before the Court during the past months are as follows:

Thomas Wasik vs. Borough of Bergenfield, was decided by the Appellate Division on December 1, 2003. The issue in this case is whether an employee who was the instigator of so-called horseplay who then is injured by a follow employee is entitled to Workers' Compensation benefits. The facts of this case indicate that both the petitioner and respondent worked for the Borough of Bergenfield as sanitation workers. They each were on different trucks however, on the date of this accident, the petitioner finished his own collection run and brought his truck to help his co-worker complete his run. The Judge of Compensation found that the assault took place and further found that the petitioner had made some insulting comments and jesters to the co-employee earlier in the day. Immediately before the assault the petitioner stood behind the co-worker and purposely bumped into him. The co-worker then turned and struck the petitioner causing injury. The Workers' Compensation Judge found that this incident did not arise out of the employment and therefore found no compensability. The Appellate Division reversed. It reviewed N.J.S.A. 30:15-7.1 and concluded that although the horseplay section of the statute specifically talks about a lack of compensation benefits when the injured employee is the instigator of horseplay, this Court held that horseplay compensability is a fact sensitive determination. In this case the Appellate Division found by it's review of the record that the horseplay was not extensive nor serious and was commingled with the performance of the duties of garbage collection and therefore the petitioner in this case should be afforded compensation benefits.

Another interesting case arose out of the national tragedy of September 11, 2001. In Stroka vs. United Airlines, decided November 26, 2003 by the Appellate Division, the Court held that an airline stewardess who regularly worked for United Airlines but was not scheduled to work on September 11, 2001, could not collect compensation benefits for a post-traumatic stress syndrome since it did not arise in the course of her employment. To be compensable an injury most arise in the course of employment meaning it accrues (a) within the period of the employment, and (b) at a place where the employee may reasonably be, and (c) while he is reasonably fulfilling the duties of the employment, or doing something incidental thereto. In this case the Appellate Division differed with the Workers' Compensation Judge and found that the petitioner was not at work on this date and that the post-traumatic stress syndrome did not originate while at work but while taking on day off. The stress did not occur while on the job it occurred off the job and therefore the Court declined benefits to the petitioner.

In Coates vs. St. Lawrence Rehabilitation, decided by the Appellate Division on November 13, 2003, that the petitioner filed a compensation claim alleging post-traumatic

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WORKERS' COMPENSATION

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stress disorder, battered women's syndrome, anxiety and depression arising out of a sexual assault and harassment by a co-worker while at work. Petitioner also filed a Third Party claim against the employer alleging a cause of action for assault and battery, intentional infliction of emotional harm, and violation of the New Jersey Law Against Discrimination pursuant to N.J.S.A. 10:5-1 to -49. The Law Division Action was settled for a total of $30,000.00 and a Workers' Compensation action was subsequently settled for 15% of partial total or $11,520.00. The issue presented on this appeal is whether the employer through its insurance carrier, is entitled to reimbursement of its Workers' Compensation lien pursuant to N.J.S.A. 34:15-40 out of the proceeds of the Third Party Settlement. The Judge of Compensation decided that no reimbursement need be made and the Appellate Division disagreed stating that the employer was entitled to its Section 40 lien rights. In addition, the Court held that the lien rights apply not only to the other defendants in the Superior Court matter but would also apply to that sum which was paid by the employer in the settlement. The Petitioner further argued that the very nature of the LAD claim should allow for double recovery or a denial of lien benefits pursuant to Section 40. The Appellate Division disagreed with that proposition indicating there was no sound reason not to treat the LAD claim the same as other settlements.

