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IN PRACTICE

PRODUCT LIABILITY LAW

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Choosing New Jersey

Preference for New Jersey law in products liability claims draws out-of-state plaintiffs

On Feb. 28, the Appellate Division issued a choice of law opinion in the Accutane litigation that, once again, shows that our courts have a strong preference for New Jersey law in products liability claims. *Rowe v. Hoffmann-La Roche, Inc.*, 383 N.J. Super. 442 (App. Div. 2006). Because Judge Dorothea Wefing dissented, the Supreme Court undoubtedly will, once again, have the opportunity to address the issue. R. 2:2-1(a)(2).

The factual background underlying the *Rowe* choice of law decision is quite simple: Hoffmann-La Roche is a well-known New Jersey-based pharmaceutical company that manufactures the prescription drug, Accutane, at its Nutley facilities. "Defendants label and package Accutane in Nutley, where they maintain the Drug Regulatory Affairs unit, which is responsible for communications with the FDA regarding Roche products, label and warnings."

The plaintiff, Robert Rowe, was sixteen years old, and "at all relevant times a Michigan resident…. Rowe's dermatologist prescribed Accutane for him in Michigan, where he purchased and ingested the drug."

According to Rowe, as a result of taking Accutane in 1997, "he became severely depressed and attempted suicide several times." His complaint alleges that Hoffmann-La Roche violated the New Jersey Product Liability Act by failing to warn that depression and suicide were possible side effects, and that "they know that some patients who had taken the drug had experienced severe depression and that some had even committed suicide." At all times, however, Accutane's labeling was FDA approved.

Michigan law and New Jersey law treat the effect of the FDA's approval of Accutane's labeling differently. Under Michigan law, FDA's approval of Accutane's labeling is conclusive, and bars Rowe's claim as a matter of law. New Jersey, on the other hand, regards the FDA's approval as creating a rebuttable presumption that the warning was adequate. N.J.S.A. 2A:58C-4. That presumption disappears if plaintiff presents sufficient evidence from which a jury could find the warning to be inadequate. Dreier, Keefe & Katz, *Current N.J. Products Liability & Toxic Torts Law* § 15.4 (2006).

As such, there is an unavoidable, indeed palpable, conflict of law present: application of Michigan law would require the court to dismiss Rowe's claim as a matter of law. New Jersey law would regard the adequacy of Accutane's warning to be an issue of fact for the jury. Since the *Rowe* decision implies that the Accutane label contained no warning about depression or suicide, the heeding presumption found in New Jersey law would require the jury to find that Rowe would have heeded an adequate warning if one had been given. *Coffman v. Keene Corp.*, 133 N.J. 581 (1993); *Graves v. Church & Dwight Co., Inc.*, 267 N.J. Super. 445, 460-61 (App. Div.), *certif. denied*, 134 N.J. 566 (1993); *N.J. R. Evid.* 301. Thus, assuming that Rowe can rebut the presumption that the FDA warning is adequate and that Hoffmann-La Roche did not warn about Accutane's alleged psychological effects, New Jersey law would appear to be highly favorable to Rowe. Indeed, under New Jersey law, Hoffmann-La Roche's essential defense simply would be that Rowe's psychological problems were not caused by Accutane.

That New Jersey products liability law is attractive to the plaintiff's bar is hardly a secret: in the *Vioxx* litigation, there are over 5000 cases pending before Judge Carol Higbee in Atlantic City – out of approximately 10,000 personal injury cases nationwide. "Jury Rules Vioxx Hurt The Heart of a User," (Newark) *Star Ledger*, April 6, 2006, at p. 1. In fact, as noted in Judge Wefing's *Rowe* dissent "New Jersey courts are, for whatever reason, the site of much mass-tort litigation. The Mass Tort Information Center in NJCourtsonline.com, for example, lists seven pending mass tort actions in New Jersey involving pharmaceuticals."

Choice of law questions in tort cases used to be straight-forward: lex loci delicti was almost universally accepted. But automobile and airplane travel irrevocably changed how our courts approached

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choice of law questions. In particular, when New Jersey domiciliaries were injured in out-of-state accidents, our courts were unwilling to apply out-of-state laws that immunized conduct that admittedly was negligent. By "fine tuning" choice of law in such circumstances, our courts were able to protect New Jersey domiciliaries from application of out-of-state laws that produced harsh results.

Initially, because of the frank recognition that choice of law analysis was motivated by a desire to protect New Jersey domiciles, our courts generally resisted the use of choice of law to benefit out-of-state plaintiffs with more favorable, pro-plaintiff New Jersey law.

