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The Evolution of the Trial Lawyer

By Stephen F. English & Timothy J. Calderbank
Bullivant Houser Bailey

1. The Vanishing Trial

In a recent article in the New York Times,¹ it was reported that—although the number of cases *filed* in federal court have increased—a new study shows that actual trials are becoming something of a rarity for the trial lawyer. “In 1962, the study says,



11.5 percent of all civil cases in federal court went to trial. By last year [2002], that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.” According to William G. Young, the chief judge of the Federal District Court in Boston, what is happening here is “nothing less than the passing of the common law adversarial system that is uniquely American.”



Stephen English



Timothy Calderbank

This same dearth of trials and the “passing of the common law adversarial system” are also occurring across the country at the state level.² Closer to home, available statistics show that trials in Oregon are also becoming a rare event. As a percentage of cases filed, the number of cases actually going to trial in 2001 and 2002 for selected counties and state-wide ranged from a low of 0.2% to a high of 3.5%.³

	<u>2001</u>	<u>2002</u>
Marion	3.5%	2.3%
Multnomah	2.2%	2.3%
Clackamas	0.2%	0.3%
Washington	1.0%	1.7%
STATE-WIDE	2.5%	2.6%⁴

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Comments From the Editor

“Novel Approaches to Witness Preparation”

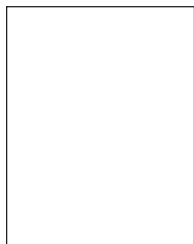
Dennis P. Rawlinson
Miller Nash LLP

1. Traditional Method

A few years into practice, based on experience and study, most of us develop a checklist that we use as a basis to prepare witnesses for trial and deposition testimony. It is not unusual for the checklist to number 10 to 20 items or more.

We then invite our witness to a testimony preparation session. We spend half an hour to 45 minutes lecturing the witness on how to be a good witness and cover the 10 to 20 points (the witness no doubt feels like a worker caught behind a dump truck when the truck bed is lifted vertically, the gate opened, and the contents dumped). At the end of

the session we ask the witness if he or she has understood or has any questions. We get either a nod of the head (to avoid the embarrassment of admitting that the witness is not on the same intellectual plane as the lawyer) or perhaps a question or two.



Dennis Rawlinson

The witness then proceeds off to the examination not only with the trepidation of facing an unusual or unknown experience

but with the additional baggage of trying to remember 10 to 20 foreign and unnatural rules.

We are then surprised when the testimony doesn't go the way we had hoped.

2. Novel Approaches

A number of psychologists have criticized the traditional form of witness preparation. The criticism is usually based on a number of factors, including:

- a. Witnesses generally have limited attention and retention capabilities;
- b. Dialogue and participation heightens the possibility of retention; and
- c. Witness preparation should be confidence-building, not fear-provoking.

Set forth below are a number of suggestions collected from a number of sources, including participation as a fac-

ulty member at National Institute of Trial Advocacy Deposition Preparation seminars:

3. Question, Don't Lecture

Don't start witness preparation sessions by advising and coaching. Instead, find out what is on the witness's mind. What concerns does the witness have? Answer and address those concerns so that they do not block the witness's ability to pay attention to the rest of the session. You may even find that such a dialogue will cover some of the points you had hoped to cover.

4. Practice Before Lecture

Practice a direct examination with the witness or even a difficult, but not brutal, cross-examination. You will discover the strengths and weaknesses of the witness. You may well discover that a number of the points you had hoped to cover don't need to be covered because the witness already understands and practices those points.

The same practice examination will raise weaknesses that can be discussed. These weaknesses will no doubt involve other points you had planned to cover and will allow you to:

- a. Prioritize those points.
- b. Take them one at a time.
- c. Create pertinence and context for the points.

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- d. Promote dialogue with the witness.

As the practice and session continues, interrupted by dialogue, discussion, and suggestions, consider the following:

- e. Initial comments should be mostly positive to build confidence. Initially instilling confidence in the witness will make the coaching session a positive experience. The witness will gain confidence and more readily accept suggestions for improvement later in the session.



- f. Give good with bad. With every negative suggestion, mention something good. If a witness believes he or she is doing well, he or she is more likely to improve, concentrate, and enjoy the preparation experience. For instance:

“Good, calm, deliberate answer.”

Then you may say,

“But remember to answer briefly.”

- g. Comment positively about the witness’s appearance. Everyone cares about his or her appearance. Make the witness feel good about how he or she looks. For instance:

“Don’t be afraid to stop and think before your answer. As you just did, you look thoughtful and credible.”

- h. Role within the overall case. Be sure your witness knows how his or her particular testimony is intended to fit into your overall case. This may prevent voluntary digressions and assist the witness in using his or her own wits in response to surprise questions.

- i. Alert the witness to vulnerabilities. Discuss with the witness what you see as probable grounds for attack by the adverse party, and practice and discuss the handling of those attacks.

- j. Conduct a practice cross-examination. Conduct or have someone in your office conduct a more ruthless cross-examination than you believe even the examiner will conduct. Discuss and cure problems and weaknesses.

- k. Help the witness sound good. Assist the witness, if necessary, with testimony volume, speed,

breathing, articulation, and fading of sentences. Help the witness be positive, clear, and engaging with his or her choice of words.

- l. Eye contact. Encourage the witness to have proper eye contact with the proper party (in the case of a jury, looking comfortably from juror to juror and then the counsel and then the jurors again). Ensure that the witness avoids talking to the floor, the ceiling, and shirt fronts. The witness should also avoid looking to you for help and approval (and thereby losing credibility).

- m. Consider video sessions. For witnesses who need work, consider preparing a videotape of their mock direct and cross-examinations and then viewing it with the witness. Often, when a witness sees his or her nagging idiosyncrasies and bad habits, it will enable the witness to address and correct them.

Consider conducting a debriefing after the testimony. Ask the witness which portions of the preparation were helpful and which were not. Witness preparation is one of the processes on which we have the opportunity to obtain regular feedback. With this feedback there is no excuse for not improving.

You may not find that by trying some of these testimony preparation approaches, you start winning cases that you otherwise would have lost. On the other hand, I believe you will find that you will improve the chances of communicating effectively with your witnesses and improve their abilities as witnesses. In a close case, that just might make the difference. □

Oregon lawyers play an important role in helping our state face its many challenges. Whether we litigate, legislate, or provide legal advice from our desks, Oregon lawyers make a positive difference in our beloved and sometimes beleaguered state. We are particularly effective when we pull together for a cause. This "Message From the Chair" column is my opportunity to salute the Oregon lawyers who promote teamwork, collegiality, and professionalism. In particular, I want to highlight the contributions made by members of our Litigation Section in the past and current year.

As I write, the 2004 Litigation Institute and Retreat at Skamania Lodge, taking place on March 5 and 6, is fast approaching. The Litigation Section co-sponsors this event with the Oregon State Bar's CLE Seminars Department, and our members serve on the Institute's planning committee. They are Denny Rawlinson, Greg Mowe, Robert Neuberger, Marie Eckert and Judy Snyder. As the result of their year-around efforts, the Institute annually provides a great opportunity to learn from national and local experts on trial practice, and casually socialize with our bench and trial bar. The Institute also gives us a chance to celebrate the best among us by conferring the Annual Owen M. Panner Professionalism Award on a member of our Section. The award for 2004 goes to Michael (Mic) Alexander of Salem.

In January, members of our Section participated in the Oregon State Bar's Trial Advocacy College. Section member Peter Richter of Portland and the Honorable Edward Leavy were among the program planners for this event. The faculty was comprised of federal and state judges, as well as many stars of the Oregon trial bar. As a program participant myself, I want to offer my deepest thanks to the judges and attorneys from all over Oregon who



Message From the Chair

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Karen E. Saul, Chair
Litigation Section
Oregon State Bar

donated their valuable time and talent to help others hone their advocacy skills during the two day program at the Mark O. Hatfield United States Courthouse in Portland.

Our Section is also proud to co-sponsor the Fundamentals of Civil Litigation CLE that occurs every other year in October. It is yet another example of the generosity shown by experienced trial lawyers and judges who volunteer to teach the trial practice techniques they have mastered. The quality of our trial bar is heightened with each and every contribution that is made by these individuals, and by the program participants who invest in the excellent educational opportunities offered by the Litigation Section. The 2003 program was a big success, and this year we will begin planning for the 2005 program.

Our Section does more than I can enumerate in the space available for these comments. Countless pro bono hours are spent by Section members on a wide variety of worthy causes. In the last few years, the Section has made an annual donation to the Campaign for Equal Justice. We do so because the vast majority of our members agree that increasing access to justice in Oregon courts is a cause vital to our profession.

Let me close with a word of thanks to the other members of the Section's Executive Committee, who meet at least four times a year (and often more) to promote and plan the Section's activities. The Committee truly is a representative body. This year we have several new members, including Mike Mahoney from Vale, Bob Thomson from Medford, Tracy Prall and Sarah Troutt from Salem, and Ray Crutchley and Simeon Rapoport from Portland. Returning members include Gene Hallman from Pendleton, John Berge from Bend, and Susan Eggum and Judy Snyder from Portland. Our other officers are Terry Wright of Portland (Past Chair), Richard Lane of Portland (Chair Elect), Marc Spence of Eugene (Secretary), and Nancie Potter of Portland (Treasurer). Our Board of Governors liaison is Denny Rawlinson of Portland, who also serves as editor of this Journal which is published three times each year. Our OSB liaison is Karen Lee, CLE Seminars Department Manager, who is tireless in her work on behalf of our Section.

