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A View from the Outgoing Chair

As I pen this message my term as Section Chair is nearly complete. It's time to reflect on what has happened since my last missive.

Our Fall Meeting at The Sagamore in Lake George was a resounding success, despite less than perfect weather. I want to thank our Program Chairs Brendan Baynes and Charlie Siegel for putting together an outstanding meeting. The CLE program received rave reviews with topics including insurance coverage, presentation skills, ADR and e-filing. We also enjoyed the world class Donald Ross-designed golf course and the picturesque surrounding of Lake George at the historic hotel, as well as socializing at the cocktail parties and dinners. The band, Blue Hand Luke, entertained us Saturday night, joined for a couple of numbers by our Vice-Chair, Gary Cusano. We can look forward to more entertainment from Gary at the 2007 Spring Meeting in Puerto Rico.

At our business meeting, we caught up on the activities of our districts and committees since our last Executive Committee meeting at The Otesaga Hotel in Cooperstown. District events have been held or are planned throughout the state to promote Section involvement. Committees are involved in CLE programs, providing case note updates on the TICL Section website (www.nysba.org/TICL) and contributions to this *Journal*. Together the Executive Committee continues to review and comment on legislation, rule changes and other issues that affect our members' practice.

Our 2007 Annual Dinner, Annual Meeting and CLE program, co-sponsored by the Trial Lawyers Section, took place on January 24 and 25, 2007 in conjunction with the New York State Bar Association Annual Meeting in New York City. The Annual Dinner was held at Tavern on the Green in Central Park and included remarks from newly appointed Court of Appeals Judge Eugene F. Pigott, Jr. and entertainment from the Acapellants, who last sang for us in 2005. The singing group is led by Hon. Erin M. Peradotto, who was recently appointed to the Appellate Division, Fourth Department. William N. Cloonan received the John E. Leach Memorial Award for outstanding service and contributions to the legal profession as a member of the TICL Section. Jacqueline Phipps Polito received the Sheldon Hurwitz Award in recognition of outstanding contribution to the practice of law in the field of insurance by a young lawyer. Kenneth A. Krajewski received the Chair of the Year Award for his contributions as Chair of the Automobile Liability Committee in 2006.

The theme of the CLE program was "Preservation of the Jury Trial." Dan D. Kohane, President of the Federation of Defense and Corporate Counsel; Lenore Kramer, former President of the New York State Trial Lawyers Association; and Lewis Sifford, President of the American Board of Trial Advocates discussed the future of the jury trial system. Judge Pigott and Michael R. Wolford of Rochester discussed the new rules on lawyer advertising. Justice Peradotto and Christopher McGrath of Mineola discussed the role of Supreme Court Justices in Settlement negotiations. Justice Matthew A. Rosenbaum of Monroe County, Justice Barry Salman, Bronx County, K. John Wright of Rochester and Daniel J. Guarasci of Buffalo discussed summary jury trials.

I congratulate Gary Cusano, our new Section Chair. He will be ably assisted by Dan Gerber as Vice-Chair. You should save the dates of March 29-April 1, 2007 for our Spring Meeting at the Westin Rio Mar Beach Resort in Rio Grande, Puerto Rico. Visit the TICL website at www.nysba.org/TICL for more details on upcoming meetings.

I again encourage you to become one who serves the bar by joining a Section Committee, writing an article for the *TICL Journal*, speaking at a CLE seminar and attending our general meetings. If you are not a member, please join. Contact our Membership Chair:

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Paul J. Suozzi

A View from the Incoming Chair

It is both with great pleasure and much excitement that I begin my term as Chair of the Torts, Insurance and Compensation Law Section of the New York State Bar Association. On behalf of myself and the entire Section I would like to take this opportunity to thank our immediate past Chair, Paul Suozzi, for his hard work and dedication to our Section this past year.

Whether due to new legislation or appellate decisions, our chosen field of practice is constantly in transition. Our Section is dedicated to meeting this challenge by offering our membership easy access to updated case law, proposed legislation that impacts our area and a forum to discuss ideas among our peers throughout the state. We accomplish this through our *cutting edge* website, our *TICL Journal* and *Newsletter*.

What's Ahead for 2007?

We will hit the ground running in 2007 as our annual Section meeting moves from the fall to the spring for the first time. Our executive committee will pick up where it left off from our winter meeting where we discussed volunteers for Lawyers in Transition (a committee formed to help lawyers back into practice after an extended absence). We will also continue our Ad Hoc Committee that is exploring the sponsoring of a bill requiring mandatory Dram Shop coverage in New York.

Our Section will be a sponsor in this year's NYSBA "Women on the Move" Seminar (April 26, 2007 at Princeton Club). Ellen Ostrow will provide a keynote speech.

Section Meeting 2007 in Puerto Rico

From March 29th through April 1st our Section will be hosting our annual meeting at the Westin Rio Mar on the sandy beaches of Puerto Rico. We are pleased to announce that leaders from CNA, Nationwide, Zurich and Generali Insurance companies will be participating in what we expect to be a lively panel discussion on the handling of high exposure cases. In keeping with our commitment to diversity in our Section, we will learn from local legal experts not only the differences in the practice of law in the Commonwealth, but also the rich culture and heritage of Puerto Rico. Our own Supreme Court Justice from Bronx County, Sallie Manzanet, a Puerto Rican native, will have an active role in our program. Golf, beach, gambling and fantastic tours await our members and guests as well.

CLE

Our Section has long been known for abundant and outstanding CLE courses given throughout the state. This year will be no exception. For 2007, TICL is sponsoring a Law School for the Claims Professionals: More Than the Basics and 5 CLE courses. These include our upcoming How to Litigate a Products Liability Case: The Fundamentals; Legal Malpractice Litigation and Risk Management; The Examination Before Trial—A Primer on Depositions in Tort and Personal Injury Cases; 2007 Insurance Coverage Update—Focus on first-Party Issues; and Automobile Crashworthiness Litigation: A New Look at Auto Cases in a World without Title-Owner Liability.

I look forward to a productive year that will see our Section grow in size as we reach out with a sense of inclusiveness to recruit new members, especially young lawyers, who can take advantage of all the benefits we offer.

Gary A. Cusano

Eggshell Skull Doctrine: Inapplicable to Certain Chemical Exposures

By Dwight A. Kern and Maria C. Carlucci

Typically, the eggshell skull doctrine is a stringent rule that imposes complete liability on defendants. This liability often leaves defendants accountable for injuries caused by the aggravation of a plaintiff's preexisting condition, which often results in more severe injuries. Yet, in New York, are some defendants escaping from the stringent application of the eggshell skull doctrine?

Over almost four decades ago, the *Kaempfe* court carved out an exception to the eggshell skull doctrine and held that manufacturers are not liable when a user suffers from an idiosyncratic allergic condition. Throughout the years, the New York courts have continued to apply the *Kaempfe* exception in the area of chemical exposures. Thus, New York jurisprudence's continued application of this exception has led to the fragility of the eggshell skull doctrine.

A first-year law student is typically taught that under the general rules of torts, a defendant may be held liable in damages for the aggravation of a plaintiff's pre-existing illness or injury. The Restatement (Second) of Torts § 461 states:

> The negligent actor is subject to liability for harm to another although physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

This concept is known as the "eggshell skull doctrine" and the defendant must traditionally "take[ ] the plaintiff as he finds him."[1] But in New York, the doctrine is not without qualification. For example, if a plaintiff with a pre-existing condition is injured, a defendant is only liable for the additional harm or aggravation that he caused.[2] Another limitation on the eggshell skull doctrine in New York is that if a defendant "succeeds in establishing that the plaintiff's pre-existing condition was bound to worsen . . . , [then] an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant's negligence."[3] Both of these limitations of the doctrine ensure defendants are not held liable for a plaintiff's preexisting condition.

A good example of preexisting conditions is an idiosyncratic reaction to a product. Although not expressly stated, there is another exception to the eggshell skull doctrine in New York involving idiosyncratic reactions to chemical exposures. A small, but growing body of case law has been developing since the 1964 decision in the New York State Supreme Court Appellate Division, First Department decision, *Kaempfe v. Lehn & Fink Products Corp*.[4] This common law—or—New York exception is remarkable because, unlike others, it denies plaintiff recovery for a preexisting physical condition. Thus, a plaintiff with an idiosyncratic allergic condition who suffers physical injuries is not taken as she is found when a substantial amount of the general population does not experience the same reaction.

In *Kaempfe,* the plaintiff sued the manufacturer of a spray deodorant after suffering an allergic reaction to aluminum sulphate in the product that caused severe dermatitis. The plaintiff had never before experienced an allergic reaction to any other product. The plaintiff's medical expert admitted that although a small number of people may be sensitive to products containing aluminum sulphate, it is safe for "normal skin" and not normally harmful.

The First Department reasoned that a manufacturer is only required to warn of the dangers of toxic exposure in allergic reaction cases where the manufacturer has actual or constructive knowledge. In order to establish knowledge on behalf of the manufacturer, the product must contain "an ingredient to which a substantial number of the population are allergic" or "an ingredient potentially dangerous to an identifiable class of an appreciable number of prospective consumers."[5] Thus, in New York, a manufacturer has no duty to warn about an injury that "is due to some allergy or other personal idiosyncrasy of the consumer found only in an insignificant percentage of the population."[6]

In analyzing duty, in *Kaempfe,* the First Department focused on foreseeability, that is, "the reasonable foreseeability of harm and reasonable care to guard against the same." Under this concept, a manufacturer or seller must exercise reasonable care to warn of dangers associated with normal use of the product that it knows about or, with reasonable diligence, should anticipate. However, a

seller or manufacturer is not required "to anticipate and warn against a remote possibility of injury in an isolated and unusual case."[7] The theory behind this reasoning is that a manufacturer or seller cannot be held liable for an injury resulting from use of a product that is safe for the normal user when that party does not have actual or constructive knowledge of a class of persons who have a propensity to react negatively to a particular product.

Therefore, manufacturers do not owe a duty to a microscopic fraction of potential users who may suffer from an unexpected, rare reaction. That is because neither the class of plaintiffs nor the reaction is foreseeable. The *Kaempfe* court acknowledged that even strict liability would be accepted under these circumstances.

Until recently, New York state and federal courts have only dealt sporadically with the *Kaempfe* rule.[8] However, some recent New York courts recently have affirmed *Kaempfe*.

In the New York Supreme Court Appellate Division, Second Department case, *Pai v. Springs Industries, Inc.*,[9] a plaintiff alleged that exposure to formaldehyde in bed sheets manufactured and sold by the defendants caused her to suffer severe personal injuries. The manufacturer demonstrated that the plaintiff's reaction was caused by a rare allergy that no other consumer had experienced. The plaintiff's toxicologist, in turn, failed to establish that the plaintiff's allergy was shared by a substantial number of consumers or that a safer, alternative design of the sheets existed. As a result, the Second Department affirmed the decision of the trial court dismissing the negligence causes of action holding that "[a]n injury is not foreseeable if it 'is due to some allergy or other personal idiosyncrasy of the consumer, found only in an insignificant percentage of the population.'"[10]

The United States District Court for the Southern District of New York granted a summary judgment motion under similar circumstances in *Smallwood v. Clairol, Inc.*[11] In *Smallwood*, the plaintiff developed severe anaphylactic related reactions, typically described as closing of the throat and difficulty breathing, that led to hospitalization after using Clairol Men's Choice hair color. The District Court found that the plaintiff's inability to establish that any other product user, let alone an appreciable number of users, had experienced that reaction. In finding for the defendant, the *Smallwood* court agreed that a manufacturer is required to warn a consumer only of "those dangers that are known or reasonably foreseeable at the time of marketing."[12]

New York courts have been quick to rule that this exception does not apply in cases where the potential dangers of the substance are known. For example, in *Holmes v. Grumman Allied Industries,* bus drivers suffered allergic reactions to a chemical, Toluenediisocyanate ("TDI"), a component of the polyurethane foam used in dashboard padding.[13] The New York Supreme Court Appellate Division, Third Department found that there is evidence that TDI is a potentially dangerous substance and the bus manufacturer might have had constructive or actual notice of an unreasonable danger from TDI exposure. Because of this knowledge, the bus manufacturers could not argue that they did not have a duty to warn based upon the relatively small population of individuals likely to become sensitized by TDI.

Another restriction on the application of *Kaempfe* can arguably be found when a toxic substance is not deliberately placed in a product. The Supreme Court, County of Onondaga recently held in *Martin v. Chuck Hafner's Farmers Market, Inc.*, the *Kaempfe* rule inapplicable to respiratory damages allegedly caused by black mold in farm straw.[14]

Distinguishing *Martin*, the Onondaga court reasoned that the large quantity of mold in the straw rendered the straw non-merchantable. Relying on a case from the Supreme Court of Iowa[15] for guidance, the court found defendant liable as a result of defendant's breach of the implied warranty of merchantability.[16]

Although the court did not include the defendant's knowledge in its reasoning of not applying *Kaempfe*, arguably these facts would place the case outside the realm of *Kaempfe* because the danger of injury was known in the industry—not an idiosyncratic injury.

The United States District Court for the Southern District of New York has recently ruled that the *Kaempfe* rule can be applied to such implied warranties under the right circumstances. In *Daley v. McNeil Consumer Products Co.* the Southern District found that "the implied warranty will not be breached if only a small number of people relative to the total number of persons using the product suffer an allergic reaction."[17] The *Daley* plaintiff alleged an allergic reaction to a drug that caused discomfort from digesting diary products. The court in *Daley* relied heavily upon the First Department case, *Hafner v. Guerlain*, where the plaintiff suffered blotches arising from wearing perfume while sunbathing.[18] The *Hafner* Court dismissed the case stating, "[w]ith a product such as this one, sold widely as stated, and easily purchased, the mere fact that an infinitesimal number experienced a discomforting reaction is not sufficient to establish that the product was not fit for the purpose intended."[19]

The *Kaempfe* rule has also been accepted by other jurisdictions.[20] The *Kaempfe* rule also seems to be expanding in New York. One court extended the rule to industrial exposure actions. In *Perkins v. AAA Cleaning*, a worker brought a negligence action against a cleaning service alleging that she had suffered reactions to carpet cleaning solutions at her workplace causing her hyperactivity to environmental irritants.[21]

In *Perkins*, the Third Department held that the information on the cleaning solution's Material Safety Data Sheet revealed that the solution was harmless. Therefore, the use of the solution by the service was not negligent because the hazards plaintiff alleged were not foreseeable. The court then went a step further saying that "even if [the chemicals] were not harmless, there is no evidence that defendant had any way of knowing of plaintiff's hypersensitivity."[22]

"The Kaempfe *rule is a logical solution to the reality that a small percentage of the general population may have the potential to suffer unforeseeable allergic reactions to substances that the ordinary population would not experience."*

The application of *Kaempfe* has made the eggshell skull doctrine ever more fragile. The *Kaempfe* rule is a logical solution to the reality that a small percentage of the general population may have the potential to suffer unforeseeable allergic reactions to substances that the ordinary population would not experience. *Kaempfe* emphasizes that foreseeability of harm and reasonable care to guard against the same is the fundamental test of negligence.[23] Whether a reaction occurs from exposure to a product placed in the stream of commerce or from an environmental exposure appears to be of no consequence under *Kaempfe*.

The concept of foreseeability, in theory, should have no effect on the eggshell skull doctrine. Nevertheless, those members of a minority population who may experience an allergic reaction to an otherwise safe substance logically can no longer find protection under this basic doctrine of common law.

Endnotes

1. *Maurer v. United States*, 668 F.2d 98, 99 (2d Cir. 1981).
2. *DiPirro v. United States*, 189 F.R.D. 60, 63 (W.D.N.Y. 1999).
3. *Evans v. S.J. Groves & Sons Co.*, 315 F.2d 335, 348 (2d Cir. 1963).
4. *Kaempfe v. Lehn & Fink Products Corp.*, 21 A.D.2d 197, 249 N.Y.S.2d 840 (1st Dep't 1964).
5. *Kaempfe*, 21 A.D.2d at 200-201.
6. *Kaempfe*, 21 A.D.2d at 201.
7. *Kaempfe*, 21 A.D.2d at 200.
8. *See Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701 (2d Dep't 2002); *Jarrell v. Wyckoff Heights Hospital*, 641 N.Y.S.2d 313 (1st Dep't 1996); *Chwat v. Smithkline Beecham Corp.*, 818 F. Supp. 36 (E.D.N.Y. 1993); *Young v. United States*, 542 F. Supp. 1306 (S.D.N.Y. 1982); *Drake v. Charles of Fifth Avenue, Inc.*, 33 A.D.2d 987, 307 N.Y.S.2d 310 (4th Dep't 1970); and *Glaser v. Pharmaceuticals, Inc.*, 26 A.D.2d 688, 272 N.Y.S.2d 649 (2d Dep't 1966).
9. *Pai v. Springs Industries, Inc.*, 18 A.D.3d 529 (2d Dep't 2005).
10. *Pai*, 18 A.D.3d at 530, *citing Kaempfe* 21 A.D.2d at 201.
11. *Smallwood v. Clairol, Inc.*, Civ.A. No. 03CV8394, 2005 WL 425491 (S.D.N.Y Feb. 18, 2005).
12. *Smallwood*, 2005 WL 425491 at *2, *citing Daley v. McNeil Consumer Prods. Co.*, 164 F. Supp. 2d 367, 373 (S.D.N.Y. 2001).
13. *Holmes v. Grumman Allied Industries*, 103 A.D.2d 909, 478 N.Y.S.2d 143 (3d Dep't 1984).
14. *Martin v. Chuck Hafner's Farmers Market, Inc.*, 8 Misc. 3d 1006(A) (Sup. Ct. 2005).
15. *Dotts v. Bennett*, 382 N.W.2d 85 (S. Ct. Iowa 1986).
16. On appeal, the Fourth Department reinstated the negligence claim for failure to warn because plaintiff raised a triable issue of fact by submitting an affidavit of a pulmonologist, which defeated summary judgment. *Martin v. Chuck Hafner's*, 28 A.D.3d 1065, 443-444 (4th Dep't 2006).
17. *Daley*, 164 F. Supp. 2d at 375.
18. *Hafner v. Guerlain* 34 A.D.2d 162, 310 N.Y.S.2d 141 (1st Dep't 1970).
19. *Hafner*, 34 A.D.2d at 164, *quoted in Daley*, 164 F. Supp. 2d at 375.
20. *Presbrey v. Gillette Company*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 550 (2d Dist. 1982).
21. *Perkins v. AAA Cleaning*, 30 A.D.3d 790, 816 N.Y.S.2d 600 (3d Dep't 2006).
22. *Perkins*, 30 A.D.3d at *2.
23. *Kaempfe*, 21 A.D.2d at 200.

Dwight A. Kern is an associate with the New York City office of Segal McCambridge Singer & Mahoney, Ltd. Mr. Kern has effectively represented clients at the trial and appellate court levels and has argued before every department in the Appellate Division of the State of New York. Mr. Kern authored the successful brief on behalf of Federated Department Stores, Inc. and R.H. Macy & Co., Inc. in *Pai v. Springs Industries, Inc.*, 18 A.D.3d 529, 795 N.Y.S.2d 98 (2d Dep't 2005), featured in this article.

Maria C. Carlucci is an associate with the New York City office of Segal McCambridge Singer & Mahoney, Ltd. Ms. Carlucci's litigation practice is concentrated in the areas of products liability, toxic tort, and environmental law. Ms. Carlucci is a member of the American Bar Association and the New York State Bar Association. Ms. Carlucci's clinical nursing experience and pharmaceutical work experiences are assets to the medical issues which arise during the defense of the claims.

Uncertainty and Informed Choice: Unmasking *Daubert*

By Margaret A. Berger and Aaron D. Twerski

Introduction

In toxic tort litigation, causation is the rub. Plaintiffs have, in large part, been stymied by their inability to establish that toxic agents, no matter how potentially dangerous, were actually responsible for the harms they have suffered. Their difficulties in this regard have increased exponentially since the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] With great frequency, plaintiffs have been unable to convince courts to admit expert testimony that a given agent was causally responsible for the plaintiff's injury.[2] In drug cases there is a recurring pattern which we find troubling: (1) the causal relationship between the toxic agent and plaintiff's harm is unresolved at the time of litigation and will likely remain unresolved; (2) the drug is not therapeutic but rather its purpose is to avoid discomfort or to improve lifestyle; (3) it is almost certain that a patient made aware of the risk that is alleged to be associated with consumption of the drug would have refused to take it; and (4) the defendant drug company was aware of the potential risk or should have undertaken reasonable testing to discover the risk and failed to provide the requisite information to the physician or patient.

We shall argue that the time has come for courts to recognize the right of patients to informed choice about risks associated with the use of a drug, a right that does not require plaintiffs to prove that the toxic agent was the cause of the plaintiff's harm. To do so we shall suggest a new paradigm for this informed choice cause of action that protects the right of patient autonomy, yet does not impose liability for the full extent of damages as would be the case when a plaintiff is able to prove causation. Absent recognition of a right predicated on informed choice, plaintiffs will be deprived of vital information necessary to make critical decisions regarding lifestyle drugs and pharmaceutical manufacturers will have little incentive to discover and warn about uncertain risks. With causation standing as a barrier to recovery, defendants will sit back confident that liability is highly unlikely to attach to conduct that is admittedly negligent.

I. *Daubert*: The Difficulty of Establishing Causation in Toxic Tort Cases

A trilogy of cases decided by the U.S. Supreme Court dealing with the admissibility of expert testimony in the federal courts has made it very difficult for a plaintiff to successfully prosecute a toxic tort case.[3] The three opinions—starting in 1993 with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[4] and continuing with *General Electric Co. v. Joiner*[5] in 1997 and *Kumho Tire Co. v. Carmichael*[6] in 1999—do not purport to deal with tort law. Ostensibly, they deal solely with the evidentiary test a trial judge must use in determining whether an expert will be allowed to state an opinion. But the *Daubert* trilogy speaks very directly to the issue of what it takes to establish the causal nexus between wrongful defendant conduct and the harm suffered by the plaintiff—the crucial issue in each of the Supreme Court cases and in virtually all toxic tort litigation.

