Recent Developments In Product Liability Litigation

By JOHN P. LAVELLE, JR., NEAL WALTERS AND ANNE G. SWEENY[1]

Members of the Pennsylvania Bar

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INTRODUCTION

The past year brought some significant new developments in product liability litigation. A new theory of liability adopted by a trial court last year could signal a major change in the way litigants and courts approach proof of causation. Another decision recognized that a jury must be allowed to consider evidence of product misuse and lack of prior complaints, even though the jury cannot conduct its own risk/utility analysis. Consumer fraud claims continue to grow as an alternative to product liability claims.

This article discusses two recent product liability decisions by Pennsylvania federal courts, and provides guidance on defending allegations of consumer fraud in a product performance case under the Uniform Commercial Code. In the first case discussed, *Moyer* v. *United Dominion Industries, Inc.*,[2] the U.S. Court of Appeals for the Third Circuit delineated the standards for exclusion of evidence concerning product misuse, product maintenance, and the lack of prior complaints in strict product liability litigation. In so doing, the Court recognized that the exclusion of such evidence is not required by Pennsylvania's unique approach to strict liability as set forth in *Azzarello* v. *Black Bros. Co.*[3] The Court also shed light on its previous decision in *Forrest* v. *Beloit Corp.*, a case that initially set the standard for the admissibility of "no prior accidents" evidence.[4]

In the second case discussed, *Drayton* v. *Pilgrim's Pride Corp.*,[5] the United States District Court for the Eastern District of Pennsylvania adopted the "alternative liability doctrine," a new and potentially significant theory of liability against product liability defendants. Under the alternative liability doctrine and holding in *Drayton*, a plaintiff may be able to pursue his or her claim against multiple defendants despite plaintiff's inability to prove which defendant actually caused the injury. A careful reading of the decision, however, shows that the alternative liability doctrine is a special exception to general causation requirements that can apply only under very

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[1] John P. Lavelle, Jr. (A.B. Princeton University (1985); J.D. Harvard Law School (1988)) is a partner in the Philadelphia office of Ballard Spahr Andrews & Ingersoll, LLP. He is partner-in-charge of the firm's Product Liability and Mass Tort Practice Group. Mr. Lavelle is licensed to practice law in Pennsylvania and New Jersey. Neal Walters (B.A. Rutgers College (1990); J.D. Rutgers Law School (1993)) is of counsel in Ballard Spahr's Litigation Department. Mr. Walters practices law in the firm's New Jersey office and he is also a member of the firm's Product Liability and Mass Tort Group. Mr. Walters is licensed to practice law in Pennsylvania and New Jersey. Anne G. Sweeny (B.A. Georgetown University (1993); J.D. Catholic University of America, Columbus School of Law (1999)) is a staff attorney in the Litigation Department of Ballard Spahr's Philadelphia office and is also a member of the firm's Product Liability and Mass Tort Group. Ms. Sweeny is licensed to practice law in Pennsylvania, the District of Columbia, and New York.

[2] ___ F.3d ___, No. 04-2104, 2007 WL 45861 (3d Cir. Jan. 9, 2007).

[3] 480 Pa. 547, 391 A.2d 1020 (1978).

[4] 424 F.3d 344 (3d Cir. 2005).

[5] Nos. 03-2334, 03-3500, 04-3577, 04-3974, 2006 WL 1193214 (E.D. Pa. May 4, 2006).

limited circumstances, such as those presented to the Court in *Drayton*.

Finally, the last topic addressed discusses the use by plaintiffs of consumer fraud allegations in product performance claims under the Uniform Commercial Code. It cautions defendants and their attorneys to carefully examine allegations of consumer fraud and decide whether defending such claims through trial, as opposed to attempting to settle them or filing dispositive motions in response to them (motions which often fail), may be in the defendant's best interest. Using a recent example of a case in which the authors' firm successfully defended allegations of consumer fraud, the authors describe the benefits of defending such claims through trial.

