COZEN O'CONNOR®

SUMMER 2008

COMMERCIAL DISPUTES OBSERVER

NEWS ON CONTEMPORARY ISSUES

MESSAGE FROM THE CHAIR
TO THE FRIENDS OF COZEN O'CONNOR:

I open this issue of the *Commercial Litigation Observer* by welcoming home Lt. Col. Peter A. Lynch, a member of the firm's San Diego office. Peter was recently awarded the Bronze Star Medal by the U.S. Armed Forces in recognition of his meritorious service as a Deputy Rule of Law Officer during Operation Iraqi Freedom. Peter served in Iraq's Al Anbar Province from March 2007 through February 2008, during which time he assisted Iraqi police and lawmakers in developing and implementing criminal justice programs and by providing guidance on the rule of law. He also led 63 combat missions in Fallujah, conducting counter-insurgency operations and building and strengthening Iraqi law enforcement, corrections and judiciary capabilities. We are thankful for Peter's safe return, very proud of his accomplishments, and hope for the safe and speedy return of all those serving in our Armed Forces.

Cozen attorneys also were recognized by the *Philadelphia Business Journal,* who awarded Cozen O'Connor five medals for philanthropy at the Corporate Philanthropy Summit on May 1st. The firm earned first place in the following categories: Top Philanthropic Donor; Top In-Kind Services Donor in the large company category, recognizing the firm's dedication to pro bono work; Top Volunteer Donor, recognizing the firm's work with charities; and the Community Impact Award. The firm was also honored in the Cash Contributions category, ranking twelfth among all area companies, and first among law firms. Congratulations and thank you to all the members of the Cozen O'Connor community who have donated their time and money to helping the less fortunate.

Ann Thornton Field

Ann Thornton Field
Chair, Commercial Litigation Practice Group

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RECENT DEVELOPMENTS REGARDING PRODUCT LIABILITY LAW

MEDICAL DEVICE AMENDMENTS TO FOOD, DRUG AND COSMETIC ACT PREEMPT STATE TORT CLAIMS IF DEVICE PASSED FDA PREMARKET APPROVAL

In *Riegel v. Medtronics, Inc.,* 128 S. Ct. 999 (Feb. 22, 2008), the United States Supreme Court ruled that the preemption clause in the 1976 Medical Device Amendments bars state common-law claims challenging the safety and effectiveness of a medical device that received premarket approval from the Food and Drug Administration ("FDA").

Charles Riegel sued Medtronic for injuries he sustained when the Medtronic Evergreen Balloon Catheter used by his physician burst during an angioplasty procedure. Riegel alleged, among other claims, that the catheter had been negligently designed and labeled. He also contended that Medtronic was strictly liable for his injuries and that Medtronic had breached its implied warranty. The district court granted Medtronic's motion for summary judgment, holding that these state law claims were preempted by federal law because the FDA had approved the catheter pursuant to its premarket approval process. On appeal, the United States Court of Appeals for the Second Circuit upheld the ruling, observing that manufacturers of premarket approved devices would be in an untenable position if claims such as Riegel's were not preempted -- in that they would have to comply with federal regulations and could still be liable to consumers under varied state laws even when in full compliance. At issue was the effective scope of authority granted to the FDA to regulate medical devices via the premarket approval process under the 1976 Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq*. Medtronic argued that under § 360k(a), which provides that no state may establish any requirement, with respect to medical devices, that is different from or in addition to any federal requirement, or which relates to safety or effectiveness of the device included in a requirement applicable under the MDA.

"...no state may establish any requirement, with respect to medical devices, that is different from or in addition to any federal requirement.."

The Supreme Court granted cert, in part, because the Second Circuit's ruling appeared to be in opposition to its 1996 decision in *Medtronic, Inc. v. Lohr.* There, the Supreme Court held that that the MDA did not broadly preempt all state or local requirements. That case, however, involved general product labeling duties and the less rigorous approval process in effect prior to the 1976 MDA went into effect and it held that state laws were not preempted if they are essentially equal to or substantially identical to, the requirements imposed under federal law. Various state and federal courts had issued divergent rulings applying that preemption to other MDA cases.

