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PRODUCT LIABILITY
LAW SECTION · STATE BAR OF GEORGIA
Volume 2, Number 2 • March 2001

Nuts and Bolts Seminar Held in December

by Staci J. McClanahan
Spelman College

"Nuts and Bolts of Product Liability Law," the most recent seminar sponsored by the Product Liability Section, was held on December 7, 2000 at the Ritz-Carlton, Atlanta. The day-long seminar was very informative and well-attended.

Above: Discussion on Plaintiff's Trial Techniques, left to right, Judge Gino Brogdon, Mike McGlamery, Leslie Bryan, Ted Eichelberger. Far right: Bernard Taylor, Seminar Moderator.

The first part of the morning session included a panel discussion surrounding discovery issues. Panelists included the Honorable M. Gino Brogdon, Judge, State Court of Fulton County; Jay B. Bryan of Hunton & Williams; and Christopher M. Farmer of Harper, Walden & Craig. Bernard Taylor of Alston & Bird, LLP served as moderator. The Panelists discussed various topics including: 1) the importance of requesting results of all tests performed on particular products; and 2) pursuing the facts surrounding previous cases when there is a substantial similarity between those and the pending case. Illustrating the former topic, Chris Farmer mentioned his strategy of utilizing ATLook, a directory that tracks law suits nationwide, to identify prior cases with substantial similarities to those he may be assigned.

The utilization of electronic discovery and its benefits were also discussed. For instance, although potentially costly, the Panelists recommended aggressively pursuing electronic mail ("e-mail") correspondence. They noted that history has shown that people tend to be less formal and not as concerned about damaging repercussions when corresponding via e-mail.

Z. Ileana Martinez of Alembik, Fine & Callner, P.A.; Bryan A. Vroon of Pursley, Howell, Lowery & Meeks; and moderator Laura Lewis Owens discussed pre-trial considerations during the latter half of the morning. Among the issues addressed were: 1) the best strategies a defendant can utilize in moving for summary judgment

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Below: Left to right, Judge Gino Brogdon, Seminar Moderator; Ted Eichelberger, Panel Member; Leslie Bryan, Panel Member.

Save the Date!

May 22, 2001

Tenth Annual Product Liability Institute

Message from the Chair

Stephanie E. Parker
Jones, Day, Reavis & Pogue

I am pleased to report that in December we sponsored another successful seminar — thanks to our speakers and Chair Laura Lewis Owens. The feedback we received from ICLE (based on evaluations from the attendees) was that the panel format worked well. With a panel discussion, the audience not only receives the benefit of each speaker's input, but also receives give-and-take between the panel members. I want to thank the speakers for taking the time to prepare their remarks so thoroughly and for bringing terrific energy and enthusiasm to the seminar.

I especially want to thank Judge Gino Brogdon for serving as moderator. Judge Brogdon brought tremendous insight and wisdom to the panel discussions, and we are grateful for the gift of his time. Also, a big thank you to Larry Jones of ICLE for his assistance.

Next Seminar

Please mark your calendars for Tuesday, May 22 – the date for the Tenth Annual Product Liability Institute. The Institute will be held again in Atlanta. ICLE will mail registration forms closer to the seminar's date. Mike McGlamery is serving as Chair. The next issue of this newsletter will feature an article on the upcoming seminar.

Meetings Outside Atlanta

One of my goals for the Section has been to hold some type of Section meetings (perhaps CLE lunch programs) in Macon, Rome, Augusta, or Savannah. While the membership of our Section is overwhelmingly based in Atlanta, we also have a small but growing number of Section members who practice outside Atlanta. I would appreciate hearing from any of those lawyers who would like to volunteer to assist with setting up a Section meeting in one of those locations.

Special Thanks

This newsletter was prepared with the assistance of two college interns who are planning to attend law school. Special thanks to Staci McClanahan and Albert Sanders. Staci is a student at Spelman College and Albert attends Morehouse. Thank you!

