

New Jersey – Law Firms

A Review Of The State Of The State

The Editor interviews **Roger Schwarz**, Principal at *Issues Management*, a public affairs company and affiliate of *Lowenstein Sandler*, and **Gavin J. Rooney**, Member of the Firm at *Lowenstein Sandler*, Chair of its *Consumer Fraud Practice Group* and a member of its *Class Action and Derivative Litigation Group* and *Securities Litigation Group*.



Roger Schwarz



Gavin J. Rooney

Editor: How have Governor Christie's regulatory reforms affected your practice and corporate clients? What are upcoming legislative issues that most affect your practice?

Schwarz: On his first full day in office, Governor Christie announced his focus on regulatory reform by issuing four Executive Orders freezing pending regulations for "red tape review" and applying "common sense principles" to administrative decision-making. While it may be too soon to characterize the governor's policy as one of deregulation, it is certainly one of fewer regulations.

At *Issues Management* we are seeing the Christie administration's take on regulation affecting practically all of our clients. From casinos, where the transfer of powers from the Casino Control Commission to the Division of Gaming Enforcement will mean a great reduction in regulatory duplication, to energy, where the just-released Energy Master Plan signals less government intervention, we are helping clients take advantage of new business opportunities.

The Department of Environmental Protection has adopted a Transformation Plan to guide changes in the way it operates. The clearest symbol of that change is DEP's proposed waiver rule, under which the department can waive strict compliance with its own rules when rules are in conflict, as well as under several other circumstances.

For our healthcare clients, state budget woes make the words "healthcare reform" something of a misnomer. Cuts to Medicaid will only be exacerbated by further healthcare-related cuts, given the need to find an additional \$500 million for education as a result of a state supreme court ruling.

Editor: What role should law firms play in advocating for clients in New Jersey's legislative and regulatory arenas? We understand that some law firms have established separate advocacy companies to assist clients with these issues.

Schwarz: While all law firms can and should be looking out for their clients' interests in Trenton, it is not enough just to scan the *Star-Ledger* every day. At that point it's often too late. Representation and advocacy before state regulatory agencies and the legislature has evolved into a specialized practice, one that demands a regular presence in the State House. At *Issues Management* we are able to combine our experience in government, public policy and crisis communication, as well as the law, to tailor solutions to each client's needs.

Editor: To what extent do you advise corporations that are considering either a move to or expansion within New Jer-

sey? What are the major factors in these discussions?

Schwarz: The Christie administration has been doing what it can to make New Jersey a more attractive place to do business. From concentrating economic development in a Business Advocacy Center to retooling the state's business retention programs, the governor has made job retention and growth a high priority. For clients thinking of relocating businesses, for those considering expansion, and for those considering leaving New Jersey altogether, we advise them to take the governor at his word. When we contact the BAC or the Economic Development Authority, we find a willing and receptive audience.

Editor: In April, Governor Christie signed Senate Bills 2753 and 2754 to provide tax relief with the intention of spurring economic and job growth. Please discuss the ramifications for New Jersey businesses.

Schwarz: Senate Bill 2753 (chapter 59 of the Laws of 2011) phases in a single sales fraction for the Corporation Business Tax allocation formula. The new law means that a corporation's New Jersey tax will be calculated based on New Jersey sales alone, the same as it is for businesses headquartered elsewhere. Given that 23 states have adopted or are phasing-in similar reforms, this change in our tax law is a competitive necessity.

Senate Bill 2754 (chapter 60 of the Laws of 2011) will bring welcome tax relief to the owners of non-corporate entities, including LLCs, partnerships, S-corps and sole proprietors, by permitting consolidation of gains and losses and carry forward of business losses for up to 20 years. The new law, which will take effect on January 1, 2012, creates an alternative business calculation under the state's gross income tax that will give small businesses the same investment and planning tools available to large corporations.

Editor: How have Dodd-Frank provisions affected a corporation's vulnerability to civil liability?

Rooney: Dodd-Frank has several provisions that increase potential exposure to civil litigation, particularly in the securities context. Rating agencies – which came under fire for unduly optimistic ratings of securities that later proved specious – are now exposed to liability under the securities laws when the ratings are used in a registration statement for a newly issued security. The law also expands the possibility of whistleblower claims by corporate insiders who report misconduct to the Securities and

Exchange Commission, and such persons may recover a portion of the fine ultimately imposed by the Commission. Securities brokers are now subject to a fiduciary duty owed to their clients, subjecting them to claims for breach of fiduciary duty if the investments the brokers recommend turn out badly. Finally, Dodd-Frank also establishes a new Bureau of Consumer Financial Protection with broad rule-making power, and the rules created by this new agency may create further potential liability for corporations as well.