In *Daubert*, the chief controverted issue was whether Bendectin, an anti-morning sickness pill taken by millions of pregnant women, could cause birth defects in their offspring, and had caused limb reduction in the plaintiffs.[7] The difficulty in establishing causation arose from the fact that there is a significant background risk of birth defects. The mere fact that a child was born with a limb reduction to a mother who had ingested Bendectin did not necessarily point to Bendectin as the cause of the birth defect. The court below, like many others that had granted judgments n.o.v. or summary judgments in Bendectin cases, found plaintiffs' expert testimony insufficient to prove a causal connection, and granted summary judgment.[8] The Supreme Court first held that the *Frey* or "general acceptance" test—used by some federal courts in determining when expert proof was admissible—had not survived the enactment of the Federal Rules of Evidence. Instead, the Court told trial judges that they must screen all "purportedly scientific evidence" on which an expert plans to rely to ensure that it is "not only relevant, but reliable."[9] By reliability, the Court meant that the trial court had to ascertain whether the proffered expert's opinion was "ground[ed] in the methods and procedures of science."[10] The Court then examined the characteristics of a scientific methodology and set out a number of nonexclusive factors for the trial court to consider that bear on "whether the reasoning or methodology underlying the testimony is scientifically valid."[11] Mentioned by the Court as indicators of good science are hypothesis testing, subjecting studies to peer review and publication, determining known or potential error rates, adopting standards for controlling the technique, and general acceptance of the methodology in the scientific community.[12] The Supreme Court then reversed, leaving it to the court below to apply the new test on remand.[13]

Defendants immediately realized that *Daubert* furnished them with a new procedural opportunity, as they could make in limine motions asking the trial judge to exclude plaintiffs' experts as witnesses. In a traditional toxic tort action, if the motion is successful in excluding plaintiff's expert testimony on causation, a defendant is entitled to summary judgment because of the plaintiff's inability to prove a crucial element of the cause of ac-

tion.[14] That is what happened in *General Electric Co. v. Joiner*, a lawsuit brought against General Electric by a plaintiff who claimed that his exposure to polychlorinated biphenyls ("PCBs") and their derivatives had promoted his small-cell lung cancer.[15] The district court granted the defendant's motion for summary judgment on the ground that the plaintiff's experts' opinions that PCBs caused small-cell lung cancer did not meet the exacting standards demanded by *Daubert*.[16] The judgment for the defendant was, however, reversed by the Eleventh Circuit; it subjected the exclusion of the plaintiff's expert testimony to a stringent standard of review which the court found was required when the exclusion resulted in dismissal of the action.[17] The Supreme Court granted certiorari.[18]

Although it is *Daubert* itself that is the most cited case in the *Daubert* trilogy, it is probably *Joiner* that has had the greatest impact in toxic tort cases. In the first place, the Court rejected a strict scrutiny standard of review and instead adopted an abuse of discretion standard for reviewing *Daubert* rulings. Trial judges were thereby given enormous control over the outcome of a case and considerable immunity from review; their decisions would stand unless "manifestly erroneous." If the plaintiff's expert was barred from testifying about a material issue like causation, the case would never reach a jury, and would end instead with a grant of summary judgment for the defendant. Although grants of summary judgment are reviewed de novo,[19] the exclusion of the expert—the crucial decision that led to the grant—would evade this strict standard of review even though the Supreme Court acknowledged that the decision on expert testimony was "outcome determinative."[20]

Second, in the course of finding that the district court had not abused its discretion in excluding the plaintiff's experts on toxicology and epidemiology, the *Joiner* Court endorsed an approach that provided trial courts with a template for excluding expert testimony on causation. First, it approved the district court's finding that the animal studies on which the plaintiff's experts relied did not support the plaintiff's contention that PCBs contributed to his cancer.[21] The Court pointed to differences between the studies and the facts of the litigation: the study subjects—infant mice—had been exposed to much higher doses of PCBs by a different mechanism of exposure, and the mice and plaintiff did not develop the same type of cancer. Furthermore, the Court observed that no study showed that PCBs led to cancer in any species other than mice.[22] The Court brushed aside the plaintiff's contention that the issue for the Court was whether animal studies can ever be a proper foundation for an expert's opinion. "The issue," said the Court, "was whether *these* experts' opinions were sufficiently supported by the animal studies on which they purported to rely."[23]

The four epidemiological studies on which the plaintiff's experts relied fared no better.[24] Consequently, the Supreme Court found that the court of appeals had erred in reversing the district court's determination that the toxicological and epidemiological studies "were not sufficient, whether individually or in combination, to support [the experts'] conclusions that Joiner's exposure to PCB's [sic] contributed to his cancer."[25]

Some trial courts have gone beyond *Joiner*. Although few courts say outright that epidemiological evidence is essential to prove causation,[26] many denigrate all other types of evidence, such as expert opinions that seek to establish causation on the basis of differential diagnosis,[27] and dismiss Adverse Reaction Reports as mere anecdotal evidence not worthy of serious consideration on the issue of causation.[28] Furthermore, even when epidemiology shows an increased risk, some courts exclude expert testimony based on such studies unless the reported relative risk exceeds two,[29] and courts generally do so without acknowledging that the treatment of relative risk "is a legal question, not a scientific question."[30]

Finally, there is the issue of transaction costs. Preparing for and litigating *Daubert* issues has undoubtedly made litigation even more expensive than before. For example, courts have noted that when a disease is relatively rare, a researcher may need a very large sample size to ensure that results of an epidemiological study are not simply due to chance.[31] This may mean that sample sizes running into the hundreds of thousands or millions of patients may be needed to validate a retrospective study. Prospective studies may be impossible to perform once a drug has been withdrawn from the market.[32] Thus no matter what the ultimate bona fides of a case, cost may serve as an efficient deterrent to bringing a credible cause of action.

II. The Forgotten Right of Individual Choice and Patient Autonomy

It is clear that in many toxic tort cases plaintiffs will not be able to overcome the substantial burden of establishing that a suspected toxic risk actually caused their injuries. The failure to establish causation does not, however, mean that pharmaceutical manufacturers met their obligation to warn of potential risks that may result from the ingestion of their drugs. To establish fault in a negligence case, it is not necessary to prove that the foreseeable harm to the plaintiff is more likely than not to occur. The duty to warn is breached when a risk is of sufficient consequence that a reasonable person would warn against it.[33] The Learned Hand risk-utility test requires that an actor take precautions to warn against even remote risks when the gravity of the foreseeable harm is great.[34] That there be a causal nexus between the defendant's wrongful conduct and the harm suffered is a principle deeply ingrained in tort jurisprudence and we do not question that hoary maxim. However, in the context of toxic tort cases, to require that the plaintiff actually demonstrate that the toxic agent caused the plaintiff's harm flies in the face of

the well-recognized right of a patient to make an autonomous decision as to whether she wishes to expose herself to even an uncertain risk. The assault on autonomy is especially egregious in the case of lifestyle drugs where the drug has little therapeutic value. In such cases one can predict with a high level of confidence that a patient informed of the potential risk would almost certainly have opted against taking the drug and subjecting herself to the risk.

Consider the following two examples: Bendectin and Parlodel. After some early victories, the overwhelming weight of authority both pre- and post-*Daubert* was that the evidence about Bendectin was too uncertain to allow for a finding of causation.[35] That the evidence was found wanting on causation does not mean that a reasonable person in a pregnant woman's position would not have wanted to have the information that Bendectin may be a teratogen before ingesting the drug. There is little doubt that the vast majority of expectant mothers suffering from the discomfort of morning sickness would have refused to take Bendectin to alleviate their discomfort if told that the drug carried with it an uncertain risk of birth defects to their fetuses because the drug had not yet been tested as was the case before litigation began.

Parlodel, an anti-lactation drug taken after childbirth, was approved by the FDA in 1980 to prevent post-partum lactation in women who could not or elected not to breast-feed their offspring.[36] Following its approval, there was evidence that Parlodel was implicated as a possible cause of strokes. Women who suffered strokes after ingesting Parlodel sought to recover for the failure of Sandoz/Novartis to warn about the dangers associated with ingestion of the drug. A majority of courts found that the evidence on causation did not meet *Daubert* guidelines.[37] Adverse Reaction Reports were deemed too idiosyncratic and unreliable. Animal studies were given short shrift because one cannot accurately liken animal reactions to those of humans. Evidence that Parlodel, when administered to a patient, caused vascular constriction that receded when the drug was withdrawn and then reappeared when the drug was introduced to the patient (dechallenge/rechallenge), was not sufficient because the patient did not actually suffer a stroke from the use of the drug. And finally, the epidemiological studies were deemed inconclusive. As Adverse Reaction Reports began coming in from the use of Parlodel, the FDA sought to get Sandoz to issue warnings about the possible relationship of the drug and strokes.[38] Parlodel was, however, a very lucrative drug and the company resisted for fear that it would cause a sharp decrease in its profits.[39] In 1989, the FDA requested that Sandoz withdraw Parlodel from the market for post-partum lactation. Its reason for doing so was that no drug, including Parlodel, was shown to be more effective than aspirin and breast support in alleviating the discomfort of the cessation of lactation.[40] In short, Parlodel created gratuitous risk with very little benefit. It is hard to believe that a woman warned of the risk of strokes and told of the comparative safety of treatment by over-the-counter analgesics would opt to take Parlodel.

One might expect that the right to informed choice would be worthy of protection whether or not a plaintiff could establish causation under the traditional norms of tort law. In both medical malpractice and products liability litigation, courts have sought to promote the right of patient autonomy by holding either the physician or drug manufacturer liable for failing to provide adequate information about risks associated with a medical procedure or a drug. Though these two developed bodies of law purport to recognize the right of a patient to informed choice, neither can serve as an appropriate model for recognition of a cause of action where the causal relationship between the uncertain risk and the plaintiff's harm cannot be established.

A. Medical Malpractice: The Informed Consent Paradigm

The right of a patient to informed consent has been a staple of U.S. medical malpractice law for over three decades.[41] In order for a plaintiff to establish a prima facie case that she has been deprived of informed consent, she must show: (1) that a physician failed to disclose a material risk of the therapy undertaken or reasonable alternatives to it (materiality); (2) that the patient would have chosen against the recommended therapy (decision-causation); and (3) that as a result of the therapeutic intervention the plaintiff suffered injury (injury-causation).[42] The action for informed consent stands separate and apart from a claim that the physician was negligent in either recommending or performing a given therapy. It assumes no operational negligence but instead focuses on the failure to deliver to the patient information about risks attached to the therapy.

Commentators have argued that requiring the plaintiff to prove what decision would have been made had the material information been communicated to the plaintiff undercuts the goal of patient autonomy.[43] The undeniable fact is that the patient was not provided with the information necessary to decide whether to undergo the therapy. The physician proceeded unilaterally. Though this argument is theoretically sound, as a practical matter the issue of decision-causation is rarely decided against plaintiffs as a matter of law. It is almost always given over to the sound discretion of juries. The requirement that the plaintiff establish the causal connection between the therapeutic intervention and the injury actually suffered is almost never a matter of contention. Indeed, it is only when the plaintiff suffers from the undisclosed risk that the plaintiff is moved to bring suit. The damages for failure to provide informed consent are measured by the unwarned-against adverse outcome that the plaintiff suffered.

In the case of uncertain risk that is the hallmark of the cases in which *Daubert* forecloses recovery, the issue of decision-causation is rarely in doubt. As noted earlier, patients taking lifestyle drugs if informed of uncertain risks that could have disastrous consequences, would most often choose against exposing themselves to them. However, as long as the law demands that injury-causation be proven, *Daubert* will block recovery whenever a plaintiff cannot establish that the toxic agent caused her injury. It matters not that the defendant was undeniably negligent in failing to warn about the risk so that the plaintiff could make an informed choice as to whether she wishes to subject herself to it. Unlike decision-causation, which is almost always a jury issue in medical malpractice cases and thus opens the path for recovery based on the denial of the right to make an autonomous choice, the injury-causation issue in cases of uncertain risk will be decided for the defendant under *Daubert* as a matter of law, making *Daubert* an insurmountable barrier to recovery for the deprivation of informed choice. The maxim that there is no injury if there is no harm should not apply because the denial of the right to choose not to expose oneself to an uncertain risk violates a very basic human right of autonomous decisionmaking, yet it will receive no recognition under the existing medical malpractice informed consent paradigm.

B. Products Liability: The Informed Choice Paradigm

In a parallel development, courts began recognizing an informed choice cause of action in drug cases as early as 1968. In *Davis v. Wyeth Laboratories, Inc.*,[44] the defendant manufacturer sold polio vaccine without warning of the risk that one person in a million would contract polio from taking the vaccine. The court held that the manufacturer had a duty to warn the consumer of the risks involved and that the failure to meet this duty rendered the drug unfit and unreasonably dangerous within the meaning of § 402A of the Restatement (Second) of Torts. The court stated:

> In such cases, then, the drug is fit and its danger is reasonable only if the balance is struck in favor of its use. Where the risk is otherwise known to the consumer, no problem is presented, since choice is available. Where not known, however, the drug can properly be marketed only in such fashion as to permit the striking of the balance; that is, by full disclosure of the existence and extent of the risk involved.[45]

The Restatement (Third) of Torts: Products Liability has endorsed these grounds for liability and this position is supported by a substantial body of case law.[46] However, the informed choice theory only triggers recovery if injury-causation has been established under traditional causation rules. Thus, it is only because plaintiff could prove that the vaccine actually brought about his polio that plaintiff was able to recover.[47] Had plaintiff failed to establish injury-causation, the right to informed choice based on a drug manufacturer's negligent failure to warn would have been irretrievably lost.

If indeed there is a right to informed choice, conditioning the right on proof that the harm was actually brought about by the defendant's conduct makes no sense whatsoever. If an uncertain risk of harm should have been communicated to the plaintiff so that the plaintiff could assess whether she wished to play this game of russian roulette, to then say that the plaintiff is not entitled to recovery because she cannot prove that the harm was actually caused by the suspect drug, renders the right to informed choice illusory.

If the courts are truly committed to the principle of autonomous decisionmaking, why is it that they have failed to see that insisting on injury-causation sabotages the autonomy right? And why have plaintiffs' counsel not been vigorous advocates for the recognition of the autonomy right as a freestanding cause of action when faced with the reality that their cases are in jeopardy of dismissal on *Daubert* grounds? We believe that there are two reasons that courts and litigants have shied away from recognizing a causation-free autonomy right. First, they have not developed criteria for deciding materiality of risk in the autonomy-only paradigm. Second, without injury-causation that defines the harm in concrete terms, they find themselves at sea in valuing the denial of the right to autonomy. Without some guidance on how to resolve these two questions, it is likely the courts will not recognize or pursue the autonomy right.

III. Redefining Materiality for a Causation-Free Informed Choice Action

In a causation-free informed choice cause of action, a prima facie case for liability is established when a drug manufacturer fails to warn about a material risk and plaintiff subsequently suffers from that undisclosed risk. The plaintiff makes out her case even if she cannot establish that the toxic agent caused her specific injury. Plaintiff bases her claim of informed choice solely on the grounds that defendant failed to disclose a material risk that warranted a warning by the defendant. What constitutes a material risk in the causation-free informed choice setting warrants careful attention.

In the classic malpractice or product liability action in which causation must be established, the law can tolerate a vague definition of materiality. Regardless of whether the applicable materiality standard is what a reasonable patient would expect to be told or what a reasonable doctor would reveal, the utilization of a fact-sensitive reasonableness test is counter-balanced by the requirement that the injury was actually caused by the therapeutic intervention or drug. In the causation-free informed choice

cause of action that we propose, the claim of failure to warn about a material risk is not buttressed by a finding of injury-causation. If causation-free informed choice litigation is to become a reality, we shall need to provide some direction to courts as to what factors they should take into account in deciding whether a risk is material. We do not suggest a litmus test for materiality. However, we do suggest that a scientific framework exists for determining risk, and that many of the factors spurned by courts under *Daubert* as insufficient to establish causation are highly relevant to the determination that a risk was of sufficient moment to deserve an informed choice warning.

We begin by noting that whether a risk is of sufficient moment that a patient is entitled to know of it before ingesting a lifestyle drug requires an evaluation of information stemming from a host of sources.[48] Even if these risk-related data do not suffice to establish legal causation, that does not mean that these data do not raise serious questions about the existence of substantial risks. At the moment a drug is prescribed, because of the lack of data, no one, including the manufacturer of the drug or device, may know whether the product is capable of causing harm. However, over time sufficient signals may emerge to alert scientists that injuries may eventuate. Animal studies that are almost always challenged under *Daubert* because of the dissimilarity between both the dosages administered to animals and the biological differences between animals and humans may be highly probative as to the potential toxicity of a drug. Adverse Reaction Reports, regularly dismissed by courts as too sporadic and anecdotal to support causation, are viewed by scientists as enormously important in evaluating whether a risk is sufficiently credible to warrant an informed choice warning. Other evidence that fails to impress judges at *Daubert* motions, such as evidence relating to the suspect chemical's structural similarity to a known toxic agent, in vitro studies, or inconclusive epidemiological studies, are all relevant to the issue of whether a risk worthy of warning is present.

In dealing with each genre of scientific evidence on which plaintiffs' experts rely to prove causation, many courts have evaluated the strength of each category standing alone.[49] If an individual study within a species of evidence is found to be weak, such as a particular epidemiological or toxicological study, it is faulted as not providing a reliable basis for the expert's opinion. After excluding the studies one by one, the court rejects the expert's opinion for failing to meet the *Daubert* criteria. Courts rarely ask whether the information in toto is probative on the issue of causation. It is debatable whether this fragmented approach to admitting expert proof on causation is justified, but we doubt that anyone would countenance a fragmented approach to risk evaluation. Indeed, it is only when you put together all the evidence from all the sources that one can divine whether a risk is sufficiently significant that it should be the subject of an informed choice warning.

That all forms of data must be considered in order to assess risk is not only mandated by fundamental principles of tort law but is also grounded in good science. Several years ago the FDA requested that the Institute of Medicine and the National Research Council of the National Academies undertake a study to set forth guidelines for evaluating the safety of dietary supplements.[50] In a 2004 report entitled *Dietary Supplements: A Framework for Evaluating Safety*, the committee charged by the FDA with the task of defining when the threshold triggering a need for regulation has been met concluded that no single criterion could adequately be used to determine whether a risk was "significant or unreasonable."[51] The entire gamut of data from all sources must be garnered and evaluated. Thus, in vitro studies, animal testing results, Adverse Reaction Reports, chemical structural similarity, as well as epidemiological studies that suggest a weak association between the toxic agent and an adverse reaction may in combination lead one to conclude that the supposed benefits of the dietary supplement do not warrant the risks attendant to its use.[52] The report makes it clear that proof of causality or harm is not necessary for the determination that risk is significant or unreasonable.[53]

Furthermore, in evaluating and integrating the signals that point to a material risk, courts should bear in mind that they are not deciding whether the risk was significant enough to warrant forceful or drastic action by the FDA such as requiring black box warnings or removing the drug from the market. All a court need decide is whether the signs of risk and their potential gravity were sufficiently strong to require a drug manufacturer to alert physicians so they in turn can provide information to patients that will enable them to make a meaningful choice.

In addition, in determining whether a risk was material, courts should also consider evidence that a defendant willfully failed to disclose information that pertains to risks posed by its product. Traditional evidentiary principles permit negative inferences to be drawn from party admissions and evasive or destructive behavior. For example, a court should consider whether the defendant (1) failed to inform the medical community about the results of negative clinical drug trials,[54] (2) brushed off physicians' inquiries about the safety of the product even though it knew that the FDA was considering whether to remove the drug from the market,[55] (3) distributed internal memoranda expressing fears about problems with the drug,[56] or (4) made advertising claims about the product's lack of side effects at a time when it was receiving reports to the contrary.[57] Admittedly, there is little social utility in providing information that is so tentative and unreliable that it will serve no purpose other than to frighten patients who need the drug away from its use. On the other hand, where the drug has little therapeutic value

and provides only aesthetic or palliative relief but the risk is substantial, the balance in favor of disclosure shifts dramatically.

One could simply analogize to the law of informed consent that bases the standard of materiality on whether a reasonable doctor would disclose the risk, or whether a reasonable patient would consider the risk relevant in deciding whether to take the drug. Critics of the physician-based standard for informed consent decry the delegation of an important autonomy decision to the custom of the medical profession. However, since the issue in the drug cases is not whether the doctor was negligent, but rather whether the pharmaceutical manufacturers failed to provide physicians with adequate risk information, deferring to the medical profession has substantial advantages. Doctors are likely to ally themselves with the interests of patients and demand that relevant risk data be shared with them. However, being professionally trained to assess risk, they will not be prone to deem highly speculative risk as worthy of disclosure.

Finally, courts will have to remain alert to the danger of allowing junk science to enter the courtroom door. But, unlike in the *Daubert* causation cases, they will be looking at the totality of evidence of risk and asking themselves whether it is sufficiently probative to warrant a warning. There is no magic bullet that will insure that a case based on tentative and unreliable data will not find its way to a jury. Judicial vigilance will be necessary, but courts mindful that they are passing on materiality to support a cause of action that does not require proof of traditional causation should be up to the task of ferreting out unworthy and frivolous claims.

IV. Formulating a Remedy for the Deprivation of Choice

On reflection, there are two forms of damages that foster either the corrective justice or efficiency goals of the law of torts. First, the failure to inform patients about material risks invades the right of autonomous decisionmaking, and could give rise to damages for dignitary harm. Second, a plaintiff who is subjected to a material risk and suffers from the very harm that should have been warned against, may experience serious mental anguish from the fact that the patient must live with the reality that the harm may have been avoidable. Even though courts ultimately decline to find causation because epidemiological studies demonstrate that the likelihood of causation is extremely low in the population of persons exposed, that does not prove an absence of causation with regard to each individual in the group. Epidemiology does not deal with individuals, and does not claim that studies showing a lack of adverse effects to the population being studied prove that the particular substance can never cause harm to anyone. In the Bendectin cases, for example, it is impossible to rule out that the morning sickness remedy is a mild teratogen that contributed to birth defects in some indeterminate number of cases in which the causal effect was too low to be detected. A mother who used the drug and whose child is deformed may therefore experience lifelong regret. This form of human anguish is no small matter and does not depend on proof that the drug actually caused the harm. It is quite sufficient that the material risk may have been responsible for the harm.

