

# Product Liability and Toxic Tort Law Section



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N e w s l e t t e r

## Message From the Outgoing Chair

by Andrew Rossetti

Get a colleague to join, join, join this great group! And please take the opportunity to get involved in the Product Liability Section of the New Jersey State Bar Association. It is a great group made up of product liability litigators. We have an array of practitioners from newly admitted attorneys to retired appellate court judges, including the two that “wrote the book”—the Honorable William A. Dreier and the Honorable John E. Keefe Sr. This section offers a wonderful opportunity to spend time with fellow litigators and to discuss the latest issues in product liability law.

The Product Liability Section is committed to keep all members abreast of the developments in product liability case law, legislation, and all other matters that touch on product liability or toxic tort. We have informal dinner meetings. Which are a great way to meet practitioners from different areas of the state and discuss current issues in product liability law. The section also produces a very successful seminar each year.

There are several hot topics that have recently developed in product liability law. In February 2008, the United States Supreme Court, in *Riegel v. Medtronic*, ruled in favor of a manufacturer, holding that the express preemption provision of the act preempts state law claims seeking damages caused by medical devices that received pre-market approval from the FDA.

In this technology era electronic discovery has become increasingly complex. Product liability practitioners need to fully understand discovery that may not be in paper form. There are many programs, emails, interoffice memorandum, drawings, etc. that are maintained and preserved at many of the larger corporations. The collection and production of this discovery is complex and time consuming.

We keep abreast of all legislation effecting product liability. Our legislative liaison reports at each dinner meeting on legislation affecting product liability. A review of legislation by Michael P. Hackett, our legislative coordinator, in this issue reports on a diverse group of legislation affecting product liability law. The scope included legislation that would limit punitive damages where one defendant settles with the plaintiff on a punitive damages

amount; a bill was introduced which requires all personal audio players distributed in New Jersey to contain a warning about volume and hearing loss; a bill was introduced addressing the arsenic content in reflective glass beads commonly used as roadway markers; a bill prohibiting the sale of asbestos or asbestos-containing products in New Jersey was introduced; a bill was introduced limiting a product seller's liability if more than five years have passed since acting as a product seller in regard to the plaintiff; these are just a few of the recent legislative developments. The report from our legislative liaison always draws the most comment at our dinner meetings.

Our section encourages anyone who is interested to move into a leadership position in the section. We traditionally have a very short ascension through the chairs. Our officers for next year are: Chair, John B. Kearney; Vice Chair, Kerry Roach; Secretary, James J. Pettit; Legislative Coordinator, Michael Hackett; Past Chair, Andrew Rossetti

We are currently in search of a website liaison to coordinate with the NJSBA staff to improve the use of our website and all of its tools.

We look forward to our activities beginning in September, and invite you to come to our dinner meetings and seminars. ■



Andrew Rossetti and John Kearney at the NJSBA Annual Meeting in May.

PRODUCT LIABILITY AND TOXIC TORT  
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# Apportionment—Pitfalls and Strategies

by James J. Pettit

**W**hat happens when controversial engineering science, careless drivers and judicial policy decisions on burden of proof collide? The courts have created a body of law on apportionment of liability and of damages that litigators must master well before the charging conference at the end of trial. Early decisions about whether to settle with one defendant, or about emphasis on how occupant kinematics were affected by alleged non-usage of a seatbelt, may return to haunt a litigator during trial.

Assume these facts (and before you think them artificial, please note they are from litigated jury trials): Bullet rear-ends blameless Target, who alleges she wore her seatbelt. Manufacturer Detroit's head restraint collapses in Target's vehicle, causing Target's head to hyperextend rearward. Bullet does not choose to dispute seatbelt usage, but argues the defective head restraint caused 99 percent of the injuries. Detroit argues non-usage of the seatbelt as support for its contention that Target fails to heed warnings, but has no expert to opine that non-usage enhanced her injuries. Target settles with Bullet before trial.

What does the verdict sheet look like?