The Executive Committee has a tradition of meeting in a variety of locations during the year. In recent times, these have included Southern Oregon, the Coast, Bend, Portland, and Eugene. Our goal is to encourage state-wide participation and represent the entire constituency of the Section. We also aim to have a representative faculty at each CLE we sponsor, so that each region, both genders, and the entire spectrum of diversity of our members are recognized. We are the largest section of the Oregon State Bar, and one of the most active. It takes the contributions of many people to be so successful. Please contact any member of the Executive Committee if you would like to become more involved. You can use our new website to find a Section membership list, a calendar of events, and other useful information and links. I am delighted to chair the Section this year. I am proud to be an Oregon lawyer and to call you my colleagues. □

CONSUMER PROJECT REPORTING REQUIREMENTS



Under the Federal Consumer Product Safety Act: *A Primer for Litigators*

By Chin See Ming
Perkins Coie LLP

A. Introduction

Litigators who handle product liability matters for clients that manufacture, distribute, or retail consumer products may unwittingly discover that the client has certain information that may require the client to report to the federal Consumer Product Safety Commission ("CPSC" or "Commission"), under the Consumer Product Safety Act ("CPSA"). 15 U.S.C. § 2051 *et seq.* Or, the lawyer may learn in the course of representing a manufacturer client that its consumer product has been the subject of a number of lawsuits, sufficient to require the client to, again, re-



port to the CPSC under the same Act. Because the CPSA provides for civil penalties up to \$1.65 million, and criminal sanctions that include imprisonment, for failure to furnish the reports, the careful counselor should properly advise the client as to its reporting obligations.

B. "Consumer Product" Defined

As a threshold matter, the CPSA governs "consumer products" only. "Consumer product" is broadly defined as:

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation or otherwise, or (ii) for the personal use,

consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise[.]

15 U.S.C. § 2052(a)(1). It does not include any articles which are "not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer[.]" *Id.* § 2052(a)(1)(A). Under these definitions, lawn mowers may be "consumer products," *Southland Mower Co. v. Consumer Prod. Safety Comm'n.*, 619 F.2d 499, 505-06 (5th Cir. 1980), as well as aluminum branch circuit wiring. *Kaiser Aluminum & Chem. Corp. v. United States Consumer Prod. Safety Comm'n.*, 574 F.2d 178 (3d Cir.), *cert. denied*, 439 U.S. 881, 99 S. Ct. 218, 58 L. Ed. 2d 193 (1978). *But see*

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Consumer Prod. Safety Comm'n v. The Anaconda Co. 593 F.2d 1314, 1322 (D.C. Cir. 1979) (It is "unlikely" that "aluminum branch circuit wiring systems are customarily sold or otherwise distributed to consumers as distinct articles of commerce.").

Categorically excluded from the definition of "consumer product" are:

- Tobacco and tobacco products. 15 U.S.C. § 2052(a)(1)(B)
■ Certain motor vehicles, or motor vehicle equipment, as defined by 49 U.S.C. § 30102(a)(6)-(7). 15 U.S.C. § 2052(a)(1)(C)
■ Pesticides as defined by the Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. 15 U.S.C. § 2052(a)(1)(D)
■ Firearms and ammunition that are subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986, 26 U.S.C. § 4181. 15 U.S.C. § 2052(a)(1)(E)
■ Aircraft, aircraft engines, propellers, or appliances as defined in 49 U.S.C. § 40102(a). 15 U.S.C. § 2052(a)(1)(F)
■ Boats which could be subject to safety regulations under 46 U.S.C. ch. 43, and certain vessels, and appurtenances to vessels, which could be subject to certain safety regulations administered by the Coast Guard. 15 U.S.C. § 2052(a)(1)(G)

Certain "consumer products" are within the CPSC's jurisdiction, and thus, subject to the reporting requirements of the CPSA, only upon a finding by the CPSC that regulation would be in the public interest.

- Drugs, devices or cosmetics as defined in sections 201(g), (h) and (i) of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g), (h) & (i). 15 U.S.C. § 2052(a)(1)(H). Food as defined in section 201(f) of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(f), including poultry and poultry products as defined in section 4(e) and (f) of the Poultry Products Inspection Act, 21 U.S.C. § 453(e)-(f), meat, meat food products as defined in section 1(j) of the Meat Inspection Act, 21 U.S.C. § 601(j), and eggs and egg products as defined in section 4 of the Egg Products Inspection Act, 21 U.S.C. § 1033. 15 U.S.C. § 2052(a)(1)(H)

Certain "consumer products" are within the CPSC's jurisdiction, and thus, subject to the reporting requirements of the CPSA, only upon a finding by the CPSC that regulation would be in the public interest. 15 U.S.C. § 2079(d). These are those articles that present injury risks that can be reduced under the Hazardous Substances Act, 15 U.S.C. § 1261 et seq., the Poison Prevention Packaging Act of 1970, 15 U.S.C. § 1471 et seq. and the Flammable Fabrics Act, 15 U.S.C. § 1191 et seq.

Id. Other "consumer products" are removed from the CPSC's jurisdiction altogether, specifically, those products that pose injury risks that can be reduced under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.; the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq. and the Clean Air Act, 42 U.S.C. § 7401 et seq. 15 U.S.C. § 2080(a). The CPSC also may not "regulate any risk of injury associated with electronic product radiation emitted from an electronic product" if the risk may be subjected to regulation under 21 U.S.C. 360hh et seq. Id.

C. The CPSA's Reporting Requirements

The CPSA's reporting requirements are contained in two different sections of the Act, first, under section 15(b) of the Act, 15 U.S.C. § 2064(b), and second, under section 37 of the Act. Id. 15 U.S.C. § 2084.

(a) Section 15(b) Reporting Requirements

Section 15(b) of the CPSA requires "every manufacturer of a consumer product distributed in commerce" and "every distributor and retailer of such product" to "immediately inform" the CPSC when the manufacturer, distributor, or retailer:

obtains information which reasonably supports the conclusion that such product:

- (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title;
(2) contains a defect which

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could create a substantial product hazard described in subsection (a)(2) of this section; or

- (3) creates an unreasonable risk of serious injury or death.

15 U.S.C. § 2064(b).

The above quoted language indicates that the test for whether a report is required is an objective one: the manufacturer, distributor, or retailer must report when it has information that “reasonably” supports a conclusion that any one of the (1)-(3) criteria are met. 15 U.S.C. § 2064(b). That information, the CPSC has made clear, may be from a product liability or personal injury claim. 16 C.F.R. § 1115.12(f)(3).

(i) Failure to Comply with Consumer Product Safety Rules or Voluntary Consumer Product Safety Standards

The manufacturer, distributor, or retailer must report when it has information that reasonably supports the conclusion that the product fails to comply with either an “applicable consumer product safety rule” or with a “voluntary consumer product safety standard upon which the Commission has relied under [15 U.S.C. § 2058.]” Consumer product safety rules exist for, among other things:

- Certain architectural glazing materials. 16 C.F.R. pt. 1201
- Matchbooks. *Id.* pt. 1202
- Bicycle helmets. *Id.* pt. 1203
- Certain citizen band radio antennas, *Id.* pt. 1204
- Walk-behind power mowers. *Id.* pt. 1205

The manufacturer, distributor, or retailer must report when it has information that reasonably supports the conclusion that the product “contains a defect which could create a substantial product hazard[.]”

- Swimming pool slides. *Id.* pt. 1207
- Cellulose insulation. *Id.* pt. 1209
- Cigarette lighters. *Id.* pt. 1210
- Residential automatic garage doors. *Id.* pt. 1211
- Multi-purpose lighters. *Id.* pt. 1211
- Bunk beds. *Id.* pt. 1213.

Voluntary safety standards on “which the Commission has relied under [15 U.S.C. § 2058]” include American National Standards Institute (“ANSI”) standards for gas-powered chain saws and gas-fired room heaters. *Id.* pt. 1115 app.

(ii) Defect Which Could Create A Substantial Product Hazard

The manufacturer, distributor, or retailer must report when it has information that reasonably supports the conclusion that the product “contains a defect which could create a substantial product hazard[.]” 15 U.S.C. § 2064(b)(2). A “substantial product hazard” is defined to mean:

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

15 U.S.C. § 2064(a). As discussed above, the general test is an objective one, that is, the question whether a “defect” exists as an initial matter, should be an objective one as well. Arguably, a single product liability suit does not establish that a “defect” within the meaning of 15 U.S.C. § 2064(b)(2) exists, if the defect at issue in the suit is an isolated manufacturing defect. On the other hand, if the defect is one of design, a single suit may be sufficient to establish the existence of a reportable “defect” under 15 U.S.C. § 2064(b)(2).

Before reporting is required, the “defect” must “create a substantial risk of injury to the public.” *Id.* Whether the defect “creates a substantial risk of injury to the public” is measured by the “pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise.” *Id.* The CPSC considers, under “pattern of defect” the cause of the defect (design, construction, warnings, etc.) and the conditions under which the defect manifests itself. 16 C.F.R. § 1115.12(g)(1)(i). The other measurements appear self-explanatory. Applying these criteria, an electrical appliance that presents a shock hazard because its case can be electrically charged by full-line voltage is defective, but a knife with a sharp blade is not. *Id.* § 1115.4.

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(iii) Unreasonable Risk of Serious Injury or Death

A report is also required if the manufacturer, distributor, or retailer obtains information that reasonably supports the conclusion that that the product "creates an unreasonable risk of serious injury or death." 15 U.S.C. § 2064(b)(3). The CPSC rules provide that in evaluating whether such a risk exists, the manufacturer, distributor, or retailer should:

examine the utility of the product, or the utility of the aspect of the product that causes the risk, the level of exposure of consumers to the risk, the nature and severity of the hazard presented, and the likelihood of resulting in serious injury or death.

16 C.F.R. § 1115.6(b). In addition, the manufacturer, distributor, or retailer should also:

evaluate the state of the manufacturing or scientific art, the availability of alternative designs or products, and the feasibility of eliminating the risk.

Id.

(iv) Timing of the Report

The manufacturer, distributor, or retailer must report "immediately" upon receipt of the pertinent information. 15 U.S.C. § 2064(b)(2); 16 C.F.R. § 1115.10(a). "Immediately" means within 24 hours of receipt of the information. 16 C.F.R. § 1115.14(e).

A manufacturer, distributor, or retailer is exempted from reporting only if it "has actual knowledge that the Commission has been adequately informed of such defect . . ." 15 U.S.C. § 2064(b). The CPSC, however, has interpreted "adequately informed" to mean that the CPSC has the information required of the rather extensive reports contemplated by the regulations. 16 C.F.R. § 1115.3(a).

A distributor or retailer who receives reportable information from a manufacturer or importer must provide the CPSC with an initial report, unless the manufacturer has already reported to the CPSC.