THIRD CIRCUIT ADDRESSES ADMISSIBILITY OF MISUSE, LACK OF PRIOR CLAIMS EVIDENCE

The United States Court of Appeals for the Third Circuit greeted 2007 with an important decision delineating the standards for exclusion of evidence in strict product liability litigation. The Court's decision in *Moyer* v. *United Dominion Industries, Inc.*[6] addressed the admissibility of evidence of product misuse and inadequate maintenance, as well as evidence of a lack of prior reports of complaints similar to those at issue in the litigation. In finding reversible error in the District Court's exclusion of this evidence, the Court of Appeals recognized the importance of this evidence even in a design defect product liability claim. Of particular significance, the Court recognized that the exclusion of such evidence from the jury is not required by the unique Pennsylvania approach to strict liability established in *Azzarello* v. *Black Bros. Co.*[7]

Moyer concerned product liability claims by factory workers who alleged that they sustained permanent hand injuries after extended use of a swager, a machine used to form metal. Plaintiffs used the swager over several years to reduce the diameter of wire coils. Plaintiffs asserted design defect claims against the manufacturer of the swager, claiming that vibrations generated by the swager caused them to develop pain, numbness and motor difficulties in their arms and hands.

At trial, the District Court prohibited the manufacturer defendant from introducing two categories of evidence: (1) evidence of alleged misuse and inadequate maintenance of the swager by plaintiffs and their employer; and (2) evidence of the lack of prior claims against the manufacturer for vibration-related hand injuries. The plaintiffs prevailed at trial, and the manufacturer moved for judgment notwithstanding the verdict. The Court denied the manufacturer's post-trial motion, explaining that the exclusion of evidence was based, at least in part, on the Court's interpretation of the Pennsylvania Supreme Court's decision in *Azzarello*. On appeal, the manufacturer argued that exclusion of the evidence was not required by *Azzarello*.[8]

The Court of Appeals rejected the trial court's view that *Azzarello* compelled exclusion of the evidence at trial. The Court reasoned that:

> Evidence should not be excluded from the jury simply because it was relevant to the judge's threshold risk-utility analysis. Such a relevance determination must be made on its own merits, even though the jury's consideration of this evidence provides the defendant an opportunity to contest certain facts relevent to the judge's analysis.[9]

The Court then proceeded to evaluate the admissibility of the evidence on its own merits.

Evidence of Misuse and Inadequate Maintenance

The Court of Appeals found reversible error in the District Court's exclusion of evidence that plaintiffs misused the swager and their employer inadequately maintained it, as well as evidence that this conduct, rather than the

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[6] ___ F. 3d ___, No. 04-2104, 2007 WL 45861 (3d Cir. Jan. 9, 2007).

[7] 480 Pa. 547, 391 A.2d 1020 (1978).

[8] In *Azzarello*, the Pennsylvania Supreme Court held that the question of whether a product is "unreasonably dangerous" and therefore subject to strict liability is a question of law to be determined as a threshold matter by the trial judge, not by the jury. Under *Azzarello*, the trial judge must engage in a risk-utility analysis weighing a product's harms against its social utility viewing the evidence in the light most favorable to the plaintiff. *Moyer*, 2007 WL 45861, at *3. While "most other jurisdictions give the jury a central role in making the strict liability determination and regard juries as capable of balancing risk-utility factors," that is not the case in Pennsylvania. Under *Azzarello*, once the judge has concluded that the product is "unreasonably dangerous" the jury determines only whether the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use, and if so, whether that defect caused injury to the plaintiff. *Id.* at *3-*4.

[9] *Moyer*, 2007 WL 45861, at *5.

design defect alleged by plaintiffs, caused their injuries. The evidence included deposition testimony and documents pointing to misuse, overuse and inadequate maintenance of the swager and suggesting that the misuse and inadequate maintenance could cause the swager to vibrate. The Court of Appeals recognized that "evidence of misuse is generally admissible to defeat causation in a strict liability design defect case."[10] The District Court therefore committed reversible error in excluding the evidence which "should have been admitted if it had any tendency to show that plaintiffs' injuries were caused solely by misuse and inadequate maintenance of the swager, rather than by a design defect."[11]

Evidence of Existence of Prior Claims

The Court likewise found reversible error in the District Court's exclusion of evidence that the manufacturer of the swager had not received previous claims of injuries similar to those claimed by the plaintiffs. The Court applied the same analysis previously announced in *Forrest* v. *Beloit Corp.*,[12] but reached a different conclusion than the *Forrest* court. The contrast between *Forrest* and *Moyer* illustrates the showing required in order to introduce evidence concerning prior claims or the lack thereof.