Section Officers

I am extremely proud to announce that Lee Wallace and Dart Meadows have agreed to serve as additional officers of the Section. When I became Chair, our Section had no bylaws and we have never had officers besides the Chair. One task assigned to me was to prepare bylaws. The Board of Governors of the State Bar has approved our proposed bylaws (which are based on the State Bar's model bylaws), thus

paving the way for a Chair-Elect and a Secretary.

The current Bar President George Mundy and the Immediate Past President Rudolph Patterson have always encouraged the inclusion of all Section members. I am therefore especially pleased that the leadership structure now in place sets forth alternating leadership between the plaintiff's bar and the defense bar. Lee and Dart have both volunteered their time to serve the Section over the past year and have done a terrific job as speakers previously, so the Section will be in good hands once the Section year concludes in June.

Please contact me if the Section can ever be of assistance to you.

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New Section Officers

Chair-Elect
Lee Tarte Wallace

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Lee Tarte Wallace graduated *summa cum laude* and first in her class from Vanderbilt University. She graduate *cum laude* from Harvard Law School and clerked on the Eleventh Circuit for Judge James Hill. Lee is a partner with the Atlanta law firm of Butler, Wooten, Overby, Fryhofer, Daughtery & Sullivan. She served as editor of the Georgia Trial Lawyers Association's ***Verdict*** magazine for two years, from 1995-1997, and as parliamentarian of GTLA from 1998-1999. Lee also is a member of the State Bar of Georgia's Disciplinary Rules and Procedures Committee, which recently completed the rewriting of the ethical and disciplinary rules currently governing Georgia attorneys. She is a member of the Boards of Directors of the Consumer Law Center of the South and of the Georgia Civil Justice Foundation. Lee is a member of the Atlanta Bar Association's Judicial Selection and Tenure Committee and Techno-Committee. She has chaired the State Courts Committee of the Atlanta Bar Association and Vice Chaired the Membership Services Committee of the State Bar of Georgia. Lee has authored several articles on topics ranging from First Amendment to product liability law. In 1999, Lee and her husband George began a program at their church to assist family members and patients at Shepherd Place, a temporary living facility for persons with spinal and head injuries who are undergoing rehabilitation at Shepherd Spinal Center of Atlanta.

Secretary
James Dartlin ("Dart") Meadows

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James Dartlin ("Dart") Meadows is a trial lawyer concentrating in litigation including products liability, personal injury, medical malpractice, real estate and commercial disputes. He has tried a substantial number of cases in these areas since he began his practice in September, 1983.

Dart has spent a significant portion of his practice defending woodworking machinery manufacturers, distributors and dealers in products liability litigation throughout the United States. He has been national products liability counsel for one of the world's largest manufactures and distributors of industrial woodworking machinery for over ten years. He has been the co-chair of the Hand and Power Tool Subcommittee of the Defense Research Institute since 1997. Dart has spoken on product liability prevention and defense issues at the Defense Research Institute (DRI), the Woodworking Industry Conference, the Product Liability Prevention and Defense Group, the Web Sling and Tiedown Association and the Association of Wire Rope Fabricators, Dart has spoken every year since 1995 at the Atlanta seminar "Going Solo With Success".

Dart graduated *magna cum laude* from West Virginia University in 1979 and Order of the Coif from the West Virginia University College of Law in 1983. Dart attended graduate school

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Section Activities

March 15-17, 2001
ABA
Product Liability Annual
Committee Meeting
New Orleans, Louisiana
(312) 988-6256

June 20-23, 2001
ABA
Tort & Insurance Practice
Product Liability
Megaconference

June 13, 2001
Product Liability Section Reception
State Bar Annual Meeting
Kiawah, South Carolina

New Case Alert

by David Monde

AYRES V. GENERAL MOTORS CORP.

__ F.3d __
(11th Cir., Nov. 29, 2000)

Last week, the Eleventh Circuit Court of Appeals issued an important decision regarding limitations on civil and criminal liability for an auto maker's violation of the safety defect disclosure obligations under the Federal Motor Vehicle Safety Act, 49 U.S.C. § 30118. *Ayres v. General Motors Corp.*, __ F.3d __ (11th Cir., Nov. 29, 2000) (copy attached). In *Ayres*, the Eleventh Circuit reversed the district court and held that GM was entitled to summary judgment against the Georgia RICO claims in this class action potentially involving up to 4.5 million GM vehicles.