(v) What Reports are Required and What They Must Contain

The CPSC's own regulations also require a manufacturer, distributor, or retailer to provide "immediately" to the CPSC the above-mentioned information. 16 C.F.R. § 1115.10(a). The CPSC's regulations contemplate an "initial report," as well as a "full report." The "initial report" must contain, insofar as reasonably available:

- (1) An identification and description of the product.
(2) The name and address of the manufacturer (or importer) or, if the manufacturer or importer is not known, the names and addresses of all known distributors and retailers of the products.
(3) The nature and extent of the possible defect . . . or the risk.
(4) The nature and extent of the injury or risk of injury associated with the product.
(5) The name and address of the person informing the Commission.

- (6) To the extent such information is then available the data specified in § 1115.13(d) [i.e. the information required in "full reports," discussed below].

Id. § 1115.13(c). The initial report may be made by any means, but if it is not in writing, it should be confirmed within 48 hours of the initial report. Id.

A distributor or retailer who receives reportable information from a manufacturer or importer must provide the CPSC with an initial report, unless the manufacturer has already reported to the CPSC. Id. § 1115.13(b). Otherwise, a distributor or retailer who is not a manufacturer or importer may fulfill its reporting obligations by contacting the CPSC directly, by sending a letter describing the defect or risk of injury to the manufacturer or importer, copied to the CPSC, or by forwarding to the CPSC reportable information received from elsewhere. Id. The distributor or retailer should provide the information that is required for an initial report insofar as the distributor or retailer knows it. Id.

Manufacturers must also file "full reports." Id. § 1115.13(d). The regulations are silent as to when such a report is due. A full report must contain, among many other things, to the extent the information is reasonably available and applicable:

- Retail prices, model numbers, serial numbers, and date codes
■ Technical drawings, test results, schematics, diagrams, blueprints, or other graphic depictions
■ Copies of any complaints related to the safety of the product or any allegations or reports of injuries associated with the product
■ A chronological account of facts or events

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- The dates when products and units were manufactured, imported, distributed, and sold at retail
- The total number of products and units involved
- The number of products and units in the possession of the manufacturer or importer, private labelers, distributors, retailers, and consumers
- A detailed explanation and description of the marketing and distribution of the product from the manufacturer to the consumer

Id.

Perhaps more importantly, a full report will have to state how the manufacturer plans to correct the defect, failure to comply, or risk at issue, to contact consumers, and whether the manufacturer will refund the consumer, replace the product at issue or repair it. *Id.* This aspect of the reporting requirement dovetails into product recall provisions of the CPSA as well the CPSC's power to impose a recall, both of which are beyond the scope of this article. Suffice it to say here that these portions of the report will have to be drafted in close cooperation with the client, and with the CPSC staff in mind.

(b) Section 37 Reporting Requirements

Section 37 of the CPSA requires that:

If a particular model of a consumer product is the subject of at least 3 civil actions that have been filed in Federal or State court for *death or grievous bodily injury* which in each of the 24 month periods defined in subsection (b) of this section result in either a *final settlement involving the manufacturer or a*

...a full report will have to state how the manufacturer plans to correct the defect, failure to comply, or risk at issue, to contact consumers, and whether the manufacturer will refund the consumer, replace the product at issue or repair it.

court judgment in favor of the plaintiff, the manufacturer must report to the Commission each such civil action within 30 days after the final settlement or court judgment in the third of such civil actions, and, within 30 days after any subsequent settlement or judgment in that 24-month period, any other such action.

15 U.S.C. § 2084(a) (emphasis added). Stated in the terms of the *Code of Federal Regulations*:

A manufacturer of a consumer product must report if:

- (a) A particular model of the product is the subject of at least 3 civil actions filed in Federal or State Court;
- (b) Each suit alleges the involvement of that particular model in death or grievous bodily injury;
- (c) The manufacturer is –
 - (1) a party to, or
 - (2) is involved in the defense of or has notice of each action prior to entry of a final order, and is

involved in the discharge of any obligation owed to the plaintiff under the settlement of or in satisfaction of the judgment after adjudication in each of the suits; and

- (d) During one of the 24-month periods defined in § 1116.2(a), each of the three actions results in either a final settlement involving the manufacturer or in a court judgment in favor of the plaintiff.

16 C.F.R. § 1116.3. Unlike section 15(b) of the CPSA, section 37 does not impose reporting requirements on distributors or retailers. *Compare* 15 U.S.C. § 2064(b) with 15 U.S.C. § 2084.

(i) The Reporting Periods

The 24-month periods referred to in 15 U.S.C. § 2084(a) and 16 C.F.R. § 1116.3 are, beginning with the current operative period:

- (1) January 1, 2003, to December 31, 2004;
- (2) January 1, 2005, to December 31, 2006;
- (3) January 1, 2007, to December 31, 2008; and
- (4) so forth.

See 15 U.S.C. § 2084(b); 16 C.F.R. § 1116.2(a). There were no reporting periods before January 1, 1991. 15 U.S.C. § 2084(b); 16 C.F.R. § 1116.2(a).

(ii) Final Settlement or Judgment and Time to Report

A report is due 30 days after the last of the three suits is resolved, either by way of "final settlement" or a "court judgment," within an operative 24-month period. 15 U.S.C. § 2084(a); 16 C.F.R. § 1116.5(a). The dates on which any of the suits were filed are irrelevant. 16

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C.F.R. § 1116.7(c). Any subsequent settlement or judgment is reportable within 30 days of each settlement or judgment. 15 U.S.C. § 2084(a); 16 C.F.R. § 1116.5(a).

A settlement is "final" when the court enters an ensuing order disposing of the suit with respect to the manufacturer "even though the case may continue with respect to other defendants." *Id.* § 1116.7(c). A subject settlement is one in which the manufacturer is involved "in the discharge of any obligation owed to the plaintiff." *Id.* § 1116.3(c)(2). A "court judgment" is reportable "upon entry of a final order disposing of the matter in favor of the plaintiff and from which an appeal lies." *Id.* § 1116.7(d). It does not matter that an appeal has not yet been sought or resolved. *Id.*

(iii) The Single Multiple-Plaintiff Lawsuit

A single multiple plaintiff lawsuit may satisfy the three cases requirement if the suit involves "three or more separate incidents of injury." 16 C.F.R. § 1116.3. The reporting requirement arises when "at least three plaintiffs have settled their claims or when a combination of settled claims or adjudications favorable to plaintiffs reaches three." *Id.* On the other hand, "multiple lawsuits arising from one incident involving the same product only count as one lawsuit." *Id.*

(iv) Particular Model

The three or more suits must involve the same "particular model" of products. 15 U.S.C. § 2084(a); 16 C.F.R. § 1116.3. A "particular model" is "one that is distinctive in functional design, construction, warnings or instructions related to safety, function, user population or other characteristics which could affect the product's safety related performance." 15 U.S.C. § 2084(a).¹ A product is "distinctive" if:

after an analysis of information relating to one or more of the statutory characteristics [*i.e.*, functional design, construction, warnings, etc., 15 U.S.C. § 2084(a)], a manufacturer, acting in accordance with the customs and practices of the trade of which it is a member, could *reasonably* conclude that the difference between that product and other items of the same product class manufactured or imported by the same manufacturer is substantial and material.

16 C.F.R. § 1116.8(a) (emphasis added). The Commission's rules provide for a lengthy list of information relevant to a manufacturer's determination whether a product is a "particular model." 16 C.F.R. § 1116.8(a)(1)-(10). The list will not be repeated here and the reader is directed to the rule at issue.

(v) Grievous Bodily Injury

The reportable settlements or judgments must arise from lawsuits for death or grievous bodily injury. "Grievous bodily injury" includes: "mutilation, amputation, dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorder, severe burn, severe electric shock, and injuries likely to require extended hospitalization." 15 U.S.C. § 2084(e)(1); see 16 C.F.R. § 1116.2(b) (elaborating on each type of injury listed in the quote). In addition, the Commission's rules contain a catch-all definition: "any allegation of traumatically induced disease." 16 C.F.R. § 1116.2(b)(7). Each of the lawsuits need not involve the same category of injury. *Id.* § 1116.8(d).

Whether a suit involves death or grievous bodily injury is to be determined from:

- (1) the allegations of the complaint;
- (2) pre-complaint investigation;
- (3) post-complaint discovery;
- (4) or informal settlement negotiation.

Id. § 1116.7(b). Conclusory language in a complaint that the plaintiff suffered grievous bodily injury does not make a resulting settlement reportable "unless the defendant manufacturer elects to settle ... without any investigations of the underlying facts." *Id.* (emphasis added). The manufacturer's opinion as to the validity of the allegations is irrelevant. *Id.*

(vi) Content of the Report

The report must contain, with respect to each lawsuit:

- (A) The name and address of the manufacturer.
- (B) The model or model number or designation of the consumer product subject to the civil action.
- (C) A statement as to whether the civil action alleged death or grievous bodily injury, a statement of the category of such injury.
- (D) A statement as to whether the civil action resulted in a final settlement or a judgment in favor of the plaintiff.
- (E) In the case of a judgment in favor of the plaintiff, the name of the civil action, the number assigned to the civil action, and the court in which the civil action was filed.

15 U.S.C. § 2084(c)(1); see 16 C.F.R. § 1116.6(a). The report need not disclose any settlement amount paid by the manufac-

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Consumer Project Reporting

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turer. 15 U.S.C. § 2084(c)(3); 16 C.F.R. § 1116.6(c). The filing of such a report is not deemed to be an admission of:

- (1) an unreasonable risk of injury;
- (2) a defect in the consumer product which was the subject of such action;
- (3) a substantial product hazard,
- (4) an imminent hazard, or
- (5) any admission of liability under any statute or under any common law.

15 U.S.C. § 2084(d). The manufacturer may deny in the report that the product caused death or grievous bodily injury. *Id.* § 2084(c)(2); 16 C.F.R. §§ 1116.6(b)(3), 1116.7(b).

