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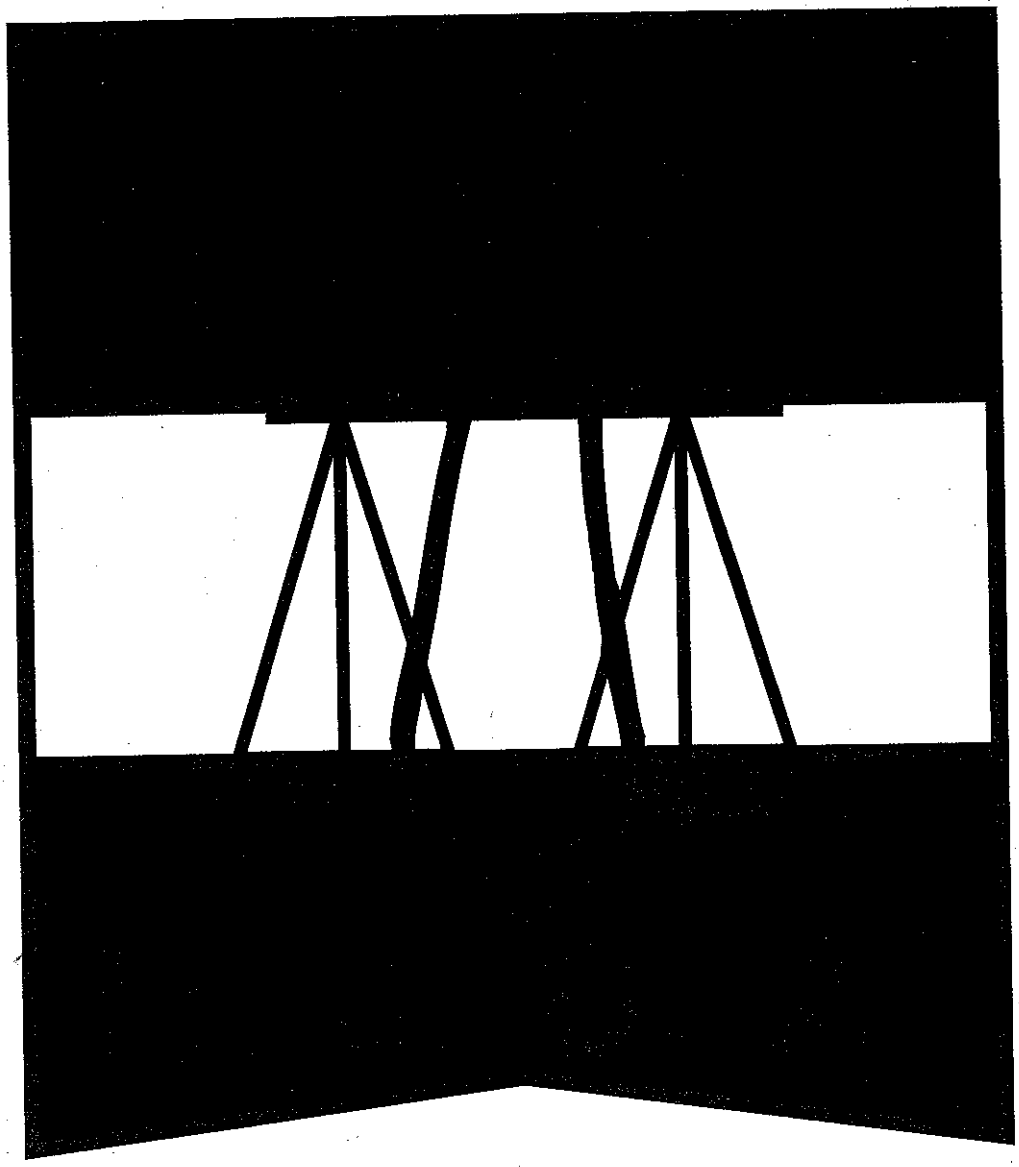
New Jersey Defense

~~ A Publication of The New Jersey Defense Association ~~



inside...

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PRESIDENT'S MESSAGE

Linda Pissott Reig, Esq.

The ringing in of the New Year is a good time to reflect on what we have accomplished, as well as to look at what lies ahead.

As you may be aware, in 2005, the Association extended a free membership offer to NJCCA and DELVACCA corporate counsel members. Recently, the Association voted to extend this "free membership" offer through December 2006. When defending lawsuits against companies, it is critical that outside counsel and in-house counsel work together effectively as a team. While the pressures on outside and in-house attorneys differ, both are well-situated to identify issues of importance to the defense bar, which may warrant participation by our Association in legislative hearings, court-appointed committees or pending cases (through the writing of *amicus* briefs). We welcome additional in-house counsel participation in our substantive committees, seminar planning and writing for this newsletter and hope that our new members find NJDA worthwhile.

Thanks to the tireless efforts of our Fall NJDA Seminar organizers (John Cinti, Mark Saloman and Steven Karg), our recent seminars were well-attended and received rave reviews. Our Auto Insurance Law Committee worked with the Insurance Council of New Jersey (through the efforts of the ICNJ's Executive Director Magdalena Padilla) to co-sponsor a September seminar on auto insurance verbal threshold standards. In October, we coordinated with the Delaware Valley Corporate Counsel Association (which is comprised of in-house counsel from Southern New Jersey, Southeastern Pennsylvania, and the State of Delaware) to co-sponsor a seminar on employment law issues. Our November seminar covered electronic discovery, document retention, protective orders and alternate dispute resolution issues in a program co-sponsored with the New Jersey Corporate Counsel Association.

Of note, the two seminars that were co-sponsored with the NJCCA and DELVACCA consisted of a nearly even split of in-house and outside counsel among speakers, as well as attendees. We particularly appreciate the efforts of in-house counsel volunteers N. Alexander Erlam and Wanda Flowers of DELVACCA and Joseph Aronds, NJCCA liaison to the NJDA, for their efforts in working with our committees to set up these jointly sponsored programs. We hope to continue to co-sponsor programs with these organizations, as well as the ICNJ, in the future.

Looking ahead to 2006, we have an exciting calendar.

- On Monday, February 13, 2006, our annual Trial Academy will occur at the Union County Courthouse in Elizabeth, New Jersey. This is a valuable opportunity for attorneys to conduct direct and cross examinations before experienced trial attorneys and to receive helpful individualized critiques.
- On Friday, March 31, 2006, we will hold an afternoon seminar on effective strategies for Crisis Management in a program co-sponsored with the New Jersey Corporate Counsel Association. Whether government officials have unexpectedly appeared at your client's door, or

PRESIDENT'S MESSAGE

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your client has uncovered the need for an immediate product recall, our experienced panel will provide valuable tips for managing the media while ensuring a streamlined approach to communication and teamwork within the company.

- On April 19, 2006, 6—9 p.m., we will host a jointly sponsored program with the Minorities in the Profession Section of the New Jersey State Bar Association at the New Jersey Law Center on Professional Liability, including Liability to Third Parties. The program will also address how to effectively handle ethical dilemmas arising in the professional liability arena. Substantive law and ethics credits will be awarded.

Our Young Lawyers Committee is thriving under the able leadership of Chairperson David Uitti, Vice Chairperson Natalie Watson, Membership Subcommittee Chairperson Michelle Hou Speaking and Writing Subcommittee Chairperson Jordan Stern. In addition to participation in our Board meetings, the YLC recently hosted its annual Holiday Party and Charity Drive. They have lined up an impressive array of speakers for the Friday morning program at our June Convention and will be hosting our annual summer associate luncheon thereafter.

During the summer, we established the Diversity Task Force led by Chairperson Joanne Vos, Vice Chairperson Arthur F. Leyden, and Task Force Members Jeffrey A. Bartolino, Stephen J. Foley, Jr., Michelle Hou and Mark Saloman. Through the Task Force, the Association seeks to increase participation by women and minorities within our Association's leadership and membership. Various specialty bar groups throughout the state have been contacted to alert them to our Association's initiative and to invite their members' participation. In addition, NJDA seminar organizers are striving for speaker diversity. We are looking forward to our April seminar, which is a direct result of the Task Force's efforts.