The Eleventh Circuit decision in *Ayres* makes some new law that should be helpful to automobile manufacturers and component part suppliers (including tiremakers) facing litigation involving the duty of a manufacturer to disclose purported "defects related to motor vehicle safety" under the Federal Motor Vehicle Safety Act. The Court assumed for purposes of argument that GM had a duty to disclose a defect and breached that duty. Nonetheless, the Court accepted GM's position that such a breach could not give rise to criminal liability under the federal mail and wire fraud statutes, or to derivative civil liability under the Georgia RICO statute, given the extensive administrative scheme under the Safety Act. The Court also held that the Safety Act confers no private cause of action to enforce its notification requirements, becoming only the second circuit court to address that issue.

The decision is also noteworthy in the context of removal jurisdiction. GM's lawyers removed the case from state court in 1996 based on a then new 11th Circuit decision, *Tapscott* v. *MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996). *Tapscott* allowed aggregation of putative class members' punitive damages claims to satisfy the amount in controversy requirement for diversity jurisdiction. After oral argument in this appeal, the 11th Circuit decided *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000), which abrogated *Tapscott* under the prior precedent rule. The *Ayres* plaintiffs filed a motion to remand based on *Cohen*.

With diversity no longer a valid basis for jurisdiction, GM resisted remand by arguing that: (1) the state RICO claim was predicated on alleged violations of the federal mail and wire fraud statutes and, (2) the federal law issue of criminal and civil RICO liability based on violations of the Safety Act was substantial enough to confer federal question jurisdiction, even though the question was presented in the context of a state RICO claim. While several district court decisions had addressed the issue by remanding state law RICO actions, the 11th Circuit agreed with GM, finding that the Safety Act issue "involves a very substantial federal question" sufficient to sustain federal jurisdiction. The Eleventh Circuit was careful to point out that it was not holding that all state law RICO claims alleging predicate acts based on violations of federal statutes would be sufficient to give rise to federal question jurisdiction. Nonetheless, the *Ayres* decision may help efforts to remove future cases in light of *Cohen*, and certainly should be persuasive authority in removing cases involving allegations of Safety Act violations made in the context of state law claims.

David Monde is a general litigation partner in the Atlanta Office of Jones, Day, Reavis & Pogue. For the past five years, David has acted as lead counsel in his Firm's role as National Coordinating Counsel for GM in its Electronic Control Module Litigation, including the successful representation of GM in the Eleventh Circuit in Ayres. *David is a* cum laude *graduate of the University of Rochester (BA 1981) and Georgetown University Law Center (JD 1987).*

The Impact of Direct-to-Consumer Advertisements on Georgia's Learned Intermediary Doctrine

*by Brandon Hornsby**

A recent essay in the prestigious *Journal of the American Medical Association* reflected on "a potentially explosive new basis for litigation against pharmaceutical companies" in America. Marcel P. Gemperli, *Rethinking the Role of the Learned Intermediary: The Effect of Direct-to-Consumer Advertising on Litigation*, 284 JAMA 2241, 2241 (2000). At issue is the tension that exists between the Learned Intermediary Doctrine and the recent proliferation of direct-to-consumer ("DTC") pharmaceutical advertisements. This tension has sparked enormous debate in the product liability legal community. To date, however, no Georgia appellate court has had an opportunity to confront this controversy.

From a Georgia perspective, this article provides a general and brief examination of the relationship between the Learned Intermediary Doctrine and DTC advertisements. First, this article looks at the principles underlying Georgia's Learned Intermediary Doctrine. Second, this article familiarizes the reader with DTC advertisements and the criticism that they are generating in the area of product liability law. Third, this article overviews the primary exceptions to the Learned Intermediary Doctrine which have been recognized since the Doctrine's appearance in American jurisprudence. Finally, this article examines the contention that there should be a DTC advertising exception to the Learned Intermediary Doctrine and identifies Georgia authority that may open or close the door to such an argument.

