LJN LAW JOURNAL NEWSLETTERS

LJN'S
Product Liability
Law & Strategy®

An ALM Publication

Volume 33, Number 3 • September 2014

PRACTICE TIP

Calculating Structured Judgments

By Lawrence Goldhirsch

Historically, a defendant would become obligated to pay the full amount of a personal injury judgment in a lump sum as soon as the judgment was entered. In 1985, New York enacted a Periodic Payment of Judgments Act as part of the State's effort at tort reform. At first, it only applied to medical malpractice actions and required verdicts over $250,000 to be paid over a period of years. A year later, New York applied the rule to personal injury and wrongful death cases.

Since then, about half of the states have enacted similar statutes. These statutes provide for the periodic payment of future damages rather than having the defendant pay them in a lump sum. New York's structured judgment statute has been said to be "circuitous," "vexing," "a judge's nightmare" and "mind-numbing." But now, with this Practice Tip, you will be armed with the ability to estimate the value of settlement proposals in the face of taking a verdict.

Structured Judgments

It is of great importance for a trial lawyer to understand the mechanics of a periodically paid or structured judgment if

continued on page 7

Proof and Defense of Causation in Failure-to-Warn Claims

By George W. Soule and Kevin P. Curry

Failure-to-warn is alleged in nearly every product liability lawsuit. Often, the claim is added to an action based primarily on defective design or manufacture. Occasionally, failure-to-warn will be the only claim. The failure-to-warn claim is frequently dismissed by the plaintiff or the court before or during trial.

In litigating failure-to-warn claims, the focus often is on duty (whether the manufacturer should have included a warning) and adequacy issues. In most cases, there is little attention paid to proof that the lack of a warning, or an inadequate warning, caused the accident. This article focuses on strategies for proving and defending the causation element of failure-to-warn.

Causation

Proof or defense of causation varies, depending on the nature of the failure-to-warn claim. In some cases, the plaintiff will allege that the product lacked a warning. In others, the claim will be that the product included a warning, but it was inadequate because it lacked critical information about the risk. Plaintiffs may also allege that a warning was not conspicuous enough to catch the user's attention. Also, the purpose of warnings may be different; some warnings "reduce the risk of product-related injury by allowing consumers to behave more carefully" and others allow consumers to make informed choices. Henderson & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure-to-Warn," 65 *N.Y.U. L. Rev.* 265, 285 (1990).

Proof and defense of causation also depends on who the plaintiff alleges would have responded to an adequate warning. In many cases, that is the injured plaintiff, who is also the product user. Sometimes, the warning recipient is a third party who is using the product, such as a co-worker. The intended audience for a warning may also be a professional, such as a physician, who is advising or making choices for the plaintiff.

continued on page 2

In This Issue

Failure-to-Warn Claims 1

Practice Tip: Structured Judgments 1

NJ Manufacturers and Punitive Damages 3

Failure-to-Warn

continued from page 1

Simply proving that a defendant has breached a duty to warn is not enough. The plaintiff must also prove that the breach caused his harm. *See U.S. Xpress, Inc. v. Great N. Ins. Co.*, No. 01-0195, 2003 WL 124021, at *5 (D. Minn. Jan. 8, 2003) (holding that the defendant had a duty to warn, the defendant failed to warn adequately, and that failure caused the accident). But proving causation is challenging because a plaintiff must prove a hypothetical: that the product user would have acted differently had the manufacturer provided an adequate warning.

Courts take one of three approaches to causal proof: 1) an objective standard (plaintiff must prove an adequate warning would have prevented harm to the reasonable person); 2) a subjective standard (requiring proof that an adequate warning would have prevented harm to the plaintiff); and 3) the "read and heed" presumption. Geistfeld, Inadequate Product Warnings and Causation, 30 *U. Mich. J. L.* Ref. 309, 337-38 (1997).