In *Poliseno v. General Motors*<sup>1</sup> and *Green v. General Motors*,<sup>2</sup> the New Jersey Appellate Division defined the parameters of specialized types of product claims that are known as crashworthiness cases. *Poliseno* established that the burden of apportionment of

damages in such claims is shifted to the manufacturer defendant. Strict liability is imposed on a manufacturer for injuries sustained in a motor vehicle accident involving a defect that enhanced the injuries of the occupant, suffered even though the defect did not cause the accident. Enhanced injury is defined as injuries beyond those the occupant would have sustained from the impact absent the defect.

**...[A] defense of "no defect" cannot eviscerate *Poliseno's* burden shifting, or every manufacturer would argue its defect, if there were one, caused no injuries and expect to avoid its *Poliseno* burden.**

Detroit, in this scenario, argues that any verdict should be reduced under the elaborate formula imposed in *Waterson v. General Motors Corp.*<sup>3</sup> Under *Waterson*, Detroit argues, it should only be liable for a fraction of any ultimate verdict. Detroit cites *Crispin v. Volkswagen Werk AG*<sup>4</sup> for the proposition that *Waterson* applies. Also, Detroit argues the jury should not know that there will be this post-trial reduction by the Court. Target argues that: 1) *Waterson* does not apply; 2) if it does apply, the jury in fairness must know that in advance.

Target's argument that the *Waterson* reduction formula does not apply is based on the fact that 1) *Waterson* involved apportionment of liability for causing the accident (not damages), 2) the apportionment was between the plaintiff and the defendant (not the two defen-

dants), and 3) the plaintiff's conduct in *Waterson* arose from non-usage of a seatbelt, whereas Detroit's seatbelt argument was not an affirmative defense that non-usage of a seatbelt enhanced injuries, but merely that non-usage rebutted Target's "heeding presumption" (a presumption that she would have heeded an adequate warning). Target argues that *Crispin* does not apply because there the

plaintiff's own non-usage of seatbelt caused enhanced injuries, and it was pre-*Poliseno*.

Prediction: The court would not reduce the verdict, because *Waterson* is inapposite.

Target also argues that Detroit had no expert to opine that her injuries could be apportioned between those caused by Detroit's defective head restraint and those caused by Bullet's rear impact. Under *Poliseno*, Detroit, therefore, is liable for 100 percent of Target's injuries, not merely for the enhanced injuries. Detroit argues that it does not need an expert to apportion damages if it argues that none of the injuries were due to the defect. Target responds that a defense of "no defect" cannot eviscerate *Poliseno's* burden shifting, or every manufacturer would argue its defect, if there were one, caused no

injuries and expect to avoid its *Poliseno* burden.

Target directs the court's attention to Model Jury Charge 5.40, and insists that this charge addresses apportionment of damages appropriately. Target insists that the verdict sheet include the separate jury interrogatory on the *Poliseno* apportionment issue,<sup>5</sup> and that the jury must be physically holding the verdict sheet so that the court may orient the jury regarding that verdict sheet question vis-a-vis the *Poliseno* charge in 5.40.

Prediction: The court will give the *Poliseno* charge in footnote 6 because an expert apportionment was required and Detroit did not have such an expert opinion.

Finally, Target argues that the verdict sheet must contain a question for the percentage of the total damages due to Detroit's defect, rather than the "routine" verdict sheet question breaking down percentages among the litigants.

For example:

What amount of money will fairly compensate the plaintiffs for all of the damages that were proximately caused by this accident? (That is, the *total* of all damages whether proximately caused by Detroit or Bullet.)

A. Pain, Suffering, Disability, Impairment, Emotional and Psychological Distress, and Loss of Enjoyment of Life?	\$ _____
B. Medical Expense?	\$ _____
C. Lost Earnings and Earning Capacity?	\$ _____
D. Loss of Consortium (Mrs. Target)?	\$ _____
<b>TOTAL</b>	\$ _____

Target argues that this jury interrogatory is needed in the event that the jury finds the defendant did not

meet its *Poliseno* burden of apportionment. That is, if the jury finds that Detroit met its *Poliseno* burden and successfully apportioned damages, then the jury writes Detroit's percentage on the verdict sheet in the very next jury interrogatory after the author's example, and Detroit is then liable for merely that percentage of the total damages. If, however, the jury finds that Detroit did not meet its burden, then the jury answers the *Poliseno* apportionment question "No," and the entire dollar amount on the "total damages" line is assessed against Detroit.