D. Where to Send Reports

Both section 15(b) and section 37 Reports should be sent to:

**Office of Compliance and Enforcement
Division of Corrective Action
Consumer Product Safety Commission
Washington, D.C. 20207**

16 C.F.R. §§ 115.13(a)&(b) & 1116.46. Oral section 15(b) initial reports can be made by calling telephone number (301) 504-0608. *Id.*

E. Penalties for Failing to Report

Knowing failures to report under the CPSA are subject to civil penalties of up to \$7,000 a day, not to exceed a total of \$1.65 million. 64 Fed. Reg. 51963; see 15 U.S.C. § 2069(a)(1) (providing for civil penalties). Most recently, in September 2003, the CPSC imposed a \$1 million civil penalty on Brunswick Corporation for failing to timely report to the CPSC defective forks on bicycles

manufactured and distributed by Brunswick. 68 Fed. Reg. 54204-06.

The CPSA also provides for criminal penalties. Knowing and willful failures, after having received notice of noncompliance from the Commission, are subject to criminal sanctions of up to \$50,000 in fines and/or imprisonment up to a year. 15 U.S.C. § 2070(a). Individual directors, officers, and agents of a corporation may also be subject to such criminal sanctions. *Id.* § 2070(b). □

(Endnotes)

- 1 The Commission's rules define "functional design" as "those features that directly affect the ability of the product to perform its intended use or purpose." 16 C.F.R. § 1116.2(c)(1). The "construction" of a product is defined as "its finished assembly or fabrication, its materials, and its components." *Id.* § 1116.2(c)(2). "Warnings or instructions related to safety," among other things, "may be written or graphically depicted and may be attached to the product or appear on the product itself, in operating manuals, or in other literature that accompanies or describes the product." *Id.* § 1116.2(c)(3). The "function" of a product refers to its intended use or purpose." *Id.* § 1116.2(c)(4). "User population" means "the group of people by whom a product is principally used." *Id.* § 1116.2(c)(5). Finally, "other characteristics which could affect the product's safety related performance" includes "safety features incorporated into the product to protect against foreseeable risks that might arise during the use, handling, or storage of a product." *Id.* § 1116.2(c)(6).

**2004 OREGON STATE BAR
CALENDAR FOR LITIGATORS**

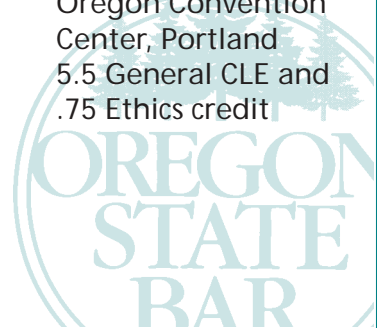


APRIL

2 Workers' Compensation Basics
DoubleTree Hotel
Lloyd Center,
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Time & credits to be announced

23 Working With Difficult People
9 am - 4:30 pm
Oregon Convention
Center, Portland
6.5 General CLE or
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30 Family Law
9 am - 4:30 pm
Oregon Convention
Center, Portland
5.5 General CLE and
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Winning...

Takes Care of Itself

By William A. Barton
Barton Strever

I hold that the odds of winning in the courtroom increase once the lawyer stops focusing on results and instead emphasizes process or simply doing their best. This is true for many reasons. The best reason is that our effort is the only variable we can completely control. Juries decide who wins lawsuits, not lawyers. Lawyers can't sell wins. We don't possess them to barter. Winning and losing are results that flow, in significant part, from effort.



While it is true that as lawyers we shouldn't hold ourselves accountable for things beyond our control, i.e., wins, conversely it is just as important that we broadly interpret what we can impact, meaning almost everything short of the ultimate jury verdict.

What is the difference between improperly accepting responsibility for the jury's result, and virtually everything short of it? It is probably more psychological than substantive. Drawing a relatively bright line between the jury's verdict and everything short of it promotes an attitude that respects the sanctity of what jurors do, and promotes a quicker closure when a loss does occur. Obstetricians can't

always deliver perfect babies, but they can control their competence and effort. When nature precludes perfection, it allows the good doctor, and the expectant parents, the best opportunities to accept an unfortunate result. So it is with lawyers and their clients.

Focusing on effort also helps in viewing losses as growth opportunities. With the right attitude there is much more to learn from losses than wins. The lawyer who lacks the temperament and emotional maturity to objectively view the facts is often the same lawyer who has the greatest trouble learning from their losses. This is because when losses occur, they minimize their contribution to the outcome. Instead of asking, "What can I do better?" they tend to deflect accountability. While there are certainly many factors that contribute to any jury verdict, from the lawyer's perspective it is always most productive to focus on how the lawyer's conduct, in the broadest sense, may have contributed to the loss.

In my view lawyers generally don't win cases, the opposing side loses them. When lawyers are equal in talent **and** preparation, they neutralize each other.



When either side has better legal representation, it follows that their chances of winning are just that much better; however, jurors are later sure they voted for the winning side, not because of the lawyering, but because that side was "right" or "had the better facts," and therefore should have won. It is in the effective presentation of the facts that true legal skill resides. The greatest compliment a lawyer can receive is none, meaning the jurors voted in your client's favor, not because of your obvious talent or effort, but because of the facts. You should be satisfied when later overhearing the jury foreperson saying to her friend in the line at your local grocery store, "Last week I served as a juror on a case that was so open and shut any first year law student could have won it!" Now that, my friend, is a real compliment . . .

Yes, the facts are primary; however,

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WINNING TAKES CARE OF ITSELF

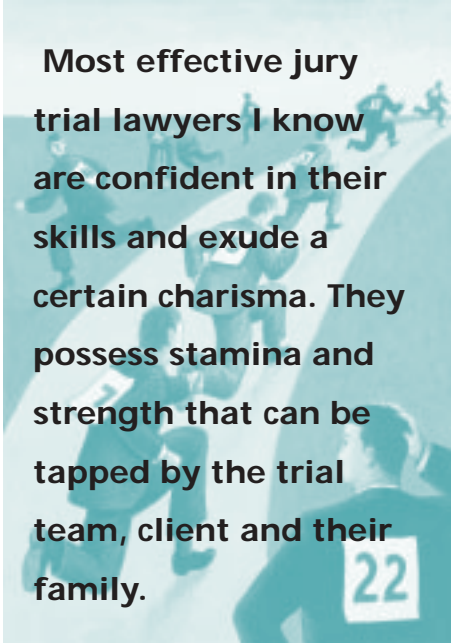
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exactly how those key facts are presented is almost as important. Let me explain. Rarely does anything exist without a context that impacts how the facts are interpreted. There is little in the real world that is an immutably fixed external reality without a context.

The relationship between "the facts" and the skills attendant to their presentation finds many analogies. Consider the work of a skilled gem cutter or portrait artist. Compare the core facts of a case to a large uncut diamond. Individual diamond cutters, each with their preferences and skills, will begin with the same starting point or rough stone, yet produce different final products. A second analogy is that of portrait painters. Have the same individual painted by several equally qualified artists, then compare the final products. Each portrait can be remarkably different, yet each artist was painting the same person. The same score performed by different musicians will once again produce dramatically different results, yet the notes on the page are the same. The preparation of a lawsuit is an equally artistic and creative enterprise.

Finally, let's compare the preparation of a trial to that of a play. The lawyer concurrently wears the hat of every contributor. He or she is the director who is ultimately responsible for the final product; the economic producer when fronting costs in a contingency fee case; in charge of casting when selecting the witnesses, and script generation and editing when preparing the witnesses for their testimony. In no small way the lawyer is also dynamically both an "exhibit" and "witness." Short of being responsible for the ultimate win, it is proper for a trial lawyer to accept as much responsibility as he or she can.

Focusing on process instead of results acknowledges the primacy of the jury in



Most effective jury trial lawyers I know are confident in their skills and exude a certain charisma. They possess stamina and strength that can be tapped by the trial team, client and their family.

the litigation process and its final result. When lawyers gather to discuss "winning" and "losing," the conversation is necessarily slanted toward the lawyer's perspective, rather than that of the jurors.

It is difficult to remember not to take ourselves seriously, but to take what we do seriously. Most effective jury trial lawyers I know are confident in their skills and exude a certain charisma. They possess stamina and strength that can be tapped by the trial team, client and their family. This kind of confidence has a self-fulfilling quality. If the lawyer doesn't believe they are going to win, why should the jury?

Stripped of all veneer, for most of the best plaintiff's jury trial lawyers I know, going to court is emotionally a "winner take all enterprise." You are either the victor or the vanquished. The ultimate economic consequence of losing is that a repetitive "loser" is driven from the market. This Darwinian harshness is tempered by the reality that most cases do settle for a sum that is viewed by each side to

be in furtherance of their self-interest.

Undue focus on winning also places unhealthy emphasis on the ends rather than the means. This devalues the important process ingredients such as ethics, civility, and collegiality. When a trial lawyer makes the numerous difficult choices that are made in private, it is easier to take the ethical high road when the importance of winning is kept in perspective. I know that no lawyer ever says it's about winning at all costs, but you move closer to the edge of morality and ethics when the focus is on winning rather than process.

When one unduly focuses on winning, the entire litigation process psychologically becomes less about winning and more about avoiding losing. At its core, this is fear, a strong emotion that the jurors and everyone else can sense. All jurors are your friends: you must trust them, they want to do the right thing. It is your job to help them to do just that, i.e., the right thing. This has a different genesis from fear avoidance. By helping the jurors in their difficult job, you not only help yourself, but more important, your client.

You will also find yourself thinking differently when the accent shifts from winning to doing your best. You will see the case in bigger terms, meaning justice. You will paint with larger and larger brush strokes. With justice as your goal, winning becomes more likely. Why? Not only because you now have your priorities **correct from the jury's perspective**, but you are also doing the "right" thing. This is what I mean when I say, "Winning takes care of itself."

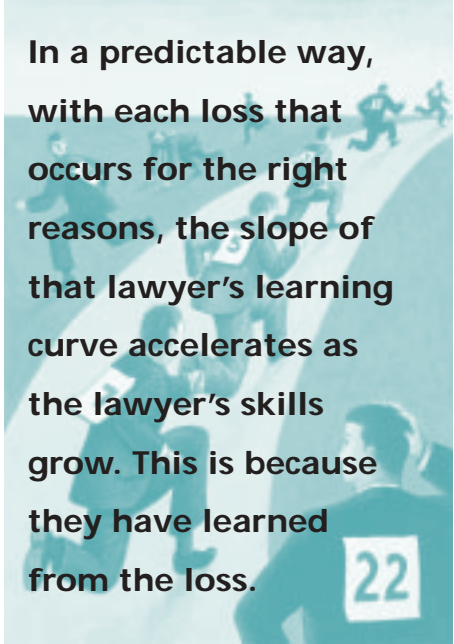
As you know, each participant in the litigation process has unique tasks and interests, and you must carefully consider what each really wants in light of their differing jobs.