Last, but certainly not least, the countdown to our NJDA Convention at Amelia Island Plantation (30 minutes from Jacksonville, Florida) on June 22 to 25 has begun. Stay tuned for further information regarding our CLE programs, tennis and golf tournaments, and childrens' program. Our Conventions are family-friendly annual events – you and your families are invited to join us!

I invite you to become active - participate in our substantive committees, write for this newsletter, help plan a seminar or alert us to important developments affecting the defense bar that may warrant NJDA action. Please also contact me to share your ideas for how our Association may improve its usefulness to you in your everyday practice. I can be reached at lpreig@pbnlaw.com or 973-889-4305. Warm wishes to you and your families for a happy and healthy 2006!

Linda Pissott Reig

President, New Jersey Defense Association

THREE FOR THREE- NJ SUPREME COURT ISSUES TRIAD OF OPINIONS THAT SHOULD PLEASE DEFFENDANTS

Anita Hotchkiss, Esq. & Linda Pissott Reig, Esq. [1]

In the last several months, the New Jersey Supreme Court has issued three significant pro-defense decisions in the areas of protective orders, consumer fraud, and apportionment of liability. In each of these cases, the Product Liability Advisory Council (PLAC) appeared as *amicus curiae.*

Protective Orders

In ***Estate of Robert Frankl v. Goodyear Tire and Rubber Company,*** 181 N.J. 1 (2004), Consumers for Auto Reliability and Safety (CARS), a plaintiffs' consumer safety organization, sought access to all documents produced during discovery in a personal injury/wrongful death action. Plaintiffs claimed defects in Goodyear's tires. The trial court had entered a broad consent protective order requiring plaintiff to challenge the defendant's designations of confidentiality before discovery documents could be disclosed to others. After CARS intervened in the underlying action claiming that the public interest required release of the documents, the parties settled.

CARS pressed its demand for public access, despite the settlement and the fact that no discovery documents had been filed with the court except those filed under seal with the motion challenging confidentiality,. In a disturbing decision, the trial court rejected Goodyear's argument that unfiled discovery materials are insulated from public access. The court noted that trial judges should not "rubber-stamp" consent orders that contain blanket confidentiality provisions unaccompanied by affidavits detailing the need for confidentiality. It also found that "[i]n exceptional instances, the party seeking confidentiality must prove good cause in a limited evidentiary hearing." Finally, the trial court ruled that the Protective Order had to be re-examined, and ultimately concluded it was invalid. After *in camera* review, the court ordered several documents released based on its determination that the documents contained "important public safety information and the interests of public safety predominated over Goodyear's need for confidentiality."

Of even greater concern was the trial court's holding that the parties' private agreement was unenforceable as against a third party seeking public access.

After reversal by the Appellate Division, CARS appealed to the New Jersey Supreme Court. Nine amici appeared in support of CARS, including Public Citizen, Center for Auto Safety, The New York Times, NJ Press Association, and the NJ Foundation for Open Government. All asserted the position that the public has a right of access to unfiled discovery materials, especially where the public interest is involved and where a protective order is entered without contemporaneous proof of "good cause." Defendant and several amici (PLAC, Pharmaceutical Research & Manufacturers of America (PhRMA), and New Jersey Defense Association) urged the Court to recognize the distinction between filed and unfiled documents. Specifically recognizing

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TRIAD OF OPINIONS

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ATLA's state-by-state efforts to obliterate this important distinction, the Supreme Court nonetheless unanimously held that this distinction is alive and well. It found that neither N.J. Rule 4:10-3 nor interpretive case law creates a right of public access to **unfiled** documents exchanged during discovery in civil litigation.

The Supreme Court's opinion specifically acknowledged PLAC's argument that "the trial court's decision would eviscerate the protective order as a discovery tool because a detailed document-by-document analysis would be prohibitively expensive, and the ability of a third party to intervene would limit parties' willingness to rely on protective orders." The Court did, however, refer the matter to the Civil Practice Committee to address whether, going forward, New Jersey should maintain the position that **unfiled** discovery is insulated from judicially compelled public access. To date, the Civil Practice Committee has made no revisions to the procedures and prerequisites for consent protective orders.

Apportionment of Liability

In ***Brodsky v. Grinnell Haulers, Inc.***, 362 N.J. Super. 256 (App. Div. 2003), *aff'd in part, rev'd in part,* 181 N.J. 102 (2004), the Supreme Court considered three significant issues:

(1) Whether a defendant may seek to reduce its percentage of liability for damages by asking the jury to allocate a percentage of fault against an "empty chair" defendant previously dismissed from the case as a result of bankruptcy;
(2) Whether a trial court may give an "ultimate outcome" charge to the jury, explaining that, if the jury does not assess at least 60% liability against a defendant, plaintiff may not collect the full extent of his/her damages; [2] and
(3) Whether counsel is permitted in opening or closing arguments to tell the jury the specific percentages of fault the jury should attribute to each party.

The case arose when the driver of Grinnell's tractor-trailer crashed into the Brodsky auto. While the Brodskys stood next to their disabled car, another driver, William Horsman, ran into them, killing Mr. Brodsky and injuring his wife. In the ensuing action, Grinnell cross-claimed against Horsman who then declared bankruptcy.

After conflicting decisions in the trial court and Appellate Division on the three issues noted above, the Supreme Court considered the arguments of the parties and amici ATLA, PLAC, NJDA, NJ Business & Industry Association, and Washington Legal Foundation. The Court agreed with defendant and amici that the jury should **not** be told that a defendant who is 60% or more at fault must pay the full judgment thereby eliminating the possibility that the jury would manipulate its allocation of fault to the prejudice of the solvent defendant. The Court also accepted the novel argument that the jury may assign a percentage of fault to a non-present bankrupt (thereby potentially reducing the solvent defendant's percentage of fault and the plaintiff's total recovery). The practical result is a greater likelihood that defendants will be held accountable for only their portion of fault, provided that portion is less than 60%. In reaching this last significant conclusion, the Court relied upon an argument concerning legislative history and intent raised only by PLAC. The Court re-

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TRIAD OF OPINIONS

(Continued from page 5)

versed as to a minor issue not addressed by PLAC by determining that it was permissible for counsel to suggest numerical percentages of comparative fault to the jury.

The Practice Point defendants should take from this ruling is that all potential tortfeasors, even those who are judgment-proof, should be joined as defendants or third-party defendants in personal injury actions and the jury should be asked to allocate a percentage of fault against them.

Consumer Fraud

Against the backdrop of the seemingly ever-expanding reach of the New Jersey Consumer Fraud Act (CFA), the Supreme Court in ***Thiedemann v. Mercedes-Benz USA***, 183 N.J. 234, interpreted what it called the "enigmatic" ascertainable loss requirement of the Act. In so doing, the Court unanimously rejected plaintiffs' CFA claims because plaintiffs could not show that they suffered a "quantifiable or otherwise measurable loss" as a result of a latent and allegedly hazardous design defect.

Plaintiffs sought to represent a nationwide class of Mercedes drivers who allegedly had, or were at risk of having, problems with their fuel gauges. They claimed that the gauge might either over- or under-estimate the amount of gas in the tank, thereby putting plaintiffs at risk of injury due to a sudden stop caused by lack of fuel. Although over 43,000 fuel sending unit failures occurred in 1998-2000 models, and Mercedes replaced thousands of gauges under its warranty program at no cost to the owners, the fuel gauge problem remained and the company seemed unable to determine its cause. Mercedes did not conduct a recall.

On plaintiffs' motion for class certification, Mercedes moved for summary judgment on the claims of the putative class representatives. Plaintiffs argued that future purchasers of second-hand Mercedes cars would pay less for the autos due to the alleged defect, and that the gauge might misregister in the future with catastrophic results. After the trial court granted summary judgment, the Appellate Division reversed, holding that future manifestation of an alleged product defect creates a likelihood of loss sufficient to survive summary judgment under the CFA, and that "common sense" supported the claim of diminished resale value. The Appellate Division acknowledged that the "ascertainable loss" was "presently unknowable."