In an 8-1 decision, the justices affirmed the lower courts, holding that *Riegel* was subject to the specific preemption referenced under premarket approval process. Riegel's common-law claims were deemed preempted because they were based on state law requirements that were different from and in addition to the federal counterparts. Judge Scalia, writing for the majority, said that permitting state juries to impose liability on the maker of an approved device disrupts the federal scheme through which the FDA has the responsibility for evaluating the risks and benefits of a new device and assuring that it is safe and effective for its intended use. The decision, it must be noted, was narrowly tailored to apply only to Class III medical devices -- those that have received the highest level of FDA scrutiny.

Chris Murphy, a member in Cozen O'Connor's Chicago office, said that this ruling constitutes a significant victory for device manufacturers. It essentially makes the FDA the last word on medical devices; and, if the proper approval process is followed, consumers will have limited legal recourse for injuries allegedly resulting from the use of the product. Nevertheless, Murphy cautioned that the ruling was limited

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to preempting state law claims and added that a ruling with more far-reaching implications will come with the cases currently before the Supreme Court that involve similar preemption issues, but as applicable to drug manufacturers.

For more information, or to discuss the effect and impact of Riegel v. Medtronics, Inc., 128 S. Ct. 999 (Feb. 22, 2008), please call Chris Murphy at 312-382-3155.

RECENT DEVELOPMENTS REGARDING FINANCIAL SERVICES LAW

OMISSION OF CERTAIN MATERIAL TERMS IN HOME-EQUITY CREDIT CIRCULAR STILL CONSTITUTES A FIRM OFFER OF CREDIT

In *Murray v. New Cingular Wireless Sers., Inc.,* --- F.3d ----, 2008 WL 1701839 (7th Cir. April 16, 2008), the United States Court of Appeals for the Seventh Circuit held that KeyBank made a firm offer of credit and did not violate the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.,* when it sent a circular offering credit despite the omission of some material terms and the reservation of the power to change terms.

Murray was a consolidation of three firm offer cases originating from district courts within the Seventh Circuit, including *Bruce v. KeyBank*. In *Bruce,* KeyBank had obtained a pre-screening list of consumers who met certain minimal credit requirements from a consumer reporting agency. It then sent those consumers an advertising circular that offered a line of home-equity credit. The circular stated that the interest rate would be based on the prime rate according to the *Wall Street Journal* at the time the loan was made, but could vary "by district, product and credit qualification." The circular did not contain terms such as the loan's duration and did not specify all possible fees. It did state that the terms of the loan could be subject to change without notice.

Under the Fair Credit Reporting Act ("FCRA"), a company may access a consumer's credit information only if the consumer initiates the transaction; however, such information may be obtained for the purposes of making a firm offer of credit or insurance. Based on the precedent set in *Cole v. U.S. Capital,* numerous plaintiffs have contended that that an offer of credit must have "value" in order to be permissible under the FCRA. In other words, from the consumer's perspective, an offer of credit without value is the equivalent of an advertisement or solicitation -- and obtaining a consumer's credit information for such purposes is actionable. Plaintiffs have argued that the *Cole* approach must be applied, not only to distinguish between offers of merchandise and offers of credit, but also to decide whether even a simple offer of credit is valuable enough to justify the use of consumers' credit files. In *Bruce*, the plaintiff contended that KeyBank did not make

"The Seventh Circuit rejected plaintiff's arguments that a firm offer of credit must contain all the material terms for it to be "valuable" to consumers."

a "firm offer of credit" because its offer of home-equity financing did not include all material terms and the terms were subject to change, and without knowing every term (such as whether interest was to be simple or compound) the consumer could not assess the offer's value.

The Seventh Circuit rejected plaintiff's arguments that a firm offer of credit must contain all the material terms for it to be "valuable" to consumers. It held that the "value" test in *Cole* was only to be used when discerning sham offers of credit from real offers of credit. Its limited purpose was to prevent merchants from obtaining consumer credit information by making hollow offers of credit in connection with an offer to sell merchandise. The Court looked to the statutory definition

of "firm offer of credit," and reasoned that the proper focus was on whether the offer will be *honored* (if the consumer's verification checks out), not whether all terms appear in an initial mailing. The Court added that putting all the terms in a home financing flier would make such mailings impossibly large, but also "turgid, and … uninformative" because they would "be harder to read and grasp." Lastly, the Court noted that the circular was sent based on a set of preliminary screening information; reserving the right to change the terms from the date of the circular's printing did not create an illusory offer, because the terms of the loan at closing would be subject to market changes or as a result of knowing more details on the applicants actual financial status.

