Product Liability and Mass Tort Section Newsletter

Vol. 16, No. 1 — September 2017

Outgoing Chair's Message

The Product Liability and Mass Tort Section: A Season of Seminars

by Rachel A. Placitella

I hope everyone is enjoying the end of the summer season. It was with mixed emotions that at our annual meeting of the Product Liability and Mass Tort Section on May 18 I relinquished my role as chair of this section to Zane Riester. I extend my heartfelt gratitude to Zane, Neel Bhuta, Leslie Lombardy and Mark Shifton, who have served on the board of this section, and I welcome Joshua Kincannon as our newest board member.

The section had a busy year, commencing with a seminar we co-sponsored with the Construction Law Section on Nov. 9, 2016. Mark spoke about when products liability and construction law collide, while I spoke about liability of the professional engineer. The interested audience received continuing legal education credits for their attendance.

On March 28, the section co-sponsored a multicounty litigation seminar, where an illustrious panel of judges spoke about the hot topics in mass tort, including the Honorable Robert B. Kugler, U.S.D.J.; the Honorable Freda L. Wolfson, U.S.D.J.; the Honorable Patty Shwartz, U.S.C.J.; the Honorable Rachelle L. Harz, J.S.C. and the Honorable Nelson C. Johnson, J.S.C. At this seminar, the 2017 Dreier Award was presented to John B. Kearney, the New Jersey office managing partner of Ballard Spahr in Cherry Hill. John is a highly respected member of the civil bar, who handles complex civil litigation matters in New Jersey and consults on such matters around the country.

On May 18, the section presented a civil trial ethics seminar at the New Jersey State Bar Association Annual Meeting. I was proud to moderate a panel of the following highly respected judges: the Honorable Joseph L. Marczyk, P.J.Cv.; the Honorable Vincent LeBlon, J.S.C. and the Honorable Robert C. Wilson, J.S.C.

I look forward to another interesting year of practice in our field, and hope to see you all at NJSBA-sponsored events! ■

Inside this issue

Getting Digital Dirt into Evidence: Authentication and Hearsay Issues

by John B. Kearney and William Reiley

#SocialMediaEvidence has become a trending topic as lawyers dig for digital dirt among various social media sites during pretrial discovery. Often, there is more smoke than fire, but now and then the digital evidence that is uncovered on Facebook, Instagram, LinkedIn, and a host of other sites can be quite powerful and worth all the digging. What defense lawyer hasn't longed to discover photographs of the plaintiff with alleged back problems doing all sorts of physical activities a week after an accident?

However, sometimes lawyers are so caught up in the chase for social media evidence that they don't reflect on what they will need in order to make sure the evidence is admissible. To avoid the trending topic of #LegalMalpractice, lawyers need to collect social media evidence in discovery in a way that enables them to overcome any authentication or hearsay objections when they try to use the evidence in court.

Authentication

New Jersey's Authentication Rule, at N.J.R.E. 901, provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." In an era of fake news, phishing emails from nefarious hackers, and other such examples of the dark side of technology, authentication of social media evidence is important because courts are skeptical of the credibility of social media posts. Due to that appropriate concern, courts require that such evidence be authenticated through direct or indirect evidence to prove it is genuine.

There are multiple ways to authenticate social media evidence. Consider the following scenario as an example: An altercation is being litigated, and a purported author posts a captioned photograph of a weapon; the caption implicates an individual in the altercation that is the subject of the litigation. The easiest (but the most unlikely) way to authenticate this evidence is to have the purported author admit (during a deposition or through requests for admissions) to posting the photograph and caption. Another way, albeit pricey, would be to have an information technology (IT) forensic expert and/or photographic expert testify that the captioned photograph in question originated from the plaintiff or defendant (as the case may be), and has not been altered. The expert would need to provide factual specificity, along with his or her expertise, about the process by which the electronically stored information in question was created, acquired, maintained, and preserved without alteration or change.[1]

A simpler way to authenticate such evidence is by showing that: 1) the profile picture on the social media account where the digital dirt was found depicts the purported author; 2) the social media account includes other identifying information of the purported author such as address, birth date, name of spouse, etc.; or 3) the post includes information that only the purported author would know, like engaging in a back-and-forth twitter conversation with an ex-boyfriend about hitting his girlfriend with a shoe (which is the subject of a case discussed below). All of these topics could probably be covered in a deposition (assuming the witness was forthright and truthful), and a pending criminal proceeding did not create Fifth Amendment concerns about testifying. But that might not be the end of the story, since not every state permits the use of such indirect evidence to authenticate social media evidence.

The authors will leave the best ways to capture the electronic information trails that social media posts leave behind for another article. Suffice to say there are programs, such as X1 Social Discovery, that preserve metadata that can be analyzed by an IT forensic expert of social media posts. Some examples of metadata that can be captured for electronic documents include a file name, location (*e.g.*, directory structure or pathname), format or file type, size, dates (*e.g.*, creation date, date of last data modification, date of last data access, and date

of last metadata modification), and permissions (*e.g.*, who can read the data, who can write to it, who can run it).[2] In appropriate situations, taking a screenshot or printing out the page in question might suffice to use in a deposition. For now, however, the focus will be on the evidentiary hurdles at trial of authentication and hearsay.

