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New Jersey Cases To Watch In 2013

By **Martin Bricketto**

Law360, New York (January 01, 2013, 3:58 PM ET) -- The new year could bring court rulings in New Jersey that redefine the scope of the state's whistleblower law, clarify coverage responsibilities for the cleanup of contaminated sites and incite or discourage more suits under the state's powerful consumer protection law, attorneys told Law360.

Here are five cases and trends that New Jersey attorneys will be watching in 2013.

Battaglia v. United Parcel Service Inc.

The New Jersey Supreme Court will spell out what constitutes "protected activity" under the Law Against Discrimination and the Conscientious Employee Protection Act when it rules on the case of a United Parcel Service Inc. supervisor who accused the shipping giant of illegal retaliation. The court granted certification in February.

"I think this particular case has the ability to either broaden or redefine what is protected activity under these two laws, especially under CEPA," said Salvador P. Simao, a Ford Harrison LLP partner who specializes in employment law.

Michael Battaglia claims UPS demoted him for voicing complaints about the use of credit cards by certain managers, the poor performance of the division in which he worked, and his supervisor's use of offensive language to refer to female employees and his flirtatious behavior with another manager, according to case documents. Before his demotion, Battaglia also fired off an anonymous letter to a human resources manager based on such concerns.

A jury eventually handed Battaglia economic damages of $500,000 and $500,000 for emotional distress. The emotional distress award was later reduced to $205,000 by the trial court judge, who also denied UPS' bid for judgment on the CEPA and LAD claims.

In August 2011, an appeals court held that the allegedly offensive conduct of Battaglia's supervisor didn't fall within the Law Against Discrimination and that Battaglia failed to establish a cause of action under that law. There was no evidence that any female employee heard the supervisor's remarks or was treated differently in any way, the court noted.

However, the court rejected UPS's contention that it deserved judgment or a new trial on the CEPA claim, refusing to disturb the determination of the jury that Battaglia's demotion constituted retaliatory conduct under the whistleblower law.

“It would certainly seem to be a broad construction of CEPA. They don't strike one as classic allegations of a violation of law,” said Thomas A. Linthorst, a partner in the labor and employment practice of Morgan Lewis & Bockius LLP. “They strike more as internal issues, company policy issues, and I think that's very much where the battle lines are drawn in this space.”

The case is Battaglia v. United Parcel Service Inc., case number A-86/87-11, in the New Jersey Supreme Court.

Farmers Mutual Fire Insurance Co. v. New Jersey Property Liability Insurance Guaranty Association

The state Supreme Court will soon hear arguments from Farmers Mutual Fire Insurance Co. against an appellate finding that solvent insurers have to exhaust their coverage of environmental cleanup costs before the New Jersey Property Liability Insurance Guaranty Association contributes. The court granted certification in December 2011.

The dispute stems from Farmers' attempt to recover costs from the cleanup of two residential sites, each of which is covered under the insurance policy of an insolvent carrier, Newark Insurance Co. The Property Liability Insurance Guaranty Association is supposed to stand in the shoes of insolvent insurers such as Newark.

Usually, insurers are responsible for a pro rata share of coverage for continuous environmental contamination, based on the effective years of their policies, explained Robert D. Chesler, a shareholder with Anderson Kill & Olick PC who practices in insurance and environment law. Farmers argued that the association had to cover Newark's share of the remediation costs.

However, the appellate division in July 2011 found that, based on a 2004 amendment to the New Jersey Property Liability Insurance Guaranty Association Act, all other insurance had to be exhausted before the state-created association has any liability.

The decision represents a break with prior law in the state, according to Chesler, who said how the Supreme Court handles this issue of statutory interpretation could prove significant in future cases related to environmental cleanup coverage.

“The case will result in a major statement on trigger and allocation law in New Jersey,” Chesler said.

The case is Farmers Mutual Fire Insurance Co. v. New Jersey Property Liability Insurance Guaranty Association, case number A-42-11, in the New Jersey Supreme Court.

Superstorm Sandy Insurance Litigation

Superstorm Sandy and the nearly $37 billion in damage it left behind in New Jersey will mean a busy year for insurance disputes in the state, according to Chesler.

One active area could lawsuits based on the theory that brokers who allegedly didn't advise their clients about flood insurance should be liable for damages, according to Chesler.

In one such case, Cardolite Corp. sued its insurance broker Willis of New Jersey Inc. on Dec. 10 for alleged negligence in lining up coverage for the company, which owns a Newark production plant that suffered $2 million in damages from Sandy.