Plaintiff's Proof of Causation

Rely on the Heeding Presumption. The "read and heed" presumption (heeding presumption) is a rebuttable presumption that the product user would have read and followed an adequate warning. The presumption arose from a mix of public policy considerations about product safety, concern about the difficulty of proving causation in failure-to-warn cases, and, arguably, support for such a presumption in the Restatement (Second) of Torts section 402A, comment j ("[w]here warning is given, the seller may reasonably assume that it will be read and heeded"). *Coffman v. Keen Corp.*, 628 A.2d 710 (N.J. 1993) (adopting the presumption based on the above criteria and noting other jurisdictions have done the same); Jones, Annotation, Presumption or Inference, in Products Liability Action Based on Failure-to-Warn, That User Would Have Heeded an Adequate Warning Had One Been Given, 38 *A.L.R.* 5th 683, 701-04 (2002) (discussing states that have adopted the presumption).

The heeding presumption essentially eliminates the plaintiff's burden of proving causation in his *prima facie* case. The burden then falls on the defendant to rebut the presumption. *Bloxom v. Bloxom*, 512 So. 2d 839, 850 (La. 1987) ("The presumption, may, however, be rebutted if the manufacturer produces contrary evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances."). If the defendant is unable to produce evidence to rebut the presumption, the plaintiff should prevail on that issue as a matter of law. If, however, the defendant satisfies its burden of production, the heeding presumption disappears and the plaintiff must prove by a preponderance of evidence that the failure-to-warn was a proximate cause of his injury. *Sharpe v. Bestop, Inc.*, 713 A.2d 1079 (N.J. Super. Ct. App. Div. 1998).

Some courts, however, have rejected the heeding presumption. In *Rivera v. Philip Morris*, 209 P.3d 271 (Nev. 2009), the court reasoned that it is not logical to presume that a plaintiff would have heeded an adequate warning, if provided. "[W]arnings are everywhere in the modern world and often go unread or, where read, ignored." *Id.* at 277.

In light of these concerns, a plaintiff should not rely on the heeding presumption and must consider how he will prove causation. Such proof will vary from case to case. Generally, a plaintiff must establish that he (or the product user if different) was not aware of the danger, and would have read and heeded the proposed warning, thus

continued on page 5

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LJN's
Product Liability
Law & Strategy®

LJN's Product Liability Law & Strategy® (ISSN 0733-513X) is published by Law Journal Newsletters, a division of ALM.
Telephone: (877) 256-2472
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

LJN's Product Liability Law & Strategy P0000-224
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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New Jersey Manufacturers and Punitive Damages

Is the Place of Injury Corporate Headquarters?

Part Two of a Two-Part Article

By Janice G. Inman

As discussed in Part One of this article, New Jersey's Products Liability Act (Defective Product) (PLA), N.J. Stat. § 2A:58C-5 (c) (2013), prevents injured plaintiffs seeking compensation from drug and device manufacturers from being awarded punitive damages. The statute, which in an earlier form was enacted in 2008, provides, in pertinent part:

> Punitive damages shall not be awarded if a drug or device ... which caused the claimant's harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency's regulations, which information was material and relevant to the harm in question, punitive damages may be awarded.

Other Jurisdictions

While New Jersey courts are bound by the statute's manufacturer protections, courts located in other jurisdictions have given the law mixed levels of respect. Most recently, as discussed last month, the Eighth Circuit Court of Appeals, in *Winter v. Novartis Pharmaceuticals Corp.*, 2014 U.S. App. LEXIS 411 (8th Cir., 1/9/14), determined that New Jersey's punitive damages prohibition law was inapplicable to a Missouri plaintiff allegedly harmed by the defendant New Jersey manufacturer's drug products Arendia and Zometa.

The decision begs the question: What is happening with New Jersey's punitive damages law in other jurisdictions, and why are courts unable to come to a consensus on whether the law applies to non-New Jersey plaintiffs' cases?

The *Winter* Court Is Not The First to Discount NJ Law

In *Hill v. Novartis Pharm. Corp.*, 2012 U.S. Dist. LEXIS 38516 (E.D. Cal. 2013), the U.S. District Court for the Eastern District of California was asked to throw out the plaintiff's claim for punitive damages based on New Jersey's prohibition on assessment of such damages for harm caused by FDA-approved drugs and devices. The *Hill* court began its analysis by turning to the choice-of-law rules of its forum state, California. Those rules ask first what the governmental interests of the competing jurisdictions are. If the rules are not materially different, then California law will apply. *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App.4th 1436 (2007). If there is a material difference — as there was in *Hill*, because punitive damages would be allowed under California's law but not New Jersey's — a court must move on to answer two questions, as described in *Frontier Oil*.

