



**PHARMACEUTICAL
AND
MEDICAL DEVICE
GROUP**

PARTNERS

DANIEL J. COHEN
NEIL M. DAY
TIMOTHY I. DUFFY
MICHAEL J. SULLIVAN

OF COUNSEL

LORNA A. DOTRO
H. LOCKWOOD MILLER, III

COUGHLIN DUFFY LLP
P.O. Box 1917
350 Mount Kemble Avenue
Morristown, New Jersey 07962
Tel (973) 267-0058
Fax (973) 631-6442

Wall Street Plaza
88 Pine Street, 5th Floor
New York, New York 10005
Tel (212) 483-0105
Fax (212) 480-3899

www.coughlinduffy.com

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

PRODUCTIVELY Thinking

June/2008, No. 7

COURT BROADENS THE DEFINITION OF “MANUFACTURER” AND EXPANDS LIABILITY FOR NEW JERSEY COMPANIES

On June 9, 2008, the New Jersey Appellate Division, in a decision approved for publication, ruled that a plaintiff could sustain an action for product liability against a New Jersey-based company that labeled and packaged, but did not sell, a drug that allegedly caused the plaintiff to suffer a stroke. In so ruling, the court determined that a product packager or labeler fits within the definition of “manufacturer,” and therefore is not entitled to statutory protection from strict liability as a “product seller” would be pursuant to the New Jersey Product Liability Act (“PLA”).

In *Smith v. Alza Corporation*, __ N.J. Super. __ (App. Div. 2008), the plaintiff, a 52-year old Army helicopter pilot from Alabama, claimed to have purchased some Acutrim, an over-the-counter weight loss product containing phenylpropanolamine, in Pennsylvania, and to have later ingested a small amount of the Acutrim in Alabama to help suppress his appetite before his daily workout. After exercising for approximately forty-five minutes, the plaintiff suffered a hemorrhagic stroke, allegedly caused by his ingestion of Acutrim. The Acutrim labeling contained no warnings with respect to the alleged risk of stroke.

Under the PLA, “manufacturer” and “product seller” are defined terms. The definition of a “manufacturer” includes any person who “packages” or “labels” a product. On the other hand, the definition of “product seller” includes “any person who, in the course of a business conducted for that purpose. . . . packages, labels, or otherwise is involved in placing a product in the line of commerce.” These definitional differences are important under the PLA because a “product seller” is relieved

of liability if it had no significant responsibility for the alleged product defect and is able to identify the “manufacturer” of the product, provided that manufacturer can be sued and is likely to be able to satisfy a potential judgment.

At the trial court level, defendant Steritek convinced the motion judge that it was entitled to be relieved from liability as a “product seller” because it had been a contract packager using packaging and labeling supplied by another defendant and had shipped the product in bulk to distribution centers for ultimate sale without exercising any significant responsibility for the packaging, labeling, or the product itself. (Indeed, not only could Steritek identify the product’s manufacturer, as required by the PLA, but that manufacturer was a named defendant in the case.) On appeal, however, the Appellate Division reversed the entry of summary judgment in favor of Steritek, concluding that Steritek did not qualify as a “seller” entitled to immunity under the PLA. Rather, the court held that Steritek’s packaging, labeling, and shipping of the product were activities that were integrally connected to the manufacturing process. While the court acknowledged that retailers and wholesalers who have no significant responsibility for the alleged product defect are immune from liability, the court refused to exempt Steritek from liability because Steritek was part of the chain of distribution and did not actually sell the product.

Although less significant, the court also addressed the choice-of-law issue between the parties. Choosing between Alabama law (the state in which plaintiff lived, ingested Acu-

PRODUCTively Thinking

June/2008, No. 7

trim, and had his stroke) and New Jersey law (the state in which Steritek packaged and labeled the Acutrim), the court recognized that New Jersey would afford plaintiff the benefit of the discovery rule but that Alabama would not, thus rendering plaintiff's suit timely under New Jersey law but untimely under Alabama law. After evaluating the policies underlying each state's statute of limitations, the court found that New Jersey's substantial governmental interest in seeking to discourage domestic entities from manufacturing and distributing unsafe products outweighed Alabama's interests in protecting its courts and companies from stale claims. Distinguishing this case from last year's New Jersey Supreme Court decision in Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615 (2007) – which applied Michigan law to the claims of a Michigan plaintiff suing a New Jersey-based drug maker in New Jersey – the court held that the Alabama statute of limitations did not have the consumer-protectionist feature considered dispositive in applying Michigan law in Rowe. The court concluded that, because “the allegedly defective product was packaged and labeled here and then shipped from this State,” New Jersey's substantial governmental interest justified the application of the New Jersey discovery rule, thus allowing plaintiff's claim to proceed.

IMPACT ON NEW JERSEY DEFENDANTS

The Smith decision represents a significant victory for plaintiffs, as the court found that a company that did nothing but apply labels to drugs could be liable as a product manufacturer under the PLA. By broadening the definition of “manufacturer” to include a defendant in the position of Steritek, the court essentially limited the “product seller” liability exemption to retailers. In doing so, the court seemingly ignored the purpose of the liability exception – which is to allow companies that sell products without exercising any significant responsibility for the alleged defect to escape liability provided there is a responsible manufacturer that can be identified and sued in the same action. As a result of this decision, it will now be easier for plaintiffs to

keep as defendants more companies involved in the chain of distribution of an allegedly defective product. While those companies may ultimately be absolved of liability on the facts, they will no longer be as able to avoid incurring costly litigation expenses to get to that result.

*Authored by H. Lockwood Miller, III,
Jonathan F. Donath, and Steven V. Ciurczak*

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>Gadolinium</i>	<i>J. Happs, Middlesex County</i>
<i>HRT</i>	<i>J. Happs, Middlesex County</i>
<i>Mahwah Toxic Dump Site</i>	<i>J. Harris, Bergen County</i>
<i>Ortho Evra</i>	<i>J. Happs, Middlesex County</i>
<i>Risperdal/Seroquel/Zyprexa</i>	<i>J. Happs, Middlesex County</i>
<i>Vioxx</i>	<i>J. Higbee, Atlantic County</i>
<i>Zometa/Aredia</i>	<i>J. Higbee, Atlantic County</i>

The Coughlin Duffy Pharmaceutical and Medical Device Group

Coughlin Duffy LLP is one of the fastest growing law firms in the northeastern United States. The Firm's litigation attorneys offer a depth of experience across a broad range of industries and disciplines, including pharmaceuticals and medical devices, products liability, environmental and toxic tort, insurance and reinsurance, labor and employment, white collar crime and internal investigations, and commercial disputes. The members of the Firm's Pharmaceutical and Medical Device Group concentrate in the defense and management of both single-plaintiff suits and multi-plaintiff mass actions involving pharmaceuticals and medical devices in New Jersey and across the country. The Group also specializes in providing regulatory counseling and conducting internal investigations for clients in the pharmaceutical and medical device industries. For more detailed information about the Group's capabilities and experience, or if you have questions regarding the information in this Update, please contact the author(s), the Coughlin Duffy attorney with whom you regularly work, or any of the members of our Pharmaceutical and Medical Device Group.

© 2008 Coughlin Duffy LLP. All rights reserved. The materials presented herein are for informational purposes only and are not offered as legal advice. No reader should act on the basis of these materials without seeking appropriate professional advice as to the particular facts and applicable law involved. Any opinions presented herein are the opinions of the individual author(s), and do not necessarily reflect the opinion of Coughlin Duffy LLP or any of its attorneys or clients.