Georgia's Learned Intermediary Doctrine

In the context of prescription drugs, Georgia's Learned Intermediary Doctrine is well settled. *See Presto v. Sandoz Pharms. Corp.*, 226 Ga. App. 547, 548 (1997). Simply put, Georgia's Learned Intermediary Doctrine holds that the manufacturer of a prescription drug is not normally required to directly warn the patient of dangers in the drug's use. *Id.* The Doctrine focuses on the question of to whom drug manufacturers owe a duty to warn. Ordinarily, in the case of prescription drugs, the manufacturer's duty is fulfilled when the drug manufacturer warns the prescribing physician as to the possible dangers of a particular drug's use.

The Learned Intermediary Doctrine has been widely recognized throughout the United States since the early 1960s. Henry B. Alsobrook, Jr., *The Learned Intermediary Doctrine: Past, Present, and Future*, Leg. Med. 269, 270 (1994) ("The Learned Intermediary Doctrine has been adopted by every jurisdiction that has considered whether a drug manufacturer has a duty to warn."); Yonni D. Fushman, Comment, *Perez v. Wyeth Labs., Inc.: Toward Creating a Direct-to-Consumer Advertisement Exception to the Learned Intermediary Doctrine,* 80 B.U.L. Rev. 1116, 1116 n.19 (2000) ("Thirty-seven states have adopted the [Learned Intermediary Doctrine].").

In *Love v. Wolf*, 226 Cal. App.2d 378, 402-403 (1964), the California Court of Appeals became the first court in the Nation to use the rationale underlying the Learned Intermediary Doctrine to shift the duty of informing patients from the pharmaceutical manufacturer to the prescribing physician. This rationale is the backbone of the Doctrine in almost every state, and is well-stated in the Georgia Court of Appeals case of *Hawkins v. Richardson-Merrell, Inc.*, 147 Ga. App. 481 (1978):

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect.

> As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is a task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative.

Id. at 483 (quoting *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974) (internal quotation omitted). As *Hawkins* explains, it is the unique relationship among the pharmaceutical manufacturer, prescribing physician, and patient that gives rise to the Learned Intermediary Doctrine.

DTC Advertisements

Due to their recent proliferation, it would be rare to find a Georgian who has not been exposed to DTC advertisements. DTC advertising allows pharmaceutical manufacturers to directly reach their consumers through the most popular media outlets, including television, the Internet and print media. There is little doubt that DTC advertisements effectively extol the benefits of products, often using well-known and well-respected spokespersons. Former ABC *Good Morning America* co-host Joan Lunden frequently reminds us that her seasonal allergy prescription allows her to do whatever she wants to do – "play tennis, hike, ride horses, or even fly on a jet glider" – without worrying about her seasonal allergies. Likewise, former Presidential candidate Bob Dole speaks of the "courage" it takes for men to speak to their doctors about erectile dysfunction in the notable and prominent DTC campaign promoting medication to combat impotence.

DTC advertisements such as Lunden's and Dole's testimonials typically present the benefits of their products. Critics, however, note that the ads devote little or no time to the risks associated with taking the marketed medications. In doing so, the critics argue that because DTC advertisements create a direct relationship between the manufacturer and the consumer, drug companies should be held liable for the inadequacies of those warnings when such inadequate warnings result in injuries. *See* Andrew Somora, *Direct-To-Consumer Advertising: Are Consumers Being Informed?*, 8 Kan. J.L. & Pub. Pol'y 205 (1999); *Teresa Moran Schwartz, Consumer-Directed Prescription Drug Advertising and the Learned Intermediary Rule*, 46 Food Drug Cosm. L.J. 829 (1991).