Forrest v. Beloit Corp.

In *Forrest*, the Court of Appeals had overturned a jury verdict entered in favor of a defendant manufacturer on the ground that the District Court admitted evidence at trial regarding the alleged absence of any prior accidents involving the defendant's product. The *Forrest* Court held that, in the absence of an adequate foundation consisting of evidence that the defendant would have known of prior accidents involving substantially identical products used in similar circumstances, the probative value of no prior accidents evidence is substantially outweighed by its prejudicial effect under Federal Rule of Civil Procedure 403.[13]

After finding that federal law, rather than state law, governed the admissibility of the disputed evidence,[14] the Third Circuit held that the district court should have excluded the testimony adduced by Beloit.[15] Although the Court observed that evidence of no prior accidents will usually meet the relevance requirement of Federal Rule of Evidence 402, the Court found that, under the balancing test set forth in Rule 403, such evidence "if offered without a proper foundation, can create the risk of unfair prejudice that may substantially outweigh whatever probative value the evidence otherwise has."[16]

Citing the Arizona Supreme Court's decision in *Jones* v. *Pak-Mor Mfg. Co.*,[17] the Court noted four ways in which such evidence, in the absence of a proper foundation, would result in unfair prejudice. The Court first pointed out that "the mere fact that a witness does not know of any prior accidents does not prove that no such accidents occurred."[18] Moreover, the Court found that where the defendant has failed to keep records regarding the safety history of its product, the plaintiff would be unable to rebut evidence concerning the absence

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[10] *Id.* at *6.

[11] *Id.*

[12] 424 F.3d 344, 347 (3d Cir. 2005).

[13] *Forrest* arose from an accident at the Jefferson-Smurfit paper mill where the plaintiff, Paul Forrest, was employed. In an effort to clear a paper jam in a line of machines designed to make rolls of paper, Forrest's arm became stuck in a large multi-ton roller (known as the "Gloss Calendar") manufactured by defendant Beloit Corporation. Forrest asserted negligence and strict liability claims against Beloit under Pennsylvania law. *Forrest*, 424 F.3d at 346-347.

At trial, Beloit elicited testimony, through its cross-examination of two long-time former employees of Jefferson-Smurfit, concerning the alleged absence of any prior accidents involving the specific Gloss Calendar machine at issue. Both employees testified that, throughout their years working at the company, they were unaware of any prior similar accidents. Such testimony was admitted over Forrest's repeated objections that the evidence was "unfairly prejudicial" because Beloit had failed to first lay a proper foundation. Forrest specifically pointed out that Beloit's former chief engineer had admitted in his deposition that the company kept no records regarding safety complaints or past accidents involving Beloit's Gloss Calendar machines. The District Court, however, allowed the testimony and the jury returned a verdict in favor of Beloit. *Id.* at 353-354.

[14] Judge Samuel J. Alito, Jr. concurred in the judgment, noting that while he agreed with the majority that the admission of no prior accidents evidence should be governed by the Federal Rules of Evidence, the Court's prior decision in *Greiner* v. *Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85 (3d Cir. 1976) "point[ed] toward the application of state law." *Forrest*, 424 F.3d at 362. Finding no conflict between federal and state law, however, Judge Alito agreed with the majority's holding that Beloit failed to establish an adequate foundation. *Id.*

[15] *Id.* at 354-355, 358.

[16] *Id.* at 356.

[17] 700 P.2d 819 (1985).

[18] *Id.* at 357.

of prior accidents.[19] The Court further found that "the absence of prior accidents may simply mean that the plaintiff was the first to be injured. . . ."[20] Finally, the Court observed that generalized testimony of no prior accidents does not reveal the number of "near-accidents" or "fortuitous escapes" that may have occurred.[21] According to the Court, evidence of "near-accidents" is particularly important in cases arising under Pennsylvania law because such evidence would be highly probative of the existence of a defect, which is the central inquiry under Pennsylvania product liability law.[22]

To balance the probative value against the prejudicial effect of evidence concerning no prior accidents, the *Forrest* Court adopted the following three-part foundation requirement that a defendant must meet before such evidence may be admitted:

- *[S]imilarity* – the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances;
- *[B]readth* – the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use;
- *[A]wareness* – the defendant must show that it would likely have known of prior accidents had they occurred.[23]

