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## Legislation

### **Fears of More N.J. Plaintiffs Spur Biz Push for Legal Fixes**

BY BRUCE KAUFMAN

Business groups are ratcheting up the pressure to improve their legal defenses in New Jersey in anticipation of a wave of new plaintiffs who may be encouraged to sue in the Garden State after a recent U.S. Supreme Court ruling.

The Supreme Court's 2017 decision in *Bristol-Myers Squibb v. Superior Court of California* could cause New Jersey's courtrooms to become "even more of a magnet" for out-of-state lawyers and non-New Jersey residents than it already is, Harold Kim, executive vice president for the U.S. Chamber Institute for Legal Reform in Washington, told Bloomberg Law.

The ruling, which tightened up jurisdictional requirements for where companies can be sued, gives plaintiffs more incentive to sue in states where companies are headquartered. New Jersey is home to 21 Fortune 500 companies including Johnson & Johnson, Merck & Co., and Honeywell International Inc.

Business-backed groups say the ruling buttresses the need for prompt changes to the state's "lenient" standards for expert evidence and its too-consumer-oriented Truth in Consumer Contracts law. Both are under review by the state supreme court.

"The pendulum has swung so far in favor of lawyers that consumers themselves are being hurt," Alida Kass, president and chief counsel for the defense-oriented New Jersey Civil Justice Institute in Trenton, told Bloomberg Law.

But others say the impact of *BMS* driving more plaintiffs to New Jersey, the state's supposedly "plaintiff friendly" evidence and contract laws, and general pro-consumer reputation overall are overstated.

The new ruling may cause some out-of-state plaintiffs to bring claims to New Jersey for adjudication, Eric G. Kahn, president of the New Jersey Association for Justice in Trenton, a plaintiffs' bar group, acknowledged.

"But it will also require some New Jersey plaintiffs to pursue their claims in other jurisdictions," he told Bloomberg Law. "Thus, it is difficult to project whether any net increase in litigation in New Jersey will result," he said.

Jay Feinman, a professor of law at Rutgers Law School in Camden, N.J., says supporters of business-backed legal changes in New Jersey already "have successfully cut back on the rights of victims, and still they want more."

**Expert Evidence Standards** The biggest battle underway in New Jersey may be over the standards for admitting expert testimony in litigation.

New Jersey currently has a hybrid standard, Feinman said. Hybrid standards embrace aspects of *Daubert v. Merrell Dow Pharms.*, the federal standard, as well as those of a rival test for novel evidence, which asks whether an expert's testimony is generally accepted in the relevant scientific community.

However, courts have become stricter when evaluating experts over the last few years, he said.

Now, a doctor might rely on a radiologist's reading of an MRI as a basis for treating her patient, but if the same doctor testifies as an expert, the jury cannot rely on the radiologist's report as accurate, he said.

But both Kim and Kass agree that New Jersey should fully embrace the federal *Daubert* standard for assessing the reliability of expert evidence, and disagree that the state's courts have been stringent enough on experts.

The Appellate Division recently issued a decision in *in re Accutane* that "all but eliminated the existing, critical, gate-keeping role" trial court judges play when expert testimony is offered, "moving New Jersey law in precisely the opposite direction of nearly every other court in the country," Kass said.

The New Jersey Supreme Court granted review in that case, and will have the opportunity to update New Jersey's approach and align state law on expert testimony with federal courts and the vast majority of state courts, she said.

Conforming New Jersey's standard to the majority approach would reduce the "incentive of plaintiffs to forum-shop" into New Jersey courts, which burdens state courts with cases that rely on "dubious" expert testimony, Kass said.

New Jersey is part of a "small and shrinking remnant of states that have not yet definitively embraced" some version of the federal standard for expert testimony, Kass said.

But Kahn, the plaintiffs' bar chief, said the *Daubert* standard is not adjudicated uniformly among the various federal district courts and circuit courts of appeal, so its adoption would "not simplify" state court proceedings.

"Indeed, it would likely increase the burden on our trial courts with additional motion practice and lengthy hearings, straining an already overburdened judiciary," he said.

The most recent New Jersey Supreme Court subcommittee report on the issue found no "conclusive evidence" that current law was creating problems such as "attracting a disproportionate number of negligence

cases or other civil litigation matters to be venued in this state,” Kahn noted.

The report also cited statistics showing a statewide decrease in new filings from 2004 (25,574) to 2013 (21,028), he said.

New Jersey courts have crafted careful standards for the admissibility of expert testimony and evidence, and were thoughtfully addressing these issues prior to *Daubert*, Kahn said.

New Jersey’s body of law in this area not only “eliminates junk science,” but it preserves the jury’s role in deciding contested issues, he said.

**Consumer Contract Statute** Another key target for those who would like to make New Jersey law more business friendly is the Truth in Consumer Contracts, Warranty and Notification Act.