Exceptions to the Learned Intermediary Doctrine

In making their argument, critics of DTC advertisements contend that there should be an advertising exception to the Learned Intermediary Doctrine. Often relied upon by Georgia's courts, *The Restatement (Third) of Torts: Product Liability* (1998) seems to contemplate the DTC advertising/Learned Intermediary Doctrine controversy. To this end, the Restatement provides:

> A prescription drug . . . is not reasonably safe because of inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to . . . the patient when the manufacturer knows or has reason to know that health care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

Restatement (Third) of Torts: Prod. Liab. § 6(d)(2) (1998). The American Law Institute states that it has "left to developing case law whether other exceptions to the learned intermediary rule should be recognized." *Id.* at § 6 cmt. e. Indeed, Comment e specifically acknowledges that while DTC advertisements are a "relatively new phenomenon," several decisions indicate that DTC advertising is "a factor to be taken into account in deciding to apply the learned intermediary rule."

While no Georgia court has explicitly carved out a clear exception to the Learned Intermediary Doctrine, other courts have been willing to recognize that in certain factual scenarios such exceptions to the Learned Intermediary Doctrine are warranted. For instance, in *Davis v. Wyeth Labs., Inc.* 399 F.2d 121, 131 (9th Cir. 1968), the

court recognized a mass immunization exception in instances such as mass polio inoculations, since there are no prescribing physicians to weigh the benefits of the medications against potential dangers.

Similarly, an oral contraceptives exception to the Learned Intermediary Doctrine was created by the Massachusetts Supreme Court in *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 69 (Mass. 1985), because, among other things, the voluntary nature of the oral contraceptive patients' involvement in the decision-making process to take the medication is heightened while the physician's role in the decision-making process is reduced.

Finally, some courts have recognized an FDA-mandate exception. *See, e.g.*, *Edwards v. Basel Pharms.*, 116 F.3d 1341 (10th Cir. 1997) (nicotine patches). Under this exception, some courts hold that where Food and Drug Administration regulations require manufacturers to provide direct warnings to patients for specific pharmaceuticals, such regulations alter the rationale of the Learned Intermediary Doctrine. This is based on the reasoning that the drug manufacturer's duty to warn patients is presumptively met by its adherence to the federally mandated warnings.

In accordance with the case law from other jurisdictions, Georgia also recognizes that the Learned Intermediary Doctrine is not absolute. In *Carter v. E.I. DuPont de Nemours & Co., Inc.*, 217 Ga. App. 139, 142 (1995), the Georgia Court of Appeals remarked: "In no case have we held that the manufacturer may always rely on an intermediary to pass along to the ultimate user warnings of dangers inherent in the use of a product." It is worth noting that *Carter* did not deal with pharmaceuticals. However, the court expressed the opinion that the application of the Learned Intermediary Doctrine can be contested when the question of to whom a drug manufacturer owes a duty to warn arises.

According to *Carter*, when determining whether a manufacturer can rely on an intermediary to pass along to the ultimate user warnings of dangers inherent in a product, a court should undertake a balancing test. The balancing test articulated in *Carter* is that suggested by Comment n of *The Restatement (Second) of Torts* § 388 (1977). According to this Comment, when determining whether the Learned Intermediary Doctrine applies, a court should balance several factors: the burden of requiring a warning; the likelihood that the intermediary will provide a warning; the likely efficacy of such a warning; the degree of danger posed by the absence of such a warning; and the nature of the potential harm. *Carter*, 217 Ga. App. at 143.

The DTC Advertising Exception

The New Jersey Supreme Court's decision in *Perez v. Wyeth Labs., Inc.*, 734 A.2d 1245 (1999) is the first case in the nation to address the controversy between DTC advertising and the Learned Intermediary Doctrine. According to the plaintiffs, in 1991, the defendant started a "massive advertising campaign" for its pharmaceutical that included television and magazines such as *Glamour*, *Mademoiselle*, and *Cosmopolitan*. *Id.* at 1248. According to the plaintiffs, none of the advertisements warned of any of the inherent dangers or side effects posed by the pharmaceutical. *Id.* In determining whether the Learned Intermediary Doctrine applied, the New Jersey Supreme Court was directly confronted with the question of whether the DTC advertisements altered the calculus of the Learned Intermediary Doctrine. *Id.* at 1254-55.