First, it must determine whether each jurisdiction has an interest in applying its own law. If not, the court should apply the law of the interested jurisdiction. However, if both have an interest, the court must next ask, "which jurisdiction has a greater interest in the application of its own law to the issue or, conversely, which jurisdiction's interest would be more significantly impaired if its law were not applied. The court must apply the law of the jurisdiction whose interest would be more significantly impaired if its law were not applied."

The *Hill* court determined that New Jersey's interest in enacting its punitive damage prohibition law was to advance the economic health of companies operating within its borders. California's interest in seeing its punitive damage laws applied to tort cases is to punish wrongful acts committed within the state and prospectively deter similar acts in the future. Both these states' interests were equally legitimate, the *Hill* court found.

This being the case, the court turned to another general rule: the maxim that, unless there is a compelling reason to apply the law of a foreign jurisdiction, the presumption is that the law of the forum state should be applied. Novartis attempted to provide the court with a compelling reason to apply New Jersey's law over California's by pointing out that its decision-making actions concerning the marketing and labeling of its product took place in New Jersey. Any harm that came to the plaintiff sprang from this source, it said.

But the *Hill* court found this rationale less than compelling. It concluded that California's interests in the case were greater, in light of the fact that so many other actions that led to the alleged harm complained of took place in California — *i.e.*, distributing and selling the drug there; paying salespeople employed there to promote the product; and sending promotional materials there. And because California law should be applied, the plaintiffs were entitled to seek the punitive damages available under that law.

In the case of *Rowland v. Novartis Pharmaceuticals Corp.*, 2013 U.S. Dist. LEXIS 166205 (W.D. Pa., 2013), the defendant attempted to obtain a declaration from Pennsylvania's Western District Court that

continued on page 4

Janice G. Inman is Editor-in-Chief of *Medical Malpractice Law & Strategy*, a sister publication of this newsletter.

Punitive Damages

continued from page 3

New Jersey law should be applied to the issue of punitive damages, even though all three plaintiffs were Pennsylvania residents who were prescribed and allegedly injured by the defendant's drug Zometa in Pennsylvania. Again, the manufacturer's argument was based on the fact that its corporate decisions regarding Zometa's labeling, as well as its clinical trials, adverse event reporting and marketing decisions, took place in New Jersey.

The *Rowland* plaintiffs claimed that Zometa caused them to develop osteonecrosis of the jaw (ONJ). Two of them originally filed their claims in Washington, DC, and the third filed his claim in New York. All three cases were conditionally transferred to the Middle District of Tennessee for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407, then transferred to the Western District of Pennsylvania, where they were consolidated for consideration of pretrial matters. All parties agreed that the choice of law as to whether New Jersey or Pennsylvania law should apply to the punitive damages claims must, in accordance with 28 U.S.C. § 1407(a), be determined by the laws of the states from which the cases were transferred. Therefore, the *Rowland* court had to decide which law as to punitive damages a District of Columbia court would apply to two of the claims, and which state law a New York court would apply to the third claim.

The choice-of-law rules in Washington, DC, begin, as do most, by asking if a true conflict exists between the laws of jurisdictions with interests in the case. If there is no conflict, then District of Columbia law will be applied. However, if there is a conflict, a government interest analysis must be undertaken. Courts will then use the factors set out in Restatement (Second) of Conflicts § 145 to determine which state has the more significant relationship to the particular dispute. One of the main factors in this analysis is the place of injury. Novartis argued, however, that the plaintiffs' place of injury was "fortuitous" because the alleged harm flowing from the company's New Jersey-made marketing decisions was no more likely to have occurred in Pennsylvania than in any other state.