Two Approaches to Authentication

Two distinctive approaches to authenticating social media evidence have developed in recent years: The Maryland approach that is articulated in *Griffin v. State*,[3] (adopting a *higher* standard to authenticate social media evidence), and the Texas approach as set out in *Tienda v. State*,[4] (adopting a *lower* standard to authenticate social media evidence). Under the *Griffin*/Maryland approach, there is a presumption that the social media posting being moved into evidence is falsified, and thus can only be authenticated if the proponent sets forth sufficient "distinctive characteristics" that connect the author to the post. The *Griffin* court suggested a non-exhaustive list of three potential methods of authentication: 1) asking the author if he or she drafted the post, 2) searching the author's browsing history or computer hard drive for traces of the post, or 3) obtaining evidence directly from the social networking site to prove the author drafted the post.

Texas, unlike Maryland, does not impose this presumption, and permits circumstantial evidence to authenticate social media evidence and allow for a reasonable juror to find the evidence was authored by a particular individual. Other states, such as Delaware,[5] have adopted the Texas approach. A close look at *Parker v. State* highlights the rationale behind the Texas approach as articulated by Delaware's highest court.[6]

In *Parker*, the defendant claimed she was acting in self-defense during a physical altercation. However, Facebook posts immediately following the altercation discredited her self-defense argument. The state sought to authenticate these posts, as well as information from her Facebook account including her profile picture, name, and the time and date of the posts at issue.

In admitting the evidence, the *Parker* trial court held (and the Supreme Court of Delaware affirmed) that the defendant's Facebook posts were properly authenticated under D.R.E. 901(b). The court explained that although the judge is the gatekeeper for the admissibility of social media evidence, the jury ultimately decides the issue of authenticity of social media evidence. The federal district court in Maryland, which authored the *Lorraine v. Market Am. Ins. Co.* opinion, made it clear that "(b)ecause authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." Thus, even though the *Lorraine* court was sitting in Maryland, that federal district judge chose to adopt the more lenient Texas standard for authentication. "Because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims."[7]

Several years after *Parker*, the Third Circuit adopted the same approach in *U.S. v. Browne*.[8] In *Browne*, the defendant used Facebook to contact minors and solicit their explicit photographs. Once he received these photographs, Browne threatened to make them public unless the minors performed sexual acts on him.

At *Browne*'s criminal trial, the prosecution sought the admission of the defendant's posts from Facebook chats he had with the minors. The trial court treated his Facebook chat logs the same as traditional documentary evidence, holding that conclusive proof of authenticity was not required. Rather, the court permitted the Facebook chats to be authenticated through the circumstantial testimony evidence of the minors.

Thus, each minor testified about exchanges with Browne in the Facebook chats, and this testimony was consistent with the content of the chat logs. Some minors also testified that after conversing with Browne on Facebook they met him in person, which enabled them to identify Browne in court. Additionally, personal details about Browne were revealed in these chats, such as where he lived, his occupation, and the fact that he was engaged at the time he was chatting with the minors. In light of all of this evidence, the Third Circuit affirmed the district court's ruling that this social media evidence was properly authenticated.

New Jersey's Approach to Authentication

The New Jersey Appellate Division has addressed the standards for authentication of social media evidence in the 2016 case of *State v. Hannah*.[9] In *Hannah*, the defendant was accused of hitting someone with a high-heeled shoe. In her defense statement, Hannah claimed she did not have contact with the victim on the night in question.

To rebut this testimony, the prosecution sought to admit the defendant's reply tweet to the victim after the

altercation, which stated, in part, "…*shoe to ya face bitch* (sic)." The prosecution authenticated this Twitter post by relying on circumstantial evidence such as: 1) the defendant's twitter handle and corresponding profile picture; 2) the content of the post, which showed the defendant's knowledge about the altercation that one would expect only her to have; and 3) the fact that the defendant's tweet was a reply to the victim. Under the reply doctrine, a piece of writing "may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication."[10]

On appeal, the defendant argued that the trial court improperly admitted her tweet since it had not been properly authenticated under the higher standard of the *Griffin*/Maryland approach. In opposition, the prosecution argued that the court properly admitted the evidence under the more lenient *Tienda*/Texas approach to authentication. In ruling, the Appellate Division did not expressly adopt either approach, but rather applied New Jersey's traditional rules of authentication under N.J.R.E. 901. Thus, the *Hannah* court held that the fact that a Twitter post is created on the internet does not set it apart from other customary writings, nor do social media posts require a special approach or rule of evidence.[11]

Although not expressly adopting the Texas approach, in *Hannah*, the New Jersey Appellate Division took an almost identical approach: Both jurisdictions permit the use of circumstantial evidence to authenticate social media evidence, with the judges' role being to determine if the proponent of the proffered evidence established a *prima facie* case that would justify admission. The Appellate Division in *Hannah* found that the trial court provided sufficient reasons for finding the tweet authentic, relevant, and admissible, and thus affirmed the lower court's ruling.[12] Note that the *Hannah* decision did not limit the scope of its holding solely to criminal cases and, therefore, this holding may also be relied upon in civil matters to resolve authentication issues, at least until the New Jersey Supreme Court addresses the issue.[13]