The Supreme Court, in reversing the Appellate Division, rejected the argument that a theoretical asserted loss in value constitutes an actual loss for purposes of the CFA. It found that "defects that arise and are addressed by warranty, at no cost to the consumer, do not provide the predicate 'loss' that the CFA expressly requires." In rendering its opinion, the Supreme Court specifically referred to PLAC's amicus brief and its argument that ". . . the CFA implicitly encourages merchants to initiate pro-consumer warranty programs by rewarding those companies with the benefit of avoiding CFA exposure for claims brought by individuals who do not incur an out-of-pocket loss."

Thiedemann represents an important victory for product manufacturers. Had the Court agreed with plaintiffs and plaintiffs' amici AARP and National Consumer Law Center, and permitted the Appellate Division ruling to stand, the "ascertainable loss" requirement for private CFA actions would have been rendered meaningless. Now, however, plaintiff must prove an actual out-of-pocket loss, or a loss of value supported by sufficient evidence, for plaintiff to be able to proceed to trial. The loss may not be hypothetical or illusory, and must be capable of calculation.

The Supreme Court's ruling shows it takes

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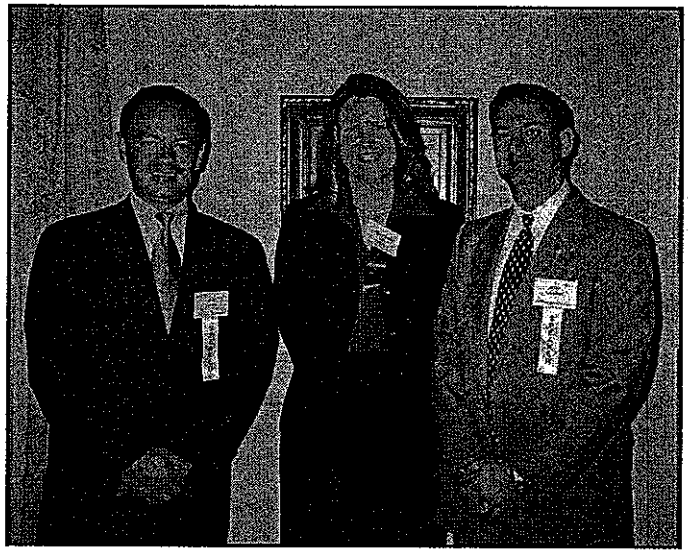
NJDA SEMINAR PHOTOS

NJDA/DELVACCA Joint Seminar October 14, 2005

Issues in Employment Law

Steven Gerber, N. Alexander Erlam, Mark Saloman, Wanda Flowers, Eric Tilles, David Wissert

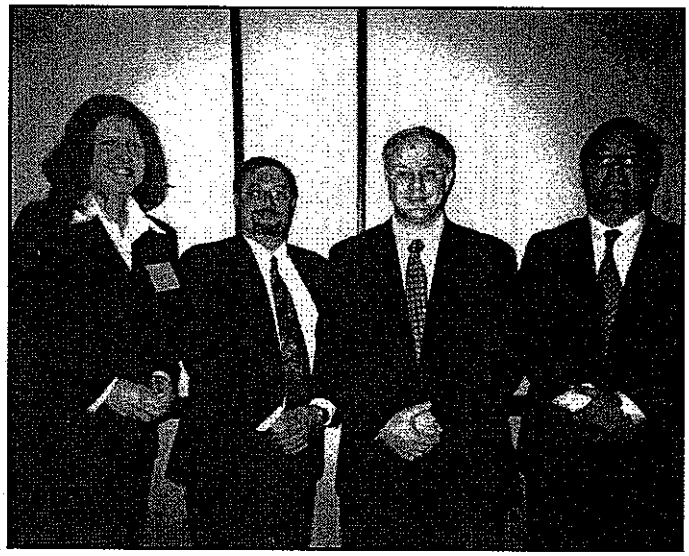


N. Alexander Erlam, Linda Pissott Reig, Mark Saloman

NJDA/NJCCA Joint Seminar November 22, 2005

Electronic Discovery, Document Retention Policies & Alternate Dispute Resolution

Back Row: Charles Cohen, Steven Karg, Arthur Saiewitz, Vito Carnevale, Curtis Michael, Joseph Maddaloni, Carolyn O'Connor, Christopher Santomassimo, Eric Probst
Front Row: Linda Pissott Reig, Joseph Aronds, Rhonda DeStefano, Susan Karlovich, Anne Patterson



Linda Pissott Reig, Arthur Saiewitz, Joseph Aronds, Steven Karg

JERSEY'S OWN

*Brian O'Toole, Esq.**

President Bush has nominated Third Circuit Appellate Judge, Samuel A. Alito, Jr., to fill the Supreme Court Associate Justice spot soon to be vacated by Justice Sandra Day O'Connor. Judge Alito, who grew up in Hamilton Township, is a Princeton graduate and West Caldwell resident. He is a former United States Attorney from New Jersey and an Adjunct Professor of Law Seton at Hall Law School. He faces a stiff challenge from the liberal left due to his primarily conservative rulings in his fifteen years on the Federal bench.

Most of his opposition seems to be concentrated on his decision in a 1991 case known as Planned Parenthood v. Casey. In that case, Alito was the lone dissenting vote in a 2-1 ruling that struck down a Pennsylvania requirement that wives planning an abortion must tell their husbands. He reasoned that because most abortions are sought by unmarried women, and most married women planning to abort voluntarily tell their husbands, the "spousal notification" requirement would not unduly burden the right of women to an abortion. The Supreme Court in a 5-4 decision disagreed and struck down the spousal notification requirement.

Another case which alarms the liberal left is ACLU v. Schundler decided in 1999. In this 2-1 ruling, Alito wrote the majority opinion allowing Jersey City to display a Nativity scene, a Menorah and Kwanzaa symbols along with Santa Claus and Frosty the Snowman. He reasoned none of these displays conveyed a message of Christianity, Judaism or religion in general, but instead, "sent a message of pluralism and freedom to choose one's own beliefs."

Counterbalancing what might be viewed as strict conservatism is Alito's decision in Planned Parenthood of Central New Jersey v. Farmer decided in 2000. Alito was part of a three-judge panel that unanimously decided New Jersey's ban on "partial birth abortion" was unconstitutional. He reasoned that "our responsibility as a lower court is to follow and apply controlling Supreme Court precedent." Similarly on the issue of religious freedom, in Fraternal Order of Police v. City of Newark decided in 1999, Alito wrote the Court's unanimous opinion allowing two "devout Sunni Muslim" Newark police officers to wear religiously required beards, despite the department's clean-shaven policy. His supporters cite this case to dispel the notion that Judge Alito is always on the side of the "Establishment."

Obviously, one's point of view is the deciding factor in how you look upon Judge Alito's rationale. Critics would say his predominantly conservative philosophy is too far right of mainstream. His supporters argue that his approach is not only mainstream, but the choice of an overwhelming majority of Americans. They proclaim that the Constitutional guarantee of "Separation of Church and State" is just that and does not justify the imposition of a standard which equates to elimination of Church from State. This issue is particularly topical in light of recent challenges to references to God on our public buildings, in our Pledge of Allegiance and on our currency. We have also recently seen a veteran high school football coach resign, rather than be prohibited from leading his team in a short prayer prior to kickoff, a practice he followed for over twenty years. Even in concepts as basic as where and how we evolved, challenges loom in what we teach our children. The Darwinian theory, which was the subject of the famous Scopes-Monkey trial argued by Clarence Darrow and William Jennings Bryan, is now being challenged by the "Intelligent Design" theory, which holds that the universe is so complex that it must have been created by a higher power.