The *Forrest* Court found that Beloit simply had not met these foundational requirements and, thus, the testimony was of so little probative value that it should have been excluded in light of its potential for unfair prejudice under Federal Rule of Evidence 403. Indeed, the Court observed that while the record showed that Beloit had sold its Gloss Calendar to many customers over the years, the company kept no safety records regarding the product.[24] Moreover, the two former employees who testified that no prior accidents had occurred testified with respect to *only one* of Beloit's Gloss Calendar machines. These witnesses had no knowledge regarding the safety record of Beloit's Gloss Calendar machines in general. The Court also noted that their testimony could not account for any "near accidents" or "fortuitous escapes" that may have occurred with respect to Beloit's line of Gloss Calendar machines.[25] The Court found that Beloit's evidence was at best "anecdotal" and was of no probative value on the issue of the overall safety of the Gloss Calendar design. The Third Circuit noted that "we are not dealing with disputed testimony predicated upon a solid foundation containing isolated gaps; we are dealing instead with a complete absence of records that Beloit has attempted to remedy using a small fragment of anecdotal testimony."[26] Not only did the Court find that the proffered testimony was unfairly prejudicial to the plaintiff, but the evidence also had the tendency to "confuse" and mislead the jury, causing "the jury to generalize from the limited experience surrounding one Gloss Calendar to a broader conclusion concerning the overall safety of Beloit's Gloss Calendar design."[27]

Forrest makes clear that a product liability defendant who intends to introduce evidence concerning the absence of prior accidents with respect to its product must first lay the proper foundation. That foundation cannot be limited to generalized testimony regarding the particular product at issue. Rather, a defendant must present evidence of the safety record of other substantially identical products used in similar circumstances, and such evidence must be presented by a witness with knowledge of the product's safety record. While the Court acknowledged that evidence of the non-occurrence of prior accidents is indeed relevant, anecdotal or speculative evidence will be excluded as having little probative value and a high danger of unfair prejudice under Federal Rule of Evidence 403.

Application of Forrest Analysis in Moyer

In *Moyer*, the Court of Appeals applied the *Forrest* analysis to determine whether evidence of the lack of past claims should be admitted. The Court of Appeals recognized, as it had previously in *Forrest*, that in a diversity case, the admissibility of such evidence was governed by federal law, since the central question is whether under Federal Rule of Evidence 403 the probative value of the evidence is substantially outweighed by its prejudicial effect or its tendency to confuse or mislead the jury.[28] In contrast to the anecdotal evidence offered in *Forrest*, the defendant in *Moyer* sought to introduce testimony of a para-

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 358 (emphasis in original).
[24] *Id.* at 359.
[25] *Id.* at 360.
[26] *Id.* at 361.
[27] *Id.* at 360.
[28] *Moyer*, 2007 WL 45861, at *9.

legal employed by the manufacturer that for many years the manufacturer had maintained "a comprehensive computerized database of claims and lawsuits filed against" the manufacturer.[29] The paralegal testified that she performed a search of the database and found no evidence of any claim or lawsuit prior to this litigation based on an allegation of upper-extremity injury due to vibration caused by a swager or by any other product manufactured by the defendant. In addition, a former employee of the manufacturer testified that the manufacturer had produced and sold thousands of similar swagers since 1950, nearly all employing the same design attacked by plaintiffs.[30] The Court of Appeals concluded that this evidence "was sufficient to satisfy the similarity, breadth, and awareness requirements described in *Forrest*."[31]

Moyer is an important case for its recognition that the unique Pennsylvania approach to strict liability under *Azzarello* does not compel the exclusion of evidence relevant to the court's risk/utility analysis which is also relevant to causation. It also shows that the *Forrest* test for admissibility of evidence of lack of prior claims can be satisfied by evidence of a comprehensive and reliable system for collecting and recording such claims. While not binding on Pennsylvania state courts, the Court of Appeals' decision in *Moyer* is certain to be cited and may prove influential on how strict product liability claims are tried in the Pennsylvania state courts in the future.