George Gowen, a member in Cozen O'Connor's Philadelphia office who specializes in financial services litigation, observed that the arguable ambiguities in the definition of what constitutes a firm offer of credit has spawned considerable litigation in recent years. The *Murray* decision rejects imposition of requirements not found specifically in the text of the FCRA. He believes that the wave of litigation that came in the wake of the *Cole* decision should begin to subside as a result of this ruling. He continues to advise his clients that their marketing departments must be wary of the numerous pitfalls created by potential grey areas in the disclosure requirements of certain federal regulations.

For more information, or to discuss the effect and impact of Murray v. New Cingular Wireless Sers., Inc., --- F.3d ----, 2008 WL 1701839 (7th Cir. April 16, 2008), please call George Gowen at 215.6652781.

RECENT DEVELOPMENTS REGARDING PRODUCT LIABILITY LAW

OHIO SUPREME COURT HOLDS STATUTE OF REPOSE IS CONSTITUTIONAL, BUT LIMITS ITS RETROACTIVE IMPLICATIONS

In *Groch v. General Motors Corp.,* 883 N.E.2d 377 (2008), the Ohio Supreme Court upheld the Ohio statute of repose applicable to product liability actions; but denied the statute's retroactive application to causes of action that accrued within two years prior to the effective date of the statute.

In *Groch,* the Ohio Supreme Court reviewed the Ohio statute of repose (R.C. 2305.10) which went into effect on April 7, 2005 as part of a tort reform bill. The statute provides a ten year limit for bringing products liability claims, and states: "[N]o cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser." Groch had filed a claim for personal injuries he suffered on March 3, 2005, when a trim press manufactured by the Kard Corporation and Racine Federated collapsed on his arm while he was working at General Motors. The lawsuit was filed after the statute of repose went into effect, which was a month after he was injured. Kard and Racine asserted that they were immune from liability based on the statute of repose because the trim press had been delivered to General Motors more than ten years prior to the accident.

Groch raised numerous constitutional challenges to the application of the statute of repose. The Court initially held that foreclosing claims against certain defendants does not mean that a right to remedy is extinguished. While the statute of repose might prevent suits against product manufacturers, in many situations an injured party will be able to seek recovery against other parties, such as those who control and maintain the product. Accordingly, it held that the statute of repose, on its face, did not violate the Ohio Constitution with respect to the right to remedy provisions and the principles of due process or equal protection. The Court went on to rule, however, that as to Groch, the statute was unconstitutionally retroactive.

The Court reasoned that as drafted, the statute should apply to all actions brought on or after its effective date, including the litigation for Groch's March 3, 2005 injury, but this left Groch with only 34 days after the accident to file his claim. Typically, a statute of limitations is designed to limit the time

in which a plaintiff may bring a suit *after* a cause of action accrues and a statute of repose will limit such time *before* the cause of action accrues. In holding the retroactive effect of this application was unconstitutional under these circumstances, the Court concluded that it was improper for the statute to unreasonably restrict an already accrued right. Instead, it held that a reasonable period of time for Groch to commence his suit would be within two years of the date the cause of action accrued – the date of injury (as two years is, generally, the statute of limitations applicable to bodily injury claims). The Court stated that while the statute of repose will not apply to all actions filed on or after April 7, 2005 (in light of the Court's retroactivity analysis), it would apply to the majority of those filed after April 7, 2007.

Paul Leary, a member in Cozen O'Connor's Philadelphia office who has tried numerous product cases, commented that the *Groch* decision represents another positive step toward ensuring that manufacturers are not subjected to open-ending liability for its products. Leary said that *Groch* serves as a reminder that legislation can often serve as the first line of defense in protecting the commercial interests of corporate clients. Still, as *Groch* demonstrated, even a seemingly straightforward statute of repose can run into anomalous situations that will test the rule.

For more information, or to discuss the effect and impact of Groch v. General Motors Corp.,(883 N.E.2d 377 (2008), please call Paul Leary at 215.665.6911.

RECENT DEVELOPMENTS REGARDING ELECTRONIC DISCOVERY

PRIVILEGE LOG DOES NOT REQUIRE INDIVIDUAL ENTRY FOR EACH EMAIL IN CHAIN

In *Muro v. Target Corp.*, 2007 U.S .Dist. LEXIS 81776 (N.D. Ill. Nov. 2, 2007), the United States District Court for the Northern District of Illinois held that Federal Rule of Civil Procedure 26(b)(5)(A) does not require that a privilege log include separate entries for multiple e-mails within the same string and that non-privileged information communicated to an attorney may be privileged via that subsequent communication.

