Best's Insurance Law Podcast

Attorney Discusses Mode of Operations and Relevant Cases - Episode #100

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John Czuba: Welcome to the Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Ed Thornton from the law firm of Methfessel & Werbel in Edison, New Jersey. Ed is a partner in the firm. He handles liability defense trials and appeals on behalf of insurance companies. He specializes in catastrophic injury, legal malpractice, as well as dental and medical malpractice cases, and the defense of lead poisoning and product liability matters. He is also a member of Defense Research Institute.

Thanks for joining us today, Ed.

Ed Thornton: Thank you for having me.

John: Today's topic is the evolution of the mode of operations. For our first question today, Ed, can you explain what you mean by the mode of operations?

Ed: Yes, thank you.

Mode of operation is a term generally used, at least here in New Jersey, and probably the 28 states or so that have some sort of a mode of operation concept. It's an important segment of the traditional negligence law that essentially has the effect, after certain proofs are submitted by plaintiff, of shifting the burden of introducing evidence and burden of persuasion to a defendant.

It's not res ipsa loquitur, although it's sometimes confused with that concept by more inexperienced trial judges. But what it is, as I say, shifting of the burdens to the defendant to disprove something as opposed to the plaintiffs merely having to rely on proofs.

The concept itself goes back, at least in New Jersey, to about 1957, although cases did not use that term, the mode of operation term at that time. What they just did was basically issued opinions in two Supreme Court cases which did away with the notice requirement that is actual or constructive notice in regard to businesses.
When we talk about mode of operation, at least cases in New Jersey have so far been confined to commercial properties, we go back to a shifting. If I can, I'd like to just give a couple of examples that would give listeners a better idea of what we're talking about here.

In 1957, as I say, there's a case in New Jersey, decided by the Supreme Court, wherein a woman was shopping in a typical store and reaching for a can, comes off the shelf, comes down and hits her foot and somehow causes her injury.

The Supreme Court says in that case, which is called *Francois versus American Stores*, that the burden of proof shifts because the store has enticed people to come in, look at goods on a shelf, and if they don't want them, to put them back.

Although the court was stuck with the problem here, it's not res ipsa loquitur, because there may have been someone else involved in the control of the object at the moment, nonetheless, shifted the burden to the defendant to show that its mode of operation or its method of operation was acceptable and not breaching a standard of care.

In 1964, the Supreme Court got really going on this concept when they decided a case of a self-service cafeteria, plaintiff slipping on a slippery food substance on the floor. Then that case went to the jury on the reversed burden or the negative burden, if you will, the defendant having to show that it took reasonable care in policing the area and cleaning up as necessary.

1966, just two years later, after the 1964 *Bozza versus Vornado* case, the Supreme Court decides *Wollerman versus Grand Union*, which again, does not use the term of art of mode of operation. But when Mrs. Wollerman slips on a bean in the vegetable aisle, Supreme Court says "You're selling from open containers." The plaintiff is not obligated to prove actual constructive notice, because this type of operation that you have gives rise to where you should always be on notice of a potential problem on your floor and the burden shifts.

When we talk about mode of operation, what it is, that's really what we talked about, is a shifting burden, depending on the style of operation or mode of operation of the business.

John: Who can be liable under this theory?

Ed: In New Jersey, so far, it's been confined to businesses and there are other cases of example on this. But there has not been a case so far as to say that any homeowner who may invite someone in and therefore, in New Jersey, turn them into invitees as opposed to licensees.

There hasn't been any case directed against a homeowner in this respect. But there's plenty of people with imagination out there and I wouldn't be surprised if someone tries to advance or transfer the concept to a homeowner.

John: What is its practical effect on the parties?

Ed: The practical effect is, as I say, it shifts the burden whereby the plaintiff merely has to show a nexus between the type of substance believed to have caused the problem, in least in fall down cases, and the injury.

By way of example, the lady in the produce aisle who says, "I slipped on a bean," once she shows that she slips on a bean and beans are sold there, the practical effect is now to shift the burden of proving reasonable care to the defendant. The plaintiff no longer has to prove a very important concept of constructive notice, i.e., that the bean was there long enough that you should have noticed and done something about it.

In essence, the practical effect is, if you're going to sell in open containers and not closed containers or cans or whatever it might be, you should be on notice that this could happen anytime and constructive notice of the presence of the object even for 10, 20, 30 seconds does not have to be shown.

The practical effect is very much in play here, very important for the defendant.

John: Can you provide some other examples for us?

Ed: We have cases in New Jersey that actually went in favor of defendant, decided cases in favor of the defendant, decided in favor of the plaintiff.