ALTERNATIVE LIABILITY DOCTRINE APPLIED TO PENNSYLVANIA PRODUCT LIABILITY DEFENDANTS: *DRAYTON* v. *PILGRIM'S PRIDE CORP.*

A Pennsylvania federal district court recently recognized a new and potentially significant theory of liability against product liability defendants. In adopting the "alternative liability doctrine" to permit a plaintiff to prevail even when unable to prove the defendants manufactured the product at issue, the U.S. District Court for the Eastern District of Pennsylvania shifted the burden to each defendant to disprove that the plaintiff was exposed to its product. A careful reading of the decision shows, however, that the alternative liability doctrine is a special exception to general causation requirements that, under the Court's reasoning, can apply only under very limited circumstances.

Following an outbreak of the deadly foodborne illness Listeriosis during the summer and fall of 2002 in the Northeastern United States, plaintiffs in *Drayton* v. *Pilgrim's Pride Corp.*[32] sued two turkey processing and distribution companies, Pilgrim's Pride Corporation ("PPC") and Jack Lambersky Poultry Company, Inc. ("JLF"), alleging that these companies were liable for several deaths and injuries resulting from the outbreak. In a significant victory for plaintiffs' attorneys, U.S. District Court Judge Timothy J. Savage of the Eastern District of Pennsylvania denied defendants' motions for summary judgment which had been based on the plaintiffs' inability to satisfy their burden of proving product identification. Judge Savage held that, under the alternative liability doctrine, plaintiffs could pursue their claims against both companies despite the fact that they could not prove which company actually caused their injuries. Although the Court recognized that Pennsylvania appellate courts have yet to address whether the alternative liability doctrine applies to product liability actions, he predicted that Pennsylvania courts would extend the doctrine to such cases if confronted with the question.

Judge Savage found the application of the alternative liability doctrine—which operates as an exception to the general causation rule by shifting the burden to defendants to prove their lack of responsibility for an injury—particularly appropriate for a case like *Drayton*. The Court found that it was not fatal to plaintiffs' case that they were unable to identify which of the two defendants' products caused their injuries because they "proffered sufficient evidence from which a reasonable jury could conclude that either or both of the defendants' products caused the deaths and injuries."[33]

The Court's analysis focused on the special, perhaps unique, circumstances justifying application of the doctrine. After conducting an investigation into the source of the outbreak, the Centers for Disease Control and Prevention ("CDC") concluded that the specific strain of listeria linked to the outbreak was found in JLF's ready-to-eat ("RTE") turkey products, as well as in the environment of PPC's Franconia plant.[34] The CDC's investigation "excluded any suggestion of downstream sources of the contamination, that is, contamination of the RTE turkey after it left the processing

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[29] *Id.* at *10.
[30] *Id.*
[31] *Id.*
[32] Nos. 03-2334, 03-3500, 04-3577, 04-3974, 2006 WL 1193214 (E.D. Pa. May 4, 2006).
[33] *Id.* at *1.
[34] *Id.*

plants."[35] The CDC further found that no samples from plants other than those operated by defendants JLF and PPC tested positive for the outbreak strain.[36] Moreover, after JLF and PPC collectively recalled millions of pounds of turkey products, "there were no other listeriosis outbreaks instigated by the same strain that caused the plaintiffs' injuries."[37]

Judge Savage found that not only had plaintiffs proffered sufficient evidence to show that the outbreak was traceable to JLF and PPC, but the record in the case permitted a finding that each plaintiff or his or her decedent had consumed turkey products manufactured by both defendants.[38] In short, the Court found that:

> There is ample evidence, if accepted by the jury, that would establish that each plaintiff had the Lm strain of Listeriosis, the defendants produced products containing the same strain that were consumed by the plaintiffs, the plaintiffs' injuries were caused by the strain of Listeriosis, and no other manufacturer's turkey products available to plaintiffs were tainted."[39]

In denying defendants' motions for summary judgment, which sought dismissal of the suits on the ground that plaintiffs could not identify which specific turkey product caused their illnesses, Judge Savage noted that "Pennsylvania has rejected an absolute rule that precludes a plaintiff from presenting evidence tending to prove the identity of the manufacturer of the injury-causing product when the product is unavailable."[40] Rather, when the product has been lost or destroyed prior to suit through no one's fault, the plaintiff may prove product identification by circumstantial evidence. The Court found that plaintiffs had met their burden of showing, by circumstantial evidence, that each of the plaintiffs was exposed to the Lm outbreak strain through one or both of the defendants' products and, thus, it was "for the jury to determine whether the plaintiff[s] actually ate the tainted product made by either or both of the defendants. . . ."[41]