Prediction: The court will use this sort of total damages question rather than one breaking down liability percentages between Detroit and Bullet.

The court's predicted rulings will provide the jury with an appropriate verdict sheet, one that captures the burden-shifting of *Poliseno* while providing the manufacturer with an opportunity to reduce its share of the verdict by eliciting the necessary quantum of expert testimony.

Now, what would that same verdict sheet look like if Bullet does not settle, proves Target did not use a seatbelt, produces an expert who opines that non-usage enhanced injuries, and argues he (Bullet) is only liable for injuries he directly caused? Sorry, only one convoluted fact pattern per article, please. ■

**ENDNOTES**

1. 328 N.J. Super. 41 (App. Div.), *cert. denied* 165 N.J. 138 (2000).
2. 310 N.J. Super. 507 (App. Div.), *cert. denied* 156 N.J. 381 (1998).
3. 111 N.J. 238 (1998).
4. 248 N.J. Super. 540 (App. Div.) *cert. denied* 126 N.J. 38 (1991).
5. See footnote 6 in Model Jury Charge 5.40 E.

*James J. Pettit is a partner in Locks Law Firm, LLC, in Cherry Hill, and the managing partner of that office. He is certified as a civil trial attorney, and has obtained \$5 million-plus verdicts, including one in a crashworthiness case.*

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**Case Note: *Colacicco v. Apotex Inc./McNellis v. Pfizer Inc.*,  
521 F.3d 253 (3d Cir. 2008)**

## **Third Circuit Court of Appeals Rules State Law Failure-to-Warn Claims Preempted in Anti-Depressant Cases**

*by M. Karen Thompson*

In a precedential opinion issued April 8, 2008, the Third Circuit Court of Appeals ruled that failure-to-warn claims against manufacturers of selective serotonin reuptake inhibitors (SSRIs) are preempted by actions taken by the Food and Drug Administration (FDA) pursuant to its authority under the Federal Food Drug and Cosmetic Act, and corresponding regulations. In their 2-1 ruling, Judges Dolores Sloviter and Jane Restani<sup>1</sup> dismissed the state law claims of two plaintiffs whose family members committed suicide after taking the anti-depressant drugs. The plaintiffs had claimed that the drugs' labeling failed to warn of an alleged association with an increased risk of suicidality.

Significant to the majority's ruling was the FDA's regular monitoring of the claimed association between suicidality and SSRIs for almost 20 years, coupled with its consistent refusal to require stronger suicide warnings for adult patients on the drugs' labeling, both before and after the suicides in question. This history of active FDA involvement enabled the Third Circuit to sidestep the broader issue of whether the FDA's mere approval of drug labeling would be sufficient to preempt state law claims. Instead, the court determined that the FDA's own actions, taken in

accordance with its statutory authority, and its clear and public rejection of the need for the warnings argued by the plaintiffs, preempted each the plaintiff's failure-to-warn claim. The majority also relied on the FDA's continued review of existing scientific studies regarding suicidality to dispose of the plaintiffs' claims that the FDA lacked sufficient information to mandate stricter warnings.

In so ruling, the court essentially adopted the FDA's explanation in its *amicus* brief filed in *Colacicco*, that the basis for federal preemption was the FDA's repeated determinations that there was insufficient scientific evidence of an association between use of SSRIs and suicide or suicidality. The court was careful to limit its ruling to situations in which the FDA had acted to publicly reject the very warnings the plaintiffs argued state law required. Under those circumstances, the court did not address whether the FDA's stance on preemption had been consistent prior to 2006, when the agency released its preamble to a final rule on prescription drug labeling.

The majority also rejected the plaintiffs' arguments that preemption was inappropriate because Congress never expressed any intent to preempt state law tort actions challenging drug labeling. While recognizing the presumption

against preemption, the majority noted the tension between such a presumption and implied conflict preemption, which analyzes preemption in the absence of any explicit intent. It concluded that state common law tort actions based on a failure-to-warn present pharmaceutical manufacturers with varying standards and subject them to considerable liability.