Obviously, we are in need of a strong guiding voice on all of these issues and I feel Judge Alito's past decisions do reflect the feelings of almost all Americans. I believe almost all Americans think this is "One Nation, Under God" and that "In God We Trust." The pilgrims prayed before they ate at the first Thanksgiving, the founding fathers opened the Continental Congress with a prayer, Thomas Jefferson invoked God's assistance to guide his hand as he drafted the Constitution, and the builders of the Washington Monument inscribed a Latin phrase glorifying God at its very top and placed a Bible in its cornerstone. Other references to a deity or God are abundant in our American history. So you may ask why all this should change 229 years later.

In any event, no matter which point of view you take, certainly Judge Alito is a jurist of substance and great accomplishment. Never have we had a nominee to the high court with such a judicial portfolio. In this man's opinion, I fervently pray that Judge Alito will be New Jersey's next gift to this great nation of ours.

* Brian O'Toole is a partner with O'Toole & Couch in Whippany, NJ and a past NJDA President.

LEVINE V. UNITED HEALTHCARE: THE THIRD CIRCUIT REVISITS PERREIRA

*Stephen J. Foley, Jr., Esq.**

Described in broad terms, the categories of compensatory damages recoverable in tort actions are economic and non-economic. As difficult to evaluate as the amorphous class of non-economic losses attributable to pain, suffering, disability, impairment and the loss of life's enjoyments may be, the law governing the recoverability of the "special damages" attributable to the costs of medical care and treatment can be equally confounding. In 2001, the New Jersey Supreme Court appeared to clarify that law by prohibiting insurers from asserting liens in their insureds' damage actions against third-parties. Perreira v. Rediger, 169 N.J. 399 (2001). More recently, however, the Third Circuit held that the State statute relied upon by the New Jersey Court in barring such liens was preempted by the Employee Retirement Income Security Act of 1974(ERISA). Levine v. United Health Care, 402 F.3d 136 (3 Cir. 2005). The discussion which follows attempts to place the conflicts between the Federal and State decisions in perspective and in the end, state as clearly as possible the current law governing liens asserted by health carriers.

Historically, injured plaintiffs were permitted to recover the costs of medical care as an element of their economic damages. Such recoveries were permitted even when treatment costs were paid by insurers and therefore, were not "out of pocket" to plaintiffs. Recognizing the inequity of permitting plaintiffs to retain as damages costs absorbed by insurers, the Legislature acted to eliminate such recoveries when benefits were paid by workers compensation carriers, automobile insurers and health insurance companies. The procedural means chosen to avoid double recoveries, however, varies from statute to statute and complicates any analysis of the rules governing the recoverability of medical costs in tort litigation.

Both the Workers Compensation Act, N.J.S.A. 34:15-1 et. seq., and the No Fault Act, N.J.S.A. 39:6A-1 et. seq., require insurers to pay benefits without regard for the role that the negligence of the insured seeking benefits played in causing the injury requiring medical care. The Acts, however, also contain provisions designed to ensure that insurers paying benefits for negligent drivers and careless workers have a stable financial base from which to make those payments. Thus, pursuant to N.J.S.A. 34:15-40, workers compensation insurers have the right to recover the amounts of the benefits paid on behalf of an injured worker when the worker's injuries are caused by the negligence or other fault of a third-party. The section 40 lien establishes a source from which to replenish the fund out of which benefits are paid. The No Fault Act protects the funding source in a different way.

N.J.S.A. 39:6A-12 makes the amounts of benefits collectible or paid pursuant to the No Fault Act inadmissible in bodily injury lawsuits arising from automobile accidents. The source of the funding from which to pay benefits is preserved rather than replenished because the same insurers who pay No Fault benefits also provide liability insurance coverage to the vast majority of the drivers sued by automobile accident victims. By eliminating medical expense benefit claims from automobile accident cases, the Legislature reduces liability insurance payments and protects the sources from which No Fault benefits are paid.

Despite their similar purposes, the differences between the replenishment and preservation mechanisms of the Workers Compensation and No Fault Acts has resulted in two very different rules governing the trial of tort actions. Because the Workers Compensation system seeks to replenish the source of benefit funding, the amounts paid by the compensation carrier for medical expenses are recoverable from tortfeasors. To be recoverable, evidence must be presented at trial to prove the amounts due. The Workers Compensation Act, therefore, requires that the amounts of medical bills paid to injured workers be admitted at trial. It favors compensation carriers over liability insurers by placing the replenishment burden

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upon the latter. The No Fault Act, on the other hand, relies upon the inadmissibility of evidence of benefits paid to maintain equilibrium among automobile liability insurers and preserves for them a source from which to pay first-party benefits. Procedurally, medical expense benefits paid by No-Fault insurers are not recoverable by plaintiffs because proofs relating to those expenses are not admissible at trial.

N.J.S.A. 2A:15-97 is generally referred to as the Collateral Source Act. The mechanism employed therein for avoiding double recoveries represents a hybrid of the Workers Compensation and No Fault mechanisms. Thus, although evidence of the amounts of medical bills paid by health insurers is admissible at trial, the Act requires that any amounts awarded for those expenses be deducted from the verdict. The Act, therefore, is similar to the Workers Compensation Act in that it permits juries to consider the amounts of medical bills incurred by an injured plaintiff. Ultimately, however, like the No Fault Act, it prohibits a plaintiff from recovering the amounts of bills paid by a health carrier. That prohibition, which effectively eliminates health insurance liens, was upheld by the New Jersey Supreme Court in Perreira. The extent to which that prohibition conflicts with ERISA was the subject of the Third Circuit's decision in Levine.

> N.J.S.A. 2A:15-97 provides that [i]n any civil action brought for personal injury or death, except actions brought pursuant to the provisions of [N.J.S.A. 39:6A-1 et. seq.], if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

The statute does not expressly address the impact that a health insurer's assertion of a reimbursement or subrogation lien has upon the recoverability of medical expense payments prior to Perreira, however, N.J.A.C. 11:4-42.10 specifically approved the inclusion of subrogation clauses in health insurance policies. As a result, the Perreira Court was called upon to decide whether the Legislature's adoption of the Collateral Source Act foreclosed health insurers from asserting liens and if so, whether the Commissioner of Insurance had the authority to permit the assertion of liens otherwise barred by statute.

The Perreira Court based its decision upon its interpretation of State law. Convinced that the Act's legislative history evidenced an intent to eliminate double recoveries and contain *(Continued from page 10)*
liability insurance costs, the Court reasoned that the Act favored liability insurers over health insurers by eliminating from tort judgments the amounts of health care payments. It further held that the Administrative Code's authorization of subrogation liens could not override the statutory prohibition. Thus, pursuant to Perreira, health insurers were barred from asserting liens against tort recoveries obtained by their insureds.

The Perreira Court did not consider federal preemption issues which had been raised in prior cases. See e.g. Dankowski v. U.S., 924 F.Supp.661 (D.N.J. 1996). Those issues were addressed directly by the Third Circuit in Levine.

It is not accurate to state, as many have since Perreira, that the Collateral Source Act does not apply to ERISA plans. With rare exceptions, all private employers' benefit plans are ERISA plans. The scope of the federal Act is so broad that for analytical purposes it should be assumed, unless established otherwise, that medical benefits are paid pursuant to the terms of a federally regulated plan and that any State laws which impact upon those plans are subordinate to the federal law. Subordinate, however, does not mean that all state laws impacting upon ERISA plans are

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LEVINE

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preempted by the federal statute. Rather, it means simply that all state laws must be scrutinized to determine whether they conflict with their federal counterparts. To the extent that they do, where ERISA is concerned, federal law controls.

Preemption analysis under ERISA involves three clauses – the preemption clause, the savings clause and the deemer clause. The preemption clause is set forth at 29 U.S.C. 1144(a). It provides that ERISA's regulations supersede all State laws which "relate to any employee benefit plan [subject to ERISA]." The savings clause is set out in 29 U.S.C. 1144(b)(2)(A). It provides that the preemption clause is not to be construed "to exempt or relieve any person from any law of any state which regulates insurance." The deemer clause is found in 29 U.S.C. 1144 (b)(2)(B). It provides that state laws which impact self-funded employee benefit plans are deemed not to be laws regulating insurance and therefore, are not saved form preemption by the savings clause. Self-funded plans generally pay benefits directly from amounts collected from plan members and do not purchase insurance to cover benefit costs. Union health and welfare funds are the most recognizable example of self-funded plans.