The court found this argument flawed because the plaintiffs were Pennsylvania citizens who purchased the defendant's drug and used it there; thus, "realistically this particular injury to these particular Plaintiffs could not have occurred anywhere other than Pennsylvania," stated the court. A second factor to be considered in a § 145 analysis is the place where the conduct causing the injury took place. Although it agreed with Novartis that the drug maker did in fact conduct research on Zometa and make decisions concerning its marketing, labeling and packaging in New Jersey, the court discounted this element precisely because of New Jersey's pro-business law, stating, "[T]he place where the Defendant engaged in certain conduct is of less significance in situations where a potential Defendant might choose to conduct his activities in a state whose tort rules are favorable." Going through the other factors in Restatement (Second) of Conflicts § 145, the court ultimately concluded that Washington, DC's choice-of-law system would apply Pennsylvania law on punitive damages. And Pennsylvania permits a drug-injured plaintiff to seek punitive damages even if the drug in question has been FDA-approved.

Turning to the case first filed by one of the three plaintiffs in the jurisdiction of New York, the *Rowland* court next observed that, under New York's choice-of-law rules, the law to be applied to a tort claim is New York law if no conflict exists between the laws of interested states. If there is a conflict, then the law of the jurisdiction with the greatest interest in the case will be applied. The place with the greatest interest will generally be the place where the tort occurred and where the parties reside. If the defendant's alleged misconduct and the plaintiff's injuries occurred in different jurisdictions, "the place of the tort is the jurisdiction where the 'last event necessary' to make the defendant liable occurred." *In re September 11 Litig.*, 494 F.Supp. 2D 232 (S.D.N.Y. 2007) (quoting *Schultz v. Boy Scouts of America Inc.,* 65 N.Y.2d 189 (N.Y. 1985). Using this analysis, the court determined that a New York court would apply the law of Pennsylvania, because "[t]he last event necessary to make [Novartis] liable plainly occurred in Pennsylvania. While [Novartis] may have made corporate decisions regarding Zometa in New Jersey, its liability to these Plaintiffs would not be in dispute had it not marketed Zometa to them and their doctors in Pennsylvania, sold Zometa to them in Pennsylvania, and allegedly failed to warn them in Pennsylvania of Zometa's possible connection to ONJ."

Contrary Outcomes: NJ Punitive Damage Law Applied

Courts in some jurisdictions are applying New Jersey law on punitive damages to drug injury cases involving plaintiffs outside New Jersey. These courts, including the U.S. District Courts for the districts of Oregon (*Stromenger v. Novartis Pharms. Corp.*, 941 F. Supp. 2d 1288 (D. Ore. 2013)) and Maryland (*Zimmerman v. Novartis Pharms. Corp.*, 889 F. Supp. 2D 757 (D.Md. 2012)) agreed with defendant Novartis's argument: that the rationale for imposing punitive damages on corporations is to deter those entities and others like them from engaging in certain undesirable conduct. Thus, the state in which a corporation conducts its business and makes its decisions has the most significant relationship to any undesirable corporate actions and should see its law of punitive damages applied.

Courts that adhere to this logic also tend to find that when a company operates nationally (or internationally), the place of plaintiff injury is "fortuitous," meaning that the

continued on page 5

Punitive Damages

continued from page 4

place of injury bears no relationship to the cause of the harm. The cause of the harm is the decisions made by the company. Therefore, New Jersey law on punitive damages should apply to a New Jersey pharmaceutical manufacturer's conduct if that conduct (*i.e.*, devising and implementing marketing practices and labeling drug products) took place in New Jersey, even if it caused harm elsewhere. It is New Jersey that has the more significant relationship to the question whether punitive damages should be imposed, according to these courts.

CONCLUSION

New Jersey residents prescribed medications in-state can expect to get no punitive damages if their claims target any of the many drug manufacturers incorporated in or conducting most of their business out of New Jersey. And, as we have seen, even some courts in other jurisdictions are applying New Jersey law to punitive damages claims brought by plaintiffs outside that jurisdiction. Meanwhile, other courts are handing pharmaceuticals companies the bad news that, no matter what the law of the State of New Jersey, it cannot necessarily insulate drug manufacturers from punitive liability when they conduct business outside of New Jersey.

Although various jurisdictions use differing choice-of-law analyses, the deciding factor appears to be whether the jurisdiction in which the filing court sits considers the place with the most significant connection to the harm caused by pharmaceuticals products to be the place where the corporate decisions that led to the injury were made or the place where the consequences of those decisions ultimately resulted in harm to the claimant. A lot is riding on that factor, for both plaintiffs and New Jersey drug manufacturers doing business outside their home state.