The majority also rejected the plaintiffs' contentions that 21 C.F.R. Section 314.70(c), which allows drug manufacturers to strengthen and augment warnings without seeking prior FDA approval, renders FDA labeling requirements mere minimum standards for the information to be included in the drugs' labeling, and that state law failure-to-warn claims requiring a manufacturer to strengthen warnings do not conflict with FDA regulations, but complement them. The plaintiffs also claimed that only the FDA's explicit rejection of a manufacturer's request to seek a stronger suicide warning would suffice to establish conflict preemption. The court rejected the need for such formality.

The decision represented an affirmation of Judge Michael Baylson of the Eastern District of Pennsylvania, who had dismissed the *Colacicco* complaint on the basis of conflict preemption.<sup>2</sup> In *McNellis*, Judge

*Continued on Page 7*

# Pending Legislation—Spring 2008

by Michael P. Hackett

**A-113 (Vainieri Huttel/Johnson)**—Proposed legislation requires all personal audio players distributed in New Jersey to contain a warning about volume and hearing loss. Distributors of personal audio equipment sold in New Jersey would be required to affix a warning label on the personal audio player that provides: “WARNING: This product may cause hearing damage. A volume level of 115 decibels may cause permanent hearing damage after 15 minutes of exposure.”

Many portable audio players can be listened to at volumes of up to 130 decibels. The Occupational Safety and Health Administration (OSHA) has stated that significant hearing loss can occur in 15 minutes at a volume of 115 decibels.

A “personal audio player” is defined as a personal, electronic device that allows the user to listen to audio while mobile.

A violator of the provision would be subject to a civil penalty of not more than \$5,000 for each offense.

**A-1035 (Wisniewski)**—This bill would prohibit the manufacture or sale of reflective glass beads with high arsenic content, which is defined as reflective glass beads containing more than 75 parts per million of inorganic arsenic. This bill would also prohibit the Department of Transportation (DOT), New Jersey Transit Authority (NJTA) and South Jersey Transit Authority (SJTA) from using these products for roadway markings.

Inorganic arsenic is a hazardous substance, and is recognized by OSHA and the Environmental Protection Agency (EPA) as a human carcinogen. These products may

represent a danger to workers who handle and apply them, and a contamination potential to soil and water surrounding roadways.

**A-1089 (Cryan)**—This bill would limit punitive damages in cases involving two or more comparatively negligent defendants, where one defendant settles with the plaintiff on a punitive damages amount by limiting the financial liability for all other defendants to a percentage of the settlement amount of punitive damages in proportion to each defendant’s respective comparative fault.

The bill states that, under current law, the trier of fact determines punitive damages and may not be informed of any statutory limitations on or exceptions to the amount of punitive damages.

**A-1344 (Prieto/Cohen)**—This bill provides for registration of mold inspectors and remediators.

The bill defines “mold inspection” as testing for the presence of mold hazards in residential housing, and defines “mold remediation” as utilizing a set of measures designed to mitigate mold hazards through the use of interim controls or to permanently eliminate mold hazards in residential housing.

This bill states that no person shall provide, or present, call or represent him or herself as able to provide a mold inspection or mold remediation for compensation unless registered in accordance with the bill’s provisions.

In addition, the bill authorizes the director of the Division of Consumer Affairs to refuse to issue, or to suspend or revoke, the registration of any person who violates its

provisions. Reasons why an individual may be denied registration or have his or her registration revoked include: acts of dishonesty, fraud, deception, misrepresentation, false promise or false pretense; gross negligence, gross malpractice or gross incompetence; repeated acts of negligence, malpractice or incompetence; and professional or occupational misconduct as may be determined by the director.

**A-1849 (Cohen)**—This bill prohibits the sale of asbestos or asbestos-containing products in New Jersey.

Asbestos has been classified by the EPA as a Category A human carcinogen, the highest cancer hazard classification for a substance. Asbestos continues to be used in some consumer and industrial products.

The bill also would allow a person to apply to the commissioner of environmental protection for an exemption if the person has demonstrated certain conditions, including that the use of the asbestos-containing product would not result in an unreasonable risk of injury to the public health or damage to the environment.