In answering the question before it, the *Perez* Court noted four (4) considerations for the Learned Intermediary Doctrine: "(1) reluctance to undermine the doctor-patient relationship; (2) absence in the era of 'doctor knows best' of need for the patient's informed consent; (3) inability of drug manufacturers to communicate with patients; and (4) complexity of the subject." *Id.* at 1255. With the possible exception of the last consideration, the *Perez* Court concluded that none of these considerations were present with DTC advertising. *Id.* at 1256. The court reasoned that the DTC advertisements encroach upon the patient-physician relationship because such ads directly encourage con-

sumers to ask for advertised products by name. *Id.* Accordingly, the court concluded that by its very nature, placing a duty to warn on manufacturers' DTC advertisements did not interfere with the patient-physician relationship since the patient-physician relationship had already been encroached upon by the ad itself.

Even though Georgia has not yet confronted the issue presented in *Perez*, the Georgia Court of Appeals has indirectly given Georgia a peek at what issues may be in store in a similar case. In *Presto v. Sandoz Pharms. Corp.*, 226 Ga. App. 547 (1998), the plaintiffs filed a prescription-drug product liability lawsuit. The plaintiffs alleged that their son committed suicide because he suddenly stopped taking Clozaril, a prescription anti-psychotic drug manufactured by the defendant and prescribed by the son's treating physician. *Id.* at 547. The plaintiffs alleged that the defendant-manufacturer should have warned their son of the dangers he faced if he discontinued use of the drug. *Id.* On summary judgment, the defendant-manufacturer successfully argued that based upon Georgia's Learned Intermediary Doctrine it had a duty to give warnings only to the son's physician. *Id.* at 548.

On appeal, the plaintiffs claimed that an exception to the Learned Intermediary Doctrine was demanded by the facts of the case because the defendant-manufacturer did give some direct information to the son in the form of a pamphlet entitled "Understanding Clozaril (clozapine) Therapy: A Guide for Patients and Their Families." *Id.* at 549. In support of their argument, the plaintiffs cited the Georgia principle that "[w]here one undertakes an act which he has no duty to perform and another reasonably relies on that undertaking, the act must generally be performed with ordinary or reasonable care." *Id.* (citing *Stelts v. Epperson*, 201 Ga. App. 405, 407 (1991)). As with DTC advertisements, because the defendant voluntarily undertook to provide some information directly to patients, the plaintiffs argued it had a duty to warn such patients of the dangers of discontinuing use of the medication.

Initially, the *Presto* Court addressed the plaintiffs claim that the balancing test presented by *Carter v. E.I. DuPont de Nemours & Co.*, 217

Nuts and Bolts of Product Liability Law

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for failure to warn; and 2) whether a *Daubert* motion warrants an attempt to remove a products liability action to federal court.

During the luncheon, Mark Herrmann of Jones, Day, Reavis & Pogue discussed some of the legal trends that have occurred over the past twenty years and that may have had an influence on product liability lawsuits. To help illustrate his points, Mr. Hermann showed previously published lawsuit advertisements, amongst other articles.

In the afternoon sessions, Plaintiff and Defense Trial Issues were addressed. During the Plaintiff's session, the Panelists discussed the timing of when a Plaintiff should be called to testify, and the most efficient ways to ask for damages. Honorable Judge Brogdon's humor and wit were enjoyed by all as he moderated the discussion. Panelists included Theodore B. Eichelberger of The Eichelberger Law Firm, Michael L. McGlamery of McGlamry, Kilpatrick & Morrison and Lesley J. Bryan of Doffermyre Shields Canfield Knowles & Devine.

The Seminar concluded with the Defense Trial Issues segment. The panelists were Richard K. Hines of Nelson, Mullins, Riley & Scarborough, LLP, Robert P. Monyak of Love & Willingham and Paul W. Painter of Ellis, Painter, Ratterree & Bart LLP. The Panelists shared their thoughts regarding how to formulate questions that yield an accurate and true response from prospective jurors during voir dire.