Editor: What is the current status of the judicial debate – in both state and federal courts – on whether the New Jersey Consumer Fraud Act (NJCFA) should be applied nationwide? Are there any recent judicial opinions that provide clarity on this issue?

Rooney: At present, there is authority in the state and federal courts of New Jersey going either way on this issue. In the putative class action brought by third-party healthcare cost payors arising out of the withdrawal of Vioxx from the market, a mid-level New Jersey appellate court ruled that the NJCFA could apply nationwide because Vioxx's manufacturer, Merck, had its headquarters in New Jersey. While the New Jersey Supreme Court reversed that ruling, it did so on other grounds and did not disturb the nationwide application of the NJCFA. Some federal courts have reached the same result, applying the NJCFA to a defendant's nationwide sales on the assertion that the defendant designed and oversaw its alleged fraudulent marketing scheme from offices located in New Jersey. Other federal judges, however, have disagreed, finding that the jurisdiction with the most significant interest in applying its laws is the state where the putative class member bought and used the product.

The legislature is currently considering a bill to reform the NJCFA. Among other provisions, the bill would limit the ability to sue under the NJCFA to New Jersey residents for products that were purchased within New Jersey.

Editor: How will the NJCFA interact with the Bureau of Consumer Financial Protection – per Title X under Dodd-Frank – which gains enforcement authority on July 21, 2011? Do you anticipate that preemption issues will arise?

Rooney: The Bureau of Consumer Financial Protection will work in tandem with the NJCFA. As a general matter, the Bureau's regulations will not preempt the NJCFA unless the two are in conflict – which is unlikely to happen. A more likely result is that the Bureau will create new substantive standards under federal law, which class plaintiffs will seek to enforce under the NJCFA.

Editor: Are sweeping protections of the NJCFA hurting New Jersey's businesses? Is reform needed?

Rooney: Yes, and the NJCFA continues to make New Jersey a magnet for litigation – including litigation brought by persons who reside outside New Jersey who seek

to take advantage of the statute's plaintiff-friendly provisions. Indeed, the easiest way for a New Jersey company to avoid the risk of being hit with a nationwide class action under the NJCFA is to move its business outside the state.

To combat this problem, the legislature is currently considering a bill to reform the NJCFA that has the support of the New Jersey Law Reform Alliance, a non-profit group that seeks reform of our state's laws. If adopted, the bill will (i) eliminate the right of non-New Jersey residents to sue for products purchased in other states, (ii) impose an explicit causation requirement between the defendant's false statement and the plaintiff's alleged loss, (iii) make an award of treble damages discretionary, as opposed to mandatory, (iv) exempt businesses that are already subject to comprehensive regulation, and therefore need not be regulated by the NJCFA, and (v) place a cap on attorney's fee awards to combat the problem of class actions that are prosecuted to line the pockets of plaintiffs' lawyers instead of providing a real benefit to the class.

Editor: Will this term's class action decisions by the U.S. Supreme Court affect cases under New Jersey law?

Rooney: Absolutely. In *AT&T Mobility v. Concepcion*, the U.S. Supreme Court enforced a mandatory pre-dispute arbitration clause in a cellular service contract that did not permit arbitration of class disputes. Prior to this decision, the lower courts had split on whether the inclusion of such a clause in a customer contract could defeat a subsequent class action claim, with some courts declining to enforce such a clause on the belief that it was "unconscionable." After *Concepcion*, however, a company that enters into service agreements with its customers can effectively inoculate itself against a future class action – including a class action under the NJCFA – by including a similar mandatory pre-dispute arbitration clause in the agreement.

Editor: What feedback are you getting from New Jersey clients with respect to legal services? Are their needs changing, particularly with the advent of e-discovery?

Rooney: The business side of litigation has changed significantly from where it stood a decade ago. Clients today are much more conscious of cost and efficiency. They look for early case assessments to determine, at the outset, the most efficient means to resolve a dispute. They favor mediation over arbitration as the means to achieve an early, effective result at diminished overall cost. And they look for alternative fee arrangements whereby the client and firm partner on risk and reward.

Discovery, too, has changed dramatically. In today's world of electronic data, massive production of hard-copy documents retrieved from a warehouse rarely exists. Instead, documents are processed, reviewed for responsiveness and privilege, and then produced in electronic form, with enhanced ability to organize and retrieve documents through keyword searches and other database functions.