One might consider the possibility of awarding damages based on the increased risk that plaintiff was subjected to by taking the drug. Whether recovery for proportional causation should be recognized outside of the medical malpractice arena is a subject of some debate.[58] However, even if theoretically one could consider some reduced proportional recovery for informed choice cases based on increased risk, it is not a practical option. We have been proceeding on the premise that epidemiological studies that accurately reflect increased risk are not likely to be readily available. As noted earlier, to commission studies for litigation purposes of low probability risks may be prohibitively expensive and, in some instances, ethically unallowable. The non-epidemiological evidence which may support a duty to give a plaintiff an informed choice will not provide the hard data necessary to support a recovery based on proportional causation.

A. Dignitary Tort Damages

It would seem only fair that a plaintiff who ingested a drug that was not accompanied with adequate information about risks that she should have been informed of should at least be entitled to dignitary tort damages. The law of torts provides such compensation for assault, battery and false imprisonment without regard to whether the plaintiff suffered physical harm. However, dignitary rights are primarily protected when the defendant has acted intentionally to invade the well-recognized right of personal security. On occasion, dignitary rights receive some recognition through the tort of intentional infliction of emotional distress. The strictures of that tort are such that even if a drug manufacturer were to be found to have intentionally failed to disclose information about uncertain risks, a cause of action could not be maintained. Courts demand that to make out a prima facie case the plaintiff must establish that the defendant's conduct was "extreme and outrageous."[59] In the case of failing to provide information with regard to uncertain risk, it is highly unlikely that such conduct would rise to the level that it could be labeled "extreme and outrageous." When the defendant acts negligently, the law of torts does not protect dignitary rights. Thus, for example, a plaintiff may recover damages for the intentional tort of assault. There is, however, no cause of action for negligent assault. To recover, plaintiff would have to seek to invoke the tort of negligent infliction of mental distress. That cause of action brings along with it considerable baggage. Some courts do not recognize it at all and others limit the cause of action in a variety of ways. We shall explore the action for mental distress in the ensuing section.

B. Damages for the Anguish of Choice Deprivation

A cause of action for emotional distress arising from the failure to divulge material risk information that deprives a patient of informed choice presents a theory of recovery that could result in significant damages to plaintiffs.[60] Fairly recently the New Jersey Supreme Court struggled with the problem. In *Canesi v. Wilson*,[61] plaintiff consulted Dr. Wilson, an obstetrician, concerned that she might be pregnant because she was amenorrheic for eleven days. Dr. Wilson took a urine sample and concluded that she was not pregnant. He then prescribed Provera, a progestational agent designed to induce menstruation. At the time she took the Provera there was a warning in the Physicians' Desk Reference ("PDR") that if a woman was taking Provera while she was pregnant, she should be advised that there was a risk that the fetus would suffer from congenital anomalies, including limb reduction. Two weeks later, Dr. Wilson gave plaintiff a blood serum test to determine if she was pregnant. This time the test was positive. Plaintiff asked Dr. Wilson if the Provera she had been taking could have a deleterious effect on a fetus and he told her not to worry. Plaintiff saw another physician, Dr. Lowe, and told him that she had taken Provera during the first month of pregnancy. He, too, told her not to worry about injury to the fetus. Plaintiff gave birth to a child born with bilateral limb reduction. Ultimately, it turned out that there was no evidence that Provera caused limb reduction, and a later version of the PDR dropped the limb reduction warning. It remains true, however, that Provera can cause congenital anomalies.

Plaintiff sued both doctors for failing to provide her with information about the risks associated with taking Provera during pregnancy. She claimed that had she known of the risk of congenital defects generally, or limb reduction specifically, she would have terminated the pregnancy. Defendants moved for summary judgment contending that since plaintiff could not prove that Provera caused the child's limb reduction, she had not proved "medical causation" and hence the plaintiff could not make out an action for lack of informed consent.[62] The trial court granted the defense motion and was affirmed by the intermediate appellate court.[63] The New Jersey Supreme Court reversed, finding that the plaintiff's claim for lack of informed consent could not stand, but that her claim for wrongful birth should not have been dismissed.[64]

The court engaged in a lengthy discussion comparing the elements of an informed consent case and those of one predicated on wrongful birth, brought by parents claiming that, had they been properly warned, the mother would have aborted the fetus. Both causes of action are predicated on a plaintiff's right to self-determination. The difference between the two is that "because damages in informed consent cases include the harm or physical injury to the patient, there must be medical causation, that is, a causal connection between the undisclosed risk and the injury ultimately sustained."[65] Thus, the plaintiff must show that: "(1) [a] prudent patient would have refused consent if full and adequate disclosure had been made, and (2) [the] injury suffered was related to [the medical intervention] and did not occur spontaneously or by independent means."[66] The court said that these two elements must be made out in cases that involve the prescription of drugs as well.[67] In sharp distinction, the court argued that in the wrongful birth case the plaintiff's claim is not for the birth defect of the child. Instead, it is "whether the doctors' inadequate disclosure deprived the parents of their deeply personal right to decide for themselves whether to give birth to a child who could possibly be afflicted with a physical abnormality."[68] It is for "their own mental and emotional anguish at having lost the opportunity to decide for themselves whether or not to terminate the pregnancy."[69]

The New Jersey Supreme Court thus concluded that the plaintiff's claim for informed consent seeking to recover damages for the limb reduction failed because there was insufficient evidence to establish medical causation and upheld the trial court's grant of summary judgment for the defendant on this issue.[70] As to the wrongful birth claim, the court held that the plaintiff was entitled to recover: (1) "special medical expenses attributable to raising a child with a congenital impairment" and (2) "the emotional injury attributable to the deprivation of 'the option to accept or reject a parental relationship with the child.' "[71] On this count the court overruled the trial court's grant of summary judgment for defendant and remanded for a new trial.

It should be obvious that the crucial distinction is not between informed consent and wrongful birth. As noted earlier, both claims seek to vindicate the right to self-determination and autonomy. The reason that the court found that the informed consent case fails and that the wrongful birth case can succeed is that the plaintiff in the informed consent case seeks damages for the physical injury caused by the failure to provide the information (injury-causation); whereas in the wrongful birth case the plaintiff eschews seeking damages for the birth defect and seeks only to vindicate the right to informed choice (decision-causation). It is interesting that in the wrongful birth case the court allows recovery both for the deprivation of the right to choose and the special medical expenses of raising a child with a congenital impairment. Allowing for these special expenses, however, logically follows from the conclusion that the mother would have aborted the fetus and would thus not have had to encounter these expenses. Having established decision-causation, her entitlement to special damages is unexceptional.

The analogy from the wrongful birth case to our paradigm case is almost exact. Just as a woman is entitled to recover for her "own mental and emotional anguish" for having lost the opportunity to decide whether she

wished to give birth to a child who could possibly be afflicted with a physical abnormality, so she should be entitled to recover for the emotional damages for having lost the opportunity to decide whether she wishes to take an anti-nausea drug that might cause serious birth defects or an anti-lactation drug that has a material risk of causing a stroke. That medical causation cannot be established should not be dispositive in either case. We thus advocate a cause of action for negligent infliction of emotional distress when plaintiff is deprived of an informed choice about material risk even if the causation of the actual physical injury cannot be established with the certainty demanded by traditional causation norms. We would expect that the greater the materiality of the risk, the greater the damages assessed against the defendant. And we would also expect that greater damages would be assessed if it were found that a defendant acted in bad faith in refusing to reveal material risk information. The sense of betrayal and hurt suffered by a plaintiff deprived of meaningful choice cannot be divorced from the conduct of the defendant who was responsible for the deprivation.

We are mindful that the tort of negligent infliction of emotional distress is not universally recognized. Although most courts allow for the action without requiring proof of physical manifestations arising from the emotional harm,[72] some courts still demand some form of physical harm as a necessary element of the cause of action.[73] Two very strong arguments lead us to believe that even the minority should recognize such a cause of action in the case of informed choice. First, unlike general negligence, which is not targeted to a specific right, the duty to provide information for informed choice is very specific and will not be protected unless damages for emotional distress are granted. General negligent conduct regularly results in physical harm. Defendants cannot plan on avoiding exposure to liability. Drug manufacturers can, however, rely on the inability of plaintiffs to establish the very high causation threshold to escape liability. A credible deterrent must be put in place. Second, those courts that require objective symptomology do so because they fear that emotional distress is too easily feigned.[74] In the cases we address, plaintiffs suffer very substantial physical injury. The question is not whether the injury is real. That plaintiffs would suffer emotional distress from having been denied the right to avoid a devastating injury does not raise the verifiability problems that attend many of the cases of negligent infliction of emotional distress.

If courts were to recognize an action for informed choice, the same testimony offered on causation would be relevant to establishing the risk potential of the drug and whether the uncertain risk should have been warned against. There is little likelihood that plaintiffs' experts could be successfully challenged on their ability to assess risk. A review of the cases indicates that experts have rarely been challenged on their academic credentials.[75] Therefore, it would be far more cost-effective and efficient for a trial court to defer ruling on the *Daubert* motion with regard to the causation issue until trial.[76] If, at the close of plaintiffs' case, the trial judge believed that the *Daubert* criteria were not met with regard to the case for injury-causation, the court would grant a directed verdict for defendants on that issue. Plaintiffs would then be free to use the testimony of their experts to support their claims for lack of informed choice.

Recognition of a causation-free informed choice cause of action in which the damages would be for the infliction of mental distress raises the possibility that plaintiffs could successfully prosecute class actions. The major stumbling block to class certification in product liability personal injury actions has been that evidence of causation is so peculiar to the individual plaintiff that common issues of fact do not predominate.[77] If every case requires extensive testimony as to whether the defendant's product caused the plaintiff's harm, there are few economies of scale to be gained by class certification. However, once medical causation is removed as an issue from drug cases, the only individual issue is the degree and extent of the plaintiff's mental upset. Once liability for failure to warn is established, remand of the issue of damages alone for individual trials will not undermine the predominance requirement. The damages issue is so narrow and focused that even if the cases are not settled, the trials are likely to be short and subject to quick resolution.

Conclusion

The current state of *Daubert* drug litigation is intolerable. Cases in which plaintiffs fall short of being able to meet the demanding criteria established for the admissibility of expert testimony on causation are deemed to have no merit whatsoever. That a toxic drug cannot be proven to have definitively caused a harm does not mean that plaintiffs should be deprived of the right to choose whether they wish to subject themselves to the material risk of that harm actually taking place. When the undisclosed risk actually occurs, plaintiffs have a legitimate claim that they must live their lives with a result that might have been avoided had they been properly informed. The sense of betrayal is greatest when a drug is prescribed not for therapeutic purposes, but rather, for aesthetic or palliative relief.

We are aware that there is no bright line that can be drawn between lifestyle and therapeutic drugs. Nonetheless, the distinction is important as a beginning point in recognizing a cause of action for informed choice. In the former, the issue of decision-causation, that is, whether the plaintiff would have chosen against taking the drug if informed of the possible serious side effects, is much clearer. The decision-causation question is much more difficult in the case of drugs that have important therapeutic properties. At this stage, we need not resolve the outer

reaches of a causation-free informed choice drug case. It is sufficient that we outline the broad strokes of such a cause of action.

Endnotes

1. 509 U.S. 579 (1993). Even without the strictures of *Daubert*, described *infra*, plaintiffs would confront difficulties in establishing a causal relationship between a toxic agent and resulting harm. *Daubert* has, however, raised the barrier to a plaintiff's ability to prove causation since it licenses courts to act as gatekeepers to exclude expert testimony that does not meet the criteria for admissibility set forth by the Supreme Court. *Daubert*, 509 U.S. at 589–92, interpreted Federal Rule of Evidence 702, which was amended as of December 1, 2000 "in response to *Daubert*" and "the many cases applying *Daubert*." *See* Fed. R. Evid. 702 advisory committee's note, 28 U.S.C. App. at 893 (2000). The new language at the end of Rule 702 allows an expert to testify "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.
2. *See, e.g.*, *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197–1202 (11th Cir. 2002); *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 989–92 (8th Cir. 2001); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 797–809 (N.D. Ohio 2004); *Nelson v. Am. Home Prods. Corp.*, 92 F. Supp. 2d 954, 966–73 (W.D. Mo. 2000); *Pick v. Am. Med. Sys., Inc.*, 958 F. Supp. 1151, 1164–78 (E.D. La. 1997); *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 877–83 (W.D. Tex. 1997); *Grimes v. Hoffman-La Rouche, Inc.*, 907 F. Supp. 33, 37–39 (D.N.H. 1995); *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1476–85 (D.V.I. 1994).
3. Although *Daubert* and the Supreme Court's subsequent opinions in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), interpret Rule 702 of the Federal Rules of Evidence and as such apply only in federal court, a considerable number of states have also adopted *Daubert*. *See* David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 Jurimetrics J. 351, 355–56 (2004) (finding that nine states have adopted *Daubert* but noting that others have put the number at thirty-three).
4. 509 U.S. 579 (1993).
5. 522 U.S. 136 (1997).
6. 526 U.S. 137 (1999).
7. *See* Michael D. Green, Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation 221 (1996) (finding that approximately fifteen million live births occurred in which the mother was exposed to Bendectin during pregnancy).
8. *Daubert v. Merrell Dow Pharms., Inc.*, 727 F. Supp. 570 (S.D. Cal. 1989), *aff'd* 951 F.2d 1128 (9th Cir. 1991). For an extensive discussion of the trial and appellate court decisions on Bendectin, see Joseph Sanders, Bendectin on Trial: A Study of Mass Tort Litigation 144–55 (1998). For leading opinions denying recovery because expert testimony did not support a finding of causation based on the inability of plaintiff to establish causation, see, for example, *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir. 1989) (reversing judgment for plaintiff); *Lynch v. Merrell-Nat'l Labs.*, 830 F.2d 1190 (1st Cir. 1987) (affirming grant of summary judgment for defendant); and *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799 (D.D.C. 1986), *aff'd* 857 F.2d 823 (D.C. Cir. 1988) (affirming judgment n.o.v. for defendant).
9. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).
10. *Id.* at 590.
11. *Id.* at 592–94.
12. *Id.*
13. On remand, the court of appeals struggled with the new test set forth in the Supreme Court's opinion. In *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir. 1995), the court affirmed the district court's grant of summary judgment.
14. Fed. R. Civ. P. 56(c).
15. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997).
16. *Joiner v. Gen. Elec. Co.*, 864 F. Supp. 1310, 1327 (N.D. Ga. 1994).
17. *Joiner v. Gen. Elec. Co.*, 78 F.3d 524, 529 (11th Cir. 1996) ("[W]e apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony.").
18. *Gen. Elec. Co. v. Joiner*, 520 U.S. 1114 (1997).
19. *Joiner*, 78 F.3d at 529.
20. *Joiner*, 522 U.S. at 142–43.
21. *Id.* at 144.
22. *Id.*
23. *Id.*
24. *Id.* at 145.

    > Epidemiologic evidence identifies agents that are associated with an increased risk of disease in groups of individuals, quantifies the amount of excess disease that is associated with an agent, and provides a profile of the type of individual who is likely to contract a disease after being exposed to an agent.

    Michael D. Green et al., *Reference Guide on Epidemiology*, *in* Reference Manual on Scientific Evidence 333, 335–36 (Fed. Judicial Ctr. ed., 2d ed. 2000); *see also id.* at 338–47 (describing different kinds of epidemiological studies such as randomized trials and various types of observational studies).
25. *Id.* at 146–47.
26. Indeed, courts often go out of their way to discuss in great detail that epidemiological evidence is not essential (in a case in which no epidemiological studies were done) before rejecting all the other evidence offered by the plaintiff. *See, e.g.*, *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 800–801 (N.D. Ohio 2004); Parlodel cases cited *infra* note 37. *But see Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1164 (S.D. Fla. 1996), *aff'd*, 158 F.3d 588 (11th Cir. 1998), stating:

    > [T]he generally accepted view in the scientific community is that [the expert's] methodology [case reports, spontaneous reports of adverse medical events collected by the FDA, and animal studies] can be used to generate hypotheses about causation, but not causation conclusions. . . . [S]cientifically valid cause and effect determinations depend on controlled clinical trials and epidemiological studies.

27. *See In re Rezulin Prods. Liab. Litig.*, No. MDL 1348, 00 Civ. 2843(LAK), 2004 WL 2884327, at *3 (S.D.N.Y. Dec. 10, 2004) (holding that differential diagnosis cannot be used to prove general causation); Edward J. Imwinkelried, *The Admissibility and Legal Sufficiency of Testimony About Differential Diagnosis (Etiology): Of Under-and Over-Estimations*, 56 Baylor L. Rev. 391, 415 (2004).
28. *See, e.g.*, *Cloud v. Pfizer, Inc.*, 198 F. Supp. 2d 1118, 1133 (D. Ariz. 2001) ("[Case reports] are merely compilations of occurrences, and have been rejected as reliable scientific evidence supporting an expert opinion that *Daubert* requires.") (citing *Jones v. United States*, 933 F. Supp. 894, 899–900 (N.D. Cal. 1996)); *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1370 (N.D. Ga. 2001), *aff'd sub nom.*, *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194 (11th Cir. 2002).
29. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995) *remanded from* 509 U.S. 579 (1993).
30. Russellyn S. Carruth & Bernard D. Goldstein, *Relative Risk Greater than Two in Proof of Causation in Toxic Tort Litigation*, 41 Jurimetrics J. 195, 202 (2001) (surveying cases); see also Vern R. Walker, *Restor-*

ing the Individual Plaintiff to Tort Law by Rejecting "Junk Logic" About Specific Causation, 56 Ala. L. Rev. 381 (2004).

31. *See Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291, 1297 (N.D. Ala. 2001); *Globetti v. Sandoz Pharms. Corp.*, 111 F. Supp. 2d 1174, 1179 (N.D. Ala. 2000); *Kelley v. Am. Heyer-Schulte Corp.*, 957 F. Supp. 873, 880 n.8 (W.D. Tex. 1997).

32. Once a drug has been withdrawn from the market because it is considered too dangerous for human consumption, it would be unethical to subject humans to the risks of ingestion in prospective controlled studies. *E.g., Brasher*, 160 F. Supp. 2d at 1297; *Globetti*, 111 F. Supp. 2d at 1179 n.13.

33. *See* Restatement (Third) of Torts § 2(c) (1998); Dan B. Dobbs, The Law of Torts § 363 (2000).

34. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

35. *See, e.g.*, *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 943 (3d Cir. 1990).

36. *See Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 442 (W.D. Pa. 2003).

37. *See, e.g.*, *id.* at 525–72; *Dunn v. Sandoz Pharms. Corp.*, 275 F. Supp. 2d 672, 676–84 (M.D.N.C. 2003); *Caraker v. Sandoz Pharms. Corp.*, 172 F. Supp. 2d 1046, 1048–53 (S.D. Ill. 2001); *Shiharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1351–74 (N.D. Ga. 2001), *aff'd sub nom.*, *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194 (11th Cir. 2002); *Glastetter v. Novartis Pharms. Corp.*, 107 F. Supp. 2d 1015, 1017–46 (E.D. Mo. 2000), *aff'd*, 252 F.3d 986 (8th Cir. 2001); *Hollander v. Sandoz Pharms. Corp.*, 95 F. Supp. 2d 1230, 1233–39 (W.D. Okla. 2000), *aff'd*, 289 F.3d 1193 (11th Cir. 2002). *But see Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291, 1299 (N.D. Ala. 2001) (denying motion for summary judgment on grounds that expert testimony was reliable); *Eve v. Sandoz Pharms. Corp.*, No. IP 98–1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531, at *55–88 (S.D. Ind. March 7, 2001) (same); *Globetti v. Sandoz Pharms. Corp.*, 111 F. Supp. 2d 1174, 1180 (N.D. Ala. 2000) (same).

38. *See Eve*, 2001 U.S. Dist. LEXIS 4531, at *14–20.

39. *See id.* at *17, 20, 28.

40. *Id.* at *26–29.

41. *See* Allan H. McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 Minn. L. Rev. 381, 426–30 (1957). Prior to the McCoid article, there was no mention of informed consent in any of the major tort treatises. A California appellate court first coined the term "informed consent" in *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957). It was not until *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972), however, that informed consent was pushed into the national limelight and became a popular theory for recovery.

42. These three elements have been reiterated by numerous courts. *See, e.g.*, *Canterbury*, 464 F.2d at 787–91; *Williams v. Boyle*, 72 P.3d 392, 397 (Colo. Ct. App. 2003); *Barton v. Estate of Buckley*, 867 So. 2d 271, 272 (Miss. Ct. App. 2004); *Grasser v. Kitzis*, 553 A.2d 346 (N.J. Super. Ct. App. Div. 1988); *Scott v. Bradford*, 606 P.2d 554, 559 (Okla. 1979); *see also* Dobbs, *supra* note 33, § 250 (setting forth five elements).

43. *See, e.g.*, Paul S. Appelbaum et al., Informed Consent: Legal Theory and Clinical Practice 122 (1987) ("By conditioning the availability of compensation on the congruence between the patient's own decision and what a so-called reasonable person would have decided, the objective test undercuts a patient's right of self-determination.").

44. 399 F.2d 121 (9th Cir. 1968).

45. *Id.* at 129–30.

46. *See, e.g.*, *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1219 (11th Cir. 1999) (holding that purchaser of SUV should have been warned of rollover characteristics of vehicle allowing him to make an informed choice whether to take the risks warned against); *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1274 (5th Cir. 1974) (holding that polio vaccine is unavoidably dangerous but defendant is liable for failure to warn parents that vaccine may cause polio); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (holding that asbestos benefits may outweigh risk but defendant is liable for failing to give workers an informed choice as to whether they wish to expose themselves to the risk); *Williams v. Lederle Labs.*, 591 F. Supp. 381, 383 (S.D. Ohio 1984) (holding that beneficial but dangerous drugs must be accompanied by adequate warnings of risk); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1379 (Okla. 1975) (same).