In Levine, the Court held that New Jersey's Collateral Source Act related to an ERISA plan. As a result, the Court reasoned that unless saved by 29 U.S.C. 1144(b)(2)(A), the State law was preempted pursuant to 29 U.S.C. 1144(a). The deemer clause of 29 U.S.C. 1144(b)(2)(B) was not an issue because the benefit plan in Levine was insured rather than self-funded. Consequently, the question presented in Levine was whether the Collateral Source Act is a law "which regulates insurance."

The Levine court held that in order to be considered a law which regulates insurance, a State law must be "specifically directed toward entities engaged in insurance" and must "substantially affect the risk pooling arrangement between the insurer and the insured." It found that the Collateral Source Act did not meet the first of these requirements because it applies to both "insurance and non-insurance entities." It, therefore, was not "specifically directed toward" insurers but was directed instead to "any contributor" in a civil action. The Court reasoned that because partially self-insured and wholly uninsured tortfeasors benefit the same extent as insured tortfeasors, the Act is one of general application rather than one "specifically directed" to insurers.

The essence of the Levine Court's decision was its determination that the New Jersey Collateral Source Act is preempted by ERISA and can not be relied upon to avoid subrogation and reimbursement liens asserted by health insurers. The Court, however, was not called upon to address the impact of the New Jersey Department of Banking and Insurance's August 5, 2002 repeal of N.J.A.C. 11:4-42.10 and its replacement with a specific prohibition against including subrogation and/or third-party reimbursement provisions in health insurance policies.

The Levine decision arose directly from Perreira. The Levine plaintiffs sued their health insurers to recover amounts collected by the insurers out of the proceeds of third-party claims resolved prior to the New Jersey Supreme Court's decision. Originally presented in State Court, the Levine plaintiffs argued that Perreira should have been applied retroactively. The defendant health carriers, however, removed the suits to federal court and ultimately had them dismissed based upon the ERISA preemption clause. The federal court decision, therefore, was predicated upon the law of New Jersey as it existed in June 2001 when Perreira was decided.

The Department of Banking and Insurance's August 2002 enactment changed New Jersey's law. As a result, New Jersey now has a law which is "specifically directed" toward the insurance industry and which bars the assertion of subrogation and/or reimbursement liens by health insurers. Applying the Levine Court's analysis of ERISA's savings clause, N.J.A.C. 11:4-42.10 is saved from preemption by 29 U.S.C. 1144(b)(2)(A) because the Code provision regulates only insurance carriers and the federal preemption clause does not relieve health insurers of their obligation to abide by that law. The Third Circuit's scuttling of Perreira, therefore, is limited to claims arising prior to August 5, 2002. Thus, in the vast majority of pending claims, health insurance liens are prohibited in New Jersey.

In summary, insofar as they involve medical expenses paid by workers compensation, automobile and health insurers in New Jersey, the rules governing the admissibility and recoverability of such expenses

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are as follows. When the expenses are paid by a workers compensation carrier, they give rise to a lien and are both admissible at trial and recoverable from a tortfeasor. When the expenses are paid by a No Fault insurer, the amounts thereof are neither admissible at trial nor recoverable from a tortfeasor. When the bills

are paid by a health insurer, they are admissible at trial but not recoverable from a tortfeasor for claims arising after August 5, 2002. The enforceability of health insurance liens arising before August 5, 2002 should not depend upon whether an action is brought in state or federal court. At present, however, given the conflict between Perreira and Levine, the surest solution to disputes arising during that time period will involve negotiated settlements.

* Stephen J. Foley, Jr., Esq. is a partner with Campbell, Foley, Lee, Murphy & Cernigliaro in Asbury Park, NJ and a past NJDA President.

New Jersey Corporate Counsel Association

Among its many benefits, NJCCA membership enables in-house attorneys to exchange perspectives on issues, such as litigation defense, that impact their companies' bottom line.

Recently, I was approached by the President of the New Jersey Defense Association (NJDA), Linda Pissott Reig, Esq., to serve as a liaison between the two groups. The NJDA is an organization composed of New Jersey defense attorneys and insurance professionals who devote a substantial portion of their time to the defense of damage suits and claims. The joint NJCAA-NJDA initiative, launched in 2005, will provide a variety of continuing legal education and other opportunities for the organizations' members to interact with each other in formal and informal settings. A free one-year membership is available to any NJCCA member who registers with the NJDA. Free membership has been extended through December 31, 2006.

On November 22, the first joint NJDA-NJCCA continuing legal education event took place at the Woodbridge Hilton in Iselin. This half-day event featured presentations by outside counsel with a range of experience in litigation defense, as well as in-house corporate counsel who offered "insider's" perspective. Topics on the agenda included "Recent Developments Affecting the Confidentiality of Documents," "Electronic Discovery," "Document Retention Policies," and "Alternative Dispute Resolution."

Opportunities also exist for NJCCA members to submit articles to the NJDA's newsletter and to attend the organization's annual convention. I attended this past year's convention in Cambridge, Maryland with my family, and it was both fun and a good opportunity to meet other corporate counsel and outside lawyers. The convention this coming year is to be held toward the end of June at the Amelia Island Plantation near Jacksonville, Florida, and should be equally enjoyable and worthwhile.

NJCCA's joint initiatives with organizations such as the NJDA serve the important function of bringing together outside counsel and their corporate clients in non-traditional settings so as to encourage communication between the two groups. As a former law firm associate and current in-house attorney, I have seen things from both sides of the fence. Bringing outside and in-house attorneys together is a win-win situation for all concerned.

Further information about the NJCCA can be found at www.acca.com, and about the NJDA at www.njdefense.com. For information about the NJCCA contact NJCCA's Executive Director Barbara Walder at njcca41@aol.com.

Joseph M. Aronds, Esq.
Member, Board of Directors, NJCCA
Liaison, Joint NJCCA-NJDA Initiative
Mr. Aronds is Assistant Vice President and Assistant General Counsel with Hartz Mountain Industries, Inc..

Calendar of Events

Monday, February 13, 2006
NJDA Trial College
8:30 a.m. — 1:00 p.m.
Union County Courthouse, Elizabeth, NJ
4.5 CLE credits (including 1 Ethics credit) pending approval

Tuesday, February 28, 2006
Products Liability Committee
6:30 p.m. at the Law Offices of Norris, McLaughlin & Marcus, Bridgewater, NJ
RSVP to Steven Karg, Esq. at sakarg@nmmlaw.com or 908-722-0700

Friday, March 31, 2006
"Effective Strategies for Crisis Management"
1:00 — 4:00 p.m. (light lunch served at 12:30 p.m.)
Jointly sponsored with NJ Corporate Counsel Association
Woodbridge Hilton, Iselin, NJ
CLE credits will be awarded

Wednesday, April 19, 2006
Professional Liability & Ethics Seminar
6:00 — 9:00 p.m.
Jointly sponsored with NJDA Diversity Task Force and NJSBA Minorities in the Profession Section
The Law Center, New Brunswick, NJ
CLE credits (including 1 Ethics credit) to be awarded

Thursday, June 22– Sunday, June 25, 2006
40th Annual NJDA Convention
Amelia Island Plantation — located 30 minutes from Jacksonville, Florida

TURNING THE TABLES ON PLAINTIFFS—USING THEIR E-COMMUNICATIONS AGAINST THEM

Eric L. Probst, Esq. & Kerri A. Wright, Esq. *

Corporate defendants, and especially their in-house counsel, shudder when the term electronic discovery or e-discovery is mentioned. Defendants have nightmares about complying with voluminous discovery requests from plaintiffs that target e-mails, databases, hard drives, servers, and back-up files. E-discovery places the defendant on the defensive and hampers its ability to develop its defense strategy. It is time for defendants to turn the tables on plaintiffs and make e-discovery a two-way street by serving e-discovery requests on and conducting Internet searches of plaintiffs.