Hearsay and Social Media Evidence

In addition to authenticating properly social media evidence, one must address potential hearsay issues if one wants to get the digital dirt into evidence. As is known from Evidence 101, hearsay is an out-of-court statement that is offered in court to prove the truth of the matter asserted within the statement.[14] In order to constitute hearsay, there must be a declarant making the statement (*e.g.*, a Mississippi court ruled that an automatic email notification from Facebook containing a message was not hearsay because there was no declarant and, therefore, no hearsay[15]). And if the statement is hearsay, the evidence is inadmissible, unless it falls under one of the exceptions to the hearsay rule.[16]

One exception that is helpful in the social media context is the party-opponent admission,[17] which is the party's own statement, made either in an individual or representative capacity. In *People v. Oyerinde*,[18] the Michigan Court of Appeals held that the defendant's Facebook messages to a non-party were not hearsay, but rather a party admission, because the messages were the defendant's statements.

With respect to social media evidence from non-party witnesses that is subject to a hearsay objection, some appropriate exceptions include: present sense impression;[19] excited utterance;[20] and then-existing mental, emotional, or physical condition.[21] The prevalence of portable electronic communication devices provides one with the ability to post about events as they occur, thereby making present sense impression and excited utterances potential hearsay exceptions depending on the specific facts of this case.[22] Additionally, the then-existing state of mind exception can be useful when *seeking to admit* emails (and equally, social media private messaging), as both are modes of communication that often are chock full of candid statements of the declarant's state of mind, feelings, emotions, and motives.[23]

Conclusion

Finding digital dirt on the other party does not automatically mean the evidence will be admitted at trial. One first must authenticate the evidence and then meet any hearsay objection by showing that it is either non-hearsay or falls within a hearsay exception. Best practices dictate that lawyers should deal with authentication and hearsay issues during discovery—especially at depositions—rather than in the middle of what one thought was going to be a withering cross-examination at trial.

Authenticating social media evidence can also be accomplished by stipulation or requests for admissions prior to trial. The more rigorous federal court final pretrial order and conference practice will force one to confront and solve those potential problems. Don't let the less rigorous state court final pretrial procedures create a false sense of security. In collecting authentication evidence—at a minimum—take screenshots, print

out postings, and capture as much electronic data as possible to display the origin of the post. Waiting until summary judgment motion practice or trial to deal with authentication issues may be too little, too late.

John B. Kearney and William Reiley are attorneys in the New Jersey office of Ballard Spahr LLP.

Endnotes

1. *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 545 (D.Md. 2007).
2. The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, App. E.
3. 419 Md. 343 (Md. 2010).
4. 358 S.W. 3d 633 (Tex. Crim. App. 2012).
5. *See Parker v. State*, 85 A.3d 682 (Del. 2014).
6. *Id.*
7. *Lorraine, supra* note 1, at 539.
8. 834 F.3d 403 (3d Cir. 2016).
9. 151 A.3d 99 (App. Div. 2016).
10. *Hannah*, 151 A.3d at 106 (*quoting State v. Mays*, 321 N.J. Super. 619, 628 (App. Div.), *certif. denied*, 162 N.J. 132 (1999)).
11. *Id.*
12. *Id.* at 108.
13. *See, e.g., New Century Financial Services, Inc. v. Oughla*, 437 N.J. Super. 299 (App. Div. 2014) (citing evidentiary rulings on authentication from criminal matters as a basis for its ruling on a civil matter).
14. Fed. R. Evid. 801(c); N.J.R.E. 801(c).
15. *Smith v. State*, 2013 WL 2400393 (Miss. Ct. App. June 4, 2013) *vacated in part on other grounds* 136 So.3d 424 (Miss. 2014).
16. Fed. R. Evid. 803; N.J.R.E. 803.
17. Fed. R. Evid. 801(d)(2); N.J.R.E. 803(b).
18. 2011 Mich. App. LEXIS 2104, at *26–27 (Mich. Ct. App. Nov. 29, 2011).
19. Fed. R. Evid. 803(1); N.J.R.E. 803(c)(1).
20. Fed. R. Evid. 803(2); N.J.R.E. 803(c)(2).
21. Fed. R. Evid. 803(3); N.J.R.E. 803(c)(3).
22. *See Lorraine, supra* note 1, at 569.
23. *Id.*, at 570.

Products Liability—Knowing and Preparing for New Jersey's Successor Liability

by Anthony J. Medori and Andrew J. Rossetti

A company is looking to acquire another entity's assets. In-house counsel has examined the purchase agreement to ensure it incorporates the general rule of successor liability: Where one company sells or transfers all of its assets to another company, the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct. In other words, if Company A sells or transfers all of its assets to Company B, then Company B is not liable for Company A's debts or liabilities. But are you really clear of all successor liability? The answer in New Jersey is no.