47. See *Reyes*, 498 F.2d at 1280 (requiring plaintiff to prove that vaccine caused polio); *Cunningham*, 532 P.2d at 1381 (finding that medical testimony established that plaintiff's polio was caused by vaccine).

48. For prescription drugs the patient will learn of the risks associated with taking the drug from her physician. The overwhelming majority of courts requires only that the pharmaceutical manufacturer provide information regarding risks to the learned intermediary and not directly to the consumer herself. *See* Restatement (Third) of Torts: Products Liability § 6(d)(1) (1997); *see also In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 806–12 (E.D. Tex. 2002) (comprehensively reviewing state law endorsing the learned intermediary rule). *But see Perez v. Wyeth Labs., Inc.*, 734 A.2d 1245, 1250–60 (N.J. 1999) (rejecting the learned intermediary rule where the drug was directly advertised to patients).

49. The problem of examining each study standing alone to determine whether it supports a finding of causation was raised by Justice Stevens in his concurring opinion to *General Electric Co. v. Joiner*, 522 U.S. 136, 152–53 (1997). He notes:

> [Plaintiff's experts] did not suggest that any one study provided adequate support for their conclusions, but instead relied on all the studies taken together (along with their interviews of Joiner and their review of his medical records). The District Court, however, examined the studies one by one and concluded that none was sufficient to show a link between PCB's [sic] and lung cancer. The focus of the opinion was on the separate studies and the conclusions of the experts, not on the experts' methodology. . . .
>
> Unlike the District Court, the Court of Appeals expressly decided that a "weight of the evidence" methodology was scientifically acceptable. To this extent, the Court of Appeals' opinion is persuasive. It is not intrinsically "unscientific" for experienced professionals to arrive at a conclusion by weighing all available scientific evidence—this is not the sort of "junk science" with which *Daubert* was concerned.

Id. (citations and footnotes omitted).

50. Inst. of Med. & Nat'l Research Council, Dietary Supplements: A Framework for Evaluating Safety 1–2 (2004), *available at* www.nap.edu/books/0309091101/html (last visited July 19, 2005).

51. Inst. of Med. & Nat'l Research Council, *supra* note 50.

52. *Id.* at 255–56 ("[A]vailable evidence from each category of data, by itself, may be insufficient to indicate concern, but when a pattern of mechanistically related adverse effects is observed across two or more categories in a consistent manner, this can establish biological plausibility and warrant heightened concern for potential harmful effects in humans."); *see also Joiner*, 522 U.S. at 522 n.4, and discussion in accompanying text (in which Justice Stevens notes that the Environmental Protection Agency gathers material from a host of sources to assess risks).

53. Inst. of Med. & Nat'l Research Council, *supra* note 50, at 12 ("Proof of causality or proof of harm is not necessary to determine unreasonable or significant risk.").

54. The prevalence of such conduct has led to demands by the leading medical journals for registries of clinical trials, and the introduc-

tion of legislation to this effect. *See* Kay Dickersin & Drummond Rennie, *Registering Clinical Trials*, 290 J. Am. Med. Ass'n 516, 519 (2003) ("There is evidence that many industry trials are never published. . . . Because there is commercial advantage to be gained by early publication of positive results and the suppression of negative results, industry reluctance to publish negative findings would not come as a surprise.").

55. *See Nelson v. Sandoz Pharms. Corp*., 288 F.3d 954, 959 (7th Cir. 2002) (finding that plaintiff asked her doctor to check whether Parlodel could have caused her post-partum stroke; Parlodel sales representative told doctor that strokes did not occur more frequently with patients taking Parlodel than those in the general post-partum population, but did not tell him that more than six months before plaintiff was prescribed Parlodel the FDA had requested the defendant to remove the drug from the market as a lactation suppressant and that Sandoz had refused; a second doctor whom plaintiff consulted was also unable to find any information that Parlodel posed a risk). For an extensive discussion of the lengthy negotiations between the FDA and the defendant that ultimately led to Parlodel's removal from the market, see *Eve v. Sandoz Pharms. Corp.*, No. IP 98-1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531, at *10–40 (S.D. Ind. March 7, 2001).

56. Internal company documents and e-mails leaked to the *Wall Street Journal* suggest that Merck knew of problems with Vioxx by 2000. *See* Anna Wilde Matthews & Barbara Martinez, *E-Mails Suggest Merck Knew Vioxx's Dangers at Early Stage*, Wall St. J., Nov. 1, 2004, at A1.

57. *See Desiano v. Warner-Lambert Co*., 326 F.3d 339, 342 (2d Cir. 2003) (finding that although Warner-Lambert was claiming in advertisements that Rezulin, a drug for diabetes, had "[s]ide [e]ffects [c]omparable to [p]lacebo," in fact "its own clinical trial data showed Rezulin users were three to six times more likely to suffer liver injury than patients taking the placebo").

58. For a comprehensive review and analysis of the judicial and scholarly community dealing with the proper utilization of the lost chance theory of recovery, see David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 Wake Forest L. Rev. 605 (2001). *See also* Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 26 cmt.h (Tentative Draft No. 2, 2002).

59. *See* Dan B. Dobbs, *The Law of Torts* §§ 303–06.

60. For an early article suggesting recovery for emotional distress where uncertainty prevents a plaintiff from establishing traditional causation, see Nancy Levit, *Ethereal Torts*, 61 Geo. Wash. L. Rev. 136 (1992). *See also* Lisa Heinzerling & Cameron Powers Hoffman, *Tortious Toxics*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 67 (2001) (positing that recovery be allowed for negligent infliction of emotional distress based on the dread associated with exposure to toxic substances).

61. 730 A.2d 805 (N.J. 1999).

62. *Id.* at 810.

63. *Canesi v. Wilson*, 685 A.2d 49 (N.J. Super. Ct. App. Div. 1996), *modified*, 730 A.2d 805 (N.J. 1999).

64. *Canesi*, 730 A.2d at 812–13.

65. *Id.* at 812 (citing *Grasser v. Kitzis*, 553 A.2d 346 (N.J. Super Ct. App. Div. 1988)).

66. *Id.*

67. *Id.*

68. *Id.* at 818.

69. *Id.* at 813–14.

70. *Id.*

71. *Id.* at 819 (citations omitted).

72. *See, e.g.*, *Taylor v. Baptist Med. Ctr.*, 400 So. 2d 369 (Ala. 1981); *Molien v. Kaiser Found. Hosps*., 616 P.2d 813 (Cal. 1980); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433 (Me. 1982).

73. *See, e.g.*, *Wilson v. Sears, Roebuck & Co*., 757 F.2d 948, 950 (8th Cir. 1985) (applying Nebraska law); *Dailey v. LaCroix*, 179 N.W.2d 390, 394 (Mich. 1970).

74. *See, e.g.*, *Payton v. Abbott Labs*., 437 N.E.2d 171, 181 (Mass. 1982); *Reilly v. United States*, 547 A.2d 894, 896 (R.I. 1988).

75. *See, e.g.*, *Siharath v. Sandoz Pharms. Corp*., 131 F. Supp. 2d 1347, 1354–56 (N.D. Ga. 2001) (holding that plaintiff's experts were well-qualified by education and experience to opine as to whether Parlodel caused plaintiff's stroke; however, their opinions did not meet *Daubert* criteria); *Nelson v. Am. Home Prods. Corp*., 92 F. Supp. 2d 954, 968 (W.D. Mo. 2000) (holding that while plaintiff's expert was a highly qualified professor, his opinion as to whether Cordarone caused plaintiff to lose his eyesight did not meet *Daubert* criteria).

76. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (holding that a court has discretion "to avoid unnecessary 'reliability' proceedings . . . [when] the reliability of an expert's methods is properly taken for granted").

77. *See, e.g.*, *In re Fibreboard Corp*., 893 F.2d 706 (5th Cir. 1990) (holding that individual medical causation issues destroy commonality and hence prevent class certification); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 444–46 (Fla. Dist. Ct. App. 2003) (holding that medical causation is inherently individualized and thus not subject to class certification).

This article is a significantly abridged version of an article that appeared in 104 U. Mich. L. Rev. 257 (November 2005). The footnotes have been renumbered and shortened for the purpose of this publication. A response to our article by Professor David E. Bernstein entitled " 'An American Tragedy ': A Critique of the Berger-Twerski Proposal" appears in 104 U. Mich. L. Rev. 1961 (August 2006) and our response to Professor Berger entitled "From the Wrong End of the Telescope: A Response to Professor David Bernstein," appears in 104 U. Mich. L. Rev. 1983 (August 2006).

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What Does the *Ahlborn* Decision Really Mean? Medicaid Reimbursement in Personal Injury Cases After *Arkansas Dep't of Health & Human Services v. Ahlborn*

By Matthew L. Garretson

You have a catastrophically injured client who receives Medicaid benefits. You have settled the case. Due to liability issues or policy limit issues, you believe you've gotten your client about 20 cents on the dollar for his true damages. Medicaid wants the entire settlement because it has paid $100,000 more for the client's medical expenses than you recovered. What now? Ahlborn *is a decision capable of creating more confusion and pitfalls—for all involved—than any case in recent history.*

It appears that Monday, May 1, 2006, was a landmark day for plaintiffs' rights in personal injury settlements. On that day the United States Supreme Court unanimously affirmed the Eighth Circuit's decision in *Arkansas Dep't of Health & Human Services v. Ahlborn*.[1] With this holding, a state's Medicaid department will be limited to reimbursement from only that portion of a judgment or settlement that represents payment for medical expenses—states are now prohibited from seeking reimbursement for Medicaid costs from settlement proceeds that were intended to cover items other than medical expenses, such as pain and suffering and wage loss. The United States Supreme Court held that the federal anti-lien statute prevents states from attaching or encumbering the nonmedical portion of the settlement or judgment.

In the slip opinion released May 1, 2006, the Court reasoned:

> There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. *See Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383–385, and n. 7 (2003). But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, *the exception carved out by §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.*

(Emphasis added.)

So Where Are We Now?

In the United States Supreme Court's own words, states may not demand reimbursement from portions of the settlement allocated or allocable to nonmedical damages; instead, states are given only a priority disbursement from the *medical expenses* portion alone. Prior to this ruling, for example, if an Arkansas Medicaid recipient settled his or her entire action against a third party for $20,000 and the state (Medicaid Department) paid that amount or more to medical providers on his or her behalf, nothing in the state statutes would preclude the state from receiving the entire settlement, leaving the recipient with nothing.

Because of the uncompromising collection/reimbursement practices in many states prior to *Ahlborn*, many plaintiffs' attorneys may now—with *Ahlborn* in their quiver—be looking for, well, let's just be honest and call it revenge. Perhaps the correct path forward, however, is to pause for a few moments, quietly reflect, and then tread carefully when trying to apply *Ahlborn*. I look at it like this—the atom has been split, but the plaintiffs' bar has not yet built a stable weapon. If the plaintiffs' bar becomes overly aggressive *without a solid strategy,* I believe the *Ahlborn* decision leaves open the door for states to seek a political solution, including, perhaps, a change in the state statutory framework that may force a favorable allocation for the state. The *Ahlborn* victory could be short-lived.

I. Defining the Issues

Following a motor vehicle accident in which Ahlborn was seriously and permanently disabled, she applied and qualified for Medicaid benefits in the State of Arkansas. As a result of the accident, Medicaid paid approximately $215,645 for her care. Ahlborn received $550,000 as a result of her settlement with the third-party tortfeasor.

In order to receive Medicaid benefits, Arkansas law (like in other states) required Ahlborn to assign to the Arkansas Department of Human Services (ADHS) her "right to *any* settlement, judgment, or award" she might receive from third parties, "to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant."

ARK. CODE ANN. § 20-77-307(a). Note the emphasis on the word "any"—Arkansas, like most states, takes the position that it gets the first bite of the apple regardless of the type of damages being paid by the tortfeasor. Accordingly, ADHS attempted to recover the total $215,645.30 it paid on her behalf based on the assumption that the settlement award ($550,000) was its property to begin with, and not Ahlborn's.

In contrast to the overbroad state statute, the Eighth Circuit found that where a third party is liable for the cost of a Medicaid recipient's health care, federal law assigns to the state plan "the rights of such individual to payment by any other party *for such health care items or services*."[2] As the emphasized language denotes, federal law narrowly defines (and limits) the assignment to the state as the right "to payment for medical care from any third party."[3] Thus, the Court found conflict between the Arkansas state law and the federal law.

In resolving the conflict, the Eighth Circuit agreed with Ahlborn's argument that 42 U.S.C. § 1396p(a)(1) prohibited (with certain exceptions not applicable here) the imposition of a lien "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan[.]" Under the statute's implementing regulation, "property" is defined as "the homestead and all other personal and real property in which the recipient has a legal interest."[4] It is basic property law that a chose in action is personal property," and that "the right to sue for damages is property."[5] Consequently, because Ahlborn had a legal interest in her right to sue, the court held that Ahlborn's right to a settlement that may be received from a third-party tortfeasor (which, again, the Arkansas statute required her to assign to the state) was Ahlborn's "property" and not that of ADHS. Thus, ADHS could only impose its lien on payments for medical care from any third party and could not enforce its lien on the entire settlement.[6]

As a matter of law, the court found that federal law trumped the Arkansas state law in that: (1) an individual's right to sue and subsequent settlement is the individual's property and not that of the state Medicaid Department; and (2) that federal law only allows Medicaid to recover third-party payments made to compensate the beneficiary for medical care. In *Ahlborn*, ADHS was only able to enforce its lien upon $35,581.47, or one-sixth of the total amount that ADHS paid in medical expenses on Heidi Ahlborn's behalf. As noted previously, Ahlborn had been seriously injured in an automobile accident. Medicaid paid $215,645 of her medical bills. She later settled her case for $550,000. Medicaid thereafter claimed that it was entitled to repayment of the $215,645 that it had paid out on her behalf. It was stipulated that Ahlborn's claim was worth more than $3,000,000 and that her settlement constituted about one-sixth of that amount. The Eighth Circuit Court of Appeals, affirmed by the United States Supreme Court, held that Medicaid was entitled to only $35,581.47, and was ineligible to receive any part of the award that was to compensate Ahlborn for pain and suffering, lost wages, or loss of future earnings. The remaining portion of the $550,000 settlement was Ahlborn's property.

Although the Eighth Circuit found in favor of the plaintiff, such a decision has not been uniformly accepted among all the circuits. For example, the Second Circuit held in the 1999 case of *Sullivan v. County of Suffolk* that:

> As a Medicaid recipient, Sullivan assigned his right to recover from a third party to Department of Social Services [DSS], up to the amount of medical assistance provided. DSS was entitled to any rights that Sullivan had to the third-party reimbursement. DSS pursued its right to recover from a responsible third party by placing a lien on Sullivan's lawsuit against that party. Because the lien attached directly to the tort settlement proceeds, the tortfeasor owes that money to DSS.[7]

Essentially the court stated that Sullivan had no right to the proceeds prior to the DSS recovery of its lien, thus allowing the DSS to collect the entire value of its lien prior to Sullivan taking possession of any settlement funds.

The apparent split among the circuits forced the Supreme Court to hear the *Ahlborn* case and rectify any discrepancies in the law.

II. Does *Ahlborn* Apply to Medicare?

Arguments both for and against *Ahlborn* controlling similar cases involving Medicare reimbursement can be advanced.

Arguments Against Applying Ahlborn to Medicare—Differing Statutory Language

It can be argued that because Medicaid third-party liability provisions differ greatly from Medicare third-party liability provisions, *Ahlborn* should not apply to cases involving Medicare. Unlike Medicaid, the Medicare statute is not based on an assignment of rights—payments are made conditionally, and are subject to full recovery when a third-party payer is held to be responsible for Medicare-related services and items. In addition, Medicare is not limited to recovering only from the portion of a settlement that is allocated to health care items and services,[8] nor does the Medicare statute contain an anti-lien provision. Glibly stated, the intent behind the Medicare Secondary Payer (MSP) legislation was not to protect Medicare beneficiaries from having to repay certain conditional payments made on their behalf.

When third-party liability is alleged, Medicare makes a payment conditioned on being reimbursed from any recovery from an insurance policy (including a self-insured plan) covering the liable third party. The MSP legislation does not limit The Centers for Medicare and Medicaid Services' (CMS's) right of reimbursement to its right of subrogation.[9] The statutory framework provides CMS with an independent right of recovery against any entity that is responsible for the payment of, or that has received payment for, Medicare-related items or services.[10] This independent right of recovery is separate and distinct from CMS's right of subrogation[11] and is not limited by the equitable principle of apportionment[12] (from which the benefits of *Ahlborn* flow) stemming from the subrogation right (*see Zinman v. Shalala*, 67 F.3d 841 (9th Cir. 1995).

In *Zinman*, certain Medicare beneficiaries argued that because CMS is a subrogee, its recovery must be limited to the pro-rata share of an insurance settlement that includes payment for medical expenses. However, the right of Medicare to receive full reimbursement was upheld (even though a beneficiary receives a discounted settlement from a third party).

Holding that the right of Medicare to recover is not limited by the equitable principle of apportionment, the Ninth Circuit Court of Appeals reasoned:

> It is clear from the statute that the references to "item or service" are intended to define the payments for which Medicare has a right to reimbursement. Nothing in this language, however, compels the conclusion that Congress intended to limit the amount of recovery for a conditionally paid "item or service" to a proportionate share of a discounted settlement. The beneficiaries' reliance on 42 U.S.C. §§ 1395y(b)(2)(B)(i) and (ii) is misplaced.

The Ninth Circuit further stated:

> [T]o define Medicare's right to recover its conditional payments solely by reference to its right of subrogation would render superfluous the alternative remedy of the independent right of recovery contained in section 1395y(b)(2)(B)(ii). We decline to construe the statute in a way that would render clear statutory language superfluous.[13]

In sum, the Ninth Circuit confirmed CMS's position that MSP legislation allowed for the full reimbursement of conditional Medicare payments.

The only situation in which Medicare may recognize allocations of liability payments to nonmedical losses is when payment is based on a court order on the merits of the case. If the court or other adjudicator of the merits specifically designates amounts that are for payment of pain and suffering or other amounts not related to medical services, Medicare will accept the court's designation. Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services—that has always been the rule. However, the allocation must be supported by a court order.[14] As the court reasoned in *Zinman*:

> [T]he injured victim alleged a variety of damages, some capable of precise computation, some not. Such allegations are not uncommon. [CMS's] ability to recover the full amount of its conditional payments, regardless of a victim's allegations of damages, avoids the commitment of federal resources to the task of ascertaining the dollar amount of each element of a victim's alleged damages. . . . Apportionment of Medicare's recovery in tort cases would either require a factfinding process to determine actual damages or would place Medicare at the mercy of a victim's or personal injury attorney's estimate of damages.[15]

Because liability payments are usually based on the injured or deceased person's medical expenses, liability payments are assumed/considered to have been made "with respect to" medical services related to the injury even when the settlement: (1) does not expressly include an amount for medical expenses; or conversely, (2) when the allocation is done by the parties absent an order or other adjudication on the merits. Absent a court order, any intellectual or legal arguments directed to a lead contractor for Medicare might be met with the classic "huh?" or "what?" response. Those contractors hold the majority of the deck and, some would argue, display indifference because they are governed by a clear statutory framework. If thrown a curveball, some contractors might simply move your client's file to the bottom of the stack and defer the matter until later. Thus, trying to use *Ahlborn* to assist in determining the amount of Medicare's reimbursement is likely a dead end.

Arguments in Favor of Applying *Ahlborn* to Medicare—Similar Statutory Obligation and Purpose

Arguments in favor of applying *Ahlborn* to Medicare present the flip side of the statutory difference position noted above: *Ahlborn* should apply to repayment claims made by Medicare even though the statutory language differs from the Medicaid statute, because the basic elements of the reimbursement obligation are the same under all of the major government-funded health care programs. Medicaid, the Medical Care Recovery Act (MCRA),[16] and the Medicare Secondary Payer Act (MSP) share a common legislative purpose—specifically, to en-

sure that the obligation to pay is *secondary* to the obligation of another plan of insurance when both are responsible for payment for medical care. All three provide their respective health care program with similar reimbursement rights to meet that purpose.

The MSP third-party liability provisions contain language that is similar to the language of the Medicaid Act that was interpreted in *Ahlborn* and the MSP repayment and enforcement provisions[17] are similar to those of Medicaid:

> A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means . . .

Tort litigation has seen the application of MSP because in many situations a defendant has liability insurance to compensate victims for injuries that the defendant may have caused. When the primary insurance plan (i.e., the defendant's liability policy) is not expected to be able to pay promptly (possibly because liability has not been established), Medicare may pay for the medical items and services for the victim, subject to a right of reimbursement. MSP allows the government to waive any provision of the Act when it is determined that "waiver is in the best interests of the program."[18]

In addition, under both statutes—Medicaid and MSP—the government's repayment rights are limited to medical costs, while the injured party's right to recover for other damages remains intact:

1. Medicaid: State assigned "rights . . . to payment for medical care from any third party"
2. MSP: Reimbursement from primary plans having "responsibility to make payment with respect to such item or service"

Thus, while the common goal of both statutes—having the government be the payer of last resort (to keep government health care costs as low as possible) rather than the primary payer—should be noted, it can be argued that these statutes construe the reimbursement obligation narrowly to just the medical costs recovered by the plaintiff.[19]

III. Practical Considerations

In the introduction to these materials, I encouraged the reader to be cautious before implementing any strategy. As practitioners form their game plans, two fundamental tenets must be embraced: (1) states are not going to sit idly by and allow parties to negotiate away their interest; and (2) defendants are not likely to cooperate in allocating damages.