Plaintiffs with viable options for forums in which to file their claims against New Jersey pharmaceuticals manufacturers are well advised to consider this choice carefully. Whether the case is heard in the filing forum or transferred to another jurisdiction, the law of the place of filing may have a profound effect on the amount of damages recoverable.

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Failure-to-Warn

continued from page 2

changing his behavior to avoid the injury.

Establish That Plaintiff Was Not Aware of the Danger. The plaintiff must establish that he had no prior knowledge of the danger, because a failure-to-warn cannot be the cause of harm when the product user was already aware of the danger. *Krajewski v. Enderes Tool Co., Inc.*, 469 F.3d 705 (8th Cir. 2006) (failure-to-warn was not causal where plaintiff was aware that using a pry bar without goggles could cause eye injury). So consider whether the danger was well known or obvious before making a failure-to-warn claim: such a claim concerning a sharp knife or a heavy hammer is bound to fail. Also consider whether the user was sophisticated enough that he might be expected to know of a product's risk absent a warning.

Establish That the Plaintiff Read and Relied Upon the Defective Warning. When a plaintiff claims a warning is inadequate, he must establish that he read and relied on the warning. A plaintiff's failure to read the existing warning defeats the causal link between the inadequate warning and the harm. *Bishop v. Bombardier, Inc.*, 399 F.Supp. 2d 1372 (M.D. Ga. 2005) (in a personal watercraft case, the plaintiff could not recover because he could not prove he read existing warnings or recall what they said, thus a more specific warning would not have altered his actions and prevented his injury). The exception is if the plaintiff is challenging the conspicuity of the original warning: The existing warning was too small or in the wrong location, and thus the plaintiff was unable to read it.

Establish That the Plaintiff Would Have Acted Differently Had There Been an Adequate Warning. The Restatement (Third) of Torts: Products Liability § 2 cmt. i (1997), provides that:

> [n]otwithstanding the defective condition of the product in the absence of adequate warnings, if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings is not a legal cause of that plaintiff's harm.

A plaintiff must prove that he would not have accepted the risk if properly warned. *Austin v. Will-Burt Co.*, 361 F.3d 862 (5th Cir. 2004) (a manufacturer's failure-to-warn is not a proximate cause of injury absent evidence that an adequate warning would have changed the product user's conduct); *Holowaty v. McDonald's Corp.*, 10 F.Supp.2d 1078 (D. Minn. 1998) (to prove causation, plaintiffs need to show that they would have acted differently if they had been warned of the risk). Proving this element poses significant challenges for plaintiffs.

Present Plaintiff's Testimony That He Would Have Read and Heeded the Warning. A plaintiff can claim he would have heeded an adequate warning, and acted to avoid the risk. But in some jurisdictions, such a self-serving statement is not admissible. *Magoffe v. JLG Indus*, 375 Fed Appx. 848 (10th Cir. 2010) (holding that Fed. R. Evid. § 701 does not permit a lay witness to speculate about whether he would have followed a hypothetical warning or what the hypothetical effect would be). However, there are paths around this hurdle. Consider whether the plaintiff can establish

continued on page 6

Failure-to-Warn

continued from page 5

that he is safety-conscious or has habitually followed similar warnings. For example, a plaintiff with a severe allergy is likely to have followed an appropriate warning on a product containing the allergen.

Present Expert Testimony That Adequate Warning Would Have Been Effective. In most jurisdictions, a plaintiff does not have to present an alternative warning, but can argue that some unspecified "better" warning would have prevented his harm. Twerski & Henderson, "Fixing Failure-to-Warn," Brooklyn Law School, Legal Studies Paper No. 301, 90 *Ind. L. J.* (2014 Forthcoming) at 14. But if the court so requires or if the defendant has rebutted the heeding presumption, the plaintiff may have to present an alternative warning. Fortunately, warnings are not developed in a vacuum. There are experts who can testify, based on psychological, physiological, and other data, that the defendant's warning was ineffective and, conversely, the plaintiff's alternative warning would be more effective.

A well-credentialed expert may be able to identify flaws in the defendant's warning's size, location, design and wording, and the existence of any better warnings on competitor products. Particularly in those jurisdictions that follow an objective standard of causation (requiring a plaintiff to prove an adequate warning would have prevented harm to the reasonable person), an expert should be able, through testing the efficacy of both the original and proposed warnings, to provide testimony that bolsters the plaintiff's causation argument.