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by Mark Saloman and Richard Reig
Electronic Discovery: What Every Litigator Should Know by Rachel Davis
Products Liability: Building a Better Mousetrap
by Linda Pissott Reig and David Uitti

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above, the insured argued that the "substantial certainty" test did not involve subjective intent to harm and therefore, the "intentional act" exclusion in the Employers' Liability policy should have no applicability. No argument was made as to the statutory mandate of coverage set forth in N.J.S.A. 34:15-78, and thus, that issue was never addressed. In its decision the Appellate Division rejected the insured's argument that there were two discreet categories of conduct which will satisfy the requirement of "intentional wrong" holding that there is only one standard of "intentional wrong" -- deliberate intent to harm. Accordingly, the Appellate Division found applicable the "intentional act" exclusion in the Employers Liability policy. 287 N.J. Super. at 197. In light of the Supreme Court's later decision in Schmidt, the question that arises is whether Joseph Oat is still "good law".

The decision in Joseph Oat was argued to the Appellate Division in Schmidt as precedent. The panel hearing the Schmidt appeal distinguished the case on the basis that the conduct in issue there was not sexual harassment. While raised before the Supreme Court in Schmidt, the Joseph Oat case is not even cited much less discussed by the Court. Thus, there is no way of knowing whether the Supreme Court agreed or disagreed with its coverage analysis in terms of whether the "substantial certainty" test involves a subjective intent to injure. We do know that in Laidlow Justice Long noted that the "substantial certainty" standard suggests a result that the employer did not will. In any event, in Schmidt the Supreme Court did not address the Appellate Division's holding in Joseph Oat perhaps because it determined that the exclusion before it for discrimination conflicted with the statutory mandate that coverage extend for the "complete payment" of the employer's common law obligation. That determination did not require an analysis of the "substantial certainty" test and whether conduct falling within it was covered by the policy. On the other hand, when the Court in Schmidt stated unequivocally that N.J.S.A. 34:15-78 mandates that the terms of an Employers Liability policy must extend coverage "for all occupational injuries", the argument can be made that Schmidt implicitly overruled Joseph Oat.

CONCLUSION

Unquestionably, employee actions against their employers grounded in the "intentional wrong" exception to workers' compensation are on the rise. The insurance industry's response to demands for coverage under the Employers' Liability policies has been mixed. While some insurers have conceded coverage, others have contested coverage. This writer is aware of two decisions at the Law Division that have gone to judgment involving the issue. Judge Burrell Ives Humphreys in Juan Pena vs. Brown Machine Co., et al., Docket No. PAS-L-435-99, held pursuant to Schmidt that coverage extended under the Employers' Liability policy. Judge Steven Smith in NJ Manufacturers Ins. Co. v. Delta Plastics , Docket No. MRS-L-318-02 held that coverage did not extend under the Employers' Liability policy. The Delta Plastics case is on appeal to the Appellate Division. Ultimately, it can be expected that the Supreme Court will address the issue and determine whether coverage extends under the Employers' Liability policy.

Francis X. Garrity is a partner in the firm of Garrity, Graham, Favetta & Flinn, a professional corporation. The firm represents insurance companies in coverage matters. The views and opinions expressed in this Memorandum are those of Mr. Garrity and not necessarily those of Garrity, Graham, Favetta & Flinn or its clients.

RECENT DEVELOPMENTS IN THE LAW OF WHISTLEBLOWING

Richard S. Reig, Esq. and Mark A. Saloman, Esq.

In light of the recent notoriety of whistleblowers in both the corporate world and government, it is no surprise that New Jersey courts have continued to extend protections to employees who object to illegal activities by their employers. Indeed, over 20 years ago -- well before recent tales of corporate malfeasance captured the attention of the media and American public -- New Jersey courts recognized the importance of protecting conscientious employees who "blow the whistle" on illegal acts committed by their employers. The New Jersey Supreme Court's holding in *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980), which created an exception to the employment at-will doctrine for employees discharged in violation of a clear mandate of public policy, was codified by the state legislature in 1986 through the Conscientious Employee Protection Act. N.J.S.A. 34:19-1, *et seq.* As in many areas of employment law, New Jersey was ahead of the national curve.

Notwithstanding the passage of time since CEPA's enactment, several issues concerning the scope and applicability of the law continue to be hotly litigated in our courts and this past year was no exception. This article provides a brief overview of some of the notable decisions concerning this statute.