In light of this reality, plaintiff's counsel should consider the following.[20]

1. Notify the government agency involved (Medicaid/Medicare) that you will be attempting to recover the full array of tort-related damages, which may include repayment of government medical expenses. Request an accounting of these expenses, noting that all tort-related damages will be equitably allocated between the injured party and the government.
2. Decide whether you are going to seek recovery for medical costs that are/have been paid by the government and make this known in your pleadings.
3. Attempt to reach an agreement with the government regarding the equitable allocation of the settlement. If the parties are unable to come to an agreement, you may be left to seek a court order allocating the settlement among different categories of damages. In cases involving minors or incompetents, the procedural mechanism is already in place. But what about cases involving a competent adult? The best recommendation this author has is:
   a. Ask the court for a hearing on the allocation of damages; or,
   b. The plaintiff (*ex parte*) or parties (by joint stipulation) could move the trial court, prior to finalizing the settlement agreement, to establish a qualified settlement fund (discussed more fully below) and ask the court to appoint a neutral fund administrator (perhaps even the mediator from the case or a respected member of the bar) to make a reasonable allocation of damages that includes the medical expense reimbursement amount; and
   c. To ask the court or fund administrator to answer, based upon the demand packages or competing life care plans and economist's reports, one of the following questions:

      > If causation and liability were not a factor, if you were to blackboard all

the damages at trial—medical and nonmedical—what percentage of the total would be for medical losses and what percentage would be for nonmedical losses (pain and suffering, disfigurement, lost wages, derivative losses, and so on)?

What percentage of the full value of the case did plaintiff recover (taking into account proof in the present case or similar damage cases without same liability or coverage limitations)? Medicaid should only recover same percentage of its claimed lien.

Example: There is a $350,000 settlement. After identifying all damages based on economic reports and/or life care plans (all the typical tools that attorneys use to show defendants what the measure of harm is/was), the plaintiff's attorney can show that reasonable damages are $1,000,000. However, due to policy limits and/or comparative fault/contributory negligence, the parties settled for $350,000. Under traditional *Ahlborn* analysis, let's say that medical provider payments by Medicaid were $100,000. However the, plaintiff accepted 35 cents on the dollar (of the blackboarded damages) to settle due to various factors. *Ahlborn* suggests that under equitable allocation theory, 35 percent of the $100,000 paid by Medicaid might be allocable to medical expenses as part of the settlement dollars. This brings the recovery amount to $35,000.

If a defendant and/or the state is not likely to cooperate in making a good-faith classification of damages, the use of a 468B Qualified Settlement Fund (QSF)[21] may become more important when used as an alternate approach to getting a court order on the merits of the case. QSFs can introduce a degree of "breathing space" to a settlement that can prove uniquely valuable in the following ways:

a. Allocating the settlement proceeds among the types of damages and/or claimants;

b. Verifying and negotiating liens and/or subrogation claims;

c. Determining the appropriate role and underwriting of a structured settlement annuity;

d. Evaluating the need to preserve governmental entitlement benefits (e.g., the need for the establishment of a special needs trust); and

e. A host of other decisions which can best be made without the pressure associated with the litigation itself.[22]

In smaller cases, however, the expense and administrative burden of establishing a qualified settlement fund may be prohibitive. In those instances, perhaps the plaintiff's counsel could obtain a court order on allocation of damages by asking for a post-settlement allocation via motion to the court (Minnesota and Wisconsin have this in place, via state supreme court cases—a mechanism for a post-settlement allocation hearing).

This author believes that states, however, are loath to participate in post-settlement allocation hearings because those hearings are not in the state's best interest. Participating as the state in a hearing in front of a judge where you (the state) appear adverse to a brain-injured child in a wheelchair is a loser's game. Most judges will be more sympathetic to the injured party in that context.

If counsel and Medicaid departments are able to establish rapport, and if they both accept the "equitable allocation" rationale of the United States Supreme Court in *Ahlborn*, then court orders may not be needed. But let's not be overly Pollyanna-ish—both sides are called to advocate fiercely for their clients in any context in which they engage in allocation discussions. And, if these discussions take place outside the court setting, the states may soon have the upper hand. This author believes—after much discussion with Medicaid-related officials in various states—that state Medicaid departments will seek to ensure that their respective statutory framework dictates that no settlements occur without Medicaid's official "signoff." In Utah, for instance:

> A recipient may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance, **without the department's [of Health] written consent . . . .**[23]

4. Should the government claim a right of priority reimbursement and ignore the notion of equitable allocation, be prepared to argue that such a position is inconsistent with the Supreme Court's holding in *Ahlborn* and/or that the taking of the other nonmedical elements of plaintiff's damages creates an undue hardship.[24]

IV. Conclusion

I introduced this article with the rather alarming statement that "Ahlborn *is a decision capable of creating more confusion and pitfalls than any case in recent history.*" I base that proposition on the fact that every effort to build

damages on the front-end of a Medicaid beneficiary's case may negatively impact the client's net recovery on the back-end. Plaintiffs' counsel must be prepared to deal with the following, as the department likely will not roll over on your construction of the "equitable allocation" at the time of settlement.

1. Medicaid will place the onus on you to prove up your numbers. Keep in mind that the state clearly knows what its damages are. States will want to see your complaint, your life care plan, economist's report, and other medical records to see whether your claim of equitable allocation on the back-end of the case is in line with what you have tried to plead and prove from the beginning.

2. The state may be more proactive in pursuing a recovery directly from the third party, as many state statutes allow.[25] If so, the state is likely to obtain all your correspondence with the defendant about your client's case.

3. In light of the above possibilities, crafty defense attorneys may begin playing Medicaid, you (the plaintiff counsel) and the Medicaid recipient (your client) off of each other, ultimately creating a rift between plaintiff's counsel and Medicaid that will hinder the ability to have a meaningful discussion regarding equitable allocation on the back-end of the case.

4. Defendants have little incentive to cooperate with you on the back-end of the case. If they are perceived by the state as participating in a process that "allocates away" the state's interests, the state likely will become more aggressive in chasing defendants directly.

The suggestions outlined above appear to be supported by the Supreme Court's opinion in *Ahlborn*. The Court addressed the "risk-of-settlement-manipulation" argument raised by ADHS (as well as by ADHS' amicus in support) by reasoning that, "the risk that parties to a tort suit will allocate away the state's interest can be avoided by either obtaining the state's advance agreement to an allocation or, if necessary, by *submitting the matter to a court* for decision."[26]

The United States Supreme Court has clarified to whom the pot of settlement money belongs. Now, it is up to plaintiff's counsel to focus on a stable allocation strategy. Certainly you should advocate as zealously as possible for your client. Further, ABA Model Rule 1.1 addresses the cause-and-effect issues articulated above (i.e., the impact that your pleading on the front-end of cases will have upon the net benefit to the Medicaid client on the back-end), stating that a lawyer *"shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation*." Against this benchmark, clients who are Medicaid recipients reasonably will expect counsel not only to advocate for the substance (the dollar amount) but the "form-of-settlement" (the allocation) as well.

In this endeavor, I believe we do not want to implement a process that benefits our current clients while the states are reeling to figure out how to equalize the balance of power—which they will—and leaves such discord in the wake that states will be difficult to work with when they level the field (if not obtain the upper hand). With the risk of being histrionic, I analogize the path forward to the "Mutually Assured Destruction" game theory I recall from the cold war era: Certain behaviors or choices are deterred because they will lead to the imposition by others of overwhelming punitive consequences. At times, rational self-interest hurts everyone.

Endnotes

1. *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, __ U.S. __, 126 S. Ct. 1752 (2006).
2. 42 U.S.C. § 1396a(a)(25)(H) (emphasis added).
3. *Id.* § 1396k(a)(1)(A) (emphasis added).
4. *Id.* § 1396a(a)(25)(H).
5. *Gregory v. Colvin*, 235 Ark. 1007 (1963).
6. 42 U.S.C. § 1396(a)(1)(A).
7. *Sullivan v. County of Suffolk*, 174 F.3d 282, 286 (2d Cir. 1999).
8. *See generally* 42 U.S.C. § 1395y(b)(2)(B).
9. This conditional payment and Medicare's right to reimbursement from the beneficiary's settlement proceeds can be found at 42 U.S.C. § 1395y(b)(2).
10. The rules that govern how this statute operates can be found in Title 42 C.F.R. § 411.20. The Centers for Medicare and Medicaid Services (CMS) has a right of action to recover its payment from any entity, including a beneficiary, provider, supplier, physician, attorney, State Agency, or private insurer that has received a third-party payment. 42 C.F.R. § 411.24(g). If the beneficiary or other party received a third-party payment, the beneficiary or other party must reimburse Medicare within 60 days. *Id.* § 411.24(h). If Medicare is not reimbursed as required by Section 411.24(h), the third-party payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party. *Id*. § 411.24. If a third-party payer learns that the CMS has made a Medicare primary payment for services for which the third-party payer has made or should have made primary payment, it must give the CMS notice to that effect. *Id.* § 411.25.
11. *See United States v. Travelers Ins. Co*., 815 F. Supp. 521, 523 (D. Conn. 1992); *Provident Life & Accident Ins. Co. v. United States*, 740 F. Supp. 492, 501 (E.D. Tenn. 1990).
12. The *Ahlborn* decision essentially reinforced the notion that the right of subrogation is equitable in nature and generally requires application of the equitable principle of apportionment. Under this equitable principle, a subrogated right holder is limited to recovery of the proportion of its loss for which third-party reimbursement is actually received. *See Zinman v. Shalala*, 67 F.3d 841, 844 (1995) (referring to APPLEMAN'S INSURANCE LAW & PRACTICE § 4054 (1990)).
13. *Id*. at 845.

14. Or perhaps an order by the administrator of a Qualified Settlement Fund.

15. *Ahlborn*, 126 S. Ct. at 1756.

16. Applicable where the United States has paid for the medical care of persons in the military, their dependents, or retired veterans. MCRA § 2651(a) states:

> In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefore, the United States shall have a right to recover (independent of the rights of the insured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment . . . and shall as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment. . . . The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person . . . to assign his [or her] claim or cause of action against the third person to the extent of that right or claim.

In order to recover under the MCRA, the government may intervene or join in any action brought by an injured person, or may bring its own action against a responsible third party. 42 U.S.C. § 2651(d). The statute also authorizes the government to "compromise or settle and execute a release of any claim that the United State has by virtue of the right to established by § 2651" or to "waive any such claim, in whole or in part, for the convenience of the Government, or if [it is determined] that collection would result in undue hardship upon the person who suffered the injury or disease resulting in care or treatment." *Id.* § 2652(b).

MCRA also shields the injured individual, expressly stating: "No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his [or her] damage not covered hereunder." *Id.* § 2652(c).

17. *Id.* § 1395y(b)(2)(B)(ii).

18. *Id.*

19. Similarly, MCRA: "Right to recover . . . the reasonable value of the care and treatment."

20. Some of the points below are advanced by Opinion Letter, Lou Bograd, Center for Constitutional Litigation, Possible Extension of *Ahlborn* Ruling to Medicare and Guidance to Plaintiffs' Counsel Regarding the Decision (May 16, 2006).

21. Designated Settlement Funds (DSFs) came into existence when the United States Tax Reform Act of 1986 inserted § 468B into the Internal Revenue Code. This section established a safe harbor by spelling out terms under which the defendant in a tort claim may make qualified payments into a designated settlement fund and be certain that the Internal Revenue Service will deem economic performance to have occurred. This is important to the defendant and his or her insurers because the payment cannot be deducted until there has been economic performance. I.R.C. § 461(h). QSFs were created by regulations relating to § 468B, which became effective on January 1, 1993. Treas. Reg. § 1.468B-1. Comparing the requirements of a DSF and a QSF reveals that a QSF is not restricted to tort claims. Neither a DSF nor a QSF can be used in relation to Workers' Compensation claims. Although there are some additional differences between a DSF and a QSF, they actually operate very similarly. Generally speaking, the regulations issued under § 468B apply the § 468B statute to a broader range of settlement funds. Henceforth, these materials will refer generically to a "468B Fund."

22. This breathing space is made available because, while temporarily parked in the 468B, the assets are not "constructively received" by any claimant, as that doctrine is set forth in Treasury Regulation § 1.451.2.

23. UTAH CODE ANN. § 26-19-7(1)(a) (emphasis added).

24. Beneficiaries have the right to appeal Medicare's lien amount. Appeal decisions are generally based on the financial hardship that repayment would cause the beneficiary. In order to make the determination, a waiver form is sent to the beneficiary, requesting information on monthly income and expenses. Failure to return this information in a timely manner will result in a denial of the appeal. Requesting an appeal does not prevent the interest accrual process. Repayment of the full debt, however, does not waive your right to appeal. There are several levels of appeals. Each appeal is outlined more fully below.

1. Level 1—Waiver or Compromise. Three statutory authorities exist under which Medicare may accept less than the full amount of its claim: § 1870(c) of the Social Security Act, § 1862(b) of the Social Security Act, and the Federal Claims Collection Act (FCCA).

a. Each statute contains different criteria upon which decisions to compromise, waive, suspend, or terminate Medicare's claim may be made. Likewise, the exercise of each authority is limited to specific entities.

i. Waiver—Medicare contractors have the authority to consider beneficiary requests for waivers under § 1870(c) of the Social Security Act.

ii. Compromise—Authority to waive Medicare claims under § 1862(b) and to compromise claims, or to suspend or terminate recovery action under FCCA, is reserved exclusively to the CMS Central Office and/or Regional Office.

b. Waiver requests must be submitted *in writing* to the Medicare contractor. The request *cannot* be submitted until settlement has been reached and you have Medicare's final claim amount (with procurement costs deducted). Upon receipt of the waiver request, Medicare will send you waiver forms, which will need to be completed. Waiver determinations generally are completed within 120 days from the date a waiver request is received.

i. Documentation needed to make a waiver determination

(1) Proof of payment for accident-related out-of-pocket medical expenses

(2) Procurement costs

(3) Expenses and income information that demonstrates financial hardship (if the beneficiary is alleging financial hardship)

(4) Physician statements, if permanent disability is stated

(5) Any other pertinent information required to make a determination

c. Compromise: In an MSP situation under the Federal Claims Collection Act, a compromise represents the acceptance by the CMS or the Regional Office (RO) of less than the full debt owed to Medicare, when the amount of the full debt does not exceed $100,000, or by the Central Office (CO) when the amount exceeds $100,000. An individual who accepts a compromise has no right to appeal the remaining debt. This process generally takes three to six months.

i. Compromise—A compromise can either be pre- or post-settlement. Only the Centers for Medicare and Medicaid Services (CMS) has the authority to negotiate a compromise, so the beneficiary's request will be forwarded to the appropriate Regional Office.

ii. A presettlement compromise request will need the following documentation.

(1) A copy of the agreement (retainer) between the beneficiary and his or her attorney

(2) Amount of the presettlement offer

(3) Procurement costs incurred

d. Partial Waiver: A decision by the Medicare program to relinquish the right to collect from a specific entity. *A partial waiver is not to be confused with a compromise.* It is different in that it does not arise from negotiation or offer, but under § 1870(c) of the Act, which provides the beneficiary the right to request waiver, and Medicare the authority to grant or deny waiver based on the factual data. An individual may appeal a determination based on § 1870(c) of the Act if the determination grants only partial waiver of a debt.

e. The CMS also has the right to grant partial waivers as set forth in § 1862(b)(2)(B)(iv) of the Act. Waiver decisions of MSP debts based on § 1862(b)(2)(B)(iv) may not be appealed.

2. Level 2—Reconsideration

If a waiver is denied, a Reconsideration of that decision may be requested in writing. Reconsideration requests are handled by the Lead Contractor's Appeals Department.

3. Level 3—Administrative Law Judge (ALJ)

If reconsideration is denied, an ALJ ruling may be requested in writing. An independent judge then reviews the case. This is the final level of appeal.

25. UTAH CODE ANN. § 26-19-5(1)(a), for instance, states that "When the department provides or becomes obligated to provide medical assistance to a recipient that a third party is obligated to pay for, the department may recover the medical assistance from the third party." As such, the state can either wait until the plaintiff recovers and assert its traditional right of subrogation (subject, of course, to the *Ahlborn* limitations), or the state can pursue the action directly against the tortfeasor.

26. *Ahlborn*, 126 S. Ct. at 1756.

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Surveillance: *Caveat Emptor*

By Adam G. Greenberg and Glenn A. Monk

The law of discoverability of surveillance photographs and videotape has changed, albeit not at the same pace as the technology available to capture its subject. The potency of this evidence—a visual record of the injured plaintiff performing physical activity inconsistent with his claims—has not diminished over time, nor as a result of more liberal discovery rules. However, a defendant seeking to develop *sub rosa* evidence needs to be attentive to exactly what is required to be turned over in discovery. The decisional law has expanded the scope of "out-takes," "transcripts" and "memoranda" referred to in the controlling disclosure statute. At the same time, the courts have supported defendants' search for photographic and video evidence prepared by or at a plaintiff's behest (i.e., personal and family celebrations), and obtaining other nonparty sources of such evidence not initially intended for litigation (i.e., security cameras). All of this suggests the obtaining, use and discoverability of surveillance evidence is now an endeavor that requires more careful consideration than those still using Kodak Instamatics may expect. Put another way, the legal adage *caveat emptor* is a useful caution to a party considering video surveillance.

A. What Is an Out-take?

CPLR 3101(i) implicitly defines an "out-take" as "those portions (of a videotape or audiotape) that a party does not intend to use."[1] Due to the literal wording of the statute and the liberal provisions for disclosure under the CPLR, it is clear that Courts do not wish to commit themselves to a more specific definition of the term "out-take" so as to allow parties room for judgment in turning over tapes. Instead, a party should assume that all tapes, regardless of their potential relevancy or subject matter, should be exchanged.[2]

B. Discoverability of Out-takes from a Party

1. Controlling Statute—CPLR 3101(i)

"In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section." *There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.* The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes, which are exempt from disclosure under section eighty-seven of the public officers law.

2. Effect of CPLR 3101(i) on the Discovery of Surveillance Tapes

CPLR 3101(i) expressly overruled that portion of *DiMichel*[3] that only required production of tapes that a party planned to use at trial. Based on the specific inclusion of the words "all portions of such materials" and "out-takes" in the statute, there is no question that an entire surveillance tape AND the transcripts and memoranda relating to those tapes must be exchanged, even those films or memoranda pertaining to the films that a party does not "intend to use."

The Court of Appeals has held that the plain language of CPLR 3101(i) "eliminates any qualified privilege" contained in 3101(d)(2) or "previously attached to the tapes under *DiMichel.*" As a result, parties seeking disclosure of the items that are specifically set forth in 3101(i) need not make a showing of "substantial need" or "undue hardship."[4] However, if the item is not identified in the statute, such as a deposition of a videographer, such a showing is likely still needed.[5]

Significantly, the Court of Appeals in *Tran, supra,* has interpreted the broad language of CPLR 3101(i) to mean that disclosures of such materials had to be made prior to the deposition of the plaintiff and thus relatively early in the litigation. This holding rejected the earlier, more lenient, timing restrictions for such materials previously recognized by the Court of Appeals in *DiMichel, supra,* which had limited disclosure of surveillance tapes until after plaintiff had been deposed. As a result, for any of the items specifically enumerated in CPLR 3101(i), plaintiff may obtain disclosure without demonstrating "undue hardship" or "substantial need."

The Court of Appeals in *Tran, supra,* also stated that CPLR 3101(i) does not contain any limitation even as to relevancy or subject matter. However, the Court noted that:

> [A] party is still free to seek a protective order to restrict disclosure based on grounds that justify the issuance of such an order as set forth in CPLR 3103.

As the statute requires the exchange of "out-takes," the basis for refusing to exchange tapes, or memoranda pertaining to the tapes, does not generally hinge upon whether a party will use the tape at trial or its relevancy. Instead, issues pertaining to the discoverability of videotapes are the same as those generally effecting discovery under the CPLR. Most notably, the attorney-client privi-

lege still remains a valid objection to exchanging surveillance materials even after the enactment of CPLR 3101(i).

3. What Must Be Exchanged Pursuant to CPLR 3101(i)

(a) Transcripts and Memoranda

The specific wording of CPLR 3101(i) identifies the materials that must be provided pursuant to a party's demand for videotapes or surveillance made pursuant to CPLR 3120. In addition, the Court of Appeals in *Tran, supra,* made it clear that "full disclosure" of surveillance tapes removed them from the protection of CPLR 3101(d)(2) and put them on the same footing as all other discovery material under CPLR 3101(a).[6] Presumably, this also means that any transcripts or memoranda related to the tapes must be produced even if they were prepared in anticipation of litigation and are not entitled to the qualified privilege contained in 3101(d)(2). CPLR 3101(i) even tracks the language of subdivision (a) which states "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action**.**"

(b) Deposition of Videographer

As Courts have made discovery of surveillance materials subject to CPLR § 3101(a), a party is entitled to the same rights to discovery under the CPLR pertaining to the exchange of videotapes as other discovery and no greater rights are created.[7] As a result, several courts have held that a plaintiff was not entitled to a deposition of the videographer prior to trial.

In *Dittmer v. Terzian*,[8] defendants exchanged three tapes of the infant-plaintiff containing "out-takes." Plaintiff moved to obtain a deposition of the videographer and the notes, surveillance logs and memoranda of the investigator. Although the Court ordered defendants to provide the out-takes and "memoranda" and to afford plaintiff an opportunity to view the original, they stopped short of requiring defendants to produce the videographer for depositions, holding that "although the deposition of a videographer is not expressly included in CPLR 3101(i), the statute does require the production of "any other matter which may be subject to disclosure."

The same result was reached in *Hicklen, supra,* where the Court held that "while CPLR 3101(i) requires the exchange of surveillance films, it does not abrogate the need of the plaintiff to make a factual showing of substantial need and undue hardship, as required by CPLR 3101(d)(2), in order to prevail in their request for depositions of the persons who took the videotape."