Electronic discovery can be a treasure trove of discoverable information about a plaintiff's injury, lifestyle, earning capacity, employment experience, and academic history. E-mail communications and chat room discussions have replaced letter writing in the 21st century. Doctors, attorneys, engineers, construction workers, teachers, students, and soccer moms all use e-mail to communicate. Stored electronic data can be found in cell phones, pagers, Palm Pilots, Blackberrys, and on Blogs. Attorneys should be aware that information exists and know how to obtain it.

This article will address the discovery of a plaintiff's electronic information for the purpose of defending a personal injury lawsuit. The concepts, however, apply to commercial litigation as well. It will briefly discuss the types of e-discovery, how to ask for them, and highlight a recent case in which the production of Internet chat room transcripts was sought. The article will also discuss how the Internet can be used to obtain information about a plaintiff's case. As will be seen, most cases addressing the discoverability of e-mail and chat room communications have been federal criminal cases. However, the reasons compelling disclosure in criminal cases can be extrapolated to civil cases to justify the disclosure of e-communications.

I. Why Is E-Discovery of Plaintiffs Necessary?

Today, e-mail is the second most popular form of communication, second only to oral communication.[1] In 2002, approximately 31 billion e-mail messages were sent per day, and that number is expected to grow to 60 billion per day by the year 2006.[2] Internet chat room participation and Blackberry use, likewise, have increased in popularity over the years.

Because of the informality that characterizes e-mail messages, chat room discussions, and instant or text messages, they can be depositories of valuable information. Indeed, "[e]mail . . . seem[s] to invite astonishing candor and to tempt pettiness and chatter."[3] The candor is more prevalent in chat room discussions where participants have real-time conversations. E-communications may contain valuable information about a plaintiff's health, employment, marital relations, and academic progress. Additionally, the recipients of a plaintiff's e-mails or instant messages may be fact witnesses the defendant wants to interview or depose. To obtain this important information, defense counsel need to know what communications to ask for and how to ask for it.

A. What To Ask For

E-mail messages and chat room discussions are stored and searchable. Counsel should be aware of the diverse sources of electronic communications when drafting interrogatories and document requests. Electronic information can be found on

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office computer hard drives, home computers, laptops, personal digital assistants, network systems drives, servers, data from internet user groups, hard and floppy disks, e-mail communications, calendars, Blackberrys, electronic appointment books, cell phones, back-up tapes, Instant Messages, telephone conference call recordings, answering machine records, fax machine data and logs, web sites, web logs, and chat room transcripts.[4] The list is endless.

Interrogatories, document requests, and deposition outlines should seek information on a plaintiff's e-communication devices (*e.g.*, laptops, desk tops). Additionally, questions should focus on how many computers the plaintiff uses or has access to. Interrogatories should target whether the plaintiff owns a cell phone, pager, Blackberry, and personal data assistant. The requests should seek a plaintiff's Internet passwords and user names, especially if the plaintiff participates in chat room discussions. Deposition questions should explore the nature and extent of the plaintiff's Internet and e-mail use to locate sources of e-communications and fact witnesses.

Discovery requests should be narrowly tailored to identify the sources and type of information sought. Courts may shift the cost of production to the requesting party if the request is overly broad. Defendants should avoid making blanket requests for "any and all" e-mail communications for a lengthy period of time or between a large group of individuals.[5] Additionally, the requests should specifically address in what form the information or documents should be provided (*e.g.*, electronic or hard copy). Electronic format is preferred because an IT expert can search the communication to identify its author and whether the document was edited.

Here are some examples of preliminary specific questions which can be asked:

- Do you use the Internet for any purpose? For what purpose?
- Who is your Internet Service Provider?
- Do you have a password?
- Have you ever carried on a conversation with persons in a chat room? If so, please provide the website and state when and how often.
- How many hours during the day/week do you spend on the Internet?
- Do you have an e-mail account? If so, please provide the e-mail address and account information.
- What type of computer do you use?
- What other electronic devices do you use (Blackberries, etc.)?
- What websites do you visit and with what frequency do you visit them?
- How often do you use e-mail for personal purposes? Who do you correspond with via e-mail or chat room discussions?

After the information is obtained, the next step is to retrieve it.

B. Electronic Discovery Sources

In general, there are three ways to communicate on the Internet: 1) e-mailing; 2) chatting; and 3) instant messaging. However, a person must first gain access to the Internet through an Internet Service Provider (ISP) to access the Web. An ISP is a private company that charges its clients, or subscribers, a monthly fee to access the Internet.[6] When registering with an ISP, such as America Online, Inc. (AOL)[7], a person creates an

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account and then chooses a screen name.[8] The screen name will identify that person when he or she is on-line, and can allow the defendant to track the sites the plaintiff visits on the Web. Therefore, the screen name is unique; no two AOL subscribers can have the same screen name. Once an individual has an account and a screen name with AOL, he or she can start communicating on the Internet.

1. E-Mail

One of the most popular forms of communication on the Internet is electronic mail ("e-mail"). E-mail is a message sent from one user to another. It can be of any length and can include attachments, such as photographs or word processing documents. E-mail messages are stored in "mailboxes" until opened by the recipient. Once the original e-mail message has been sent, the originator has no control over to whom, or how many times, the message is forwarded to other people.[9]

The ability to retrieve copies of e-mail messages depends upon where the communications are stored. E-mails sent and received on residential personal computers generally will be stored on the computer's local hard drive. A request to download the hard drive may be required; an IT expert may have to be consulted. On the other hand, e-mails sent from, or received on, corporate computers might be stored either locally to the individual computer's hard drive, or centrally to the company's server or storage unit. AOL stores e-mail messages for five weeks on its central computer.[10] After five weeks the messages are purged from AOL's system. Further, AOL provides its own contractual privacy protection and only discloses e-mails to third parties with a court order.[11] This makes retrieval of e-mail messages directly from AOL very difficult. Privacy issues may be encountered during an attempt to obtain this information.

2. Instant Messaging

Another form of electronic communication is instant messaging. An instant message (IM) is a short message, generally not more than 300-500 characters, sent from one user to another when both are on-line at the same time.[12] The messages are transmitted over the Internet and received within seconds of being sent. This is very similar to a telephone conversation because the discussion back and forth progresses virtually instantaneously.[13]

Unfortunately, obtaining copies of these messages is more difficult than obtaining copies of e-mails. AOL for example, does not monitor these conversations nor does it keep a record in its com-

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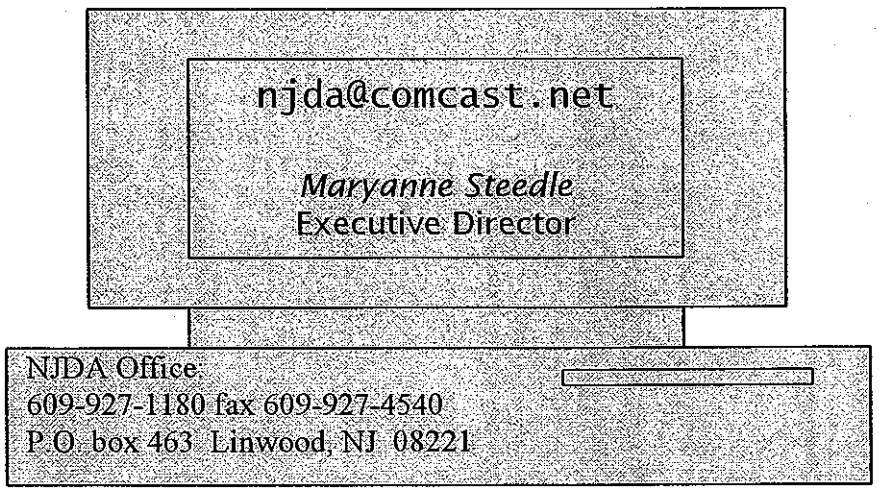

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puter bank. In addition, most computer programs do not automatically save transcripts of these messages. As a result, the only "record" capable of being reproduced at trial would be if one participant actively saved the entire conversation to his or her computer. Discovery requests and deposition questions should be crafted to obtain any saved IMs or the identity of the person with whom plaintiff communicates.