Plaintiffs argued, and Judge Savage agreed, that because plaintiffs presented sufficient evidence from which a jury could conclude that one or both of the defendants' products caused their injuries, the alternative liability doctrine relieved the plaintiffs from having to show precisely which of the two defendants' products actually caused their injuries. Indeed, the Court observed that plaintiffs simply could not prove, and medical science may never be able to show to a reasonable degree of certainty, which of the defendants' products did, in fact, cause their injuries.[42]

Under the alternative liability doctrine, embodied in Section 433B(3) of the Restatement (Second) of Torts, the burden shifts to the defendants to show which of them actually supplied the tainted product and caused the harm.[43] If defendants are unable to identify which one of them actually caused the harm, both can be found liable as joint tortfeasors.[44] The Court noted that the doctrine requires that each defendant's tortious conduct be "substantially simultaneous and identical, and all potential defendants [be] joined."[45] Judge Savage explained that "[s]ubstantiality of conduct does not mean concerted conduct. The defendants need only have acted in substantially the same manner and need not have been aware

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[35] *Id.* at *2.

[36] *Id.*

[37] *Id.*

[38] *Id.* at *3-*4. Relatives of the deceased or injured plaintiffs each testified that the plaintiffs had purchased specific brands of RTE turkey products made by the defendants, or had bought RTE turkey products from grocery stores that sold defendants' turkey products. *Id.*

[39] *Id.* at *8. Judge Savage found that plaintiffs' failure to state that they (or their decedents) ever actually ate the turkey products manufactured by the defendants was not fatal to their case, noting that "it is reasonable to assume that if tainted products were purchased and the person became ill from a disease traced to that product, the person actually consumed the product." *Id.* at *5.

[40] *Id.* at *5.

[41] *Id.* Relying on the Third Circuit's decision in *Robertson* v. *Allied Signal, Inc.*, 915 F.2d 360, 367, 368 n.4 (3d Cir. 1990), defendant JLF argued that Pennsylvania law required plaintiffs to show that not only were they exposed to JLF's products, but that they ate JLF's products on a "regular basis" in the months before they became sick. The Court rejected this argument, noting that *Robertson* involved an alleged injury resulting from exposure to asbestos and there is typically a long period before exposure to asbestos results in illness. Judge Savage observed that "[n]othing in *Robertson* suggests a requirement of lengthy prior exposure to a company's product where the alleged injury results from a toxin that causes sudden and acute symptoms." *Drayton*, 2006 WL 1193214, at *5, fn. 66.

[42] *Id.* at *6.

[43] Section 433(B)(3) of the Restatement (Second) of Torts states as follows:

> Where the conduct of two or more actors is tortuous, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

[44] *Drayton*, 2006 WL 1193214, at *6.

[45] *Id.* at *7.

that others were also acting at about the same time."[46]

Judge Savage rejected defendants' argument that because they each operated independent production facilities, plaintiffs could not show that both JLF and PPC acted tortiously in a simultaneous and identical manner. The Court found that plaintiffs need not show that *both* defendants' conduct actually caused the harm. Such a requirement, according to Judge Savage, would subvert the purpose of the rule.[47] Because plaintiffs were able to demonstrate that *both* defendants distributed, at about the same time, RTE turkey products containing the same listeria strain that infected plaintiffs, they had met the requirements of Section 433B(3) of the Restatement.[48]

The Court further rejected defendants' contention that plaintiffs failed to join all possible defendants and, thus, were foreclosed from relying on the alternative liability doctrine. Defendants found support for their argument in the CDC report which stated that two other outbreak victims, who had no connection to either defendant, were possibly infected from a third source. In rejecting defendants' contention, the Court found that the "'all inclusion" requirement of joining all defendants applies to all potentially liable defendants, not all possible defendants."[49] The fact that other processors may have produced tainted product was immaterial because "only processors to whose products the plaintiffs were potentially exposed need be named as defendants."[50]

Drayton provides Pennsylvania product liability plaintiffs with a new potential legal theory on which to rely to pursue their claims against defendant manufacturers. No longer relegated to cases of "hurled projectiles" as Judge Savage observed, defendants can expect to confront the alternative liability doctrine with increasing frequency in future litigation. To defend such cases successfully, defendants will have to distinguish the very unusual circumstances presented in *Drayton* as the exception, not the rule.