That, however, ended in 1996 with the case of *Gantes v. Kason Corp.*, 145 N.J. 478 (1996), where an out-of-state plaintiff sought application of New Jersey law, arguing that her products liability lawsuit should be permitted to proceed here because the food processing machine that injured decedent had been manufactured in New Jersey.

The facts in *Gantes* could hardly have been more sympathetic to plaintiff: the decedent was a 22-year-old worker in a Georgia chicken processing plant who was killed "when struck in the head by a moving part of the machine." Georgia, however, had enacted a 10-year statute of repose applicable to products liability claims brought against manufacturers. O.C.G.A. § 51-1-11(b)(2). Since it was undisputed that the machine was over 10 years old, decedent's representatives were barred by Georgia's statute of repose from instituting an action there. Applying a governmental interest analysis, the *Gantes* court found that New Jersey law — which has no such statute of repose — would be applied because "[t]he goal of deterrence … is especially important in the field of products-liability law."

The *Gantes* decision undoubtedly was influenced by its facts, but hard cases can make bad law. In particular, the *Gantes* choice of law analysis — which so heavily emphasizes deterrence through New Jersey's strict liability rules — means that out-of-state plaintiffs injured by products with substantial New Jersey ties will be able to have their claims litigated here under New Jersey law. Given the pro-plaintiff tilt of New Jersey law as compared to many jurisdictions, out-of-state plaintiffs often will have strong incentives to litigate their claims here under New Jersey law, rather than in their home states, using their own laws. Indeed, the *Gantes* court practically invites plaintiffs with claims against New Jersey manufacturers to have those claims adjudicated here under New Jersey law: "In this case, plaintiff does not seek to use New Jersey's court system to litigate a dispute that has only a slight link to New Jersey…. This action is materially connected to New Jersey by the fact that the allegedly defective product was manufactured in and then shipped from this State by the defendant-manufacturer."

Although the *Gantes* court argued that its decision would not create forum shopping, an out-of-state plaintiff who is injured by a New Jersey product has an incentive to take that claim here if his home state does not share New Jersey's desire to deter injury. The *Gantes* court failed to recognize that if the effect it sought — greater deterrence — was to occur, it only can occur if New Jersey has stricter liability rules than the other jurisdiction. If the difference between New Jersey's rules and the other state's rules are large enough, plaintiffs will come. In other words, if New Jersey is more hospitable to products liability claims than the out-of-state plaintiff's home, the lawsuit will be more valuable here and, consequently, will be filed here. Simply put, you cannot create the increased deterrence the *Gantes* court seeks without creating incentives for out-of-state plaintiffs to file here.

The *Gantes* experiment has now had eight years to play out and its effects on pharmaceutical litigation are evident: out-of-state plaintiffs have, in extraordinary numbers, chosen to venue their cases here.

The *Rowe* majority opinion, written by Judge Babara Byrd Wecker, represents a straight-forward application of *Gantes*, that emphasizes deterrence above all other values. Although the *Rowe* outcome appears to be required by *Gantes*, the *Rowe* majority does more than go through the motions by simply applying precedent. They go out of their way to characterize New Jersey's "rebuttable presumption" that an FDA approved warning is adequate as mainstream, while characterizing Michigan's rule that gives conclusive weight to FDA approval as being one of a kind.

In this regard, the *Rowe* majority appear to be unwilling to recognize just how favorable a venue New Jersey is for out-of-state plaintiffs. The New Jersey mass tort litigation industry referred to in Judge Wefing's dissent that has arisen subsequent to *Gantes* renders the majority's conclusion suspect: "We see little chance that our courts will become a haven for products liability suits against drug manufacturers if plaintiff succeeds on the choice-of-law issue."

As a result of Judge Wefing's dissent, the Supreme Court will have the final say. Under the *Gantes* deterrence rationale, New Jersey's choice of law doctrine essentially compels the application of New Jersey law in a products liability claim involving a product manufactured in this state. For an out-of-state plaintiff, this means that by filing in New Jersey, New Jersey's liability rules can, under *Gantes*, readily be procured. That many plaintiffs have chosen this course demonstrates that out-of-state plaintiffs believe that they and New Jersey law are "perfect together."

When the Supreme Court reconsiders *Gantes*, it will have to consider whether our court system should bear the crushing caseload created by out-of-state plaintiffs. It will have to consider whether perhaps New Jersey's strict product liability laws result in over-deterrence. It will have to decide whether the mass-tort industry and New Jersey's courts are "perfect together." ■