4. What Is Not Discoverable Under CPLR 3101(i) Pertaining to Out-takes?

(a) Original Tape Need Not be Provided

In *Zegarelli, supra*, defendants in a personal injury action obtained surveillance tape of plaintiff shoveling snow on an eight-millimeter camera. The investigator copied the tape onto a VHS tape and sent the copy to plaintiff. The trial court and the Appellate Division found that the tape was properly precluded from being admitted into evidence because the original eight-millimeter tape was not disclosed. In finding that production of the original tape was not required, the Court held that "CPLR section 3101(i) does "not require parties making disclosure of surveillance tapes to be more forthcoming than they would with any ordinary discovery material." The Court concluded that "videotapes are subsumed under the phrase 'documents and things,' and are, therefore, obtainable by using a CPLR 3120 Notice for Discovery. CPLR 3120 requires a party to produce and permit the party seeking discovery . . . to inspect, copy, test or photograph the items produced. This could be satisfied by telling the party where the materials are and providing them a reasonable opportunity for that party to look at them and obtain copies. As with all discovery, it is understood that the originals are available for inspection upon request."

(b) Amount of Footage Taken, Bills, Invoices Are Not Discoverable

In *Grossman v. Emergency Cesspool and Sewer Cleaners, Inc.*,[9] plaintiff demanded production of "all surveillance reports, correspondence, memoranda, bills, invoices and proof of payments for surveillance, investigative services reported, records, notes and logs of all of the parties and any material relevant to this lawsuit that the defendant(s) intends to produce at the time of the trial, and the names and addresses of all investigators and photographers in this matter. This includes, but is not limited to, records of amount of footage of film/video/audio tape used; the type of equipment used to take, develop and convert/edit and transfer and transcribe such film/tape; the make and model of all equipment, lenses and range settings used." The court denied disclosure of these materials stating that "CPLR 3101(i) does not either expressly or impliedly refer to any of the above information demanded such as invoices, reports, correspondence, bills, records of footage, proof of payment, logs of surveillance, etc." The court further held they were not discoverable absent a showing of substantial need and undue hardship and that even at its broadest interpretation, CPLR 3101(i) only requires surveillance videotapes and memoranda and transcripts. It does not expressly or impliedly refer to invoices, reports, correspondence, bills, records of footage, proof of payment, logs of surveillance, etc. A protective order was thus granted for such materials.

(c) Footage of "Wrong Person"

The Court of Appeals in *Tran, supra*, concluded that CPLR 3101(i) eliminated any qualified privilege that previously attached to surveillance videotapes of a "party," as defined by CPLR 3101(a)(1). The subdivision does not, however, pertain to tapes of a nonparty. Therefore, if a

party has obtained any films, photographs, videotapes or audiotapes of a nonparty, they are not *automatically* subject to disclosure under CPLR 3101(i).

However, these materials, if relevant, would still be subject to disclosure under CPLR 3101(a), with a CPLR 3120 demand serving as the vehicle for obtaining them. If the tapes, films or photographs were "prepared in anticipation of litigation," they would be entitled to the qualified privilege in CPLR 3101(d)(2).[10] A plaintiff must therefore make a showing that the tapes are *relevant* in such cases before being entitled to obtain the tapes or logs pertaining to a nonparty.

This issue was collaterally addressed in *Beckford v. Gross*.[11] In *Beckford*, *supra*, defendant's attorney provided plaintiff's attorney with a copy of a surveillance videotape taken of plaintiff at the request of defendant's liability insurance carrier. Defendant's counsel also indicated to plaintiff's counsel that the investigators had also prepared a "report" of their investigation. Plaintiff's attorney then requested a copy of the report and defendant refused to provide a copy of the report, contending that it was confidential correspondence consisting of material prepared for litigation containing commentary, opinions and conclusions of the investigator, as well as suggestions as to how to proceed with the investigation.

Plaintiff argued that since defendant admitted that, initially, the investigator videotaped the wrong person, the reliability of the entire videotape was suspect. Additionally, plaintiff argued that the report was necessary in order to properly cross-examine the investigator expected to testify at trial. The Court held that the tapes must be provided along with transcripts or memoranda relating to such tapes and any materials in the report must be provided, unless they fall within the attorney-client privilege. The Court held that the report in this situation would be necessary for plaintiff to determine if the tape misrepresents plaintiff and "because the tape may have been manipulated, the report that goes with the tape should have been disclosed." The *Beckford* court shunned adherence to labels appended to any "transcripts or memoranda" and held that if such documents "concern a videotape of a party to litigation," they are subject to disclosure.

Based on the concerns of authenticity and to guard against the manipulation of tapes, it appears that a party, under certain circumstances, may be entitled to obtain the footage inadvertently taken of a nonparty. However, in these cases, unlike in cases involving "out-takes" of a party, a party must make a showing of "relevance."

C. CPLR 3101(i) as "Two-Edged Sword"

1. Use of Tapes Made for Purpose of Litigation by Adversary

As parties must exchange virtually all videotaped material taken of an adverse party, including out-takes, there is a danger that the tapes may ultimately be used against the party taking or commissioning the making of the tape. In *Hairston v. Metro-North Commuter Railroad*,[12] defendant conducted videotape surveillance of plaintiff performing her daily activities. Rather than capturing the plaintiff engaged in robust activity, the videotape showed her using a walker. Plaintiff, who had obtained a copy of the videotape through disclosure, was permitted to offer it in her own case over the defendant's objection. *Hairston* relied on *Zegarelli* for the tenet that the tape plaintiff offered in evidence, which was the very one that defendant had produced, was properly authenticated, even in the absence of testimony from the videographer. Plaintiff accomplished this task when she testified that the videotape was accurate. Although the admission of the videotape into evidence may have prejudiced the defendant, it did not result in "undue prejudice" and was probative of plaintiff's damage claims. The defendant's hearsay objection was also overruled as the videotape had no sound and plaintiff did not commit any non-verbal acts constituting hearsay. The Court, in *Hairston, supra*, borrowing from Shakespeare's Hamlet, stated, "Defendant was hoisted by its own petard in videotaping plaintiff."

Similarly, in *Barnes v. New York State Thruway Authority*,[13] plaintiff, a painter, was entitled, when proving damages in an action brought under the scaffolding law, to make offensive use of surveillance videotapes made by defendants' investigator, where defendants suggested the painter was malingering or even fabricating disability. As plaintiff had testified at depositions that he was able to perform the taped activities with difficulty and the tapes were made without his consent or knowledge, the Court found they were sufficiently authenticated by plaintiff's own testimony.

2. Use of Tapes Made for Personal Use in Litigation

Just as "out-takes" taken by an adverse party may be used in litigation, Courts have also held that tapes that are not made or commissioned for litigation are discoverable when they impact on issues in the case. Thus, in *Srok v. L.I.R.R.*,[14] defendant requested production of plaintiff's own wedding videotape. The wedding occurred approximately eighteen months after the alleged accident. The court required production of the tape, even though it was undoubtedly procured by plaintiff at a significant cost. The tape was deemed relevant to plaintiff's claimed injuries because it likely depicted her "in activities which contrast with her claims that she is no longer able to exercise regularly."

This use of videotape taken outside the scope of a litigation was also at issue in *Sgambelluri v. Recinos*.[15] Following a motor vehicle accident, plaintiff filed personal injury action. Defendant filed a motion seeking to compel disclosure of video tape of plaintiff's wedding reception, photographs of the wedding reception, an authorization for physician and the name, address and phone

number of business that was hired to take the wedding video. Plaintiff filed a motion for a protective order. The Supreme Court, Nassau County, held that plaintiff's wedding video and name address and phone number of persons hired to take video were relevant to claims that she could no longer engage in activities such as running or horseback riding, due to permanent injuries she suffered as a result of the motor vehicle accident.

As Professor Siegel comments:

> The rule on discovery of surveillance tapes is a two-edged sword, just as tapes defendant has made of plaintiff are discoverable to plaintiff, so are tapes plaintiff has made of her own activity discoverable to defendant.[16]

The rule on discovery of personal non-litigation-related videotapes is clear. Where the videotape is relevant to the claimed damages, it must be disclosed.

D. Other Cases/Issues Involving Surveillance/ Out-takes

1. Closed Circuit Tapes

In *Read v. Ellenville Nat. Bank*,[17] the admissibility of a bank's twenty-four hour surveillance tapes became an issue for the Court. In *Read, supra*, plaintiff filed suit to recover for damages she sustained when the lid on the bank's night deposit box snapped shut on her hand. Defendant-bank moved for summary judgment on the grounds that the accident did not occur as the tape submitted by defendant showed plaintiff making a nighttime deposit without incident. After the lower court denied the motion on the grounds the tape was not admissible, the Appellate Division, Second Department affirmed this ruling, holding that the affidavit of the security firm's Vice President was not sufficient to authenticate the tape. Instead, the Court held that the affidavit of the security company did not explain the relationship with the bank "vis-à-vis the closed circuit surveillance system" or state the type of equipment used.

2. Still Photographs taken from Videotapes

In *Krute v. Mosca*,[18] plaintiff sued defendant for neck injuries sustained in a motor vehicle accident. At trial, defendants presented the testimony of a private investigator who surreptitiously videotaped plaintiff at home engaged in a number of physical activities. The trial court also allowed the introduction of a number of stills, "photos that were captured from the freeze frames of the videotape," to be used in connection with the questioning of defendant's orthopedist. The Appellate Division found that the trial court's admission of these stills was proper as the videotape was timely exchanged pursuant to CPLR 3101 and plaintiffs had never requested a continuance to examine the photographs.

3. Electronic Photographs/Photographic Computer Programs

As seen in *Read* and other matters cited above, courts may be more wary of the doctoring of surveillance videotapes and photographs when there is more opportunity for altering of the evidence. These considerations apply to the now dominant and more sophisticated digital media. Where electronic photographs are taken which are saved on a computer, it raises additional concerns for photo-editing programs, and may broaden the commonly accepted concept of what constitutes an "out-take." In these cases, greater steps must be taken to authenticate the photographs or videotape, including a specific statement describing "the type of video equipment used."[19]

Endnotes

1. See CPLR 3101(i).
2. *Tran v. New Rochelle Hospital Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003).
3. *DiMichel v. South Buffalo Railway Company*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992).
4. *See Tran, supra*, at 388.
5. *Hicklen v. Broadway West Street Associates*, 166 Misc. 2d 12, 630 N.Y.S.2d 897 (Civ. Ct., N.Y. Co. 1995).
6. *Zegarelli v. Hughes*, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004).
7. *See Zegarelli, supra*.
8. N.Y.L.J., Oct. 14, 2004, p. 20, col. 3.
9. 162 Misc. 2d 440, 617 N.Y.S.2d 422 (Sup. Ct., Qns. Co. 1994).
10. See CPLR § 3101(d)(2), Practice Commentary C3101:29, *et seq.*
11. 3 Misc. 3d 638, 774 N.Y.S.2d 316 (Sup. Ct., Monroe Co. 2004).
12. 6 Misc. 3d 399, 786 N.Y.S.2d 890 (Sup. Ct., N.Y. Co. 2004).
13. 176 Misc. 2d 195, 671 N.Y.S.2d 616 (Ct. Claims 1998).
14. Sup. Ct., N.Y. Co., August 18, 1993, Index No. 1671/92, J. Cohen.
15. 192 Misc. 2d 777, 747 N.Y.S.2d 330 (Supreme Nassau 2002).
16. McKinney's Consolidated Laws of N.Y. Annotated, Civil Practice Laws and Rules, Siegel Supplementary Practice Commentaries 2002 pocket part, C3100:50 p. 27.
17. 20 A.D.3d 408, 799 N.Y.S.2d 78 (2d Dep't 2005).
18. 234 A.D.2d 622, 650 N.Y.S.2d 862 (3d Dep't 1996).
19. *See Read, supra*.

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Palsgraf Revisited: A Brief Amicus Analysis

By Harold Lee Schwab

On May 22, 2006, I was privileged to attend a reargument of *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928), sponsored by the Historical Society of the Courts of New York. Appearing on behalf of the appellant, Helen Palsgraf was the indomitable trial attorney and thespian, Henry G. Miller. Representing the respondent, LIRR, was Court of Appeals Associate Judge Robert S. Smith. The prestigious bench consisted of Howard A. Levine, retired Associate Judge of the New York Court of Appeals; Caitlin J. Halligan, New York Solicitor General; Judith A. Livingston, a senior partner at Kramer, Dillof, Livingston & Moore; Bettina B. Plevan, President of the New York City Bar Association, where the reargument was held; and Roy L. Reardon, a senior partner at Simpson Thacher & Bartlett and regular columnist for the *New York Law Journal*. The SRO audience consisted of Historical Society President Hon. Albert M. Rosenblatt, Chief Judge Judith S. Kaye, other jurists from the New York Court of Appeals, the federal bench, state courts, law professors, attorneys, relatives of participants in the original trial, and even the current Chairman of the MTA. The proceedings were historically informative and thoughtfully provoking while at the same time most enjoyable. The Historical Society of the Courts of the State of New York received a well deserved round of applause at the end of the program.

I had thought that reargument was a "slam-dunk" and that the LIRR would prevail once again. After all, wasn't *Palsgraf* still the law in New York? How could the railroad be held liable for fireworks causing a scale at the end of a platform to fall on the plaintiff? The bizarre *Palsgraf* fact pattern was undeniably a law professor's delight and a defense lawyer's dream. Alas, I was mistaken.

Henry Miller emphasized the duty owed to his client, a paying passenger, the negligence of the railroad and the proximate cause of the injuries from that negligence. In jocular fashion (going outside of the record), Henry noted the poverty of his client, the wealth of the railroad and the foreseeability of an Italian (pronounced by him "eye" talian) carrying a package of fireworks. Judge Smith conceded negligence but argued in substance the unforeseeability of the extraordinary events which culminated in plaintiff's injuries. Factual disputes were presented in the respective arguments such as the distance of plaintiff and the scales from the location of the fireworks explosion. As the arguments progressed and questions were presented from the Bench, I became concerned over the correctness of the decision of the venerable Cardozo. Certainly, the explosion of the fireworks was a proximate cause, or if you will, a substantial factor and cause in fact, of the injuries to the plaintiff. Further, although injury from a falling scale was obviously unexpected, under the law the exact occurrence does not have to be foreseeable. Indeed, the potential for injury from an explosion is diverse and without geographical limitation. Accordingly, the five members of the bench unanimously voted to grant reargument and upon reargument reverse the prior decision of the Court of Appeals and affirm the Order of the Appellate Division. At long last, Helen Palsgraf had her $6,000 verdict reinstated, albeit hypothetically and for one night only.

I left the evening intellectually distressed by the reargument verdict. How could the revered jurist, a writer of monumental opinions, been so wrong? This caused me to read the entirety of the opinion of Judge Cardozo, the dissent of Judge Andrews, and the Appellate Division majority and minority opinions. The basic facts are of interest and not in dispute although critical to any analysis. On August 24, 1924 plaintiff was standing on the East New York platform of defendant's railroad after buying a ticket for Rockaway Beach. Another train came into the station, stopped to discharge and pick up passengers, and then started up. Two men ran forward to catch the train while it was already moving. One of the men got on without mishap. The other man, carrying a package, jumped aboard the car but appeared unsteady. Two employees of the railroad came to the assistance of this individual. One of them, the trainman on the car who had held the door open, reached forward to help him. The other, a guard on the platform, pushed the man from behind so he would not fall. During their efforts to assist the man onto the moving train the trainmen accidentally knocked the package out from under his arm. It was a nondescript package about 15 inches long covered by a newspaper. The package fell upon the rails. The package contained fireworks which, according to witnesses, exploded when the wheels of the moving train ran over it. The shock of the explosion caused a large scale near where the plaintiff was standing to be thrown against the plaintiff, causing her injuries.

I read, and then read again, the opinion of Judge Cardozo. It is at the very least challenging and certainly not an easy read. To my surprise, I found that Judge Cardozo readily disavowed proximate cause as the basis for his decision, and thus rendered irrelevant the many proximate cause analogies presented in the dissent. He succinctly states, "(t)he law of causation, remote or proximate, is thus foreign to the case before us" (248 N.Y. at 346). Since proximate cause is not an issue insofar as Judge Cardozo was concerned, there was no need on reargument to analyze the case in terms of proximate cause, either for or against. What then was the basis for his decision? Without doubt, the key is his profound statement, learned by

all of us in law school, that "(t)he risk reasonably to be perceived defines the duty to be obeyed—" (248 N.Y. at 344). This is in fact the genesis for New York Pattern Jury Instruction 2:12 on foreseeability:

> Negligence requires both a reasonably foreseeable danger of injury to another and conduct that is unreasonable in proportion to that danger. A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable. The exact occurrence or exact injury does not have to be foreseeable; but injury as a result of negligent conduct must be not merely possible, but be probable.
>
> There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in the light of what could be foreseen. On the other hand, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in the light of what could have been foreseen.

The issue of foreseeability cannot be analyzed in terms of what can occur if fireworks explode. That is after the fact and therefore not the issue. Foreseeability must be analyzed at the time of the alleged negligence. As regards the conduct of the LIRR vis-à-vis the man with the package, Judge Cardozo states "(i)f there was a wrong to him at all which may very well be doubted, it was a wrong to a property interest only, the safety of the package" (248 N.Y. at 343). He continues "(o)ne who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground" (248 N.Y. at 343). Assuming *arguendo* negligence on the part of the railroad, the foreseeable risk at the time of the negligence was not probable risk of injury to third persons.

Query, what was the risk reasonably to be perceived from the conduct of the trainmen in attempting to pull/push the man onboard the moving train? It was at best a risk that the package being carried would be dropped and damaged. It was in this context that Judge Cardozo noted, "(n)othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed" (248 N.Y. at 341). It is certain that the defendant could not have foreseen that the man who was being assisted onto the train was carrying a package of fireworks. Additionally, although not referenced by Judge Cardozo or by anyone on reargument, the fireworks were in apparent violation of the New York City Code of Ordinances, Chapter 10—article 6, § 93(2) which prohibited "firecrackers longer than 15 in. or larger than the ¾ in. in diameter" and "bombs and shells."[1] No one could foresee that the package which might be dislodged, fall to the ground, break and possibly even fall under the wheels of the moving train, contained fireworks in apparent violation of a New York ordinance. Indeed, the law does not require that one foresee criminal conduct of another absent evidence of recurring criminal conduct.

The issue is not one of proximate cause as regards Helen Palsgraf. The issue is not whether the exact occurrence or injury has to be foreseeable, which it does not. The question to be resolved as a matter of law is whether it was foreseeable that the passenger was carrying fireworks concealed in an apparently innocuous newspaper package. The answer to this must be a resounding "no." The bench on reargument on May 22, 2006 was in error. The decision by the greatest New York jurist of the 20th century, Benjamin Cardozo, should have been affirmed. *Palsgraf*, decided more than 75 years ago, remains good law today.

Endnote

1. See footnote 44 of the excellent article by William H. Manz, "Palsgraf: Cardozo's Urban Legend?" 107 Dick. L. Rev. 785, reprinted in The Historical Society of the Courts of The State of New York brochure for The Reargument of the Appeal.

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Tort Reform and Leadership Education for Physicians

By Linda L. Vila

Tort reform is being touted as the solution to the apparent deluge of frivolous medical malpractice lawsuits in the courts, exponential increases in insurance costs and the decision by fewer physicians to enter high-risk specialties. In response, current federal legislative efforts are focusing on capping non-economic damages at $250,000, modifying the statute of limitations for initiating a suit and establishing a schedule for attorney contingency fees. These efforts, geared solely toward the legal process and community, ignore a factor that may be fueling the alleged health care crisis and driving the need for change. That factor is physician performance failures stemming from disruptive behavior. Performance failures create a slippery slope that spirals from patient harm to adverse outcomes to negligence litigation to awards for damages. A tort reform agenda must also be aggressively aimed toward the medical community to preclude the occurrence of errors directly or indirectly caused by disruptive physicians.

Disruptive physician behavior is an age-old problem that can negatively impact the delivery of quality care and treatment, institutional and financial risk exposure, and the medical liability climate. It can directly contribute to the skyrocketing expense of coverage premiums and perpetuate the practice of defensive medicine. It can corrosively affect the tort arena. While numerous recommendations have been put forth in the literature concerning how to address this phenomenon, none promotes a tactic of dually preventing the disruptive physician from ever emerging and preventing a patient from initiating a malpractice case: include leadership training in the core curriculum in medical school education programs. The melding of a clinical culture with a leadership culture in a physician's formative years will result in a more professional practitioner, a safer and secure patient environment and will ultimately strengthen the health care and jurisprudence systems.

Definition

The American Medical Association defines disruptive conduct as "personal conduct, whether verbal or physical, that affects or that potentially may affect patient care negatively. This includes but is not limited to conduct that interferes with one's ability to work with other members of the health care team."[1] Examples of disruptive behavior include profane or disrespectful language, demeaning behavior, sexual comments or innuendo, outbursts of anger, throwing instruments or charts, boundary violations with staff or patients, negative comments about patient care provided by another member of the health care team and unethical or dishonest behavior. Although sound data are lacking for the frequency of errant behavior, surveys suggest that 3% to 5% of physicians present a problem of disruptive behavior.[2]

Research bridging disruptive physician behavior and performance errors is sparse and inconsistent. The number of physicians disciplined by state medical boards in accordance with the New York State Public Health Law § 230 and Education Law § 6230 is viewed as an indicator of performance issues but this correlation is not completely accurate because physicians are disciplined for a variety of reasons and some may not be related to performance[3] and state boards do a fairly poor job at policing physician misbehavior.[4] These data should not be dismissed, however. In 2005, approximately 1% of practicing New York physicians were disciplined: 208 physicians had their licenses revoked and 154 had license restrictions imposed.[5]

Courts recognize the authority of health care organizations to impose disciplinary action against physicians who demonstrate disruptive behavior.[6] The Health Care Quality Improvement Act of 1986[7] provides qualified immunity protection to the peer review process, specifically the peer review participants, which identifies and addresses these "bad doctors." The legislation, enacted to encourage meaningful and honest peer review, places limits on discoverability and mandates reporting to the National Practitioner Data Bank to monitor the movement of disciplined physicians. While the Act requires standards of good faith and reasonableness and protection of physician due process rights, many doctors believe that peer review is simply negative targeting stemming from personal vendettas, retaliation and political motives. In turn, numerous suits by physicians who have been subject to a suspension or restriction of privileges based on disruptive behavior have been brought.[8] Some have been successful, most have been unsuccessful.