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WINNING TAKES CARE OF ITSELF

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- a. The clients: They want to win, it's just that simple. Each of them are certain they are entitled to win for every reason imaginable.
- b. The jurors: They certainly don't, and really shouldn't, care about what any client or lawyer wants, or thinks they are entitled to. The juror's job is simply to do "justice." To them, and the community they represent as a reflection of its values, this means "to return the right verdict - for the right reason."
- c. The lawyer: The lawyer's view is myopic. It is, within the rules, TO WIN, for the client! Acknowledged byproducts of winning for the client are the furtherance of one's own economic, professional and psychological ends.
- d. The judge: In the abstract, the judge should not even be mentioned here. Your job is to keep it that way. Judges should only be interested in seeing that the trial operates within the proper rules of process. We all know that with the many discretionary rulings judges make they can and do affect the outcomes of jury trials. With this concession, I mention the bench here because it is your job, as a trial lawyer, to keep the judge as neutral as possible. In many ways it is doing all the little things well that results in excellence. Read and follow the trial court rules. File everything on time. Honor not just the letter of the court's rulings, but also the spirit. If there is a question concerning the admissibility of evidence, first consult with the court and opposing



In a predictable way, with each loss that occurs for the right reasons, the slope of that lawyer's learning curve accelerates as the lawyer's skills grow. This is because they have learned from the loss.

counsel out of the presence of the jury. Don't make speaking objections. Do these things and most of the judges I know will stay out of the way and let you try your case. Are there exceptions? Yes; however, they are small in number, well known to all, and to the extent they are automatic or unfair, they generally are equally unfair to both sides.

With a little insight, what emerges from this swirling vortex is the notion that attorneys will win more when they focus less on winning and more on doing their best. When an attorney has done their job correctly and properly cast their case, it will be apparent to all the jurors that when your side wins, everyone (except the recalcitrant opponent) wins. Why? Because it is "just," meaning in alignment with your arguments, your client's position, and most important, in furtherance of basic community values. So you want to be a winner before ju-

ries? This is the answer. Why? Because this is where every juror begins and ends. The jury alone, as the conscience of the community, has the power to allocate justice in the form of a "win" or a "loss." The acquired perspective of carefully framing your case in the context of community values, and thereby justice, is one of the headwaters from whence a trial lawyer's real power hails.

When any lawyer embraces this perspective, something important begins to happen, and happen quickly. The lawyer will start losing for the right reasons, meaning they will lose because they didn't have the facts, rather than for something they did that compromised their credibility with the jury. That is exactly what should happen. Losing "on the facts" permits the lawyer's learning curve to dramatically increase, resulting in fewer losses. This is because the instincts for what are the outcome determinative facts, supported by their predicate values, within the case grow keener with each new trial.

In a predictable way, with each loss that occurs for the right reasons, the slope of that lawyer's learning curve accelerates as the lawyer's skills grow. This is because they have learned from the loss. Once losses for the wrong reasons are out of the way, it is easier to see the core ingredients of any case in all its potency.

It is appropriate to close with the obvious systemic comment that while a lawyer's contributions in trying the case are obviously important, it is primarily the facts that are determinative. This is as it should be. In a lawsuit, if you don't have the "best" facts or case, then you should lose. What is wrong with that? Nothing. □

When Was the Last Time You Handled a...

Death Penalty Case?

By Robert D. Newell
DavisWright Tremaine LLP

I grew up on a farm and one of my self-appointed jobs on that farm was to keep the birds out of the strawberries. Really it was just an excuse to use my BB gun, but initially I had some trouble hitting the small birds that were the biggest consumers of strawberries. So one day in my early career as a marksman, I saw a much bigger bird and successfully brought it down.



When I showed the trophy robin to my Mom she, knowing that robins were not usually strawberry thieves, looked at me and said "you've done a good job of shooting it, now how are you going

to bring it back to life?"

That is a parable which describes our problem with the death penalty in this country.

The American Bar Association has recognized that there are serious flaws in the death penalty system in this country. In February 1997, it adopted a resolution calling for a moratorium on further executions. That resolution concluded that the capital punishment system in this country does not meet the basic standards of due process and fundamental fairness, the lack of which increases the chance that inno-

cent people will be executed. The ABA identified four flaws in the administration of the death penalty:

1. Inadequate representation;
2. Inadequate opportunity for review of death sentences by independent courts;
3. Intractable and widespread racial discrimination; and

4. Execution of the mentally ill and those who were juveniles at the time of the offense.

This article will address just the first flaw.

The ABA didn't stop with just a resolution. One of the steps it has taken to try to implement the resolution is a program it began called the ABA Death Penalty Representation Project, which seeks to recruit civil law firms to represent death row inmates in post-conviction proceedings. My firm, Davis Wright Tremaine, was one of the first such firms recruited. I am the primary lawyer on our case, but I've had abundant help from many lawyers and staff throughout the firm.



Before my involvement in this case, I could probably have been best described, in Scott Turow's phrase, as a "death penalty agnostic." Death did not seem too harsh a punishment for monsters like Timothy McVeigh and John Wayne Gacy. My experience with this case and my broader study has moved me to conclude that our system cannot be relied upon to flawlessly carry out an irreversible penalty. What follows is intended to illustrate the reasons for that change of position.

My background has been entirely in civil litigation and I have been doing that for over 28 years. Before this, the closest I'd ever come to criminal law was in my first year of practice when I was instructed

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DEATH PENALTY

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to appear at criminal call and enter a plea of *nolo contendere* for a ship owner in an oil spill case. With that background, it was only natural for the ABA to come knocking on my door, asking us to handle a death penalty case. What could be more logical?

Actually, the ABA is a little more subtle and sophisticated than that. They pointed out that habeas corpus proceedings are technically civil actions with some familiar civil proceedings such as depositions and document discovery. But still — a murder case???

The basic premise of the Project is that anyone facing the death penalty ought to have our system's full measure of due process and fundamental fairness. The best way in our system to guarantee those rights is for the accused to have competent counsel.

Well, death row inmates do have competent counsel, don't they? The simple answer is "no," and the more refined version of that answer is "rarely."

Virtually all of these death row inmates are poor, unable to hire counsel, and many, if not most, are mentally ill. Nearly all were represented at trial by appointed counsel, most of whom were overworked public defenders with inadequate resources. Several states with the death penalty have no public defender program. Few have any provision for post-conviction counsel. Those that have any such program fail to fund them adequately — the state virtually always outspends the defense and I can tell you from the civil side that dollars can make a difference in the outcome of a case. There are about 3,500 people on death row in the United States and hundreds lack counsel for post-conviction proceedings.

Let me give you some examples. These are taken from a study done by the Chicago Tribune of 131 recent executions in Texas. In 40 of those cases, the defense presented no evidence (22) or just one witness (18) in the sentencing phase. One

defense attorney who presented no evidence later testified he didn't know he was allowed to. In 43 of the cases (1/3), the defendant was represented at trial or on initial appeal by a lawyer who had been or later was disbarred or suspended. In 29 cases, the State called a psychiatrist to testify, in response to a hypothetical question based on defendant's past, that defendant would commit future violence. In 23 cases, the State's evidence included a jailhouse informant, which is so unreliable that it formed part of the basis for Gov. Ryan's moratorium in Illinois. 23 of the cases included evidence based on visual examination of hairs, which is so inexact it is barred in some states.

A lawyer in Alabama recently submitted a bill for about \$11,000 for 200 hours of work as second chair on a case that settled for a life sentence during jury selection. Three thousand dollars of that had been pre-approved for investigation. The case lasted for over a year, and the judge allowed \$4,500 after sitting on the fee petition for months. The lawyer paid the investigator and was left with \$1,500 for his trouble. Think he'll be taking another case anytime soon? In Mississippi, a lawyer was appointed in a death penalty case which was his first felony case. His total fee — \$1,000. He cannot do what he probably should — refuse the appointment — because if he does, he won't get more criminal defense appointments from the judge, and those constitute his bread and butter.

Let me be more specific about the effect of bad lawyering with other examples. One female defendant had a strong battered spouse defense to the murder charge. Her lawyer not only didn't present it, but got so drunk during trial that he was held in contempt and sent to jail with his client. Her conviction and sentence were upheld on appeal.

A Georgia defendant was represented by a husband and wife team who didn't read the death penalty statute, didn't visit

the crime scene, didn't interview the state's witnesses or discover the state's evidence (too busy) and barely spoke to their client. Husband left during the key prosecution witness' testimony but later cross-examined that witness, and the pair presented no mitigation evidence because they didn't know there was a sentencing phase. They failed to offer evidence that the victim was alive at the alleged time of death and that their client had an iron-clad alibi for the certified time of death. They failed to appear on their own motion for new trial. One of them was later disbarred for this performance.

Another Georgia defendant spent 11 years on death row. His solo practitioner lawyer was paid less than \$20 per hour at a time when the lawyer was having personal financial problems. He got no funds for co-counsel, investigation or experts. Closing argument was 255 words. The attorney was later disbarred. This story ended better than most, however, because an Atlanta firm stepped in and cleared the defendant of all charges. During his 11 years on death row, he witnessed 15 executions in the electric chair and said that the smell of burning flesh is something he'll never forget.

You've heard the stories about other lawyers who were drunk or slept through trial, or committed some other egregious act of incompetence — things that would get any civil lawyer fired — yet the consequences in death penalty litigation are borne by the defendant.

These are the two "I's" of death penalty litigation: INCOMPETENCE and INADEQUACY.

So how could things get any worse? Some might say by having the ABA appoint a shmo like me who knows absolutely nothing about criminal law or habeas corpus, and certainly nothing about the death penalty.