National Union Fire Insurance Co. of Pittsburgh, Pa., denied coverage based on its policy terms with Cardolite, which manufactures products with cashew nut liquid, including coatings, adhesives and automotive applications, according to the complaint. Now, Cardolite has accused Willis of breaching its obligations by failing to properly examine the policy and advise the company.

Chesler also expects a number of suits alleging bad faith practices on the part of insurers.

For example, State Farm Fire & Casualty Co., Liberty Mutual Fire Insurance Co. and other carriers were hit with a proposed class action Dec. 13 accusing them of improperly denying insurance claims filed by flood victims after hurricanes Irene and Sandy.

Plaintiff Patrick Donnelly's allegations relate to the handling of flood claims by various insurance companies that participated in the Federal Emergency Management Agency's "Write Your Own" insurance program and that consequently issued the federal Standard Flood Insurance Policy to New Jersey property owners.

The Write Your Own program allows participating insurance companies to write and service the flood insurance policy in their own names. Donnelly claims his and many others' claims were wrongfully rejected due to a disagreement over how to define a basement.

The cases are Cardolite Corp. v. Willis of New Jersey Inc., case number L8962-12, in the Superior Court of New Jersey, Essex County, and Patrick Donnelly v. New Jersey Re-Insurance Co. et al., case number 2:33-av-00001, in the U.S. District Court for the District of New Jersey.

Perez v. Professionally Green LLC

New Jersey attorneys are also awaiting the Supreme Court's guidance on key issues related to the state's Consumer Fraud Act.

In Perez, the high court will consider whether a plaintiff can recover attorneys' fees and costs when they prove a technical violation of the CFA, but their claim is ultimately dismissed at trial as a matter of law for failing to provide sufficient proof of an ascertainable loss. The court granted certification in January 2012.

Alex Perez and Cathy Perez had won partial summary judgment on their claim that Swim-Well Pools Inc. and Professionally Green LLC technically violated the CFA by not including start and end dates in their contracts related to a pool construction project. However, Swim-Well secured a dismissal of the CFA claim at trial, successfully arguing that the couple failed to establish an ascertainable loss based on that technical violation.

The trial judge denied the plaintiffs' bid for attorneys' fees and costs, but the appellate division in October 2011 reversed on that issue. Under case law, a CFA plaintiff only has to demonstrate a bona fide claim of ascertainable loss, the appeals court said.

"Defendant does not challenge the trial court's determination that plaintiffs established by their summary judgment motion a violation of the CFA as well as a triable issue for the factfinder," the opinion said. "That determination satisfied the requirement that plaintiffs demonstrate a bona fide claim of ascertainable loss."

The Supreme Court's eventual ruling could affect attorneys' decisions on whether to bring such claims, according to Dechert LLP partner John J. Sullivan, who focuses his practice on complex litigation.

“It's an important decision because it gives a lot of incentive for plaintiffs' attorneys to bring CFA cases, because they can get fees even if they don't win,” Sullivan said.

The case is Perez v. Professionally Green LLC, case number A-66-11, in the New Jersey Supreme Court.

Manahawkin Convalescent v. O'Neill

The Supreme Court is also set to weigh whether an exception to the Consumer Fraud Act for highly regulated professionals means the law doesn't apply to nursing homes.

In October, the court granted certification to a woman who has claimed an admission agreement for the Manahawkin Convalescent Center, where her mother was a patient, violated various laws because it held her personally financially liable for her mother's debt.

An appeals court in May not only found that the admission agreement was a lawful contract, but also that the “learned professional” exception precluded application of the CFA to Manahawkin.

Drawing a distinction between the activities of such professionals and ordinary merchants, the exception intended to avoid clashes between the CFA and regulations covering those occupations, the court noted at the time. For example, courts have held that the CFA doesn't apply to hospital services because those institutions are highly regulated in the state.

A reversal of the appellate division's decision could expose nursing homes in the state to costly litigation under the CFA, which provides treble damages for successful claims, according to Sullivan.

“Nursing home litigation is pretty prevalent across the country and even in New Jersey, so whether these types of claims can be brought under the CFA is an important issue,” Sullivan said.

The case is Manahawkin Convalescent v. O'Neill, case number A-17-12, in the New Jersey Supreme Court.

--Additional reporting by Juan Carlos Rodriguez. Editing by Jocelyn Allison and Lindsay Naylor.