DEFENDING THE CONSUMER FRAUD CASE THROUGH TRIAL

Consumer fraud allegations are often abused by plaintiffs in product performance litigation. Plaintiffs pursuing product performance claims under the Uniform Commercial Code and related statutes often overreach by pursuing an additional claim for consumer fraud in connection with the sale and servicing of the product. Instead of a simple claim for breach of warranty or breach of contract, plaintiffs are often enticed by the fee-shifting, catch-all provisions of many state consumer fraud statutes.[51] As a result, they frequently tack-on the additional arguments that the seller or manufacturer of the product actually knew, in advance of the product sale, about the defects or other problems that ultimately caused plaintiff's performance problems. The factual allegation is often that the seller either failed to disclose the defect as a material term of the sale, or worse, that it misrepresented the product's performance capabilities in its advertising.

Product sellers and manufacturers should closely examine whether defending such reckless claims through trial may serve to protect the company's interest. Trying claims that may have a tendency to affect the company's future sales and advertising involves risk. But identifying the right case to challenge these assertions may have a chilling effect upon plaintiffs' consumer lawyers threatening the company in future litigation.

Consumer fraud contentions that are based upon a product's design or performance capabilities carry a risk of creating dangerous precedent that may affect the company's design, sales and advertising practices with respect to the entire product line. In particular, the contention that a product does not do what the company says that it can do in its product literature is a claim that requires attention beyond the four corners of a single, individual plaintiff's lawsuit. Aside from cases involving class certification, defending the merits of such cases may typically involve at least two distinct components: (1) defending the product's design and capabilities; and (2) defending the advertising or other literature describing the product and its effect upon consumers. Thus, from a plaintiff's perspective, there are cases in which the consumer may elect to focus on the product's allegedly deficient performance, and those in which the plaintiff may

[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

[51] "Consumer fraud" has become a bit of a misnomer. Although originally predicated upon common law theories of affirmative misrepresentation and concealment arising out of product sales, the consumer fraud statutes that exist in nearly every state have grown to regulate a much broader range of unfair trade practices, including discriminatory service practices, and conduct that may generally be considered misleading or unfair.

include consumer fraud claims that dramatically increase the scope of the case. There would seem to be a great temptation to overreach given the theories available, and the potential availability of attorneys' fees.

Overreaching is particularly prevalent in complaints filed by purchasers of motor vehicles. Plaintiffs' consumer lawyers, some of whom engage in the serial filing of hundreds of individual lawsuits each year, frequently leverage garden-variety warranty and lemon law cases with more aggressive statutory fraud claims. And indeed, the leveraging often works, when the manufacturer pays the plaintiff an inflated settlement amount for the underlying economic loss, in exchange for plaintiff foregoing the threat of treble damages.

Sitting idle while consumer fraud allegations believed to be "throw-in" claims remain in a case is a bad idea. Discovery in the case related to plaintiff's other legal theories may yield information that encourages a zealous pursuit of the fraud claims. Consumer fraud allegations that criticize a company's product literature and media advertising should not be taken lightly. An adverse ruling on these issues may require the manufacturer to recall its product literature, issue corrective advertising, and defend piggy-back litigation against other plaintiffs' lawyers thanking you for the free meal.

In cases in which plaintiffs actually pursue consumer fraud theories from the outset of the case in an aggressive manner, it is not unusual for manufacturers or sellers, in recognition of the potential rippling effect, to settle these claims without a full consideration of the merits. This sets a bad precedent, however, because for manufacturers who sell tens of thousands of products, potentially hundreds of such cases await. It also sends the wrong message internally to employees, who may develop a poor morale and outlook about the quality of the product, and the company's service and advertising practices.

Defendants frequently file dispositive motions in response to consumer fraud claims. This is not always a fruitful exercise because courts often find predicate factual issues that preclude summary judgment. More importantly, losing such a motion can expose the details of the manufacturer's defense position and provide a road map for plaintiff to fortify the weaknesses in his or her case for trial.

