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An Update from the Pharmaceutical
and Medical Device Group at Coughlin Duffy LLP

PRODUCTIVELY Thinking

April/2008, No. 2

NEW JERSEY MASS TORT JUDGE FINDS DRUG MAKERS' CHOICE-OF-LAW ARGUMENTS WAIVED AS UNTIMELY

Pharmaceutical mass tort litigation in New Jersey routinely involves cases brought primarily by plaintiffs who reside, were treated and/or diagnosed, and/or claim to have been injured in states other than New Jersey. When such cases are filed in New Jersey by out-of-state plaintiffs, pharmaceutical and medical device defendants must carefully assess their available defenses under all potentially applicable state laws, as different states have different rules with respect to statutes of limitations, the impact of federal regulatory approval, etc. For example, just last year, in *Rowe v. Hoffman-La Roche*, 189 N.J. 615 (2007), the New Jersey Supreme Court held that Michigan law – under which FDA approval of a prescription drug's warnings constituted a complete bar to a failure-to-warn claim – should be applied to the claims of a Michigan resident plaintiff, suing in New Jersey, who was prescribed, ingested, and was allegedly injured by the prescription drug Accutane in Michigan. (Unlike the complete defense afforded under Michigan law, New Jersey law would only have afforded the defendants a rebuttable presumption that the drug's warnings were adequate.) Thus, choice-of-law decisions can be outcome determinative.

On March 7, 2008, the Honorable Jamie D. Happas, who presides over the Hormone Replacement Therapy ("HRT") mass tort litigation in Middlesex County, New Jersey, rendered a decision denying choice-of-law motions filed by the defendants in three HRT cases. Judge Happas did not reject defendants' applications on their merits, but instead based her denial on her finding that the defendants had waived any arguments they

had regarding choice-of-law by not raising the issue sooner in the litigation.

Citing *Rowe*, the defendants argued in their motions that the laws of Texas, Kentucky, and Pennsylvania, rather than the law of New Jersey, should apply to the claims of three out-of-state HRT plaintiffs. While both plaintiffs and defendants briefed the issue of the relative governmental interests of New Jersey, Texas, Kentucky, and Pennsylvania to the disputes before the court, as New Jersey choice-of-law jurisprudence requires, Judge Happas did not engage in this weighing analysis. Rather, Judge Happas was persuaded by plaintiffs' arguments that defendants had waived their choice-of-law claims and that plaintiffs would be greatly prejudiced should they be forced to prosecute their cases under these foreign states' laws after conducting fact and expert discovery in each case for a period of years under the assumption that New Jersey law would apply.

In rendering her decision, Judge Happas asserted that defendants' contentions that other states' laws should apply to the three cases came as a surprise to her because such issues had not been raised before her at any prior case management conferences and because each defendant's Answers to these particular plaintiffs' Complaints raised only New Jersey law affirmative defenses. Citing to the New Jersey Mass Tort Manual, Judge Happas found that choice-of-law issues hold highlighted importance in the mass tort context and must therefore "be identified as early as possible, starting in most cases at the initial pre-trial conference" and that such issues "should be resolved as soon as feasi-

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ble.” Bailey v. Wyeth, MID-L-999-06-MT (March 7, 2008) available at http://www.judiciary.state.nj.us/mass-tort/hrt/other_orders.htm; quoting New Jersey Mass Tort (Non-Asbestos) Resource Book 16, (3d ed. 2007) available at http://www.judiciary.state.nj.us/masstort/MassTortsSOP_NonAsbestosNovember_2007WebVersion.pdf.

Because, in her view, the defendants had allowed plaintiffs and the court to think that New Jersey law would apply as the cases progressed through fact and expert discovery and through trial preparation, Judge Happas ruled that defendants had waived any argument that she should apply anything other than New Jersey law to these plaintiffs’ claims.

IMPACT ON NEW JERSEY DEFENDANTS

Judge Happas’ decision is an important one for drug and device defendants facing claims in New Jersey by out-of-state plaintiffs. Although choice-of-law is not listed in the New Jersey Court Rules as one of the affirmative defenses that can be waived if not pled in a defendant’s Answer, Judge Happas’ decision can be interpreted as elevating choice-of-law to that status. While Judge Happas subsequently stated, at a post-motion case management conference, that she would permit defendants in all other HRT cases before her to file amendments asserting choice-of-law allegations and defenses, the implication in her decision is that choice-of-law defenses may be deemed waived if not asserted at the outset of a case. Indeed, Judge Happas indicated that this will be the procedure for dealing with choice-of-law issues in all mass tort cases before her.

At the present time, we not aware of the defendants directly affected by Judge Happas’ decision seeking an interlocutory appeal with the New Jersey Appellate Division. In the meantime, however, in light of Judge Happas’ decision, it will be essential for all defendants in mass tort cases before Judge Happas (see accompanying chart of all New Jersey mass torts)

to assert all applicable choice-of-law allegations and defenses in any matter in which such contentions would be applicable as soon as practicable, and in the Answer if at all possible. Likewise, for defendants facing claims before any of New Jersey’s other mass tort judges, or for pharmaceutical and medical device manufacturers facing claims by any out-of-state plaintiff, prudence dictates proceeding in a similar manner to minimize the chances of another New Jersey judge finding that valid choice-of-law arguments should be deemed waived.

*Authored by H. Lockwood Miller, III, Esq.
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Current Mass Torts in New Jersey

<i>Accutane</i>	<i>J. Higbee, Atlantic County</i>
<i>Asbestos</i>	<i>J. McCormick, Middlesex County</i>
<i>Bextra/Celebrex</i>	<i>J. Higbee, Atlantic County</i>
<i>Ciba-Geigy</i>	<i>J. McCormick, Middlesex County</i>
<i>Depo-Provera</i>	<i>J. Harris, Bergen County</i>
<i>HRT</i>	<i>J. Happas, Middlesex County</i>
<i>Mahwah Toxic Dump Site</i>	<i>J. Harris, Bergen County</i>
<i>Ortho Evra</i>	<i>J. Happas, Middlesex County</i>
<i>Risperdal/Seroquel/Zyprexa</i>	<i>J. Happas, Middlesex County</i>
<i>Vioxx</i>	<i>J. Higbee, Atlantic County</i>
<i>Zometia/Aredia</i>	<i>J. Higbee, Atlantic County</i>

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