3. Chat Rooms

Another popular form of electronic communication occurs in Internet "chat rooms." Chat rooms are public or private discussion groups on a website typically organized by subject. For example, fans of Desperate Housewives can participate in chat rooms devoted to the show. A public chat room is one open to the general public and does not require a user to fulfill any specific prerequisites prior to receiving access. Restricted chat rooms, on the other hand, might require a user password or code to enable a user to access the site. Some chat rooms might also require the user to pay a fee to access the site.

To enter a chat room, individuals will first enter what is called the "lobby," where they can view a list of all the individuals currently participating in the conversation. If they decide to join the conversation their screen name – which is unique to them—will immediately appear on the participant list. All other persons in the chat room will immediately know that a new person has joined.[14] Chat room conversations take place in much the same way as Instant Messaging. The user types a short message and sends it (a.k.a. "posting") to the chat room, inviting a response. The message immediately appears on the screen and is visible to all those participating in the conversation as well as those viewing the website. Users generally do not have the ability to prevent other individuals present in the chat room from receiving messages they generate.

The ability to obtain transcripts of chat room conversations depends upon the website that hosts the chat room. Each website on the Internet is maintained by an individual or company known as the "webmaster." A website and chat room maintained by a corporation will likely have corporate policies regarding monitoring chat rooms and retaining transcripts. For example, AOL monitors and retains transcripts of public chat room discussions.[15] However, the webmaster of a privately maintained chat room may or may not retain copies of particular discussions. If discovery reveals a plaintiff frequents a particular chat room, the webmaster for that site should be contacted to determine whether he or she retains transcripts of the discussions. Copies of these transcripts can then be obtained either by request or subpoena. If a subpoena is required, and the webmaster is not within the state where the litigation is pending, a commission will be needed to obtain the transcripts.

In a recent mass tort personal injury case we handled, the discovery of a plaintiff's chat room discussions became the subject of motion practice when the plaintiff moved to quash our subpoena to obtain transcripts of the plaintiff's chat room conversations. The plaintiff was a wheelchair-bound fifty-year-old woman. She admitted in discovery requests and at deposition that she spent a considerable amount of her time on a disability Internet chat room. At deposition, she revealed the name of the website, www.Disabilities-R-Us.com. We contacted the webmaster and learned that the website maintained transcripts of the chat room discussions for five years. Further, the webmaster could conduct topic and term searches of the public transcripts. Plaintiff also had a screen name to enter the chat room, allowing us to track her conversations. Finally, the webmaster recognized the name of the plaintiff as a participant in the chat room. We obtained a commission and subpoenaed the transcripts of the chat

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room discussions in which plaintiff participated.

Plaintiff's counsel quickly moved for a protective order, arguing that the subpoena harassed his client and other chat room participants. Further, counsel claimed that his client's chat room conversations could not be verified. We opposed the motion and argued that the information was reasonably calculated to lead to the discovery of admissible evidence. We pointed out that an *in camera* review of the transcripts would prevent the accidental disclosure of transcripts in which plaintiff did not participate. Further, the webmaster's ability to search the transcripts decreased the chances that conversations in which plaintiff did not participate would be disclosed.

Because of the dearth of civil case law on the issue, we relied on several federal child pornography cases to argue that plaintiff had no expectation of privacy in her chat room discussions. Although the case law established by these cases draws from federal and state statutes, such as the Communications Assistance to Law Enforcement Act of 1994, and the Electronic Communications Privacy Act of 1986, we argued the principles discussed in these cases supported the disclosure of e-mail communications and chat room discussion transcripts in civil cases.

Two cases that summarize reasons why the chat room discussions should be discoverable are discussed below. In *Commonwealth v. Proetto,* the Superior Court of Pennsylvania held that the defendant did not have an expectation of privacy in e-mail messages or chat room conversations.[16] In *Proetto*, the court rejected the defendant's constitutional claim to privacy because once the defendant sent the communication they could be forwarded to anyone.[17] Chat rooms provided even less privacy because oftentimes people pretend to be someone they are not. According to the court, "[w]hen [defendant] engaged in chat-room conversations, he did not know to whom he was speaking" and, therefore, could not reasonably have expected his conversation to remain private.[19] In *United States v. Maxwell,*[20] the court similarly found that whatever reasonable expectation the defendant might have had ended when the e-mails he sent were received.[21] In comparing e-mails to letters, the court noted that once a message is sent, the "originator of the message has no control over to whom or how many times the message is forwarded." [22] The court further indicated that Fourth Amendment privacy protections "diminish[] incrementally" when messages are sent using the computer and "the more open the method of transmission, such as the 'chat room,' the less privacy one can reasonably expect." [23]

The court neither granted nor denied the motion. The judge was troubled by several aspects of the request – whether plaintiff had contractual rights with the website that would prohibit the production of the material, whether licensing issues and First Amendment rights were implicated, and whether plaintiff could be identified in the chat room with sufficient particularity. The judge noted that the criminal cases, though not completely inapposite, were based on criminal statutes and public policy not present in our case. The court reserved its decision. Within two weeks of the motion hearing, the matter resolved.

The lessons learned from the motion are that chat room transcripts are available and can be found with specific interrogatory and deposition questioning. However, satisfying a court that the information should be produced may require a careful analysis of multiple issues. If a court is unwilling to grant the defendant access to the chat room transcripts, counsel should explore other non-traditional avenues to find information about plaintiffs.

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II. Internet Research

Conducting Google™ searches on plaintiffs is another way to find valuable information about a plaintiff. As anyone knows who has spent five minutes on-line, the Internet contains a treasure chest of useful and useless information. However, you will be surprised how much *useful* information you can obtain from a Google™ search on a plaintiff's name.

In several cases in a recent mass tort, Google™ searches exposed weaknesses in the plaintiffs' causation and damages theories. In the litigation, the plaintiffs alleged the defendants' products caused strokes resulting in paralysis, lack of coordination, weakness, and numbness. One plaintiff claimed his stroke resulted in left-sided paralysis, weakness, and numbness. However, an Internet search revealed his web site, complete with pictures of him working as a DJ in night clubs. Another plaintiff, a child, claimed his stroke caused him to suffer from a lack of coordination. The Google™ search revealed the seven-year old won a longest-drive contest at a golf driving range with a drive of one hundred and thirty (130) yards. Another search unearthed a website maintained by a plaintiff's son who posted messages on the web site that his father's stroke was caused by his diet; no mention was made of our client's product. Finally, the son posted a medical history revealing a stroke several months prior to the stroke his father suffered allegedly caused by our client's product, severely undermining the plaintiff's liability theories.

Google™ searches can reveal, with a little luck, some devastating information to a plaintiff's case. Several Internet searches should be made during the course of a law suit to determine whether the plaintiff has posted a message or established a web site that contains information that can be used at deposition, in an alternative dispute resolution proceeding, or at trial.

III. Conclusion

Over the past decade, correspondence via the Internet has dramatically increased. This phenomenon can be expected to grow over the next decade. Thus, no case is too small for electronic discovery. A proper defense should include efforts to identify a plaintiff's electronic devices, locate e-communications, and obtain copies and/or transcripts of the communications if possible.