Defense of Causation Claims

Causation is often overlooked by the plaintiff and the court; defense counsel should highlight the issue. The defense strategy must start early in discovery, especially in depositions of the plaintiff or other product user. The defense also may choose experts and develop expert opinions to address causation.

Demand That the Plaintiff Offer a Reasonable Alternative Warning. The Reporters for the Restatement (Third) of Torts: Products Liability, recently argued that just as plaintiffs in a design defect case are required to offer a reasonable alternative design, plaintiffs in a failure-to-warn case should be required to submit a reasonable alternative warning ("identify specifically what, how, and to whom the defendant distributor should have communicated additional risk information"). Twerski & Henderson, Fixing Failure-to-Warn, 90 *Ind. L. J.* at 10. They contend that "a defendant cannot challenge … whether [a warning] would have saved the plaintiff from injury without knowing the specifics of the proposed warning." *Id.* at 24. The defense lawyer should persuade the court to require the plaintiff to detail the warning he contends should have been given. Regardless, the defense should pin down the plaintiff and his expert on specifics of their warning claim.

Police Admissibility of Plaintiff's Proof. In some courts, the plaintiff's testimony that he or she would have read and heeded a warning is too speculative to be admitted. *See Magoffe*, 375 Fed Appx. 848. Expert testimony on causation issues, *e.g.*, an untested warning would have prevented the accident, may be unreliable under Rule 702 or its equivalents. Defense counsel should move to exclude speculative and unreliable testimony.

Prove Product User's Awareness of Risk. Plaintiff's prior awareness of the risk will defeat causation. If the plaintiff knows the risk, a warning would not have changed his conduct. *See Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F.Supp. 1511 (D. Minn. 1993) (failure-to-warn claim dismissed when plaintiff was aware of danger presented by grain auger intake).

Proving the product user's knowledge is an effective strategy in cases involving a sophisticated user who helps the plaintiff make decisions on product use. For example, the knowledge level of the plaintiff's treating physician who prescribes a medical device or pharmaceutical must be explored. If the physician is already aware of the harm that allegedly should have been addressed by a different warning, then the existing warning did not factor in the physician's choice of the device or drug, or in providing informed consent to the patient/plaintiff. *Ackermann v. Wyeth Pharms.*, 526 F.3d 203 (5th Cir. 2008) (physician aware of suicide risk and would have prescribed drug even if different warning provided).

Prove Product User Did Not Read the Warning. Lack of, or inadequacy of, a warning is not causal if the product user did not read the warnings accompanying the product. If the defendant can prove that the user did not read the product's warnings, the failure-to-warn claim should be dismissed. *Motus v. Pfizer*, 358 F.3d 659 (9th Cir. 2003) (inadequate warning claim dismissed when prescribing physician did not read warnings before prescribing drug).

This approach may not work if the plaintiff claims that he did not read the warning because it was not conspicuous enough, *e.g.*, was not of a proper color or size, or was buried in the manual. *See* Bowbeer, et al., Warning: Failure to Read This Article May Be Hazardous to Your Failure-to-Warn Defense, 27 *Wm. Mitchell L. Rev.* 439, 460 (2000) ("[F]ailure to read the warning because the warning was not noticed in the first instance can raise the issue of the warning's adequacy, a question of fact, which may preclude judgment as a matter of law.").

Similarly, if the product user admits he habitually does not read warnings, then failure-to-warn cannot have caused the accident. Even if an adequate warning appeared on the product, the plaintiff cannot prove he would have read and heeded it.

Prove Product User Does Not Heed Warnings. Even if the plaintiff shows that the user read the product's warnings, evidence that

continued on page 7

Failure-to-Warn

continued from page 6

the user frequently disregards warnings may defeat causation. Evidence that the plaintiff smokes, drinks while pregnant, or does not use seat belts, despite relevant warnings, will help prove that he or she would not have heeded the proffered safety messages. The court may require the defendant's evidence of disregard of warnings to be related to use of the product involved in the accident, and to reach the level of habit, rather than anecdotal character evidence, to be admissible on causation. *See, e.g., Sharpe v. Bestop, Inc*., 730 A.2d 285, 286 (N.J. 1999) ("habitual disregard" of seat belt warning admissible, while "occasional disregard of warnings not to drink and drive" not admissible).