A violation of the act would result in a civil penalty of \$500 for the first offense and \$1,000 for the second or subsequent offense.

**S-188 (Cardinale)**—This bill modifies the current law concerning a product seller’s liability for product liability.

Presently, a product seller is subject to strict liability or breach of implied warranty of merchantability if the manufacturer of the product has no attachable assets or has been adjudicated bankrupt and a

judgment is not otherwise recoverable from the assets of the bankruptcy estate. According to the bill, this provision was originally included because it was argued that the product seller had insurance to cover the loss. The bill further states that the product seller may not have such coverage, or may have recently purchased the business and faces product liability claims only recently filed under the discovery rule with no record of the previous owner's insurers.

The law would be modified so that a product seller in those circumstances *shall not be liable if more than five years have passed since acting as a product seller in regard to the plaintiff*.

Another stated reason for this legislation is that extensive product liability claims that bankrupt manufacturers and remain not fully paid will bankrupt product sellers with fewer assets and who had no responsibility for the damages.

**S-1625 (Bucco)**—This bill establishes the Toxic Mold Protection Act of 2008 and was proposed for introduction on April 7, 2008. Proposed legislation not yet available.

**NJSBA Business Law Section Drafted Bill**—This proposed legislation amends the Professional Service Corporation Act, N.J.S.A. 14A:17-14a, to expressly permit the use of alternate names authorized by the New Jersey Business Corporation Act, N.J.S.A. 14A:2-2.1.

This section of the Professional Service Corporation Act has created uncertainty in the Division of Commercial Recording, which allowed the registration of alternate names at one point and later refused to do so.

The amendments also clarify that "PA." and "P.C." can be used without periods.

**A-2112 (Lampitt/Greenstein) and S-1859 (Turner)**—These bills seek to prohibit the sale or distribution of hard plastic beverage containers containing bisphenol A (BPA).

BPA is a main ingredient in polycarbonate plastics used in many food and drink packaging applications, which has been shown to have hormone-disrupting effects. A study by the U.S. Department of Health and Human Services found that the greatest concern about hazards associate with BPA exposure is the neural and behavioral effects caused by BPA exposure in utero. There is also concern that the chemical could cause problems in developing fetuses and young children. ■

*Michael P. Hackett is the section's legislative coordinator and is an associate at Archer & Greiner in Haddonfield.*

## Case Note

Continued from Page 5

Jerome Simandle had denied Pfizer's motion for summary judgment on preemption grounds, but certified his order for interlocutory appeal.<sup>3</sup> Pfizer's application for interlocutory review was granted, and the case was consolidated with the plaintiff's appeal in *Colacicco*.

Judge Thomas Ambro dissented, and would have applied the presumption against preemption in cases where Congress has not enacted an express preemption provision. He commented that state tort law actually complements the FDA by eliciting more information than the FDA would obtain from manufacturers. Characterizing the FDA's prior positions on preemption as "inconsistent," he concluded the FDA's recent statements in support of preemption, both in its *amicus* brief in *Colacicco* and in its informal statement in the preamble to the final rule on drug labeling, deserved little deference. Because neither drug manufacturer had enhanced the FDA-approved warnings, and had sustained no FDA sanction as a result, in his view no true conflict had occurred.

On May 5, 2008, a majority of the Third Circuit denied the plaintiffs' petition for rehearing and rehearing *en banc*. ■

### ENDNOTES

1. Chief judge, United States Court of International Trade, sitting by designation.
2. *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 537-39 (E.D. Pa. 2006).
3. *McNellis ex rel. DeAngelis v. Pfizer Inc.*, No. Civ. 05-1286 (JBS), 2006 WL 2819046 (D.N.J. Sept. 29, 2006).

*M. Karen Thompson is a member of the firm of Norris McLaughlin & Marcus, P.A., who regularly practices in the area of products liability and toxic torts. The firm represented Pfizer Inc., along with Wheeler, Trigg & Kennedy, Pfizer's national counsel, in McNellis.*

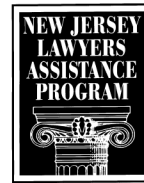
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- Alcohol is the most widely used and destructive drug in America.
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