

Same Product, Different Liability Law in Pennsylvania and New Jersey



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In New Jersey, the Products Liability Act is the sole basis of relief for harm caused by defective products. The Act has not, however, codified all issues of product liability law.

The applicable law in Pennsylvania and New Jersey governing a cause of action for the "failure to warn" of the dangers of a pharmaceutical product is similar in many respects but has some notable distinctions, particularly the existence of a "heeding presumption" in New Jersey. The heeding presumption assists a plaintiff on the issue of proximate cause by establishing a rebuttable presumption that if a warning or instruction had been given, such a warning or instruction would have been heeded by the plaintiff. Therefore, the burden of production on the issue of proximate cause shifts to the defendant to come forward with evidence sufficient to demonstrate that plaintiff had knowledge of the risk that the absent warning would have addressed, or otherwise, evidence that plaintiff would have proceeded voluntarily and reasonably to subject herself to the dangerous product.¹

In a products liability action in both Pennsylvania and New

Jersey, a plaintiff must demonstrate that the defect in the instructions and warnings were the proximate cause of the injury at issue. Both jurisdictions have adopted the "learned intermediary doctrine." In the context of prescription drug cases, the rule provides that a pharmaceutical manufacturer generally discharges its duty to warn the

ultimate users of prescription drugs by supplying physicians with information about the drug's dangerous propensity.² New Jersey's highest court has created an exception to the learned intermediary doctrine by holding that it does not apply where the manufacturer directly markets the prescription drug to

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consumers.³ In those circumstances, the manufacturer can be sued by consumers if its advertising fails to provide an adequate warning of the product's dangerous propensities. Pennsylvania courts that have considered the issue have expressly rejected adopting an exception to the doctrine.⁴

Consistent with New Jersey case law, if there is no warning to either a consumer or doctor or, alternatively, if the warning is inadequate, the heeding presumption simplifies plaintiff's burden of proof. Pennsylvania has chosen not to apply the presumption in prescription drug cases because in its view, such cases do not warrant a perceived "evidentiary advantage" for plaintiffs.⁵ Pennsylvania and New Jersey cases discussing product liability law highlight "deterrence" as the underlying public policy, but only New Jersey has chosen to relax its proximate cause standard and in fact, shift the burden to defendant to rebut the heeding presumption. As the Supreme Court of New Jersey has concluded, "The use of the heeding presumption provides powerful incentive for manufacturers to abide by their duty to provide adequate warnings."⁶ Therefore, New Jersey offers a plaintiff's attorney helpful assistance in proving a failure to warn pharmaceutical product case.

Not all New Jersey courts have simplified a plaintiff's burden in product liability litigation. For instance, in the Phen-Fen diet drug cases courts imposed

burdens that were unanticipated when New Jersey was chosen as the venue. In diet drug cases, plaintiffs who had "opted out" of the class action settlement had a choice between the federal court MDL, and large consolidated case management programs in Pennsylvania and New Jersey, among other states. When the decisions were made to "opt out" counsel understood that the only issues which determined a given client's right to opt out was whether the "opt out" was timely (under strict intermediate and "back end" opt out rules in the class action settlement agreement) and whether the plaintiff was "FDA positive" in the opinion of a qualified physician. At the time, it was not expected that there would be disparate treatment between Pennsylvania and New Jersey that could potentially be case dispositive.

Wyeth, the defendant in the Phen-Fen litigation, filed a motion in New Jersey asking the court to consider whether the opinion that a plaintiff was "FDA positive" was based on proper scientific principles. In essence, the court was asked to appoint an independent panel of experts and review the plaintiff's experts' conclusions on a case-by-case basis and then make a threshold determination as fact finder that would either bar or permit an individual case. The late Judge Walsh granted Wyeth's motion and began a series of Daubert-like hearings with testimony offered by a panel of "independent" experts appointed by the court to advise the court on whether the echocardiograms used to support a plaintiff's "FDA positive" status were properly performed *and/or* properly