The law, enacted in 1981, bars consumer contracts that violate existing consumer rights. But by allowing additional damages for each violation, plus attorneys’ fees, it has become an increasingly valuable tool for plaintiffs.

New Jersey is the only state in the nation with a statute like it, Kass said.

The law may have been intended to deter the inclusion of unenforceable provisions in consumer contracts, but “it has generated massive and potentially catastrophic class actions that are vastly out of scale with harm to the plaintiff or the culpability of the defendant,” she said.

Kass cited as an example a plaintiffs’ attorney’s request for “billions” in damages for a TCCWNA violation over drink prices that were missing from menus. The Civil Justice Institute says court rulings in these suits have gone up in recent years, indicating a corresponding increase in filings.

But consumer advocates and plaintiffs’ lawyers see the statute differently, saying the 1981 law was enacted to bolster the rights of consumers.

Plaintiffs’ attorney Michael A. Galpern of Locks Law in Cherry Hill, N.J., said in a filing in an earlier TCCWNA case that the legislature sought additional protection because the inclusion of anti-consumer provisions in contracts, warranties, notices and signs “deceive consumers into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights.”

Galpern’s comments came in an amicus brief filed on behalf of the New Jersey Association for Justice.

The N.J. Supreme Court has agreed to decide whether the TCCWNA requires the consumer to have suffered harm related to the underlying violation, Kass said. That would make it harder for plaintiffs to sue under the law.

**Pro-Plaintiff or Pro-Business?** Business groups’ support of changes to New Jersey’s expert evidence standards and the TCCWNA come as they assess the effect of the *BMS* decision.

“Plaintiffs’ lawyers, who otherwise might have brought cases in other states under the guise of specific jurisdiction prior to the *BMS* ruling, may now see New Jersey as a good place to bring claims on behalf of large classes of plaintiffs from various different states,” Kim, of the U.S. Chamber, said.

That might not be good for companies if, like Kim, one views New Jersey’s lawsuit environment as unfavorable to businesses.

But Feinman, of Rutgers Law, disputes that assertion. Supporters of pro-business litigation overhaul in New Jersey have made a number of significant gains in recent years pushing the state’s legal system even further in favor of corporate defendants, he said.

“They have succeeded in getting legislation that makes it harder for injury victims to recover damages, harder for victims of defective products to recover for their injuries, and harder to deter companies from wrongful conduct. The courts also have become less plaintiff-friendly, not more,” Feinman said.

Kahn, with the plaintiffs’ bar, said there are already safeguards in place that “make it hard to say New Jersey is too plaintiff-friendly”:

- Public entities are protected by New Jersey’s Tort Claims Act, which provide immunities that are not available to private citizens or commercial entities;

- Motor vehicle accident victims must satisfy a high injury threshold before they can obtain a recovery;

- Medical malpractice cases require an affidavit of merit from a licensed doctor in the same specialty before filing a lawsuit.

Feinman said those business gains have contributed to a dramatic decrease in tort litigation in New Jersey, even while the population has increased.

According to Feinman, over the last decade, product liability suits in New Jersey are down 70 percent; medical malpractice lawsuits are down 16 percent; general personal injury lawsuits are down 14 percent; and automobile personal injury lawsuits are down 11 percent.

“These declines are the result of courts and law that are less favorable to victims, not because the world is that much safer. And for every suit that is filed, many more injuries go without redress,” Feinman said.

But Kim said New Jersey law skews toward, not away from, plaintiffs. The state fell three spots in the U.S. Chamber Institute for Legal Reform’s *2017 Lawsuit Climate Survey* which ranks states nationally: dropping from 38th most business favorable to 41st, he said.

Kim attributed New Jersey’s score to rules that allow broad and expensive discovery practices, and its “poor” appeals process.

The state’s legal system ranked sixth worst for businesses in a similar review by the American Tort Reform Association in Washington. Other big complaints by business groups about New Jersey are that the state’s arbitration system isn’t used enough and that there isn’t enough transparency around asbestos claims.

Another top concern for companies is the state’s cap on punitive damages excludes whistleblower and Law Against Discrimination claims. This “strengthens ‘the incentive to allege violations of these statutes in other workplace disputes,’” Kass said.

But Kahn, with the plaintiffs’ bar group sees New Jersey’s caps on punitive damages as overwhelmingly business-friendly and said they shouldn’t be expanded.

He also said the caps take away the authority of judges and juries to decide compensation based on each case, and allow those who “commit bad acts to predict the effect of their actions and make a business decision as to whether their acts are cost-effective.”

Practitioners will have to wait awhile to see how the state top court weighs in on the issues of expert evidence and consumer contracts. Arguments before the state top court have not yet been scheduled in either case.

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