Current Literature

The influx of recent articles and research published on this topic reflects the sentiment that disruptive physician behavior must be tackled and must not be tolerated. The repercussions on consumer and provider health care access and costs are too high, respectively. Moreover, the ramifications to the insurance industry are troubling. Carriers are exiting the market in large numbers, experiencing investment losses and encountering difficulty in obtaining reinsurance.[9]

Leape and Fromson[10] advocate a national effort to develop and implement formal hospital physician monitoring systems, processes for the identification and correction of physician shortcomings, better performance

measures and external programs for physician assessment and remediation. Lapenta[11] posits the adoption of a well-defined physician code of conduct as well as personal code of conduct, collegial intervention and a formal hearing process. Youssi[12] supports strict adherence to the standards set by the Joint Commission for the Accreditation of Health Care Organizations and Rosenstein et al.[13] encourages a zero tolerance policy and organizational cultural change.

While the aforementioned are solid strategies that in-house and outside counsel could assist in the development and implementation of, they fail to recognize that the legal and financial implications of processes that identify and respond to disruptive behavior long after it has probably begun are problematic. Physicians could have been involved in numerous patient incidents, even meritorious claims, before their unacceptable behavior is noticed and mediating costs, including defense costs, could be accruing. It is no surprise that physicians whose performance persistently falters and who pose a substantial threat to patient safety have frequently gone unrecognized or properly addressed by health care organizations.[14] No one wants to be the one to confront or discipline the physician, especially when the physician accounts for a large percentage of generated revenue. Further, physicians may already be parties to negligence actions and may be jeopardizing their own cases by being uncooperative with defense counsel. If a doctor is disruptive in practice, chances are this behavior is carried over into other arenas.

A recent study explores this issue from a somewhat different perspective and derives recommendations potentially more effective. Papadakis et al.[15] examine the link between unprofessional behavior in medical school and subsequent disciplinary action by a state licensing medical board. They find that the former is strongly associated with the latter—that disciplinary action by a medical board was strongly associated with prior unprofessional behavior in medical school—and unprofessional behavior overwhelmingly consists of irresponsibility, the diminished capacity for self-improvement and poor initiative. The study concludes that the early identification of problem doctors is essential and professionalism should have a central role in medical academics.

The remainder of this article extends the above conclusion by offering recommendations to abort the birth of a disruptive physician. As such, it will glance at the components of current medical education, map out the tenets of leadership education and define the role of lawyers vis-à-vis a leadership curriculum.

Medical Education

Medical schools prime promising physicians in the art of medical knowledge and foster a specific skill set pivotal to the medical culture. These skills include autonomous and quick decision-making, reactive problem solving, a focus on detail, linear thinking, little tolerance for ambiguity, adherence to hierarchical processes and career advancement contingent on clinical excellence.[16] While they are clearly useful to the physician, these competencies are equally encumbering when considering the 21st century challenges and pressures physicians are faced with on a daily basis. The "normal" stressors of medical practice have been exacerbated in recent years by decreasing reimbursement, increasing medical malpractice premiums, increasing demands for greater accountability and productivity, exorbitant student loans, and increasing governmental oversight.[17] Physicians now more than ever are under a microscope by hospital administration—and society—to act socially, politically, and economically correct at all times while pursuing the highest level of excellence in their respective specialties and, of course, saving lives. They are expected to be "team players" and work harmoniously under all circumstances.

Unfortunately, these are not simple feats. Accordingly, some physicians feel isolated and demoralized, harbor a victim mentality and lash out in a manner incongruous with the clinical situation at hand. They may exhibit retaliative behavior which unequivocally increases the likelihood of an individual performance failure and adverse patient outcome since the physician's attention may be diverted from the patient. Nurses, residents or fellow physicians may act erroneously since they may try to avoid dealing with the disruptive physician or may hesitate to ask for help, clarification of orders and suggestions regarding patient care. A chasm between safety and treatment is created. Leadership education can fill this gap.

Medical training programs currently devote little, if any, time and attention to teaching the art of leadership in a structured, unified fashion. In fact, medicine has traditionally viewed leadership as an inherent personal trait that cannot be learned and, only recently, has begun to recognize the need for leadership training for seasoned, practicing physicians. The response to this has been the sporadic offering of relatively rudimentary leadership program opportunities geared toward specific genres of physicians.[18]

Contrastingly, business and public policy schools have fully recognized and embraced the leadership imperative as the building blocks to superior personal and organizational performance and are forging forth with curricula that reflect this proliferation. To this end, they are providing their graduate students with the literacies needed to successfully handle public and private sector challenges and advance the goals of the local and global communities. Medical education must take notice.

A Model for Physician Leadership Training

What should leadership education for medical students entail? It should not simply be the inculcation

of information with the intended goal of producing a stalwart administrative physician executive leader. As a member of the health care team, physicians, by virtue of their very role, are leaders. Accordingly, it must be the process of imbuing future physicians with the skills, knowledge and values to consistently emerge as the consummate professional and never use abusive and obscene language or gestures with staff, act unethically, threaten colleagues, criticize and degrade team members in public, write unsuitable chart notes, or rely on intimidation to manipulate others. It is this tutelage that will provide the tools essential to practice, from the outset, in an efficacious and dignified manner and keep potential patient harm and subsequent malpractice claims at bay.

There exist a wide variety of approaches to teaching leadership and just as much available instructional literature. There also exists a standing caveat that, although leadership can indeed be learned, not everyone will benefit from its tenets.[19] With this in mind, leadership curricula must be comprehensive in scope, rigorous in approach and sit on a foundation of real world considerations and obstacles. For the purposes of medical practice, the focus of leadership pedagogy should be, at the very least, two-fold: concept development and skill building.

Concept development envelops the trilogy of cognitive, emotional and action learning and results in the capacity to think more conceptually and intelligently. Cognitive growth establishes a strong foundation of reasoning, perception and intuition to diagnose issues, evaluate the utility of approaches to taking action and explore root causes of problems. It hones critical thinking dexterity and enables one to better understand substantive knowledge, such as leadership theories and models, as well as professional performance standards. Emotional growth advances the ability to exercise enlightened judgment, maintain composure under pressure, and restrains destructive and impulsive behavior, culminating in emotional intelligence, a characteristic paramount to understanding one's role in relationships. Action learning enables the application of theory into practice, the integration of thinking and doing, allowing for a deeper capacity to learn from experience through reflection.[20] Interestingly, self-reflection is championed in the medical education field as the *sine qua non* of the successful professional and necessary to the expression of core values in medicine such as compassion and altruism.[21]

Skill building encompasses developing or enhancing certain leadership skills and results in the capacity to act more suitably. Of specific note are self-management skills (self-awareness, personal leadership style development, career plan, role management, and time management); systems management skills (assessment of system needs and development of strategic plans); and team leadership skills.[22] The latter are particularly significant since they are the precise literacies that can help the physician avert disruptive behavior and avoid litigation. They range from effectively communicating and listening, engaging in collaborative and shared decision-making, team building, managing diversity, resolving conflict and negotiating to inspiring a shared vision, establishing interpersonal competence, delegating, risk taking, and prioritizing.

Team leadership skills also embody a huge moral and ethical dimension that must be recognized. Future physicians must learn to instinctively act and react with respect and empathy, treat others with dignity and kindness, demonstrate professionalism and commitment, evidence fairness and sensitivity and employ humility. In fact, they must master these skills. It is not enough to be a capable physician leader; one must be an ethical physician leader.

Collaboration with the Bar

The medical and legal communities must stop blaming one another for the jagged health care terrain. Physicians must quit claiming that plaintiffs' attorneys bring too many frivolous cases and demand excessive amounts in physician liability suits—contentions members of the medical profession recently studied and dispelled[23]—and lawyers must cease rebutting these claims by arguing that suits are necessary to uncover and drive incompetent doctors from the medical field and to establish proper parameters of patient care.[24] Instead, each must view the other as an antidote for the "health care crisis."

Academic medicine should join forces with the state bar to foster a partnership of cooperation and collaboration in providing support, education and expertise to the leadership initiative. Practicing attorneys and legal scholars should be retained as faculty by medical schools to participate in leadership curriculum development and implementation. Whether full time, part time or adjunct, attorneys can teach both concept development and skill building, particularly literacies such as critical thinking, conflict resolution and negotiation. It has been suggested that traditional classroom teaching approaches are not adequate for acquiring leadership skills and instructional methodology should entail the use of case studies, mock trials, experiential learning, interactive group exercises, simulations, participant led facilitation and coaching, among others.[25] Lawyers are a perfect fit to provide this type of instruction.

Law and medicine must also align their goals to proactively seek to minimize the occurrence of medical errors. In its report *To Err Is Human* (2000), The Institute of Medicine revealed that preventable medical errors result in as many as 98,000 deaths annually.[26] To this end, legislators should be lobbied to pursue public policies that concentrate on medical education. Medical school accreditation should include leadership as a standard of performance. Successful medical school completion and subsequent physician licensure upon passing the United States Medical Licensing Examination (USMLE) should

require demonstrated leadership proficiency and continuing medical education should mandate a requisite number of leadership credit hours. Policy should also include stronger physician sanctioning by state boards and monitoring of behavioral deficiencies with required remediation that includes leadership reeducation. The latter point is beyond the scope of this article.

Future

The implications of leadership education extend beyond medical school and physician practice. The perpetuation of a safe health care environment and professional workplace setting will ultimately benefit society. Patients will not be placed in precarious situations amenable to litigation and disruptive physicians' peers will not avoid imposing disciplinary action, when warranted, even through the peer review process. "Good" doctors will dominate the field, uphold their fiduciary duty to their patients, and the practice of defensive medicine will become the exception rather than the rule. The attrition rate of insurers will decrease, alleviating adversity in the industry. The plaintiffs' bar will be satisfied since injured patients will be able to pursue legitimate claims in court without encountering the negative reverberations of prior suits. Tort reform will be placed on solid footing.

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New York Court of Appeals Rejects the Product Line Exception to Successor Corporate Liability

By Jonathan M. Bernstein, William J. Greagan and Dennis P. Glascott

In *Semenetz v. Sherling & Walden, Inc.*[1] the New York Court of Appeals recently rejected the product line exception to successor corporate liability. The Court held that the product line exception was a radical change from existing law implicating complex economic considerations better left for the Legislature to address. New York now joins the majority of jurisdictions that have rejected this exception.

The purpose of this article is to briefly discuss the general principles of law pertaining to successor corporate liability and then delve into the facts and holdings of the Appellate Division, Third Department, and New York Court of Appeals in *Semenetz*.

A. Principles of Successor Corporate Liability

In New York, the general rule is that a corporation which acquires the assets of another is not liable for the torts of its predecessor.[2] In order for a successor corporation to be held liable for the torts of the predecessor corporation, the plaintiff must establish that the successor corporation (1) expressly or impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the successor corporation was a mere continuation of the predecessor corporation; or (4) the transaction was entered into fraudulently to escape certain obligations.[3]

In certain jurisdictions, there are two additional vehicles for establishing successor corporate liability, the "product line"[4] and "continuing enterprise" exceptions.[5] In order to invoke the product line exception the plaintiff must demonstrate:

> (1) the injured party's remedy against the original manufacturer was virtually destroyed by the successor's acquisition of substantially all the predecessor's assets, (2) the successor continued to manufacture essentially the same line of products as its predecessor, (3) the successor had the ability to assume the original manufacturer's risk-spreading role, and (4) the successor benefited from the original manufacturer's good will.[6]

To invoke the continuing enterprise exception, a plaintiff must establish that a successor corporation represented itself "either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise."[7]

In *Schumacher*, the Court of Appeals declined to apply either the product line or continuing enterprise exception to the facts of this case.[8] Following *Schumacher*, there was disagreement between the First and Third Appellate Division Departments regarding whether the product line exception should be adopted.[9]

B. Facts of *Semenetz*

In May 1998, defendant S & W Edger Works, Inc. (Edger Works), an Alabama corporation, manufactured and sold a sawmill to Semenetz Lumber Mill, Inc., located in Jeffersonville, New York. On July 26, 1999, the infant plaintiff, the twelve-year-old son of the owner of the lumber mill, caught his right hand and fingers between a sprocket and chain apparatus in the sawmill.

On October 5, 2000, Edger Works sold most of its assets, including real property, goodwill, trade names and inventory, to Sawmills & Edgers, Inc. (Sawmills), another Alabama corporation, for $300,000. The purchase contract documents expressly stated that "[t]he Buyer [Sawmills] assume[d] none of the Seller's [Edger Works] liabilities except for the receipt of and payment of ordered but undelivered inventory," as listed in an attachment. On October 6, 2000, Edger Works changed its name to Sherling & Walden, Inc. (Sherling). Sherling paid Edger Works' outstanding corporate debts in the months after the closing.

Sawmills manufactured sawmills at the same plant in Alabama where Edger Works had formerly produced them, and retained at least some of Edger Works' former employees. Its advertising described Sawmills as "formerly S & W Edger Works," stating that it "opened [its] doors for business in 1990," which is the date Edger Works first sold its products in the marketplace. Sawmills made only two sales in New York, both to Semenetz Lumber, at its request, and for less than $100.

On April 15, 2002, the infant plaintiff's mother commenced an action for damages on behalf of her infant son, naming Sawmills, Edger Works and Sherling as codefendants in causes of action alleging strict products liability; negligent design and manufacture; breach of duty to warn; and breach of warranty. She also asserted a cause of action against Semenetz Lumber for failure to maintain safe premises.

Interestingly, Edger Works sold the product in 1998. The incident occurred in 1999. Edger Works sold most of its assets to Sawmills in 2000, after the subject incident occurred. The lawsuit, commenced in 2002, alleged that

Sawmills was responsible for Edger Works' liabilities that occurred before the asset purchase.

In its answer, Sawmills pleaded lack of personal jurisdiction as an affirmative defense. Thereafter, Sawmills moved for summary judgment, seeking dismissal of the complaint and all cross claims on this ground. The lower court denied Sawmills' motion for summary judgment, and held that Edger Works was subject to jurisdiction in New York. The Court further held that product line exception existed and that Sawmills, as a successor to Edger Works, was subject to long-arm jurisdiction in New York. In essence, the lower court used the product line exception as a basis for subjecting Sawmills to long-arm jurisdiction in New York. Sawmills appealed.

C. The Holding of the Third Department

The Appellate Division, Third Department,[10] reversed and dismissed the complaint against Sawmills. The Court did not decide whether Sawmills fit within the product line exception because it held that the product line exception could not be used as a means for conferring long arm jurisdiction over Sawmills. The Court held that

> [t]he "product line" and "continuing enterprise" exceptions to the successor liability rule deal with the concept of tort liability, not jurisdiction. When and if either exception is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having in personam jurisdiction over the successor, but the exceptions do not and cannot confer such jurisdiction over the successor in the first instance. While we recognize that in certain circumstances a successor corporation "may inherit its predecessor's jurisdictional status," the facts of the subject case do not fit within such a scenario.[11]

Simply put, the Court held that because Sawmills was not subject to long-arm jurisdiction in New York, the plaintiff could not use a theory of liability such as the product line exception as a means for conferring such jurisdiction. *In personam* jurisdiction must exist first before the issue of the applicability of the product line exception is to be considered. Thereafter, the Court of Appeals granted the plaintiffs' motion for leave to appeal.

D. The Holding of the Court of Appeals

The Court of Appeals affirmed but on different grounds. The Court did not address the issue of whether the product line exception could be used as a means for conferring *in personam* jurisdiction because it rejected the product line exception in the first place. The Court rejected this exception because a successor corporation may lack the capacity to spread the risks associated with inheriting the potential for its predecessor's liabilities. The Court acknowledged that small manufacturers may find it impossible to cover the risks associated with assuming a predecessor corporation's liabilities by raising their prices because then they could not compete with large manufacturers who could keep prices down. The Court noted that manufacturers will have great difficulty obtaining products liability insurance when they have to insure for the products made by their predecessor.

Regarding whether liability should be imposed upon the successor corporation because it enjoys the benefit of its predecessor's goodwill, the Court acknowledged that "'any benefit the successor acquired through the goodwill or reputation of the predecessor's product line was considered and negotiated for at the time of the sale and constituted part of the sale price. To hold the successor liable for defects in products manufactured by the predecessor would be forcing the successor to pay twice for . . . goodwill.'"[12]

Importantly, the Court held that the product line exception threatens "economic annihilation" for small businesses. Due to small business' limited assets they would face potential financial destruction if saddled with liability for their predecessors' torts. The Court noted that such a threat would deter the purchase of ongoing businesses that manufacture products. Instead, sellers would liquidate their companies and thereby prevent small businesses from purchasing ownership of such companies. This in turn would inhibit the transfer of ownership amongst the nation's manufacturing enterprises which are primarily comprised of small businesses. The Court further noted that

> extending liability to the corporate successor places responsibility for a defective product on a party that did not put the product into the stream of commerce. This is inconsistent with the basic justification for strict products liability, "which is to place responsibility for a defective product on the manufacturer who placed that product into commerce. The corporate successor has not created the risk, and only remotely benefits from the product. The successor has not invited usage of the product or implied its safety. Since the successor was never in a position to eliminate the risk, a major purpose of strict liability in modifying a manufacturer's behavior is also lost."[13]

In essence, the Court held that the product line exception offends traditional notions of products liability—that the manufacturer, not its successor, be held strictly liable for the product it puts into the stream of commerce.

E. Conclusion

Overall, the *Semenetz* decision is an important victory for small businesses because it limits the liability of a successor corporation for products manufactured by its predecessor and reaffirms traditional notions of strict products liability.

Endnotes

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13. 7 N.Y.3d at 201 (quoted case omitted).

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Don't Become a "Spoliated" Sport: Developments in the Defense of Spoliation

By Tara C. Fappiano

Spoliation is generally termed the "intentional destruction, mutilation, alteration, or concealment of evidence."[1] In application, specifically in New York, the term is applied more broadly to a host of situations, including both intentional and negligent conduct. Similarly, the potential pitfalls of being branded a "spoliator" may be serious, ranging from preclusion of evidence, to the striking of an answer and the entry of judgment against the spoliator, to the dismissal of a claim, to potential liability for intentional spoliation. To avoid these outcomes, particularly as enforced by the New York courts in recent years, it is necessary to take steps immediately to avoid the destruction or alteration of evidence in the event of a potential claim.

The penalties provided for in CPLR 3126—striking of a pleading or preclusion—have been utilized in most New York courts with uniformity.[2] In a leading case on this topic, *DiDomenico v. C & S Aeromatik Supplies, Inc.*, the Appellate Division, Second Department, struck the answer of a plaintiff's employer and granted summary judgment in favor of the plaintiff after the defendant disposed of an allegedly defective package and delayed providing any records to the plaintiff before they were destroyed, despite knowing of the plaintiff's need for the evidence.[3] In addition to the application of sanctions under CPLR 3126, the Second Department found that a "spoliator of key physical evidence is properly punished by the striking of its pleading."[4] Importantly, the Court held that whether the destruction of evidence was negligent or intentional, if a party is on notice that the evidence might be needed for future litigation, the party's pleading may be stricken.[5] The Second Department also stressed that the destruction of evidence deprived the plaintiff of the means to prove his case and a co-defendant from properly defending itself.[6] Prejudice having been established, the Court struck the defendant's answer and granted summary judgment in favor of both the plaintiff and co-defendant.[7]

In the wake of the *DiDomenico* decision, courts in both the Second Department and First Department, in addressing spoliation issues, have consistently considered: a) whether the spoliator was on notice that evidence would be needed for future litigation and b) whether the destruction of evidence resulted in prejudice to another party to the litigation. If so, the Courts issue CPLR 3126 sanctions.

With respect to the first factor, it need not matter whether notice is provided before a litigation is commenced, or after—just that notice is given. In *Bear, Stearns & Co. v. Enviropower, LLC*, the defendant's answer was stricken, and summary judgment granted in favor of the plaintiff, when the defendant negligently destroyed documents after receiving notice of a potential claim, but before the action was commenced.[8] In *Hotel 57 LLC v. Harvard Maintenance, Inc.*, the plaintiff's complaint was dismissed when he replaced windows that were the subject of the plaintiff's lawsuit before the action was commenced, but before the defendant, according to the court, had a fair opportunity to inspect the allegedly damaged windows.[9] The Second Department has also looked closely at the issue of notice, requiring the plaintiff to establish that a "defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence might be needed for future litigation."[10]

The imposition of the notice requirement is akin to establishing a duty to preserve the evidence in the first instance. In *Tomkins v. Armstrong,* it was determined that the City would have in the ordinary course created certain types of documents that were missing at the time they were being demanded.[11] However, the court also found that because the documents were created so long before the fire that was the subject of the action even occurred, the plaintiff did not establish that the records were actually available at the time of the fire.[12] Therefore, the plaintiff did not establish the City's duty to preserve evidence.[13]

As recently as July of 2006, Justice Gigante of the Supreme Court, Richmond County, ruled that a defendant's answer should be stricken when it was determined that the defendant and its attorney received notice that a trampoline, upon which the plaintiff claims she was injured, would be integral to the plaintiff's case.[14] In *Molinari*, defendant's attorney entered into a verbal agreement to provide a trampoline for inspection, then left the firm.[15] Apparently, he failed to advise anyone else at the firm of the agreement.[16] The defendant, relying upon her insurance agent's advice (to avoid cancellation of her insurance policy), disposed of the trampoline before the inspection was held.[17] Justice Gigante found that since the attorney was a member of the firm, the firm had a duty to supervise his work.[18] The Court also noted that the defendant was present when the agreement was entered into and, thus, her reliance upon her agent's advice was unavail-

ing.[19] Justice Gigante also noted that the disposal of the trampoline deprived the plaintiff of the opportunity to present the actual equipment to a jury at the time of trial, although she might have been able to prove her claims in another manner.[20] Therefore, the defendant's answer was stricken.