Courts have recognized four exceptions that warrant the imposition of successor liability: 1) where the purchasing corporation expressly or impliedly agreed to assume such debts and liabilities; 2) the transaction amounts to a consolidation or merger of the seller and purchaser; 3) the purchasing corporation is merely a continuation of the selling corporation; or 4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities.[1] New Jersey has added to this list with the adoption of the 'product-line exception.'

Origination of the Product-Line Exception

In the California Supreme Court case of *Ray v. Alad Corp.*,[2] the plaintiff was injured after falling from an allegedly defective ladder. The ladder manufacturer previously dissolved and sold its assets, stock in trade, trade name and goodwill. The purchasing entity continued to manufacture the same line of ladders as the selling corporation while using their name, equipment, employees and customer lists. The Court concluded that "a party which acquires a manufacturing business and continues the output of its line of products…assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired." And just like that, the product-line exception was born.

The Court gave a three-part justification for the imposition of liability upon a successor corporation: "(1) The virtual destruction of the plaintiff's remedies against the original manufacture caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will be enjoyed by the successor in the continued operation of the business."

New Jersey's Adoption of the Product-Line Exception

In 1981, the New Jersey Supreme Court officially adopted this exception in the seminal *Ramirez* case. The plaintiff was injured while operating an allegedly defective power press. From an earlier purchase agreement, the defendant acquired the selling corporation's trade name, physical plant, manufacturing equipment, inventory, manufacturing designs, patents and customer lists. The Court held that "where one corporation acquires all or substantially all the manufacturing assets of another corporation…and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor." The Court reasoned that by acquiring the selling corporation's manufacturing assets, and by holding itself out to potential customers as the manufacturer of the same line of that corporation's products, the purchaser benefitted substantially from the legitimate exploitation of the accumulated goodwill.

By adopting the "product-line exception, *Ramirez* expanded plaintiffs' recourse against successor corporations, but not to the exclusion of remedies against predecessor companies that remain extant and viable and therefore liable."[3] If the predecessor remains in business and continues to exist, it remains liable for its own conduct.

In the complaint, name both the predecessor and successor entities that may be responsible. The claim will likely come down to a motion for summary judgment. Remember, the "continuation of the product-line test…presents a mixed question of law and fact to a trial judge, and if the factual component of the issue is subject to a bona fide issue of material fact, the resolution of the question must await a trial."[4]

The Exact Product Line?

The court system has not laid out a specific definition for the same product line. Fortunately, there has been some guidance from *Bussell v. DeWalt Products Corp.*[5] The plaintiff suffered amputations while using a saw manufactured by DeWalt. Years earlier, Black & Decker purchased DeWalt's saw-manufacturing assets. The defendant argued that the saw in question was not the same product line because it was upgraded over the years. The Court found that technological advances and updates were not important, and that the successor must undertake essentially the same manufacturing operation. They noted that the "word 'essentially' does not mean 'identically.'"

Product-Line Exception in a Bankruptcy Sale

Unlike a statutory merger where "all of the liabilities of a former corporation attach to the surviving corporation,"[6] a bankruptcy is more complex. In *Lefever v. K.P. Hovnanian Enter., Inc.*,[7] an asset sale under a bankruptcy Section 363 order applied. There, an injured forklift operator brought an action under the product line exception against the manufacturer's successor that acquired the product line owner's assets at the bankruptcy sale. The purchasing corporation also benefited from claiming that the predecessor's founder was their founder, and their product quality and leadership role in the forklift industry never changed. Lastly, they claimed to have a "continuity of enterprise" with the same personnel and dealers.

The Court held for the plaintiff, reasoning that recourse is justified when a successor corporation enjoys the trade name, good will and continuation of an established manufacturing enterprise. The Court stated: "Ready access to counseling…enabled [the purchasing corporation] to structure the acquisition to avoid or accept successor liability. It should not seek to have it both ways—trading on the good will generated by a long-standing customer base, yet disavowing responsibility to those same customers." Overall, the "supremacy of federal bankruptcy law prevents the application of state common law to claims against a successor business enterprise that has acquired its assets through a bankruptcy sale only if the general bankruptcy court has 'dealt with' the claim."

Preventative Steps Buyers Can Take

Make sure the purchase agreement is clear, unambiguous and expressly excludes any assumption of the seller's debts or liabilities. An additional indemnity clause should be included regarding prior tortious conduct. Next, analyze the potential sources of liability. Investigate the seller's industry and identify any product that may give rise to post-sale liability. Once fully informed, it will be possible to discuss perhaps the most important step—insurance.

Buyers should maintain insurance that covers the pre-sale conduct and products of the selling company, and/or contract for the selling corporation to maintain their corporate existence post-closing, and retain an additional post-closing insurance policy. Furthermore, a selling corporation can fund and set aside a future occurrences account for any potential liability claims. These terms will have to be negotiated, with any discrepancy being resolved by adjusting the purchasing price. Paying more in advance may be more beneficial to lower future exposure.