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1 Ron Miller, *Email: The Other Content Management*, ECONTENT, *available* http://www.econtentmag.com/ArticleReader.aspx?ArticleD=882.
2 Grave v. Bacon, *Fundamentals of Electronic Discovery*, 47 BOSTON B.J. 18 (2003).
3 *Id* at 4.
4 Christopher P. DePhillips & Carlos G. Manalansan, *How To Keep From Getting Blindsided by E-Discovery* by E-Discovery, COMPLEX LITIGATION, at S-2 (April 26, 2004); David K. Isom, *Electronic Discovery: New Power, New Risks*, UTAH ST. B.J., Nov., 18, 2003, *available at* http://www.isomlaw.com/published-works-ElectronicDiscovery.asp.
5 Carole E. Heckman & Jerauld E. Brydges, *Best Practices for E-Discovery Motions*, May 2003, at 8.
6 United States v. Maxwell, 45 M.J.406, 410 (C.A.A.F. 1996).
7 America Online will be referenced throughout this article because it is the word's most popular ISP. *See* Press Release, America Online Inc., America Online Named "Best Internet Service Provider" (May 9, 2000) available at http://media.aoltimewarner.com/media/cb_press_view.cfm?release_num=30100443 (last visited July 27, 2004) (indicating that AOL is the world's most popular Internet Service Provider with over 22 million subscribers as of 2000).
8 Every subscriber must choose at least one screen name, but can choose up to five on the same account. United States v. Maxwell, 45 M.J. 407, 411 (Ct. App. A.F. 1996).
9 Id at 412.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 Commonwealth v. Proetto, 771 A.2d. 823 (Pa. Super. Ct. 2001).
17 *Id.*
18 *Id.*
19 *Id.*
20 *Maxwell*, 45 M.J. at 417.
21 *Id* at 417-18.
22 Id at 412.
23 Id at 417.

* Eric L. Probst is counsel with Porzio, Bromberg & Newman in Morristown, NJ and is a member of the NJDA Products Liability Committee.

Kerry A. Wright is an associate with Porzio, Bromberg & Newman in Morristown, N.J.

(Continued from page 6)

more than simply alleging a Consumer Fraud Act claim to survive summary judgment, and the requirement that "ascertainable loss" must be "capable of calculation" will make class certification more difficult for plaintiffs. The Court also recognized that "defects can, and do, arise with complex instrumentalities . . . " Defects alone do not constitute ascertainable loss and, when repaired under warranty at no cost to the consumer, defects do not entitle plaintiff to a CFA recovery of treble damages and attorneys' fees. If plaintiffs fail to produce evidence of a "quantifiable or otherwise measurable loss as a result of the alleged CFA unlawful practice, summary judgment should be entered in favor of the defendant."

In a recent related development, the New Jersey Appellate Division has granted the motion of defendant Merck and amici PLAC and PhRMA for leave to appeal the mass tort trial court's certification of a nationwide class of third-party payors in the VIOXX litigation. Briefing in the Appellate Division is currently under way. Oral argument in the Appellate Division will occur on January 31, 2006.

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[1] Anita Hotchkiss and Linda Pissott Reig are principals of Porzio, Bromberg & Newman in Morristown, NJ and New York, NY. Ms. Hotchkiss is chairperson and Ms. Reig is a member of the Porzio Appellate Group, which includes former NJ Supreme Court Justice James Coleman. Ms. Hotchkiss is a member of the Product Liability Advisory Council and has worked as amicus counsel in all of the cases addressed in this article. Ms. Reig worked on the Frankl and Thiedmann amicus briefs. Both Ms. Hotchkiss and Ms. Reig are currently assisting PLAC with its amicus application in support of Merck's appeal seeking reversal of the trial court's certification of a nationwide class of third party payors who put Vioxx on formulary, as well as in support of an *amicus* application seeking affirmance of a trial court's dismissal of a complaint by Vioxx users seeking recovery for medical monitoring. Ms. Reig currently serves as President of the New Jersey Defense Association.

[2] The NJ Comparative Negligence Act (N.J.S.A. 2A:1505.3a, c) imposes joint and several liability only on defendants found 60% or more at fault.

Save these dates...

When: June 22-June 25

What: 40th Annual NJDA Convention

Where: Amelia Island Plantation (30 minutes from Jacksonville, Florida)

CLE programs on Friday and Saturday mornings. Cocktail Hour on Friday night and Annual Dinner on Saturday night.

Bring Your Family!

There is a separate children's program on Friday and Saturday nights.

Young Lawyers

Committee

The NJDA Young Lawyers Committee Is On The Move

As Chair of the Young Lawyers Committee for the 2005-2006 term, I would like to share with the NJDA's membership the Committee's agenda in order to encourage across-the-board involvement to improve and grow the Committee.

The Committee's first order of business this term was to create a Steering Committee headed by Sub-Committee Chairs that will, among other things, foster a smooth succession of leadership from term to term. I am happy to report that Natalie Watson of McCarter & English, LLP has agreed to serve as our Committee's Vice Chair; Michelle Hou, of Colliau Elenius Murphy Carluccio Keener & Morrow has agreed to serve as our Membership Sub-Committee Chair; and Jordan Stern of Pepper Hamilton LLP has agreed to serve as our Speaking and Writing Sub-Committee Chair.

The Committee's next goal for this term is to do a better job of ascertaining and adding to our membership. We are working to create an electronic address book for current and prospective members. We are also actively marketing the NJDA to New Jersey law firms and in-house legal departments of New Jersey companies. Last, we are planning to conduct on-campus informational sessions at the three New Jersey law schools to introduce the NJDA and all of its benefits to prospective lawyers so that they can get involved early. As more new lawyers join the NJDA, we plan on integrating them into our sub-Committees where they can lend a hand and one day assume leadership positions within the Committee. Michelle Hou has been spearheading this work, and if you have any questions or would like to direct any of your firm's new lawyers to our Committee, please feel free to contact Michelle directly at Michelle.Hou@CNA.com.

The Committee is also actively building up a Speaking and Writing Sub-Committee for the benefit of our members. In the 2005-2006 term, this Sub-Committee will establish an annual "nuts-and-bolts" seminar event, outside of the Annual Convention, that will especially appeal to new lawyers. The Sub-Committee will also organize the Continuing Legal Education presentations for the first day of the NJDA's 2006 Annual Convention. In addition, the Sub-Committee is working towards increasing publication opportunities within the NJDA. If you have any questions or would like to get involved in our speaking and writing activities, please feel free to contact Jordan Stern directly at sternj@pepperlaw.com.

We are looking forward to a great 2005-2006 term, but we need everyone's help to achieve our goals. Natalie and I are always open to hearing new ideas, so please do not hesitate to contact us at david.uitti@dechert.com and NWatson@McCarter.com.

David C. Uitti*

* Mr. Uitti is an associate attorney with Dechert LLP in Princeton, NJ.

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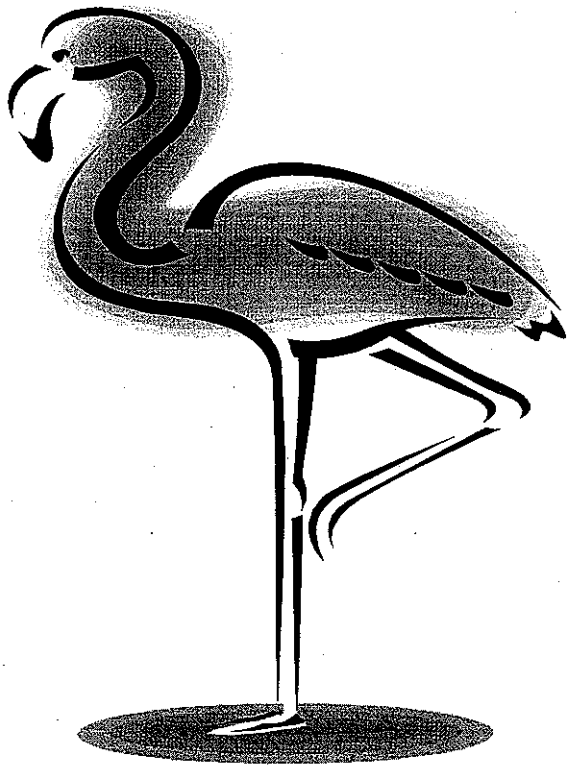

40th Annual NJDA Convention

June 22-25, 2006

- AAA Four Diamond 1,350 acre waterf resort
- Three 18-hole championship golf courses
- 23 clay tennis courts
- Health and fitness center
- Full service spa
- Upscale shopping village

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