Sellers and manufacturers should consider another option: selecting the right consumer fraud case to aggressively defend through trial. This may enable a manufacturer to discredit plaintiff's entire case, while at the same time achieving a chilling effect on future litigation.[52] Plaintiffs who overreach by claiming that a seller lied to them about a product's performance, without adequate factual support, risk losing the more basic contention that the product did not perform. As much as consumer fraud allegations may raise corporate concerns internally, an important reality is that juries do not look favorably upon people who are perceived as greedy or who overreach. For this reason, plaintiffs claiming that a company has committed "fraud" must be able to back it up at trial with evidence that really matters. Conversely, manufacturers and sellers concerned with technical statutory violations, which do not involve intentional or bad faith conduct, should consider whether a jury will recognize that a plaintiff is manipulating the system.

The authors recently used this strategy against a plaintiff motor vehicle owner who aggressively pursued questionable consumer fraud allegations in connection with the purchase of a very expensive specialty vehicle. By doing so, the manufacturer secured a defense verdict as to all claims, in a case where plaintiff otherwise made arguable non-performance claims under the Code. The baseline for compensatory damages, not including the treble damages at issue under the New Jersey Consumer Fraud Act (the "CFA"), was the $125,000 contract price of the vehicle. Plaintiff experienced 13 different repairs to the vehicle's brakes during a two-year period, for which he sought revocation of acceptance of the sale in violation of New Jersey statutes. But plaintiff went further. He also insisted upon aggressively pursuing through trial a claim that the manufacturer had committed consumer fraud when its authorized dealer violated a predicate statute, the Federal Odometer Law. Plaintiff claimed that the dealership, during the course of performing two different odometer replacements, mistakenly failed to place the prescribed mileage label for one of

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[52] The economics and opportunity cost to plaintiffs' lawyers are also a factor to be considered in this calculus. They predominantly work in small firms with business models dependent upon the frequent turn-over of settlements yielding payment of the firm's attorneys' fees. Such firms are reluctant to occupy their lawyers with full-blown trials involving marginal returns when, instead, the firm may devote its time to more fruitful cases during that same time period that would yield settlement fees. A plaintiffs' lawyer will also remember the time and effort that was lost to pursue such an unsuccessful action the next time he or she considers filing an action against this manufacturer.

the replacements on the door jamb of the vehicle. As a second basis for consumer fraud, plaintiff alleged that the information set forth in the manufacturer's sales brochure regarding the vehicle's general durability and reliability were false and misleading.

At trial, defendant's counsel discredited the testimony of plaintiff and his expert witness about the mileage discrepancy and the sales brochure representations to such a degree that the jury presumably did not believe *any* of plaintiff's proofs, and issued a full defense verdict. Although the odometer-based consumer fraud claim could have been dismissed before trial, a conscious decision to keep this questionable claim in the case through the trial helped win an otherwise challenging case.

Plaintiff's affirmative misrepresentation claims about the sales brochure similarly were discredited by confronting the plaintiff during cross-examination about the lack of specificity for this claim. General statements of opinion about the quality of a product, without specific factual information about the product's characteristics or performance are generally considered "puffery," which should not be considered in determining whether product literature or advertising constitutes consumer fraud.[53]

As this example demonstrates, manufacturers and sellers would be well-served to consider selecting an appropriate case to defend through trial. Although the risks are real, the potential benefits, both in the specific case and in stemming cases that might follow, prove well worth the effort.

CONCLUSION

Looking back at recent years, particularly this past year, it is clear that product liability law in Pennsylvania remains anything but stagnant. Although the decisions in *Moyer* and *Drayton* have yet to be adopted by Pennsylvania state courts, at a minimum they will be part of the dialogue on how product liability claims are tried in Pennsylvania state courts in the future. Moreover, with increasing use of consumer fraud claims against defendants in product liability cases, it may behoove defense counsel and their clients to defend such claims through trial in an effort to deter the use of them in the future.

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[53] Plaintiff claimed that the brakes had failed on numerous occasions. If he had not overreached with a consumer fraud claim, and focused simply on the product performance concerns and their effects, he may have increased his chances of success. However, when the jury learned that the vehicle's sales brochure did not make any specific representations about the brakes or the vehicle's stopping abilities, it was again prompted to question plaintiff's motives.