Lastly, remember *Ramirez*. If purchasing substantially all of the manufacturing assets of a company and undertaking essentially the same manufacturing operation as the selling corporation, the buyer is strictly liable for injuries caused by defects in units of the same product line, even if the former company manufactured them. Take this into account when continuing the same (not exact) product line as the selling corporation. ■

Anthony J. Medori and Andrew J. Rossetti are plaintiff's personal injury attorneys at Rossetti & DeVoto, PC, in Cherry Hill.

Endnotes

1. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 340-341 (1981).
2. 136 Cal. Rptr. 574 (1977).
3. *Arevalo v. Saginaw Mach. Systems, Inc.*, 344 N.J. Super. 490, 504 (App. Div. 2001).
4. *Saez v. S & S Corrugated Paper Mach. Co.*, 302 N.J. Super. 545, 551 (App. Div. 1997).
5. 259 N.J. Super. 499 (App. Div. 1992).
6. *Arevalo*, *supra*.
7. 160 N.J. 307 (1999).

TCCWNA: An Unusual Statute with an Uncertain Future

by Zane Riester, Jean Patterson and Elizabeth Monahan

Before 2016, few New Jersey attorneys had ever encountered the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA). Although TCCWNA has been in existence for over 30 years, there were—until recently—only a handful of reported cases applying the statute, and class action complaints alleging violations of the statute were even more rare. That all changed in 2016, when over 40 class actions alleging TCCWNA violations were filed in the state. That flood of complaints has suddenly made TCCWNA a hot topic in the class action bar and beyond, and plaintiffs are increasingly pursuing TCCNWA claims. Yet, the scope and impact of TCCWNA remains largely unclear. A number of recent decisions have helped define the parameters of TCCWNA, and several pending cases promise additional clarity. Soon, it will become clear whether the TCCWNA claim is a one-hit-wonder or a cause of action that is here to stay.

For the unacquainted, TCCWNA is a unique statute that allows plaintiffs to bring claims without alleging any apparent injury or actual harm, or seemingly establishing reliance or proving any intent on the part of the defendant. Moreover, TCCWNA claims can be based on any alleged violation of any New Jersey law or regulation, no matter how insignificant or obscure. Although some district courts have effectively curtailed the statute's seemingly broad reach through the enforcement of standing principles, recent rulings by the Third Circuit suggest that may not be the right move.

Federal Court Strikes Down TCCWNA Claims on Standing

The first wave of TCCWNA opinions have come from the federal court, where a number of TCCWNA cases were dismissed based on standing pursuant to *Spokeo, Inc. v. Robins*.[1] For example, in *Rubin v. J. Crew Group*,[2] the District of New Jersey dismissed a TCCWNA claim premised on alleged violations arising from the defendant's website terms of use. Judge Freda Wolfson held that, in light of *Spokeo*, the plaintiff could not plead a TCCWNA claim without alleging some harm, and that the plaintiff had, at most, alleged only a procedural error that did not confer constitutional standing.

Likewise, in *Hite v. Lush Internet, Inc.*,[3] the plaintiff asserted TCCWNA claims based on a defendant's website terms of use, but admitted in her complaint (in an attempt to escape an arbitration agreement) that she did not read the terms. The defendants brought a motion to compel arbitration, which the District of New Jersey denied. However, Judge Jerome Simandle granted the defendants' motion to dismiss on the grounds that the plaintiff was not an "aggrieved consumer" under TCCWNA. Central to the court's holding was the fact that the plaintiff had never seen or read the terms of use and, therefore, could not allege a cognizable harm resulting from those terms. Further, and irrespective of whether the plaintiff accepted the terms, she failed to allege that her underlying rights were deprived or that she was harmed in any way by the allegedly violative language and, therefore, she did not have standing. Thus, the court concluded that a defendant's bare procedural violation without any resultant harm to a plaintiff cannot form the basis of a TCCWNA claim.

Judge Peter Sheridan similarly granted a defendant's motion to dismiss in *Russell v. Croscill Home, LLC*,[4] yet another putative class action alleging that the defendant's website terms and conditions violated TCCWNA. Judge Sheridan addressed two issues in reaching his decision: "[whether plaintiff had] standing to sue under *Spokeo v. Robins*; and whether plaintiff is an aggrieved consumer under TCCWNA." As to both, Judge Sheridan found in the negative.

Lastly, Judge William Martini granted a defendant's motion to dismiss in *Hecht v. The Hertz Corporation*.[5] Much like Judges Simandle and Sheridan, Judge Martini held that the plaintiff did not meet the standing requirements of *Spokeo*. In addition, the court rejected the plaintiff's argument that a defendant's failure to specify

in a consumer contract whether certain provisions are applicable in New Jersey could, in and of itself, confer standing, reasoning that the plaintiff's argument was "just another way of saying that a bare procedural violation is itself a concrete harm – a principle explicitly rejected by the Supreme Court."