Most recently, for instance, in 2003, we had another mode of operation case, again, involving produce. But this one was slightly different involving grapes at a checkout counter. The Supreme Court in that case said that we're not going to necessarily confine this to the produce aisle. But if you're going to sell grapes in an open, in this case, an open plastic container, you have to know that they can fall out at any time at any place in the store.

In that case, it was important that it expanded the geography of the event from the produce aisle to, in this case, the checkout.

There's a 2013 case in New Jersey where someone bought one of those phone calling cards and a person probably slipped on a card bought in the store, slipped on it, actually, outside the store. In that one, the Appellate Division said, "Whoa, this is not a mode of operation case, because this has nothing to do with the mode of operation. This is not a self-service type thing where a customer can pick this up and just walk out or walk by."

The issue here was, or one of the issues was, of course, notice, but the issue became really, what is the style of selling that would lead a court to say mode of operation? This is not, again, not something that you just pick up, hand to the checkout agent and then walk out. This was different. This is not something that you expect to be dropped, necessarily, or dropped at that point.

Fortunately for defendants, the courts did not go so far as to say this was a mode of operation type thing. Lastly, a very good example of this is a 2014 case, which is before the Supreme Court now, called *Prioleau versus Kentucky Fried Chicken*. In that case, Ms. Prioleau fell on a slippery substance outside the restroom.

Very important that she could not tell what the substance was, but she said, "Well, Kentucky Fried Chicken cooks with a lot of grease and oils, so that must have been what I fell on. This, I don't have to prove what it was or how long it was there, it has to do with their mode of operation."

The court, fortunately, said, "Whew, time out." If we buy into that theory, the exception is then going to be the rule, so you have to show us what you slipped on and then the traditional concepts of how long it was there come into play.

Those type of operations have dealt just with basic commercial entities, again, not going as far as the homeowner, but it is important to remember, it's the method of operation of the defendant, not just merely that they are a fast food store or a convenience store, that is the important feature that courts will look at.

John: Ed, what are the underwriting issues for insurance companies?

Ed: That's very important, because underwriting traditionally goes by more generalized concepts of either gross sales, square footage, et cetera. They really have to now pay more attention to what is the mode of operation of the store? Is it something a person can just go in, grab off the shelf and leave? Or does it have to do with the actual product that can wind up on the floor?

If I may, let me give another example and we can see how underwriting would play an important role here.

Last year, I tried a case involving a drug store, a very traditional fall down. We had it, actually, on security videotape. Woman walked into a store 30 seconds after a man had walked into the store and upturned a corner of a rain mat. Was not noticed in those 30 seconds by the store, woman fell, busted up her shoulder, had a shoulder replacement surgery. It was a significant case.

To my amazement, the trial judge allowed a mode of operation charge, because he said people came into the store to buy things off the shelf. I said, "Well, it has nothing to do with the fall. This type of mat could have been anywhere, it could have been in an office complex."

Fortunately, the jury was, let's say they were more reasonable than the judge, and I was able to get a defense verdict. But it was scary, because if mode of operation were accepted in that type of case, where there's no nexus between the event and the products that are sold, underwriting would have to start to take into consideration virtually an abandonment by courts of the traditional concepts of notice and it would have just a tremendous effect on potential liability underwriting for any commercial enterprise.

John: Can you comment on the mode of operation status?

Ed: The status is that the case that I mentioned regarding *Kentucky Fried Chicken Prioleau*, is a 2014 case. It's early in 2014. But it has been granted certification by the New Jersey Supreme Court.

Usually, that's not a good sign for a defendant who won in the Appellate Division. I don't know if they're going to say as the final word in New Jersey that the exception is not going to swallow up the rule and the Supreme Court will say enough is enough. Or if they're going to expand mode of operation, which I tend to doubt, because it does not seem to be the climate for that.

But the status of it is, it is before the Supreme Court and very curiously, the two cases that I've mentioned as most recent, that being the convenience store case with the phone card and the Kentucky Fried Chicken case. Both of those cases say, we're not going to go any further with this exception to the general rule unless there's a comprehensive legislative scheme to do so.

The court felt, both Appellate Division titles felt they were not going to expand the law themselves. Whether the Supreme Court takes that opportunity, I don't know. I tend to doubt it. I just don't see this as a climate for expanding wholesale the concept of actual and constructive notice in the field of at least commercial retail operations.

John: Ed, thanks very much for joining us today.

Ed: My pleasure. Thank you.

John: That was Ed Thornton, from the Law firm of Methfessel & Werbel in Edison, New Jersey. Special thanks to our producer, Brian Cohen.

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I'm John Czuba, and now this message.

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