interpreted.⁸

Judge Walsh held: "In short, Wyeth will not be bound by the determination by a plaintiff's physician that he or she is FDA Positive, but may challenge the medical reasonableness of that conclusion. Such a hearing will follow the format used to access challenges made to the scientific methodology used by expert witnesses in tort and other cases. . . . Thus Wyeth, in order to disqualify a plaintiff from pursuing an . . . [opt out case] will bear the burden of establishing by a preponderance of the evidence that the performance and/or evaluation of the echocardiogram supporting the opt-out was medically unreasonable."⁹ Despite the imposition of that burden on the defense, the result of the first round of hearings was that many cases were dismissed and remanded back to the class action settlement rather than proceeding as individual opt-out cases. Many others were voluntarily dismissed when it was clear that the "FDA positive" opinion which originally supported the opt-out would be difficult to support in an eligibility hearing. This decision by Judge Walsh, and the likely dramatic reduction of the thousands of cases filed in New Jersey if they had to undergo "eligibility" hearings was one of the factors which led many lawyers to recommend to their clients that they agree to the settlement of the opt out cases shortly after the "eligibility challenges" began in New Jersey.

Not every decision from the New Jersey courts in Phen-Fen was unwelcome by the plaintiff's bar. In fact, those cases that survived the threshold "eligibility

challenges” were not subjected to the same “reverse bifurcation” trials instituted across the river in the Philadelphia mass tort program. “Reverse bifurcation,” which typically tries case-specific causation and damages first, led to a number of disappointing verdicts among the first Phen-Fen trials in Philadelphia. During one status conference, in response to a renewed request that reverse bifurcation might help reduce the volume of cases facing the New Jersey courts, Judge Walsh told counsel that the “sun has set” on reverse bifurcation in New Jersey. He did later indicate some willingness to revisit that issue once sufficient cases had tried so that both sides had a “track record” in the litigation.¹⁰ ♦

¹. Coffman v. Keene Corp., 133 N.J. 581, 603 (1993)2.

². Niemiera by Neimiera v. Schneider, 114 N.J. 550, 559 (1989) and see also Taurino v. Ellen, 579 Atl.2d 925 (Pa. Super. Ct. 1990)

³. Perez v. Wyeth Laboratories Inc., 161 N.J. 1 (1999)

⁴. Colacicco v. Apotex, Inc., 432 F. Supp. 2d 514, 547 (E.D.Pa. 2006)

⁵. Vigures v. Phillip Morris USA, Inc., 837 Atl.2d 534, 537-538 (Pa. Super. Ct. 2003), affm'd 881 Atl.2d 1262 (Pa. 2005)

⁶. Coffman, 133 N.J. at 599

⁷ “FDA positive” meant generally that the plaintiff had qualifying heart valve injuries. While the right to challenge a plaintiff’s FDA positive status was in the Class Action Settlement, it had never been handled as a threshold legal determination rather than as a jury question considered during deliberations as part of the plaintiff’s burden of proof.

⁸. In Re: Diet Drug Litigation,

Superior Court of New Jersey, Law Division: Bergen County, Docket Number: BER-L-7718-03, Slip Op. April 13, 2004, Walsh, J. ⁹ *Id.*

¹⁰. “I may reverse bifurcate later in the game when the liability issues are clearly out there and when Wyeth, I think, will have a good view on how they’ll do from a liability standpoint. But I don’t think they’re entirely clear how they’re going to fare. And I’m not either. And I don’t know that there’s such a large track record elsewhere that we can tell. So, I’d just as soon have my own track record here after we try four or five cases. Then I think Wyeth will have a better feel; so will the plaintiffs. I mean, these are very good lawyers on the other side, as they are on Wyeth’s side. So, after you have a few fights, well, then you’ll have a better idea of what everything is worth. There’s no way I’m going to start these cases in a reverse bifurcation. I just don’t think it’s fair to the plaintiffs. It’s as simple as that . . . I’m not even going to write on this, because, to me, it’s a non-starter. We’ll see what happens, as I say, six months down the road or so.”

Transcript, November 23, 2004, Diet Drug Case Management Conference before Judge Walsh, pgs. 15-16.

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