The above decisions dismissing TCCWNA claims on the basis of standing signal a narrowing of TCCWNA's expansive reach. Conversely, two recent decisions from the Third Circuit would seem to suggest that a TCCWNA claim premised on a procedural violation could—if properly articulated—survive a *Spokeo* challenge. In *Horizon Healthcare Services Inc. Data Breach Litigation*,[6] involving a data breach of the plaintiffs' confidential information, the Third Circuit held that an injury, in fact, was adequately alleged, because the plaintiffs' personal information was disclosed to unauthorized individuals who were specifically targeting such information in the theft. Under the circumstances, the Third Circuit reasoned, the plaintiffs had done more than "allege a mere technical or procedural violation of [a statute]" but "instead the unauthorized dissemination of their own private information—the very injury that [the statute] is intended to prevent."

Thus, the *Horizon* decision stands for the proposition that when an individual sues under a statute and alleges "the very injury [the statute] is intended to prevent," and the individual's claimed injury "has a close relationship to a harm...traditionally...providing a basis for a lawsuit in English or American courts," a concrete injury has been pled.

Shortly after *Horizon* was decided, the Third Circuit handed down another *Spokeo*-related decision in *Susinno v. Work Out World Inc.*,[7] which involved a Telephone Consumer Protection Act (TCPA) claim arising from a *de minimus* loss of cellular telephone battery over a minute-long phone call. Relying on its ruling in *Horizon*, the Third Circuit held that the injuries the plaintiff alleged were concrete for two reasons: 1) the injury the plaintiff alleged was exactly what the TCPA prohibited, and 2) the injury, though intangible, met the "concreteness" requirement of *Spokeo*, as it was "closely relate[d] to a cause of action [intrusion upon seclusion] traditionally recognized in English and American courts." These Third Circuit rulings, while potentially significant, have yet to be applied by the District Court of New Jersey.

Third Circuit Seeks Clarification from New Jersey Supreme Court

The Third Circuit has also recently taken two appeals of TCCWNA claims based on furniture sales contracts allegedly in violation of the New Jersey Delivery of Household Furniture and Furnishing Regulations. In *Spade v. Select Comfort Corp.* and *Wenger v. Bob's Discount Furniture LLC* the District of New Jersey dismissed both cases because the plaintiffs did not qualify as "aggrieved' under the statute. The plaintiffs appealed. In reviewing the cases, the Third Circuit found a lack of statutory or decisional law on two key issues and, therefore, certified two questions to the Supreme Court of New Jersey, which are currently pending:

> (1) Is a consumer who receives a contract that does not comply with the Furniture Delivery Regulations, but has not suffered any adverse consequences from the noncompliance, an "aggrieved consumer" under the TCCWNA?
>
> (2) Does a violation of the Furniture Delivery Regulations alone constitute a violation of a clearly established right or responsibility of the seller under the TCCWNA and thus provide a basis for relief under the TCCWNA?

How the New Jersey Supreme Court rules on those two issues will undoubtedly have a significant impact on future TCCWNA claims. If the Court answers "no" to the question of whether a bare procedural violation confers standing, then TCCWNA's impact may be limited. If, on the other hand, the Court comes to the contrary conclusion, TCCWNA claims may very well be a source of consumer protection claims for years to come.

Are TCCWNA Claims Suitable for Class Treatment?

The New Jersey Supreme Court also has two other significant TCCWNA cases pending: *Dugan v. TGI Friday's* and *Bozzi v. OSI Restaurant Partners, LLC*. Those cases—both putative class actions—involve the alleged omission of beverage prices from menus, a purported violation of TCCWNA and the Consumer Fraud Act.

In *Dugan* the Appellate Division reversed a trial court's order certifying a class of plaintiffs. The Appellate Division held that the trial court failed to rigorously analyze the plaintiffs' claims, and that individual issues predominated over common issues. That decision was at odds with the Appellate Division's decision in *Bozzi*, where the court declined to consider an appeal of class certification based on a similar TCCWNA claim related to drink prices on a menu.

In light of the apparent discrepancy between the two decisions, the New Jersey Supreme Court certified the question: "Is class certification appropriate...where plaintiffs allege that defendant violated…the Truth-in-Consumer Contract, Warranty, and Notice Act (N.J.S.A. 56:12-14 to -18) by failing to include drink prices on its menu?" The Supreme Court's decision will provide additional clarity as to the force and effect of TCCWNA, and could operate to foreclose class treatment of TCCWNA claims in the future.

In sum, while the breadth of TCCWNA remains uncertain, particularly as it relates to crucial issues such as standing and class certification, these pending cases offer hope of some TCCWNA clarity. ■

Zane Riester, Jean Patterson and Elizabeth Monahan are attorneys at McCarter & English in Newark.

Endnotes

1. 136 S. Ct. 1540 (2016).
2. No. 3:16-cv-02167 (D.N.J. March 29, 2017).
3. No. 16-1533, (D.N.J. March 21, 2017)
4. Case No. 3:16-cv-01190-PGS-LHG (D.N.J. Oct. 11, 2016).
5. Case No. 2:16-cv-01485-WJM-MF (D.N.J. Oct. 20, 2016).
6. 846 F.3d 625, 633-35 (3d Cir. 2017).
7. __ F.3d __, No. 16-3277 (3d Cir. July 10, 2017).