The Seminar was enjoyed by all who attended. After thanking everyone for their support, the Seminar Co-chairs Stephanie E. Parker and Laura Lewis Owens adjourned the Seminar until next year.

Ga. App. 139 (1995) weakens the Learned Intermediary Rule Doctrine. In response to this argument, the court explained that *Carter* "involved plaintiffs who purchased clothing available to the general public without warnings regarding the fabric's flammability." *Presto*, 226 Ga. App. at 548. As such, the *Presto* Court concluded that *Carter* is not applicable in cases which involve prescription drugs, available only through a licensed, skilled physician. *Id.*

In rejecting the plaintiffs' argument, the *Presto* Court found that the touchstone of the issue before it was one of reasonable reliance. *Id.* at 549. To this end, the court held that the plaintiffs' argument failed because their son could not, as a matter of law, have "reasonably relied" on the pamphlet for such a warning. Under the facts presented in *Presto*, the court found that the pamphlet provided to the son did not constitute an effort to inform patients of all the dangers of Clozaril and did not purport to do so. *Id.*

Instead, the pamphlet stated that it "provides answers to many common questions about CLOZARIL" but cautions the reader: "If there are any other questions about CLOZARIL therapy, be sure to ask the doctor, nurse, or pharmacist." *Id.* Accordingly, the *Presto* Court concluded that because the pamphlet covered only general issues concerning the drug, and as the plaintiffs relied on the son's treating physician to prescribe and supervise their son's use of the drug, the Learned Intermediary Doctrine protected the defendant-manufacturer from liability. *Id.*

Conclusion

To date, the *Journal of the American Medical Association's* prediction that "a potentially explosive new basis for litigation against pharmaceutical companies" exists has not come to fruition in Georgia. However, since the New Jersey Supreme Court's decision in *Perez*, a tremendous amount of literature has been written which both praises and condemns the reasoning of the *Perez* decision. In Georgia, based upon the strength of the Learned Intermediary Doctrine, there have been very few challenges to the Doctrine's rationale and even less appellate decisions explaining its limits. It is unknown for now where those limits lie, but it is safe to say that both sides of the DTC advertising exception argument will have plenty of ammunition in their arsenals when their day in court comes.

Brandon Hornsby is a trial attorney at the Atlanta law firm of Alembik, Fine & Callner. He obtained his B.S. from Florida State University and J.D. from the Emory School of Law, where he was an Associate Editor for the Emory Law Journal. Brandon's primary practice is in the areas of products liability, medical malpractice and personal injury law.

Submission of Materials

The Product Liability Newsletter welcomes submission of articles and case summaries involving issues of interest to product liability lawyers. If you are aware of a significant or interesting case, please bring it to our attention. We are also interested in short articles.

Thank you to Christine Panchur of Jones, Day, Reavis & Pogue for contributing the design and layout of this newsletter.

New Section Officers

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in the Department of Zoology at Louisiana State University in 1980. He practiced law in Powell, Goldstein, Frazer & Murphy's litigation department from 1983 until March 1992 when Meadows, Ichter & Trigg was formed.

Dart is a member of the American and Atlanta Bar Associations, the State Bars of Georgia and West Virginia, the DRI, the Product Liability Advisory Council (PLAC) and the Georgia Defense Lawyer's Association. He also handles plaintiff's personal injury cases and is a member of the Association of Trial Lawyers of America (ATLA) and the Georgia Trial Lawyers Association. Dart is on the Board of Directors of the Peachtree Christian Hospice. He has served on the Board of Directors of the Atlanta City Unit of the American Cancer Society and as the President of the Peach State Chapter of the West Virginia University Alumni Association. Dart was the number one tennis player on the West Virginia Tennis Team from 1975-79. He was a nationally ranked junior and is currently ranked near the top of the state rankings in Georgia in his age division. Dart also has a single digit handicap in golf.

Previous Product Liability Section Chairs:

Jane Fugate Thorpe

Robert L. Goldstucker

Karen Deming

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Section Member Questionnaire

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Yes, I'd like to join the Product Liability Section. Dues are $20.00 per year.