At least that's the way I felt when I first got involved in my case. To give you an example of how naive I was, during my

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first read-through of the transcript in my case, I came to a point early in the trial when the trial judge told all defense counsel that they should make their objections to the court reporter during recesses, rather than in open court. I remember thinking, "wow, criminal law is really different than civil law". At that point, it didn't dawn on me that there might be something fundamentally wrong with that unique practice.

My defendant had been represented by lawyers in the public defender's office who did virtually nothing during the eight months they were on the case. My case involved six teenage boys murdering my client's grandparents, and if you know anything about murder cases, you know that the murder of parents or grandparents in virtually every instance follows, sometimes by years, severe child abuse of the perpetrator by the victim. Yet the public defender's office had not done any mental examinations, had not appointed a psychiatrist, and had not even sought funds for such work during the eight months they were involved. Then suddenly, just before the preliminary hearing, which was followed immediately by the trial, the public defender's office developed a conflict of interest, entirely unexplained in the record, and a new lawyer was appointed, virtually without warning. That new lawyer did not seek appointment of co-counsel, did not seek investigative funds, did not hire an investigator, hired no mental health professionals, and quite simply had no chance to present any kind of realistic defense. Despite the fact that there were no fingerprints, no blood splatter analysis, and some evidence of my client's innocence, the inevitable guilty verdict followed a non-defense. That was followed by an almost non-existent penalty phase hearing where very little evidence was presented, no mitigation specialist hired or serious mitigation evidence offered and, of course, a death penalty sentence was handed down.

Keep in mind that though I had no previous criminal law experience, our firm, working with four investigators and other experts, has come up with evidence of actual innocence and a laundry list of major constitutional errors that should result in a new trial. Yet with our system being stacked against the defendant the way it is, I have no confidence that such will be the outcome. My firm has spent more time and money on this case than was spent in his three previous trials combined, and there can be little doubt that if the work had been done up front, the outcome would have been different.

Let me illustrate. In the third trial my client had, the public defenders who represented him had available two investigators for the approximately 30 murder trials in their office and about four months to do the job. We had four investigators for four years and there is still more to be done.

Here are just a few examples from my case that we, as completely inexperienced civil litigators, who have had the luxury of time and resources, have come up with:

1. A witness, available at the original trial, who will testify to my client's actual innocence.
2. Extensive evidence of abuse of my client by the victims and by his parents, not presented to any court.
3. Evidence of use of psychotropic drugs in jail while awaiting trial, provided by the state because of my client's mental problems which affected his ability to participate in his defense, but no competency hearing.
4. Suicide attempts in jail, not presented to any court.
5. Evidence of a close social relationship between the inexperienced judge and the very experienced lead prosecutor.

Based on my conversations with other people doing this kind of work — I've been to a number of CLEs to learn as quickly as I could how to do this — there is nothing unique about my case. They are virtually all like this. Poverty, race, mental illness and a lack of resources for the defense play a major role in nearly all death penalty litigation. Similarly, the appeals and the habeas cases are done by poorly paid appointed attorneys who have too many cases and not enough resources. As a consequence, a great many of the death penalty verdicts handed down are inherently unreliable. In the vast majority of these cases, habeas corpus proceedings are the last best hope for what David von Drehele has called "the lowest of the dead."

A recent comprehensive study by Professor James Leibman of Columbia University School of Law demonstrated that there was reversible error in 68% of the death penalty cases in this country. That study covered 23 years and 4,578 cases nationwide. He found that it took, on average, 3 judicial reviews to catch these errors, and concluded that there is grave doubt that all such errors are caught. Federal courts find serious error in 40% of the cases left after state courts have weeded out the most obvious ones.

As has been widely reported, the State of Illinois has in recent years released more prisoners from death row than it has executed. Governor Ryan, who was a strong supporter of the death penalty before leaving office, imposed a moratorium on executions and then commuted all death sentences in Illinois because of his conviction that the system was fundamentally flawed. Ten other states have considered moratoria or abolition. Senator Feingold introduced the Federal Death Penalty Abolition Act and with Sen. Levin, sponsored the National Death Penalty Moratorium Act. Other bills in Congress have dealt with DNA evidence and due process protections.

In connection with his declaration of

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a moratorium on executions, Governor Ryan appointed a "Commission on Capital Punishment" which conducted a comprehensive study of the death penalty in Illinois. The Commission, in its report issued in April, 2002, made 85 recommendations for specific changes in the death penalty system. Those recommendations encompassed such things as



the videotaping of all interrogations of murder suspects, reform of line-up procedures, a statewide commission to review all cases in which the prosecutor wishes to seek the death penalty, elimination of reliance on jailhouse informants in death penalty cases, and certification of judges qualified to hear capital cases. Oregon has none of these safeguards.

We say in this country that it is better to release 99 guilty people than to convict one innocent person. We have the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt. Certainly the public, the legislative and executive branches are demonstrating concern about these important concepts, ones that the judicial system has safeguarded from the beginning.

But once there is a verdict, all those presumptions disappear in our jurisprudence. Once that verdict is in, everything shifts to favor the upholding of that verdict. Even DNA evidence which demonstrates actual innocence has been strongly resisted by prosecutors and courts.

The current focus on DNA analysis and actual innocence is misplaced. Taken to its logical extreme, we seem to be saying that if, through the use of DNA evidence, we can satisfy ourselves of a defendant's guilt, the fairness of that defendant's trial does not matter. Setting aside the fact that in

many cases DNA evidence plays no role, succumbing to this siren song of certainty would undermine the foundation of our legal system: due process.

To avoid that trap, the focus of our judicial system must be on process. We must guarantee a fair and impartial process to every criminal defendant, but especially to those facing the

death penalty. That's what will protect not only criminal defendants, but each and every one of us who might one day find ourselves as a participant (litigant) in our judicial system or perhaps a member of a minority, whether political, religious or racial, that our system is pledged to protect.

The most egregious judicial mechanism for upholding death penalty judgments has been the notion of harmless error. The worst example of that occurred recently in Texas, where a defendant was convicted on two pieces of evidence; one was his confession, the other the testimony of a teenager who was demonstrably incredible, by all accounts. The courts found the confession to have been coerced and therefore unconstitutionally admitted, but ruled that it was harmless error. How can a violation of the constitution be harmless?

You need not be an opponent of the death penalty to have grave concerns about the system of capital punishment as it currently exists in this country. Civil litigators with little or no previous experience in criminal law can play a critical role in assuring that due process protections are available to those least able to achieve it on their own.

We find it all too easy to bring down the bigger birds, but impossible to bring them back to life. □

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Oh, Oh...

The Injured Party is Receiving Government Benefits

By Donna Meyer
Fitzwater & Meyer, LLP

You have just successfully settled a personal injury claim on behalf of your client. You feel good about your work and pleased that injured party, who has greatly suffered, will receive some financial benefit. You talk to the structured settlement



my government benefits?

For most personal injury lawyers, this question triggers a deep sigh at best. Trying to understand public benefits, with the myriad of programs and ever-changing eligibility criteria, is like hiking in quicksand. But if left unaddressed, your client may receive no benefit from the settlement, and could ultimately be the worse off for it. You have no choice but to move bravely forward. What do you do next?

A. DETERMINE WHAT GOVERNMENT BENEFITS YOUR CLIENT IS RECEIVING

The first task is to identify the government benefits the injured party is receiving. The answer will tell you whether or not the settlement will affect his or her benefits.

1. Many Shapes and Sizes.

Government benefits come in many shapes and sizes. Benefits may be based on disability, age, unemployment, or workplace injury.

Some benefits are "needs based" or "means tested;" that is, based on financial need, while others are based on a work record. Typically if a government benefit is not means-tested, receipt of a personal injury award will have no effect on the client's government benefits.

2. Don't Rely on Your Client.

Getting accurate information about what government benefits your client is receiving can be surprisingly difficult. For example, the client may tell you he or she is receiving Social Security Disability Income, when in fact it is Supplemental Security Income (SSI). You should never rely on the client to accurately identify the benefits he or she is receiving. The wise approach is to require verification. It is usually a good idea to obtain a release and request the list of benefits from the caseworker.

3. Injured Party is Participating in More Than One Program.

Almost always the injured party is receiving more than one type of public benefit, and the eligibility criteria are not the same for all programs.

B. DON'T WORRY ABOUT PROGRAMS NOT BASED ON FINANCIAL NEED

If your client is not receiving means tested benefits, and if it does not appear that he or she will need them in a foreseeable time, then you can proceed as you would with any other client. Among the most common government benefit programs that are not means tested are Social Security Benefits and its accompanying health benefit program, Medicare. The Social Security Act provides for a range of cash and health benefits, including old-age (retirement), survivor's, and disability insurance benefits. These benefits are paid to retired or disabled wage earners and their dependents, or, if the wage earner



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is deceased, to that person's survivors. Social Security is a public insurance benefit, and eligibility for Social Security payments is based on the earnings record of the individual (or another wage earner on whose record the individual is eligible to draw).

A Social Security beneficiary may have any amount of assets, and unearned income is not restricted. In some instances a person is eligible for such a small amount of Social Security Disability Income benefits that he/she is also eligible for Supplemental Security Income ("SSI") [see discussion regarding SSI below].

C. EVALUATE EFFECT OF LUMP SUM OR INCOME STREAM ON ELIGIBILITY FOR MEANS TESTED PROGRAMS

If the injured party is receiving means tested benefits, you should understand what effect receipt of a lump sum or income stream will have on the benefits. Some of the most common government benefit programs for which eligibility is based on financial need are described below.

1. Supplemental Security Income (SSI).

a. Eligibility for SSI. SSI is a federal benefit program.¹ SSI provides a monthly cash payment in order to provide a minimum level of income for persons who are disabled, blind or age 65 or over. The income eligibility is very low (\$564 in 2004). Further, the asset eligibility limit for an individual is \$2,000, excluding exempt assets. Exempt assets effectively include a residence, one car, household goods and furnishings, prepaid funeral plan, and term life insurance.

Funds received by SSI recipients are treated as income in the month received and an asset on the first of the month following receipt. Receipt of funds must be reported by the recipient. Technically, the receipt of funds in the first month causes an overpayment, and the Social Security Administration (SSA) will issue an overpay-

Timing is important, because every month that the recipient has funds in excess of the resource eligibility limits he or she will not receive government benefits, and the award or settlement can quickly dissipate.

ment notice. SSA typically administratively waives overpayments if they are under \$500.