Once notice is established, and it is determined that evidence has been destroyed or lost, there still must be a showing of prejudice. *Molinari* notwithstanding, recent cases indicate that it is becoming more and more difficult to establish such prejudice. In general, a court will decide, in its broad discretion, whether the evidence is relevant and essential to the party's claim before imposing spoliation sanctions.[21] For example, in *Kerman v. Friedman*, the defendant, an accountant being charged with professional malpractice, apparently destroyed certain work papers.[22] The Second Department, stating specifically that the decision was based upon the common law doctrine of spoliation and not CPLR 3126, found that the plaintiff failed to demonstrate that the defendant's destruction of physical evidence left him "without appropriate means to confront a claim with incisive evidence."[23] Thus, the lower court's decision to strike the defendant's answer was reversed.

In *Dennis v. City of New York*, when the plaintiff failed to show prejudice in proving his claim after a bungee cord which allegedly caused him injury was lost, the Second Department found that the lower court properly denied a motion to strike the defendant's answer.[24] Recently, in *Soto v. New York City Transit Authority*, the plaintiff's motion to strike the defendant's answer was denied when the plaintiff failed to show that key evidence was destroyed, thereby depriving the plaintiff of her ability to prove her claim.[25] In a First Department case, several infant-plaintiffs claimed they were injured when a stove tipped over and spilled hot food on them.[26] The Court denied the manufacturer's motion to dismiss the design defect and failure to warn claims on spoliation grounds when it found that the unavailability of the stove posed no impediment to the defendant's defense.[27]

Finally, in a recent case in the Supreme Court, Kings County, Justice Kurtz issued a conditional order striking the answer of a defendant hospital charged with malpractice, unless it produced actual fetal monitoring strips that were determined to be "the most critical evidence to determine fetal well-being at the time of treatment" of an infant who allegedly was deprived of oxygen during labor, leading to an immediate Caesarian section.[28] Reviewing physicians' affidavits and other cases involving deprivation of oxygen, the Court considered and ruled specifically that the missing evidence was critical and the loss of the fetal monitoring strips deprived the plaintiffs of the means of proving their claims.[29] It should be noted that the defendant doctors' answers were not stricken because there was no showing that they had any independent responsibility to maintain the missing strips.[30]

Once it has been established that spoliation sanctions should be imposed, most courts have looked toward CPLR 3126, oftentimes striking a pleading and, effectively, dismissing a claim or granting summary judgment. While these sanctions are serious enough in practice, there continues to be an attempt by litigants to pursue an independent tort of spoliation of evidence. Until recently, only one New York court, in *Fada v. Faschi Building Co.*, had recognized such a cause of action, even acknowledging that its decision to allow such a claim to proceed was a distinctly minority view.[31] When posed with a similar claim, the Supreme Court, Nassau County, labeled the *Fada* decision an "exception" to the rule that a cause of action for spoliation is not recognized in New York.[32] In fact, other lower courts, and federal courts construing New York law, have consistently refused to recognize an independent tort for spoliation of evidence.[33]

In 2004, in *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, the Court of Appeals issued a decision that seemingly agreed with the majority of the New York courts and refused to recognize an independent tort for spoliation of evidence.[34] A recent decision in the Supreme Court, Kings County, however, appears to have given new life to such a tort, carving out an exception to *MetLife* and recognizing a cause of action for spoliation of evidence provided certain criteria are met.[35]

In *MetLife*, a fire started in a 1999 Chevrolet Tahoe owned by the defendant, Joe Basil Chevrolet.[36] The vehicle was parked in a garage owned by Faith and Michael Basil, causing significant property damage.[37] A homeowners' claim for property damage was paid by MetLife, which then pursued a subrogation claim against Chevrolet, GMC (the manufacturer), and Speaker Shop, a company that had installed a remote starting device in the dashboard of the vehicle.[38] After the parties and their insurers verbally requested a joint inspection of the vehicle, but before the inspection took place or the subrogation claim was commenced, Royal, the insurer for Chevrolet, disassembled and disposed of the vehicle.[39]

Thus, MetLife, in addition to several negligence and products liability claims, pleaded a cause of action against Royal claiming " 'as a result of the negligence, carelessness and recklessness of [Royal], invaluable, necessary and important evidence has been destroyed and lost[,] thereby irrevocably impairing [MetLife's] right to pursue successfully the defendants.' "[40] The lower court granted Royal's motion to dismiss that cause of action, finding that MetLife did not state a cognizable cause of action since New York does not recognize a tort for spoliation of evidence.[41] The Fourth Department affirmed.[42]

The Court of Appeals granted leave to appeal, noting that the issue was whether Royal could be held liable un-

der a theory of spoliation of evidence when the evidence had been destroyed as a result of negligence.[43] The Court noted that a traditional method of dealing with spoliation is to impose sanctions pursuant to CPLR 3126, citing specifically to *DiDomenico* and noting that the striking of a pleading, where the defendant failed to obey multiple court orders, was appropriate under the circumstances.[44] However, the *MetLife* Court found that Royal was not in violation of any court orders and, in fact, criticized the plaintiff for failing to seek pre-action disclosure or obtaining a temporary restraining order to prevent the destruction of critical evidence.[45]

The Court went on to state that, under these circumstances, Royal was not under a duty to preserve the evidence since there was no relationship between it and MetLife, it had not received any request in writing or by court order to preserve the evidence, and, thus, it had no notice of an impending lawsuit.[46] The Court then held "[t]he burden of forcing a party to preserve when it has no notice of an impending lawsuit, and the difficulty of assessing damages militate against establishing a cause of action for spoliation in this case, where there was no duty, court order, contract or special relationship."[47] Since the *MetLife* decision, at least one lower court has concluded that there is no cognizable cause of action for negligent spoliation in New York, at least absent a duty to preserve evidence.[48]

The issue left unanswered by the *MetLife* Court, however, was whether an independent tort exists if a duty to preserve evidence is established. Justice Martin M. Solomon of the Supreme Court, Kings County, recently considered that specific question and concluded that such a cause of action may be pursued.[49] In *Ortega*, the plaintiff purchased a used vehicle, then took the vehicle to a service station for an inspection and "tune up."[50] The following day, as the plaintiff was driving the vehicle, it caught fire, causing her and her passenger to suffer severe burns.[51] The vehicle was towed by Ridge Transportation, a company hired by the City of New York, to the College Point Impound.[52] When plaintiffs' attorney attempted to inspect the vehicle, Ridge Transportation denied him access.[53]

Plaintiffs' attorney then obtained an order staying any disposal of the vehicle pending a hearing on an underlying motion to grant the inspection.[54] The Order was served on the City of New York, then a subsequent order was issued requiring Ridge Transportation and The City to preserve the vehicle and allow plaintiffs to inspect, photograph and videotape the vehicle.[55] It appears that the City was provided with a copy of the order, but that there was some confusion as to the identity of the vehicle to be preserved.[56] The subject vehicle was sold as scrap and crushed by the City before the plaintiffs were given the opportunity to inspect it, despite counsel's reported "valiant efforts" to do so.[57] The Court also considered whether the plaintiffs could proceed with an independent cause of action against the City for spoliation of evidence or contempt.[58]

In a lengthy decision, Justice Solomon reviewed the history of spoliation in New York, noting that "[r]ecognition of spoliation of evidence as an independent tort is a recent and evolving theory of liability. It is an outgrowth of discovery practice in which a sanction is directed against a person or entity that is a party to an ongoing action for failure to preserve evidence that is important to an adversary."[59] Justice Solomon discussed the *DiDomenico* case, noting that the striking of a pleading is appropriate when the destruction of evidence is willful and contumacious.[60] He also noted that negligent destruction of evidence may result in spoliation sanctions.[61]

Specifically, Justice Solomon discussed the limitation on the independent cause of action for spoliation set forth in *MetLife*.[62] While the Court of Appeals did not recognize an independent tort, Justice Solomon noted that *MetLife* did not involve a court order to preserve the vehicle, the spoliator was not on notice of an impending lawsuit and, thus, under no duty to preserve the evidence.[63] As such, the facts of the *Ortega* case were likened to those in *DiDomenico* in which there was, in fact, a series of court orders issued and an employee/employer relationship between the plaintiff and defendant, thus creating the duty to preserve.[64] Justice Solomon explained:

> The Court of Appeals leaves open the issue of recognition of an independent tort of spoliation. The situations noted in *MetLife* giving rise to a duty on the part of the spoliator to preserve the evidence, by written contract, special relationship or court order, may fairly readily be subsumed, however, under other theories of action, such as breach of contract or promissory estoppel, breach of fiduciary duty by way of a contempt proceeding. While, actions under each of these theories suffers from difficulties of their own in redressing the wrong, they avoid the many nearly insoluble problems endemic to an action for spoliation.[65]

Some of the problems inherent to a tort for spoliation include the overreaching of the tort to situations in which evidence might be destroyed as in the ordinary course, when a litigation is not contemplated, or the repair, alteration or use of an item by its rightful owner.[66] Justice Solomon found, however, that the requirement of establishing a duty to preserve, as enunciated in *MetLife*, addresses such concerns.[67]

Other problems that could arise with a tort of spoliation are proof of causation and "a determination as to the utility of evidence that no longer exists and its likely

impact on a litigation, a difficult and speculative determination, at best."[68] Such problems may be addressed, according to Justice Solomon, by establishing a causal relationship between the loss of evidence and the impairment of the case or defense, or prejudice.[69] Justice Solomon also stated that there must be some showing that the "aggrieved party would have been successful in their claim had the evidence been available."[70] Justice Solomon recognized that an estimation of potential damages in some types of cases cannot be anything but "wildly speculative."[71] He also considered concerns about creating derivative litigation or requiring potential defendants to undertake wasteful and unnecessary record and evidence retention practices, a concern enunciated by a California court.[72]

"Litigants and their attorneys must continue to take precautions, both before and during litigation, to protect against the consequences of being branded a spoliator, particularly as the application of the doctrine is applied more broadly under the discretion of the New York courts."

Despite such concerns and looking toward cases from various jurisdictions, including Florida, Montana, California, West Virginia, New Mexico, and the District of Columbia, as well as *MetLife*, Justice Solomon concluded that "recognition of the independent tort of spoliation against a third party is found to be [a] necessary remedy to protect th[e] process [of truth seeking] and outweighs any problems created by recognition of the tort."[73] Thus,

> [r]econciling MetLife and DiDomenico, this court is compelled to find that even unintentional and negligent violation of the court order to preserve the vehicle may support a cause of action for spoliation. The issuance and service of the court order in the instant case places this matter squarely within one of the caveats set forth by the Court of Appeals in MetLife.[74]

As such, *Ortega* creates a cognizable cause of action for negligent spoliation in cases in which a party violates a court order, whether intentionally or negligently.

Spoliation continues to be presented as an evolving defense, a means to obtain summary judgment, and, now, an independent tort in cases where a party, intentionally or negligently, disobeys a court order to preserve evidence. Litigants and their attorneys must continue to take precautions, both before and during litigation, to protect against the consequences of being branded a spoliator, particularly as the application of the doctrine is applied more broadly under the discretion of the New York courts.

Endnotes

1. *Kirkland v. New York City Housing Auth.*, 236 A.D.2d 170, 173, 666 N.Y.S.2d 609 (1st Dep't 1997).
2. N.Y. CPLR 3126 (2)-(3) (McKinney 2005).
3. 252 A.D.2d 41, 43, 682 N.Y.S.2d 452 (2d Dep't 1998).
4. *Id.* at 53.
5. *Id.*
6. *Id.*
7. *Id.* at 53-54.
8. 21 A.D.3d 855, 855-56, 804 N.Y.S.2d 54 (1st Dep't 2005).
9. 816 N.Y.S.2d 420, 421 (1st Dep't 2006).
10. *Lovell v. United Skates of America, Inc., d/b/a USA Empire Roller Skating Center*, 28 A.D.3d 721, 812 N.Y.S.2d 881, 881 (2d Dep't 2006).
11. 7 Misc. 3d 311, 314, 793 N.Y.S.2d 736 (Sup. Ct., Kings Co. 2005).
12. *Id.*
13. *Id.*
14. *Molinari v. Smith*, Index No.: 10904/2003 (Sup. Ct. Richmond Co., July 24, 2006); *Reargument Granted, Upon Same Defendants' Answer Struck as Sanction for Spoliation of Evidence*, N.Y.L.J., July 25, 2006, at 24.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *See Dennis v. City of New York*, 18 A.D.3d 599, 600, 795 N.Y.S.2d 615 (2d Dep't 2005).
22. 21 A.D.3d 997, 998, 801 N.Y.S.2d 387 (2d Dep't 2005).
23. *Id.* at 999, *citing Foncette v. LA Express*, 295 A.D.2d 471, 472, 744 N.Y.S.2d 429 (2d Dep't 2002).
24. 18 A.D.3d at 600.
25. 25 A.D.3d 546, 547, 806 N.Y.S.2d 420 (2d Dep't 2006).
26. *Rodriguez v. Pelham Plumbing & Heating Corp.*, 20 A.D.3d 314, 315, 799 N.Y.S.2d 27 (1st Dep't 2005).
27. *Id.* at 315-16.
28. *Spitz v. Perlman*, 11 Misc. 3d 1084A, 816 N.Y.S.2d 701 (Sup. Ct., Kings Co. 2006).
29. *Id.*
30. *Id.*
31. 189 Misc. 2d 1, 17, 730 N.Y.S.2d 827 (Sup. Ct., Queens Co. 2001).
32. *Hartford Insurance Company v. Rosa*, Index No.: 031812/1999 (Sup. Ct., Nassau Co., Aug. 22, 2002).
33. *See, e.g., Sterbenz v. Attina*, 205 F. Supp. 2d 65, 72 (E.D.N.Y. 2002); *Black Radio Network, Inc. v. Nynex Corp.*, 44 F. Supp. 2d 565, 586 (S.D.N.Y. 1999); *Pharr v. Cortese*, 147 Misc. 2d 1078, 1081, 559 N.Y.S.2d 780 (Sup. Ct., New York Co. 1990).
34. 1 N.Y.3d 478, 482, 775 N.Y.S.2d 754 (2004).
35. *Ortega v. The City of New York*, 11 Misc. 3d 848, 861, 809 N.Y.S.2d 884 (Sup. Ct. Kings Co. 2006).
36. 1 N.Y.3d at 481.

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 481-82.
43. *Id.* at 482.
44. *Id.* at 483, *citing DiDomenico*, 252 A.D.2d at 53.
45. *MetLife*, 1 N.Y.3d at 483.
46. *Id.* at 484.
47. *Id.*
48. *Hennessey v. Restaurant Assocs., Inc.*, 25 A.D.3d 340, 341, 807 N.Y.S.2d 349 (1st Dep't), *appeal denied*, *Hennessey v. RAROC, Inc.*, 6 N.Y.3d 712, 816 N.Y.S.2d 747 (2006).
49. *Ortega*, 11 Misc. 3d at 861.
50. *Id.* at 849.
51. *Id.*
52. *Id.* at 849, 850.
53. *Id.* at 849.
54. *Id.*
55. *Id.* at 849-50.
56. *Id.* at 850.
57. *Id.*
58. *Id.* at 851.
59. *Id.* at 852-53.
60. *Id.* at 853.
61. *Id.* at 854.
62. *Id.* at 854-55.
63. *Id.* at 855.
64. *Id.*
65. *Id.*
66. *Id.* at 855-56.
67. *Id.* at 856.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 857.
72. *Id.* at 857-58, *citing Cedars-Sinai Medical Ctr. v. Superior Court*, 954 P.2d 511, 514-15 (Cal. 1998); *Temple Community Hosp. v. Superior Court*, 976 P.2d 223, 227-28 (Cal. 1999).
73. *Ortega*, 11 Misc. 3d at 858, *citing Cedars-Sinai Med. Ctr.* 954 P.2d at 514-15; *Temple Community Hosp.*, 976 P.2d at 227-28; *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849-50 (D.C. 1998); *Continental Ins. Co. v. Herman*, 576 So.2d 313, 316 (Fla. 3d DCA 1990); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 54-57 (Mont. 1999); *Torres v. El Paso Elec. Co.*, 987 P.2d 386, 402 (1999); *Hannah v. Heeter*, 584 S.E.2d 560, 566-67 (W. Va. 2003).
74. *Ortega*, 11 Misc. 3d at 859.

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SCENES FROM THE

TORTS, INSURANCE AND COMPENSATION LAW SECTION

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Business and Commercial Litigation in Federal Courts, Second Edition

Reviewed by David M. Gouldin

When you are evaluating various publications that may be of assistance to you in your practice, it is customary to look for a work which is comprehensive, learned and practical. *Business and Commercial Litigation in Federal Courts*, now in its second edition, is a resource which meets all of those criteria. In addition, it will appeal to both the experienced practitioner and one in the early stages of his or her work in the Federal Courts.

Part of the reason that this eight-volume set has such broad-based appeal is that Robert L. Haig, the Editor-in-Chief, recruited an exceptional complement of practitioners to author the 96 chapters that run the gamut from jurisdiction to collections. It is unlikely that you will have occasion to look up questions on commercial litigation in the federal system that are not answered in one or more of the chapters in this publication.

The roster of contributors includes a true "who's who" in the commercial litigation field, mixing both jurists and highly respected practitioners. Mark Alcott, our current State Bar President, authored a chapter on "Theft or Loss of Business Opportunities." R. Franklin Balotti and Frederick L. Cottrell II of the Richards Layton firm in Wilmington, Delaware provide sage counsel on the subject of "Collections." The Honorable Harold Baer, Jr., from the Southern District of New York, addresses "Alternative Dispute Resolution." The highly regarded and well-known David Boies authored a chapter on the very timely subject of "Litigation Technology."

Former U.S. Attorney General Benjamin Civiletti and his partner from the Venable firm, David W. Goewey, discuss the subject of "Compensatory Damages." "Trials" is the title of the important chapter authored by John J. Curtin, Jr. and John R. Snyder from the Bingham McCutchen firm in Boston. John Curtin has taught trial practice at Boston College Law School for more than 40 years. Edward L. Foote and Peter C. McCabe III collaborated on the chapter entitled "Cross-Examination." They offer observations from more than six decades of combined jury trial experience which are recommended reading for any practitioner in the field. The text of Kenneth Geller and David M. Gossett on "Appeals to the Supreme Court" is educational reading for all lawyers, even if you do not expect to appear before our highest court in the near future.

Bob Haig not only drew authors from the northeast, but from across the nation, as evidenced by the contribution of Harry M. Reasoner from Houston on "Ethical Issues in Commercial Cases" and the chapter on "Jury Conduct, Instructions and Verdicts" co-authored by the Honorable Susan P. Graber, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, the Honorable M. Margaret McKeown, also a Circuit Judge from the Ninth Circuit, and the Honorable Jeffrey T. Miller, a United States District Judge serving the Southern District of California.

One of the concerns that a practitioner may have in buying a multi-volume, comprehensive publication such as "Business and Commercial Litigation in Federal Courts, Second Edition" is even though the reader may be confident answers to their questions are contained within such a comprehensive series, getting to those answers may be challenging simply because of the size of the work. Access to the text pertinent to each reader's concern is greatly facilitated by having a thorough and reader-friendly index to such a multi-volume work.

Bob Haig and the editors at Thomson West are to be applauded for their recognition of the importance of Volume 9, the tables and index for the 96 chapters which form the core of the work. Volume 9 contains an excellent index of over 225 pages, an invaluable key to accessibility and the type of tool one would expect with a publication of this quality. Volume 9 also provides the practitioner with thousands of citations to current cases, statutes and rules, all of which complement the many forms which provide a particularly helpful starting point when any lawyer is attempting to customize a particular agreement or pleading for the business or commercial matter on which he or she is working.

As I noted, my review has focused on the "Second Edition" of this prodigious work. The latest edition contains 16 new chapters, which provide a definite "value add" for anyone who already has the first edition and is contemplating the benefit of the newest publication. New chapters include "Discovery of Electronic Information," "Techniques for Expediting and Streamlining Litigation," "Litigation Technology," "E-Commerce," and "Director and Officer Liability," which reflect the effort of the Editor and Thomson West to keep this publication current, above and beyond the very helpful pocket parts or CDs which contain an annual update of the recent statutory changes and new case law citations that one might anticipate with a work of this stature.

There are a host of entertaining and enlightening chapters in this comprehensive undertaking. I found the chapter on "Trials," authored by John J. Curtin, Jr. and John R. Snyder, covered most, if not all, of the multiple

facets of a trial. I particularly liked the section entitled "Dealing with the Unexpected and with 'Disasters'" to be a constructive reminder of what a roller coaster experience a trial can be. An unusually bad performance by a witness, an unexpected exhibit, or a strong performance by opposing counsel may infect even the most seasoned professional with some measure of pessimism. As the authors note, it is important to recognize the difference between something which is fatal to your case and something which simply requires additional effort, a new strategy, or further investigation.

In any case, it is important to remain outwardly calm and cool, even if you are churning inside. As Curtin and Snyder noted, "Things happen. It can be frightening to contemplate all that can go wrong at trial, in front of the judge, jury, client, adverse counsel. . . ." Even attorneys who have thoroughly prepared their case may encounter departures from what is expected, but as the authors suggest, "the key is not to panic and not to do anything precipitous or rash." The hallmark of a great trial lawyer is obviously the ability to determine how serious the bleeding is, and how to cauterize the wound.

The chapter on trials also contains a section on "Top 20 Trial Tips." While many of them might be viewed as "common sense," when we are in the heat of battle, it is often helpful to be reminded of the fundamentals and not let the emotion of the moment inappropriately influence your development of a strategy, or more importantly, your ability to carry it out.

The scope of the coverage, the expertise and experience of the authors, and the ability of any lawyer to gain easy access through the thorough index to this wealth of information make this publication "a must" for any firm or individual with a significant roster of federal commercial litigation and a sound investment for those whose practice is more state-oriented, but will find helpful counsel in those parts of the anthology that are equally useful in both forums.

Scenes from the
Executive Board Meeting
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