CEPA was created to protect from retaliation employees who report illegal or unethical workplace activities. To maintain a CEPA claim, a plaintiff must demonstrate: (1) a reasonable belief that his or her employer violated a law, rule or regulation, or committed a fraudulent or criminal act, or acted in a manner incompatible with a clear mandate of public policy; (2) that he or she performed a "whistle-blowing" activity protected by CEPA; (3) that an adverse employment action was taken against the employee; and (4) a causal connection between the whistle-blowing activity and the adverse employment action. N.J.S.A. 34:19-3. Although an actual violation of a law, rule, regulation or clear mandate of public policy is not required, recent decisions make clear that a plaintiff must have an objectively reasonable belief that a violation occurred. The import of this requirement was reinforced by the New Jersey Supreme Court in *Dzwonar v. McDevitt*, 177 N.J. 451 (2003).

CEPA Requires An Objectively Reasonable Belief

In *Dzwonar*, a union representative claimed she was discharged from her employment after she complained that the union's executive board failed to read its minutes at general membership meetings. Plaintiff alleged that the board's conduct denied union members "the right to participate, deliberate, and vote in Union matters as prescribed by [the federal Labor Management Reporting and Disclosure Act] and the Union's internal bylaws." 177 N.J. at 456. Despite a jury verdict in favor of the plaintiff, the Appellate Division reversed on the basis that federal labor law preempted CEPA and that the essence of plaintiff's dispute was over an internal policy concerning how information would be provided to union members. "[T]hat policy dispute cannot in itself form the basis of a CEPA claim." *Dzwonar v. McDevitt*, 348 N.J. Super. 164, 170, 174 (2002). The New Jersey Supreme Court affirmed the Appellate Division and held that in order to maintain a claim under CEPA,"a plaintiff must set forth facts that would support an objectively reasonable belief that a violation [of a law, rule, regulation or clear mandate of public policy] has occurred." 177 N.J. at 464. Because the LMRDA protects union members'

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right "to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings," 29 U.S.C. § 411 (a) (1), and plaintiff's complaints dealt with the administration of union meetings, as opposed to the denial of free speech and assembly protected under the federal law, plaintiff's belief that her employer violated the LMRDA was not objectively reasonable. 177 N.J. at 467.

The Supreme Court also rejected the plaintiff's theory that a CEPA claim could be based upon the alleged violation of internal by-laws. CEPA requires a plaintiff to demonstrate that she was retaliated against for objecting or refusing to participate in an activity that she reasonably believed violated a law, rule or regulation. The Court in *Dzwonar* held that internal by-laws do not constitute a law, rule or regulation under CEPA and, accordingly, cannot form the basis of such a claim. 177 N.J. at 468-69.

In an unreported decision, the Appellate Division affirmed a trial court's finding that an employee who objected to the company's sloppy and careless accounting errors (while admitting at his deposition that he knew of no law that had been violated) and was allegedly terminated in retaliation, was not protected under CEPA. *Mutch v. Curtiss-Wright Corporation*, No. A-5454-00T2 (App. Div. June 17, 2002), *certif. denied*, 175 N.J. 75 (2002). The plaintiff's allegation that his "whistle-blowing" activity implicated the company's own code of conduct requiring accurate record keeping was rejected by the Appellate Division, which held that "private codes of conduct are not the equivalent of statutes or rules" and that CEPA was not intended "to protect chronic complainers or those who simply disagree with their employer's lawful actions" nor "to shelter every alarmist who disrupts his employer's operations by constantly declaring that illegal activity is afoot . . . or to spawn litigation concerning the most trivial or benign employee complaints."