In *Muro,* a class action was filed on behalf of credit card recipients claiming that Target violated certain provisions of the Truth in Lending Act by sending unsolicited credit card offers that did not contain the required disclosures. An extensive dispute arose over the production of documents by Target. Specifically, Target claimed privilege as to a number of chain e-mails that included members of the legal department. The documents and Target's privilege log were reviewed *in camera* by the Magistrate Judge, who ruled that the log was inadequate and ordered production of all the documents in the log. The judge reasoned that, first, the log failed to identify and describe separately each allegedly privileged message within a string of e-mails. This was a violation of Rule 26(b)(5), which requires a log provide enough information that the opposing party can assess the applicability of privilege. Second, he held the log did not include sufficient information to demonstrate that each e-mail was limited to persons within the scope of privilege.

"...failure to identify all people in an e-mail distribution list constituted a serious defect in the privilege log."

In reviewing the Magistrate Judge's ruling, the District Court noted that the U.S. Supreme Court's decision in *Upjohn Co. v. United States* held that non-privileged information forwarded to an attorney can become privileged. Therefore, in the context of e-mail, a latter e-mail to counsel that forwards a prior unprivileged e-mail could be privileged in its entirety. Accordingly, a party could be justified in withholding an e-mail that forwards otherwise unprivileged information. The Court agreed, however, with the Magistrate Judge that the failure to identify all people in an e-mail distribution list constituted a serious defect in the privilege log. Without the identities and job descriptions of the persons on the distribution lists, there is no way for opposing party to assess whether they are within the sphere of corporate privilege. Target was ordered to submit a revised privilege log addressing the deficiencies for an *in camera* review of the documents on the

log, and determine, on an individual basis, whether each is protected by privilege.

Vincent Pozzuto, a member in Cozen O'Connor's Downtown New York office, who has guided his corporate clients through many difficult discovery disputes, observed that *Muro* highlights the dilemma facing all defendants under the strict electronic discovery rules now governing federal cases. When parsing through the voluminous amounts of correspondence exchanged via e-mail, drawing the distinction between what is privileged and then how that privilege must be asserted has become an arduous task. He advises his clients to err on the side of asserting a privilege, but that additional effort many be necessary to provide the opposing party (and court) with a basis for upholding that assertion.

For more information, or to discuss the effect and impact of Muro v. Target Corp., 2007 U.S. Dist. LEXIS 81776 (N.D. Ill. Nov. 2, 2007), please call Vincent Pozzuto at 212.908.1284.

RECENT DEVELOPMENTS REGARDING CLASS ACTION LAW

CLASS REPRESENTATIVE WHOSE CLAIM IS RENDERED MOOT DOES NOT DOOM CLASS CERTIFICATION

In *Weismueller v. Kosobucki,* 513 F.3d 784 (7 th Cir. 2008), the United States Court of Appeals for the Seventh Circuit held that while an individual class representative's claims may become moot, the appeal from the denial of class certification does not.

Weismueller involved the challenge by a law school graduate to a Wisconsin law that automatically admits Wisconsin law school graduates to the Wisconsin bar, but requires non-Wisconsin law school graduates to pass the bar exam. Weismueller sought to certify a class consisting of other non-Wisconsin law school graduates who wanted to practice law in Wisconsin on the ground that the law was unconstitutional under the Commerce Clause of Article I. The District Court denied a motion for summary judgment filed by Weismueller. While a motion to dismiss filed by the Wisconsin Board of Bar Examiners and the Supreme Court of Wisconsin was pending, Weismuller filed a motion for class certification. The District Court granted the motion to dismiss and ruled that the motion for class certification was moot. Weismueller appealed, but had since taken, and passed, the Wisconsin bar exam. On appeal, the defendants raised the argument that the appeal of the class certification was moot due to his having passed the Wisconsin bar.