If the recipient still has the funds on the first of the following month, and if this puts him or her over the resource eligibility limit for non-exempt assets, then he or she will be ineligible for SSI. Even recipients of SSI who might feel that they can forgo the monthly SSI payment once they have access to some other source of funds may decide that they must maintain their SSI because it automatically qualifies them for basic Medicaid Assistance.

If the recipient receives an income stream, his or her SSI will be reduced each month by the amount received.

b. Spend Down. If the recipient still has the funds on the first of the following month, and if this puts him/her over the applicable resource limit for non-exempt assets, then he or she may be ineligible for SSI. One solution to insure that the injured party actually receives a benefit from the lump-sum is to spend down. This works particularly well when the client will receive a relatively small amount. The client may use the funds to purchase needed goods and services and/or to pay off any debt. Any goods purchased should be ex-

empt assets under the Medicaid rules, such as a house, car, clothing, other tangible personal property, or a prepaid burial fund.

Timing is important, because every month that the recipient has funds in excess of the resource eligibility limits he or she will not receive government benefits, and the award or settlement can quickly dissipate. For example, if the injured party is receiving \$10,000, and will be using it to purchase a car or pay off debt, then ideally he or she will have time to accomplish this before the first of the following month. If he or she receives the funds on the 30th of the month, then spend down may not be accomplished immediately, and eligibility will be affected for the month of receipt and the following month. Ideally funds from the settlement should be received at the beginning of the month in order to allow adequate time for spend down to be completed.

c. Gift. Sometimes the recipient wants to give away the funds. This will trigger a penalty period of ineligibility for SSI. The formula to determine the ineligibility period for SSI is to take the value of the gift and divide by \$565.70.² The resulting number is the number of months of ineligibility. This long ineligibility period makes gifting in SSI cases impractical in most cases.

d. Trusts to Preserve SSI. In the Omnibus Reconciliation Act of 1993 ("OBRA '93")³, Congress explicitly carved out two exceptions in the otherwise restrictive rules regarding trusts for beneficiaries of Medicaid, which Congress later adopted for SSI in the Foster Care Independence Act of 1999.⁴ This law changed the Social Security law to adopt the exceptions in the Medicaid rules. One exception is a "pay-back trust" or "under 65 disability trust," which allows disabled individuals who are under the age of 65 to place their assets in a trust provided certain criteria are met. Transfer of the individual's assets to this

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type of trust will not cause the trust assets to be deemed "available" for purposes of eligibility for Medicaid, nor will such a transfer cause a penalty period of ineligibility. The second exception allows a disabled individual of any age to transfer assets into a pooled trust. These exceptions are described below.

e. Structured Settlements. There are special issues to consider in cases involving a structured settlement. *If the claimant or the conservator is named as the direct beneficiary of an annuity purchased in the context of a structured settlement, then it could cause him or her to permanently lose eligibility for public benefits.* If the payments are "unassignable" then some government agencies will treat them as received by the individual each month even if the payments are contributed to a properly drafted special needs trust. Therefore, it is essential payments be made directly to the trustee.

There is some concern that even income streams directed to the trustee of a special needs trust will be treated by the Social Security Administration in the future as available to the beneficiary and thus reduce or eliminate eligibility for SSI. Although that is not the policy now in our region, purchase of an annuity is irrevocable, and the possibility of a different future interpretation is unsettling. All things being equal, a lump sum settlement is safer for the beneficiary. If a structured settlement is being considered, the plaintiff should be made aware of the risk.

2. Medical Coverage.

A person who receives SSI automatically receives Medicaid coverage for his or her basic health care needs. *Even someone who is willing to forgo cash assistance may not be able to give up medical benefits. These benefits are usually essential for people with disabilities.* Maintaining some SSI, even a dollar, can preserve eligibility for medical coverage.

The Oregon Health Plan (OHP) has

There is some concern that even income streams directed to the trustee of a special needs trust will be treated by the Social Security Administration in the future as available to the beneficiary and thus reduce or eliminate eligibility for SSI.

varying subprograms, with different eligibility criteria. If the client receives an income stream as a result of a structured settlement in a personal injury case, then the income will cause ineligibility for the OHP if the income is over the allowed limit. If the client receives a lump-sum payment, then this may cause the client to be over the resource limit and ineligible for OHP, unless the assets are spent down or transferred to a trust.⁵

3. Medicaid Assistance for Long Term Care.

a. Eligibility. Medicaid Assistance for long term care covers persons with limited income and resources who need assistance with the activities of daily living. Long term care includes nursing homes, assisted living facilities, adult foster homes, and in-home care. To meet the financial criteria, a person must meet both an income test and a resource test. Under the income test a person's gross monthly income must be at or below \$1,692.00 (a 2004 amount; three times the SSI standard). People over this income cap but otherwise eligible may still qualify by creating an income cap trust. The person's resources must be at or below \$2,000 for single persons. Different rules designed to

avoid spousal impoverishment apply to married couples, which are based on a formula and are beyond the scope of this outline.

Similar to SSI, funds received by an individual needing long term care are treated as income in the month received and an asset on the first of the month following receipt. Technically, the receipt of funds in the first month causes an overpayment, and the state agency administering the program can issue an overpayment notice.

b. Spend Down. Spend down can be a solution to preserve government benefits and still receive some benefit from the settlement. The process is the same as described above under SSI.

c. Gift. A gift will trigger a penalty period of ineligibility for Medicaid for long term care. The length of the penalty period depends on the amount of the gift. A formula is used: the value of the gift is divided by \$4,300.00 (this amount changes periodically). The resulting number is the number of months of ineligibility.

d. Trusts to Preserve Medicaid Assistance. In OBRA '93, Congress explicitly carved out exceptions in the otherwise restrictive rules regarding trusts, which Congress later adopted for SSI as well (see above). Two of these exceptions, the payback trust and the pooled trust, are described below.

4. Public and Subsidized Housing.

Many low and moderate income individuals receive assistance through federal rent subsidy programs. Rents are a percentage of monthly income, generally not more than 30%. There is no resource limit for federally subsidized housing. Eligibility is based on income, including fixed and investment income.

Since eligibility for federal housing is

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based on income, any situation in which the person will receive automatic payment of monthly income may make the individual ineligible for a federal housing subsidy or result in an increase in rent.

Receipt of a lump-sum will not automatically make the recipient ineligible. If the recipient immediately spends the assets on needed items or pays debts, then investment income will not be generated by the assets that would affect the client's monthly income. If the recipient receives a large lump-sum, and does not spend down, then the amount of investment income received or imputed to the individual will translate into increased rent or possibly even ineligibility.

5. Food Stamps.

Food stamps is a program which provides assistance to purchase food for low income households. There are no asset limits for some participants. Eligibility for food stamps works in a similar manner to federal housing. Since eligibility for food stamps is based on income, a scenario designed to give the individual monthly income may make the individual ineligible for food stamps or reduce the benefits.

Since there is no asset limit for food stamps for persons who are eligible based on receiving certain benefits, such as SSI, receipt of a lump-sum will not automatically make the client ineligible. If the recipient immediately spends the assets on needed items or pays debts, then investment income will not be generated by the assets that would affect the client's monthly income. If the recipient receives a large amount, and does not spend down, then the amount of investment income received or imputed to the individual will translate into decreased food stamps or possibly even ineligibility.

D. DECIDE IF A SPECIAL NEEDS TRUST IS APPROPRIATE⁶

Congress has passed laws intended to chill the use of trusts funded with the assets of recipients of SSI and Medicaid. A

The trust must provide that upon the death of the individual, any remaining trust property will be distributed to the State agency, up to the amount paid in Medicaid benefits on behalf of the individual.

personal injury or wrongful death settlement will be treated as owned by the individual for purposes of eligibility for public assistance.

Congress explicitly made an exception from the restrictive provisions in both OBRA '93 and FCIA '99 for disabled beneficiaries who are under the age of 65.⁷ These trusts have commonly been called "payback trusts" (also "under 65 disability trusts").

The key elements of a payback trust are as follows: (1) the trust is created by a parent, grandparent, guardian/conservator, or court; (2) the individual is under 65; (3) the trust is created for the benefit of a disabled person; (4) any remaining trust balance at the death of the life beneficiary is first paid to the state agency to the extent Medicaid Assistance has been provided.⁸

1. Grantor/Trustor.

Although the disabled individual is contributing the trust assets, he or she may not act as the grantor or trustor. The trust must be created by a parent, grandparent, legal guardian, or court. The term "legal guardian" is presumably intended to include a conservator in States like Oregon. ORS 125.440 specifically allows a

conservator to create a trust, but only with prior court approval.

Probate court approval is always required when the recipient is a minor or mentally incapacitated. If a conservator has not been appointed, and no parent or grandparent is available, then a petition may be filed with the probate court to establish or authorize the establishment of a trust on behalf of the disabled individual.

2. Under 65.

The life beneficiary must be under 65 when the trust is created. The trust is excepted for purposes of Medicaid eligibility after the individual reaches 65, but assets of the individual cannot be added to the trust after age 65.

3. Disabled.

The trust must be established for an individual who is disabled as defined in the Social Security Act. If the beneficiary is receiving either Social Security Disability Income (SSDI) benefits or SSI benefits as a disabled person, then the State will accept this determination.

4. State Receives Remaining Trust Property.

The trust must provide that upon the death of the individual, any remaining trust property will be distributed to the State agency, up to the amount paid in Medicaid benefits on behalf of the individual. When the individual has received Medicaid benefits in more than one State, the trust "must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf." There is no requirement to pay back SSI. The interest of the State in the remaining trust assets by the terms of the trust is completely separate from the right of the State to estate recovery.

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*continued from page 22***E. DECIDE IF A POOLED TRUST IS A GOOD ALTERNATIVE**

Under OBRA '93, a non-profit organization may establish a trust in which the funds of the disabled recipients are pooled for purposes of investment and management.⁹ There is no age limit. The exception made for pooled trusts found in FCIA '99 appears to limit their use to disabled beneficiaries under the age of 65.

