MODE OF OPERATION: PRIOLEAU V. KENTUCKY FRIED CHICKEN

BY EDWARD L. THORNTON, ESQ.

As you may remember, several editions of this magazine ago I reported on the "mode of operation" liability situation as the Prioleau v. Kentucky Fried Chicken case was heading to the New Jersey Supreme Court.

Since that time the Supreme Court has spoken, affirming the Appellate Division's dismissal of the suit. Since then it is also clear that lower courts are not willing to stray from the mandate of Prioleau and it appears the plaintiffs' attempts to, in effect, do away with notice requirements will gain no traction.

For example, the Appellate Division on January 26, deciding Troupe v. Burlington Coat Factory, held that a mode of operation liability is not created merely because a store's cleaning schedule is allegedly inadequate. Pointing to the historic application of mode of operation, Judge Bergman in Middlesex County and Judge Suter in the Appellate Division (temporarily assigned) pointed to the logic that the hazard complained of had to bear some nexus to what the store was selling or its style of selling. The fact that someone disagreed with the store's cleaning schedule is not a mode of operation of the store in the sense that the Courts have carved this limited exception since 1957.

In fact, Judge Suter was somewhat clear in sending the plaintiff's bar smoke signals that merely because there are going to be many different types of store fall down situations, not each case is going to be looked over with a magnifying glass to see if the mode of operation rule should be expanded. Mrs. Troupe fell on a berry in a clothing aisle. Suter noted that the berry had no demonstrable connection with any aspect of Burlington's self-service business and therefore the risk of falling was the same as a risk that has been historically demanded to be proven by actual or constructive notice.

Also, the import of the mode of operation is that once such a jury charge is given, actual or constructive notice of a particular condition does not have to be proven by the plaintiff and the burden shifts to the defendant to prove due care. The recent cases makes it clear that the concept of mode of operation is an exception, not one of broad application, and is to be used sparingly. Again, the focus of the trial court should be on the business model that encourages self-service, not merely the type of business that may be involved, such as fast food, shelf display, etc.

EDWARD L. THORNTON, ESQ.
Partner at Methfessel & Werbel, admitted to the New Jersey Bar in 1977, certified by the New Jersey Supreme Court as a civil trial attorney and admitted to practice before the United States Supreme Court.