In another unreported decision, the Appellate Division similarly rejected a CEPA claim brought by an employee who complained of lewd, pornographic and sexually abusive images on a computer video clip in the defendant Catholic high school's business office. *Schaefer v. Campbell*, No. A-6786-00T5 (App. Div. June 17, 2002), *certif. denied*, 174 N.J. 543 (2002). After raising the issue during an outside committee meeting of technology directors of diocesan high schools, Schaefer was fired allegedly in retaliation. The plaintiff argued that her complaints constituted an objection to employer activity that was incompatible with a clear mandate of public policy. Schaefer "contended that the public policy at issue involved the protection of children from 'outside influences,' such as pornography," as "reflected in criminal statutes," and "her own personal code of ethics." Since there was no evidence that "the video in question was either distributed to students or made available to students," Schaefer's belief that the law was violated was deemed "unreasonable." Plaintiff's "personal morals" were also rejected as a source of public policy sufficient to support a CEPA claim. The Appellate Division further noted that "a policy difference" between an employer and employee is insufficient to support a claim under CEPA.

Private vs. Public Harm

In *Cosgrove v. Cranford Bd. Of Educ.*, 356 N.J. Super. 518 (App. Div. 2003), *abrogated in part by Dzwonar*, 177 N.J. at 463, an employee filed a grievance with his union concerning the alleged unfair distribution of overtime. The grievance was resolved through a settlement that called for overtime to be distributed more evenly among the employees. Cosgrove ultimately lost his job over a year later due to poor performance, however, he claimed he was terminated in retaliation for filing the overtime grievance. In affirming the trial court's grant of summary judgment, the Appellate

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Division looked to the personal nature of the underlying harm alleged by Cosgrove, *i.e.* the denial of overtime. The court held that a significant "limiting factor" to CEPA's scope is that "the alleged activity must represent a public harm rather than a private harm or a harm only to the aggrieved employee." The court looked to the underlying activity and determined that "a complaint regarding overtime distribution concerns a personal harm rather than the public harm required under . . . CEPA." 356 N.J. Super. at 524-25.

Blurring the Private/Public Harm Distinction

In stark contrast to *Cosgrove* and established authority under CEPA, an Appellate Division majority recently ruled that an employee's refusal to sign a non-compete agreement "may, depending on the surrounding circumstances, violate the public policy necessary to support a cause of action under CEPA and at common law." *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420, 427 (App. Div. 2003). This decision, currently under review by the New Jersey Supreme Court, clouds the distinction between acts implicating public issues, which are protected under CEPA, and those regarding merely private concerns, which are not protected. *See Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 188 (1998) ("[a] salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee").

Maw, a graphic designer who admitted that she "may have had access to certain confidential material in the course of performing her designing duties," was terminated for refusing to sign an employment agreement that contained a covenant not to compete. Plaintiff sued under CEPA and claimed that the non-compete clause was solely intended to stifle competition by "substantially limiting *her employment opportunities* if she left ACCI, hindering *her ability to earn a living* and support *her family*." 359 N.J. at 430 (emphasis supplied). Despite the individualized analysis required under the law of restrictive covenants in determining whether a particular agreement would inflict a harm upon a particular employee, and the clearly private nature of the alleged harm to Maw, the Appellate Division majority searched high and low for a "public harm" to anchor the CEPA claim. The court found its "public harm" in the case law of California, a state that, unlike New Jersey, almost completely bars the use of non-compete agreements. 359 N.J. at 437-38. The majority, in relying upon California law, held that New Jersey's interest in prohibiting the "restraint of trade" and "unduly burdening employees by restricting their right to engage in their chosen field of employment," presented a sufficient mandate of public policy upon which to sustain Maw's CEPA claim.

The impact of *Maw* upon New Jersey employers and the general public will be significant. Indeed, until our state Supreme Court completes its review of the decision, New Jersey employers must exercise caution whenever requiring their employees to sign non-compete agreements.

Messrs. Reig and Saloman are associates in the Newark office of Proskauer Rose LLP. The firm is representing a party appearing as *amicus curiae* before the New Jersey Supreme Court in the *Maw v. Advanced Clinical Communications, Inc.* matter.

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