Offer Expert Testimony That Proposed Warning Would Not Have Affected Conduct. Defense experts may offer opinions that the plaintiff's proposed warning's effectiveness is untested or questionable. Communications or industrial psychology experts may also explain that the product user was habituated to using the product and a warning would not have affected his conduct. *See* Martin, et al., 'If Only I Would Have Been Told …' A Failure-to-Warn Discussion: Causation, the Uncertainty Principle, and the Benign Experience Principle," 40 *Product Safety & Liability Reporter* 879 (2012).

Explore Other Evidence to Defeat Causation. Each case presents unique facts, which should be explored for causation defenses. For example, lack of warning may not be the cause of the accident if the plaintiff learned to use the product by earlier, frequent use of a similar product made by another manufacturer. Or a warning may be irrelevant when the plaintiff must make a split-second decision about product use. Or the plaintiff may not be able to prove that the manufacturer could have delivered an effective warning to the user. *See, e.g., Huitt v. Southern California Gas Co*., 188 Cal. App.4th 1586 (Cal. App. 2010) (plaintiff failed to prove that warning by natural gas supply company that odorant could be adsorbed by new steel pipes would have reached plaintiff).

Rebut the Read and Heed Presumption. The same evidence offered to defeat causation may burst the heeding presumption, requiring the plaintiff to offer evidence that an adequate warning would have been read and heeded to get his claim to the jury. Evidence that the user was aware of the harm and confronted it anyway, or did not read the product labels, or does not customarily read warnings may defeat the presumption. *See* Bowbeer, Warning: Failure to Read This Article … , 27 *Wm. Mitchell L. Rev*. at 462-63.

Move for Summary Judgment or to Dismiss When Undisputed Facts Defeat Causation. If the defense develops undisputed evidence defeating causation, *e.g.*, the plaintiff was aware of the risk or did not read the challenged warning, it should seek dismissal of the failure-to-warn claims at summary judgment or at trial before submission to the jury. If the record is fully developed, the defendant may win summary judgment when there is no evidence to support causation. *Koken v. Black & Veatch Constr., Inc*., 426 F.3d 39, 49 (1st Cir. 2005) (summary judgment appropriate where plaintiff failed to offer proof that "foreman would have ordered a course of action different from that which occurred" if he had received a warning).

Move to Dismiss When Plaintiff Fails to Prove Causation. In a state that has not adopted the heeding presumption, or if the presumption is rebutted, the plaintiff's failure to offer evidence at trial that the product user would have read an adequate warning and changed his conduct to avoid the risk should result in dismissal of the failure-to-warn claim. At the conclusion of the plaintiff's case, defense counsel should make a Rule 50 motion for judgment as a matter of law. *See, e.g., Huitt*, 188 Cal. App.4th at 1589 (trial court should have dismissed failure-to-warn claim when "there was no evidence that, had the [defendant] issued a warning, [plaintiffs] would have been aware of it").

CONCLUSION

While duty and adequacy issues may predominate in failure-to-warn litigation, the causation issue is equally important and may be more challenging. Even if they pursue the claim in a state with a heeding presumption, plaintiffs' lawyers must prepare a strategy to prove that absence of an adequate warning caused plaintiff's loss. Defense counsel must plan to defeat causation at all stages of discovery and trial. The failure-to-warn claim is more likely to be resolved justly with proper focus by the parties and the court.

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Practice Tip

continued from page 1

s/he is trying a case in a jurisdiction in which such judgment will be entered. Otherwise, the trial lawyer may be rejecting offers that, at first glance, appear to be much lower than verdict value but may, in fact, be equal to or higher than a verdict. Of course, no one has ever lost a case s/he settled, so it behooves the trial lawyer to learn the mechanics of periodic payments so s/he can explain it to the client.

Under the structured judgment procedure, past damages are paid in a lump sum as before; however, future damages are paid in periodic installments by the defendants through the purchase of an annuity contract. In some states, the periodic payments cease if the plaintiff dies.