No Repose for Building Product Manufacturers

by Mark D. Shifton

Defending a building product manufacturer in a products liability or complex construction defect action inevitably presents an interesting situation. Whether such an action takes the form of a small, direct action involving a single homeowner, or a large development consisting of a dozen separate buildings housing thousands of residents, claims of products liability alleged within the context of a construction defect action often involve their own unique theories of liability, defenses, and strategies. A significant issue that occasionally arises in construction defect actions is when the passage of time implicates the statute of repose—potentially barring the claim in its entirety, and providing the defendant with a complete defense to the action.

While New Jersey's statute of repose may provide design professionals and contractors with a complete defense against claims of their alleged negligence or breach of contract, manufacturers of building products used by those entities during the course of construction enjoy no such protection. This quirk in New Jersey law not only puts manufacturers of building products at a distinct strategic disadvantage, it ignores the public policy reasoning behind the purpose of the statute of repose, and ultimately operates to shift the exposure to a party that—from a technical perspective—is often least at fault for the alleged damages.

At the outset, it is important to understand the difference between a statute of limitations and statute of repose; while they are both creatures of the Legislature, they serve very different purposes, and operate completely independently. A statute of limitations defines the time period within which an action must be commenced. For example, an action seeking damages for tortious injury to real property must be commenced within six years from the date the claim accrues.[1] Generally, the limitations period begins running on the date the claim accrues—whether by the occurrence of an injury, the discovery of that injury, or some other mechanism—and once the claim accrues, the limitations period runs until it expires. In those cases where a plaintiff did not have actual knowledge of the injury within the limitations period, and could not reasonably discover the injury within that period, equitable principles may toll the running of the limitations period.[2] Accordingly, within any statute of limitations analysis, the date the claim accrued is of paramount importance.

The date the claim accrued, however, is irrelevant to a statute of repose analysis. Rather than defining the period within which an action must be filed to be considered timely, a statute of repose effectively defines when a claim 'dies'—statutes of repose essentially serve to 'cut off' liability past a certain point, and are almost never subject to equitable tolling. Once the period of repose has run (regardless of when, or even *if*, a plaintiff has knowledge of its injury), all potential claims are extinguished—from a metaphysical/legal perspective, it is like the claim simply never existed.[3]

Construction law attorneys are well aware of New Jersey's statute of repose, at N.J.S.A. 2A:14-1.1, which provides that:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction.

Simply put, New Jersey's statute of repose bars any action against a party for property damages or personal

injuries caused by the design or construction of an improvement to real property, which is commenced more than 10 years after the services provided by that party. New Jersey's statute of repose has been applied to bar claims against several different types of defendants routinely named in construction defect actions, such as developers, contractors, and design professionals. The legislative intent behind New Jersey's statute of repose is, as the Appellate Division has noted, to "provide a measure or repose and prevent 'liability for life' against contractors and architects."[4]

For those parties significantly involved in an entire construction project, such as the general contractors, or an architect of record responsible for contract administration, courts will generally use the date of 'substantial completion' of the construction project as the trigger for the 10-year period provided by the statute of repose.[5] For a subcontractor that may have only worked on a portion of the overall project, however, the 10-year statute of repose clock begins running upon the completion of that party's work on the project.[6] A construction project that is completed in phases may have separate trigger dates for the running of the statute of repose clock—the 10-year statute of repose period as to each phase may begin to run when that phase is completed.

Nearly all states have statutes of repose similar to N.J.S.A. 2A:14-1.1 (and 10 years is a relatively common time period for most states). In addition to protecting contractors and design professionals, a significant number of other state statutes of repose also apply to product manufacturers, precluding product liability or breach of implied warranty actions against the manufacturers of building components whose products are incorporated into construction projects, placing those manufacturers on equal footing with design professionals, developers, and contractors. New Jersey's statute of repose, however, provides no such protection to building product manufacturers, as by its very terms, N.J.S.A. 2A:14-1.1 applies only to defendants "performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property."

Further clarifying that N.J.S.A. 2A:14-1.1 provides no protections to the manufacturers of building products, in 2015, the New Jersey Supreme Court held the statute of repose inapplicable to claims of product defect—even claims relating to products used during the construction of real property (which itself would be subject to the statute of repose).[7] This decision, in taking the statute of repose out of play as to building product manufacturers, unfairly places the manufacturer on an unequal footing relative to other defendants. Unless the building product manufacturer was itself involved in the installation of its product, the manufacturer is not considered one whose 'professional services' fall under the ambit of the statute of repose; rather, claims against such entities (presumably brought under the New Jersey Products Liability Act, at N.J.S.A. 2A:58C-1 *et seq.*), may only rely on the six-year statute of limitations provided by N.J.S.A. 2A:14-1 (two years if the claim is for personal injuries). Stated differently, while the statute of repose may bar all claims of property damage and personal injury caused by the deficient design or construction of an improvement to real property, the manufacturer of a building component installed during the course of construction—an entity that may have never visited the site during construction, nor had the opportunity to observe its product being installed—may be called to account for deficiencies in its product more than 10 years after it was installed, while those responsible for the project's design and actual construction enjoy complete immunity by virtue of the statute of repose.