The Court of Appeals agreed that Weismueller's claim was moot, at least as far as the personal relief sought; however, this was not the death of the appeal from the denial of class certification. The Court noted that a class action claim that has been certified is not doomed if the claim from the named plaintiff becomes moot after the certification. Doing so would allow a defendant to indefinitely delay the action by paying off each class representative in succession. The Court recognized the tension where the named plaintiff's claim becomes moot prior to certification, in which case, the suit must be dismissed because no one besides that plaintiff has a protected interest in the litigation. *Weismueller* differs from either scenario in that the appeal from the denial of class certification had been filed prior to the named plaintiff's claim becoming moot (his passing the Wisconsin bar). The Court held that, unless and until the appellate court affirms the denial of the motion to certify the class, there may be people other than the plaintiff with a legally protected interest in the suit.

Joe Bellew, a member in Cozen O'Connor's Wilmington office, said that the Court of Appeals in *Weismueller* has unfortunately provided class action plaintiffs another means to prolong the costly defense of such claims. Bellew noted that the prospects of obtaining early dismissal prior to class certification is a much sought after prize and was disappointed that the Court of Appeals would go to such lengths to preserve the rights of unidentified parties once the lone named plaintiff no longer had standing.

For more information, or to discuss the effect and impact of Weismueller v. Kosobucki, 513 F.3d 784 (7th Cir. 2008), please call Joe Bellew at 302.295.2025.

RECENT DEVELOPMENTS REGARDING ATTORNEY-CLIENT PRIVILEGE

WHEN SINGLE LAW FIRM HANDLES CORPORATE REORGANIZATION THAT RESULTS IN TWO SEPARATE ENTITIES, NEITHER ENTITY CAN CLAIM PRIVILEGE AS TO DOCUMENTS PASSED THROUGH THAT FIRM

In *In re Brownville General Hospital, Inc.,* 380 B.R. 385 (W.D. Bankr. Pa. 2008), the United States Bankruptcy Court for the Western District of Pennsylvania held that when a property corporation and its spin-off retained the same firm to facilitate their creation, they owned the documents generated by the law firm equally and neither could assert attorney-client privilege against the other.

"...while Pennsylvania law states that a fundamental change in non-for-profit entity...essentially terminates that entity, it does not relinquish the new entities rights to certain assets."

In re Brownsville involved a dispute over the production of certain legal documents during the bankruptcy proceedings for Brownsville General Hospital. Brownsville General Hospital had retained counsel when it converted from not-for-profit to for-profit status some years prior to filing for bankruptcy. During that reorganization, it also created a new entity, Brownsville Property Corporation. The same law firm handled both transactions. After Brownsville General Hospital filed for bankruptcy, the Plan Administrator sought production of the legal documents in the possession of the law firm. Brownsville General Hospital sought to establish that it was the sole owner of these documents and that they were protected by attorney-client privilege. The same assertion was being made by Brownsville Property Corporation, which also argued that, under Pennsylvania law, the reorganization of Brownsville General Hospital terminated the not-for-profit entity such that it was no longer entitled to the documents.

The Bankruptcy Court ruled that Brownsville Property Corporation and Brownsville General Hospital were joint clients of their transaction counsel. During the reorganization, both entities had a common interest for which they collectively consulted with counsel. More importantly, the court reasoned that, while Pennsylvania law states that a fundamental change in non-for-profit entity, such as a division or conversion, essentially terminates that entity, it does not relinquish the new entities rights to certain assets. Rather, Brownsville General Hospital retained the ownership of all assets prior to the reorganization. Therefore, the documents at issue, as well as the right to assert attorney-client privilege and all other privileges and protections were jointly owned by Brownsville Property Corporation and Brownsville General Hospital and could not be asserted against the other. The court reiterated the basic tenet that the attorney client privilege protects joint client communication from discovery by third parties, but may not be used to restrict access to such communications as amongst those who (at least formerly) had a common interest.

Tim Haggard, a member in Cozen O'Connor's Dallas office who has litigated the fallout from corporate reorganizations, commented that *In re Brownsville* shows the importance of thorough planning when it comes to obtaining legal representation. There is a natural tendency toward trying to maintain the veil of privilege by retaining single counsel (in addition to reducing costs); however, this can backfire down the road in the event the parties no longer share a common interest. Haggard emphasizes to his clients the importance of anticipating the potential for post-transaction disputes, as it may warrant the use of separate counsel.

For more information, or to discuss the effect and impact of In re Brownville General Hospital, Inc., 380 B.R. 385 (Bankr. W.D. Pa. 2008), please call Tim Haggard at 214.462.3018.

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