The first thing the trial lawyer must realize is that a structured judgment statute is substantive for *Erie* purposes as it is "outcome-

continued on page 8

Practice Tip

continued from page 7

affective." *Gravatt v. City of New York*, 54 F. Supp. 2d 233, 234 (S.D.N.Y. 1999). Thus, even if you are trying a case in a foreign jurisdiction, you must make a determination as to whether or not a structured judgment statute will be applicable under conflict of laws rules.

After a verdict, both parties usually submit a proposed judgment to the court with an economist's report, which provides the methodology of the calculations. The court then decides the amount of the judgment which is to be docketed. But before the momentum of the trial reaches that stage, the plaintiff's attorney should undertake his/her own calculations which need not be as complex as courts have expressed. This article uses New York's structured judgment statute as an example (NY CPLR 5041).

How It Works

New York requires that the jury indicate in its verdict for future damages the number of years for which the amount is going to paid. This number is usually based on the plaintiff's life and work-life expectancies. Unlike the rule in numerous other state and federal cases, New York does not ask the jury to discount future damages to present value (Present value is the current worth of a future sum of money or stream of cash flow. It is based upon the federal discount rate which is the rate charged by the Federal Reserve Bank to commercial banks). The courts in New York will make the present value calculation, usually based upon the economists' reports submitted by the parties.

These calculations can easily be done by a trial lawyer during the trial to weigh the future value of an offer to settle versus a verdict. For example, suppose a 40-year-old worker earning $60,000/year loses his leg due to some defective product. Let's estimate a verdict exactly three years after his accident: $300,000 for pain and suffering from the date of accident to the date of verdict, plus $1 million for the pain and suffering and loss of enjoyment of life from the verdict for 20 years into the future, plus $60,000 x 3 years for lost wages from the date of accident to verdict plus future lost earnings of 22 years x $60,000 = $1.32 million for lost wages (not taking into account any inflation.) See the chart above.

Assumed Verdict	Past losses	Future losses	
Pain & Suffering	$ 300,000	$ 1,000,000	20 years
Lost Wages	$ 180,000	$ 1,320,000	30 years
	$ 480,000	$ 2,320,000	

If a judgment was entered on the amount in the chart above, New York would permit a lump sum payment of $300,000 for past pain and suffering and $180,000 for past lost wages (New York does not reduce for income taxes) = $480,000 for past damages to date of verdict. The client may think he's getting an additional $2.32 million for future pain and suffering and lost wages, but the statute will require a reduction of the $2,320,000.

New York allows the first $250,000 of future damages to be paid in a lump sum which is added to the past damages. That means the plaintiff will get $480,000 + $250,000 = $730,000 as a lump sum, which leaves $2,070,000 (2,320,000 – $250,000) to be paid out in an installment annuity. (We will allocate $125,000 of the $250,000 lump sum payment to each item of future damages: pain and suffering $1,000,000 – $125,000 = $875,000; lost wages $1,320,000 – 125,000 = 1,195,000.)

One has to calculate two annuities; one to cover pain and suffering and another for lost wages. New York limits the payout period for pain and suffering to 10 years, notwithstanding that a jury may find it will last longer. (Here, we assumed a jury award for 20 years.)

Present Value

To calculate the present value of $875,000 over 10 years, you can consult a website such as Moneychimp (http://bit.ly/1v3o9HY) and plug in the numbers (using 2.7% as the present Federal discount rate). That present value amount is $670,353 as compared with $875,000.

The present value of remaining lost wages, $1,195,000, ($1,320,000 – $125,000) over 20 years is approx. $701,389 according to Moneychimp. The annuities required would be $67,035/year ($5,586/month) for pain and suffering and $35,069/year ($2,922/month) for lost wages.

Therefore, if the defendant were to offer $2,101,742 ($480,000 + 250,000 + 670,353 + 701,389) that would be the present value of a possible verdict as calculated under the New York structured judgment statute.

Conclusion

This is just a rough estimate of the calculated amounts. The calculations that would include case expenses and legal fees allocated to each category of damages and income tax consequences are too complicated to discuss within the limitations of this article and will await another day. However, these calculations should be sufficient to permit a trial lawyer to explain to his/her client that it may be in their best interest to take what the client thinks is a reduced settlement than to chance a verdict.

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