In contrast to New Jersey, many other states extend the protections of their statutes of repose to building product manufacturers whose products are ultimately incorporated into improvements to real property. This disparity places building products manufacturers at a distinct disadvantage—both when compared to their counterparts in other states as well as against other named defendants in the same case.

To illustrate this disadvantage, consider a hypothetical construction defect action where a property owner alleges damages caused by water leaking through the roof of its building. The property owner commences an action alleging the roofing system was improperly designed by the architect (and the architect's design consultants), improperly installed by the roofing subcontractor (and under insufficient supervision by the general contractor). After testing reveals premature degradation in the roofing system (which in and of itself creates a 'the chicken or the egg' scenario, as degradation of components of the roofing system could be a cause of the water infiltration, or could itself be caused by it), the property owner asserts claims against the manufacturer of the roofing system (or component of the system), alleging the roofing products were defectively manufactured (or designed). Under the right set of facts,

if the property owner's complaint is filed more than 10 years after the date of substantial completion, the statute of repose would bar the property owner's claims against the architect and its consultants, the general contractor, and the roofing subcontractor (regardless of whether any of those claims sounded in negligence or breach of contract). The property owner's claims against the product manufacturer, however, (subject to the statute of limitations) might survive, as the manufacturer would enjoy no benefit from the statute of repose. This creates a paradoxical result—even though all claims relating to the design or construction of the building are barred in their entirety by the statute of repose, the product manufacturer (a party which is almost always farther removed from the project than the design professionals and contractors), enjoys no such protection from liability, and the property owner is free to pursue its claims against the product manufacturer.

Furthermore, denying building product manufacturers the benefits of the statute of repose ignores significant case law advancing the idea that building products are not discrete 'components' that can be separated from the structure itself—they are integral parts of a unified whole. The District of New Jersey, in granting a brick manufacturer's motion to dismiss, and holding that a property owner could not maintain an action against the manufacturer under the New Jersey Products Liability Act, has stated:

> The question thus becomes what "product" the plaintiffs purchased for the purposes of resolving the instant motion. The plaintiffs purchased a completed apartment complex. They did not purchase a load of bricks from the defendant...the court must look not to the product manufactured by the defendant, but to the product purchased by the plaintiff.[8]

Ultimately, in any construction defect action, a property owner is alleging claims of property damage due to the deficient design and/or construction of an improvement to real property. Creating such improvements necessarily involves decisions made by design professionals (in selecting certain components and determining how they are to be installed), as well as the work of those contractors who are putting the decisions of design professionals' into practice during the course of construction. New Jersey's statute of repose provides absolute protection to those design professionals and contractors from any claims relating to their work. The legislative intent behind New Jersey's statute of repose is to protect defendants from 'limitless' liability; over time, memories fade, documents are discarded, and witnesses move on with their lives. As the inexorable passage of time causes a claim to go 'stale,' forcing a party to defend against such a claim is unfair. By extending the protections of the statute of repose to design professionals and contractors, yet not to the manufacturers of building products used by those design professionals and contractors, New Jersey law creates an artificial legal distinction where—from a practical perspective—none is warranted. As Justice Roberto Rivera-Soto has noted, however, legal decision-making often fails to comport with practical reality:

> The notion that an exterior finish that can only be removed by extensive demolition work is not "integrated" into the structure to which it is attached is so fanciful, so nonsensical, that it beggars the imagination. It is a conclusion that can germinate only in the minds of lawyers and can find root only in the rarified environment of this Court's decisions; it cannot, however, long survive in the atmosphere of the real world. EIFS is in many relevant respects no different than roofing shingles. Yet, applying the majority's reasoning, the roof of a home is not integrated into that home.[9]

Mark D. Shifton is a senior partner in the Princeton and New York City offices of Seiger Gfeller Laurie LLP.

Endnotes

1. N.J.S.A. 2A:14-1.
2. *See Lopez v. Sawyer*, 62 N.J. 267 (1973).
3. *See Cumberland County Bd. of Chosen Freeholders v. Vitetta Grp.*, 431 N.J. Super. 596 (App. Div. 2013), *cert. denied* 216 N.J. 430 (2013) (noting that a claim barred by the statute of repose "forms no basis for recovery," and that "[t]he injured party literally has no cause of action").
4. *Hein v. GM Const. Co.*, 330 N.J. Super. 282, 286 (App. Div. 2000).
5. *See Town of Kearny v. Brandt*, 214 N.J. 76 (2013).
6. *Daidone v. Buterick Bulkheading*, 191 N.J. 557 (2007).
7. *See State v. Perini*, 221 N.J. 412 (2015).
8. *Easling v. Glen-Gery Corp.*, 804 F. Supp. 585, 590 (D.N.J. 1992).
9. *Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 308-09 (2010) (J. Rivera-Soto, dissenting).