In Oregon, ARC of Oregon has formed a pooled trust, which is available to beneficiaries who have been disabled before the age of 65. The pooled trust is a professionally managed program. Funds are deposited into a pooled bank trust fund, although each beneficiary will have a separate account consisting of his/her separate share. Information about the pooled trust is available from Mitch Teal, Pooled Trust Director, at the ARC of Oregon, (503) 581-2726 or toll-free at (877) 581-2726.

F. DETERMINE IF A SPECIAL NEEDS TRUST WILL WORK FOR YOUR CLIENT ON A PRACTICAL LEVEL**1. Special Needs Defined.**

A "special needs trust" specifies that the trust is intended to pay for the beneficiary's special (or supplemental) needs. The term *special needs* suggests needs particular to the person and his or her disability, such as medical equipment or rehabilitative treatment, and usually special needs trusts do specify that distributions are allowed for such needs.

However, a trust limiting distributions to special needs can allow distributions for anything that is not food, clothing, and shelter. This encompasses many things that are not related to a disability or medical treatment, and may not even be properly classified as a need. The term *supplemental needs* is sometimes used to perhaps more accurately describe the type of distribution that can be allowed by the terms of the trust.

Supplemental needs distributions are

The term *special needs* suggests needs particular to the person and his or her disability, such as medical equipment or rehabilitative treatment, and usually special needs trusts do specify that distributions are allowed for such needs.

anything but food, clothing, and shelter. Typically, distributions for medical expenses are limited by the terms of the trust to medical, dental, and psychological services not otherwise covered by Medicaid.

Examples of supplemental needs are as follows: medical insurance premiums, telephone services and equipment, transportation (including automobile, auto maintenance and repair, gasoline, auto insurance, and/or bus pass), recreation, education, pet care, subscriptions, and computer equipment and services.¹⁰ The list of potential distributions for supplemental needs is unlimited.

Perhaps of more use is to know what is not considered supplemental: rent, mortgage, property taxes, heating, gas and electric power, garbage, sewer, water, fire insurance (if required by mortgage holder), clothing, and food.

2. Distributions Beyond Special Needs.

It is not always necessary to completely prohibit distributions for basic needs. While distributions limited to special needs trust can work well for many beneficiaries, for some individuals the restrictions will limit options that could sub-

stantially increase their quality of life.

For example, we may wish to write a trust for someone who is now disabled and receiving public assistance, but who later may not be disabled and no longer need public assistance. This particularly arises when writing special needs trusts for minor children or for individuals who have had a recent brain trauma. If the trust prohibits distributions for basic needs, the trustee will be breaching his/her fiduciary duty if prohibited distributions are made, even though there may no longer be a concern about whether a distribution from a trust will affect eligibility for public benefits.

As another example, the beneficiary may be receiving SSI and Medicaid, and living in substandard housing. His or her parents would like to create a trust that will allow distributions for shelter, to improve the living situation. The biggest concern is to maintain Medicaid. If the trust allows the trustee to make some distributions for basic needs, then the trustee can pay for rent in a decent apartment. While the beneficiary's SSI will be reduced under the in-kind support and maintenance rules, he or she will continue to receive some SSI to pay for food and clothing, and will retain Medicaid.

One approach to provide more flexibility, sometimes called the "hybrid" standard, is to clearly state that the purpose of the trust is to preserve the beneficiary's ongoing eligibility for public benefits and to provide for the beneficiary's special needs, but not to expressly prohibit all distributions for food, clothing, and shelter. The trust provisions might also expressly allow distributions for some basic needs.

Courts typically interpret trusts in light of their express purpose. With the hybrid approach, the stated purpose is to preserve the beneficiary's ongoing eligibility for public benefits, but flexibility is incorporated. This approach is clearly successful now for SSI beneficiaries in our region. In Oregon, the State agency administering may or may not accept the "hybrid"

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distribution standard for a trust created with the beneficiary's own funds. However, if the beneficiary is receiving some SSI, then the beneficiary will automatically receive medical coverage.

When using this standard, it is advisable to include a provision allowing the trustee to amend the trust if necessary to accomplish the stated trust purpose, which is to preserve public benefits.

3. Purchase of Exempt Resources.

A common provision in special needs trusts allows distributions for purchase of exempt resources, such as a home or car.

G. DETERMINE WHAT COURT INVOLVEMENT IS NEEDED

1. Mechanics of Court Approval of Trusts.

In some instances, a disabled individual is not mentally incapacitated, and court approval is not required to fund a trust and preserve Medicaid assistance. However, court approval is required when a trust is being created for a minor or mentally incapacitated person with his or her own funds.

Multnomah County probate court policy is that the "presumed" vehicle for maintaining the funds from a settlement in a civil action involving minors or incapacitated adults will be a conservatorship. However, the court will consider requests involving payback trusts for individuals receiving public assistance.

In such cases, a petition can be filed under ORS 125.650(1), which allows the court to exercise any power that could be exercised by a conservator in a protective proceeding (in this case, the power to create a trust under ORS 125.440). ORS 125.650(5) also allows the court to authorize, direct, or ratify any "contract, trust or other transaction relating to the protected person's financial affairs..."

Experience suggests that there is little difficulty obtaining approval from courts for trusts for minors who are disabled when there is an expectation that the minor will be unable to manage financial affairs well into adulthood and perhaps for a lifetime.

Alternatively, a petition may be filed under ORS 125.650(4) for the appointment of a temporary conservator with authority "limited to a specified time and whose power is limited to certain acts needed to implement the protective order." Under this subsection, the fiduciary "need only make such report to the court as the court may require."

Some courts require an ongoing conservator to which the trustee must report each year, who then files the annual accounting to the court. Often the conservator and trustee are the same person or trust company. Note also ORS 125.440(2), which states that the "court may not approve a trust that has the effect of terminating the conservatorship."

2. Extending Term of Trust or Annuity Beyond Age of Majority.

As noted above, ORS 125.650(5) allows the court to authorize, create, or ratify "any contract, trust or other transaction relating to the protected person's financial affairs or involving the estate of the person if the court determines that the transaction is in the best interests of the protected person." This includes the

power to approve structured settlements. Under ORS 125.440(5) a conservator may authorize, direct, or ratify any annuity contract only with court approval. The court will typically approve the purchase of an annuity in cases involving a minor in which there will be a full payout to the child at age eighteen.

May the court approve creation or funding of a trust or annuity for the benefit of a minor that will extend beyond the age of majority? ORS 125.440(2) allows the conservator to create trusts "beyond the period of disability of the protected person or beyond the life of the protected person." The term "disability" is not defined in the statute, and the term "incapacity" is used to define mental incapacity. It would appear that the word "disability" as used in ORS 125.440(2) means legal disability, which traditionally refers to both minority and incapacity.¹¹

The local rules and practices of probate courts will determine whether a court will approve a trust for a minor that extends beyond the age of majority. Some judges, in Oregon and elsewhere, do not hesitate to approve such trusts, even for minors who are expected to be capable of handling their own financial affairs upon majority, while other judges are more reluctant. Experience suggests that there is little difficulty obtaining approval from courts for trusts for minors who are disabled when there is an expectation that the minor will be unable to manage financial affairs well into adulthood and perhaps for a lifetime.

In summary, the Oregon statute appears to allow the probate court to approve trusts that will extend beyond the age of majority. However, the practitioner should not assume that the court will approve a trust or a structured settlement involving an annuity that will extend past the age of majority. Rather, be prepared to explain why it is desirable and in the best interests of the child. The court is likely to look favorably on cases involving

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a child who is expected to remain unable to handle finances in adulthood, or in those situations involving special needs trusts in which the maintenance of public benefits is essential.

H. DETERMINE IF THERE ARE ANY GOVERNMENT BENEFIT LIENS

Most personal injury lawyers are experienced in identifying and paying liens. A thorough treatment of liens is beyond the scope of this outline. A brief reminder of some of the issues that may particularly arise in the context of public benefits and trusts are as follows:¹²

1. Medicaid Liens.

These liens arise out of ORS 416.510 to 416.610. The Third Party Recovery Unit will typically issue a lien notice. However, the personal injury lawyer should confirm whether there are any liens by contacting the Third Party Recovery Unit in Salem at (503) 373-0333. The procedure is set out in OAR 461-195-320 and 325.

The issue of whether the use of a Medicaid payback trust obviates the need to pay any Medicaid liens until the time of ultimate payback of remaining trust property at the beneficiary's death has effectively been resolved. There is a line of cases that hold that the Medicaid lien must be paid prior to transfer of the net proceeds to the trust.¹³

2. Medicare Liens.

Medicare does not issue lien notices. You must determine if your client is receiving or was receiving Medicare benefits, and whether a lien is appropriate. Part A and Part B recoveries are handled by different agencies.

A personal injury settlement or award can make a remarkable difference in the day to day life of someone who receives government benefits. This chance for an improved quality of life can be lost in the absence of a timely and thoughtful analysis of the effect of the settlement.

3. Risks When Trust or Annuity Involved.

When the net proceeds will be paid to a Medicaid payback trust with the State Medicaid agency as the payee at the death of the beneficiary, both the trust lawyer and the personal injury lawyer are at risk if the liens are not paid prior to transfer of the net proceeds to the trust.¹⁴ There are numerous complications that can arise when a lien is not fully paid and the funds are no longer in the control of the beneficiary or the lawyers. This can also be an issue if virtually all of the net proceeds are used to purchase an annuity.

I. SUMMARY

A personal injury settlement or award can make a remarkable difference in the day to day life of someone who receives government benefits. This chance for an improved quality of life can be lost in the absence of a timely and thoughtful analysis of the effect of the settlement. Luckily, with careful planning many injured parties who receive income or assets from a settlement or award will not lose needed government benefits. □

Endnotes

- 1 42 USC Sec. 1382
- 2 The maximum SSI benefit (currently \$564) plus the OSIP standard (currently \$1.70).
- 3 42 USC Sec 1396p
- 4 42 USC Sec 1382b(e)
- 5 The availability and scope of the OHP is subject to the vicissitudes of the state budget, and the rules are currently changing.
- 6 Detailed information regarding special needs trusts can be found in the following resources: Cynthia L. Barrett, Cinda M. Conroyd and Donna R. Meyer, *SPECIAL NEEDS TRUSTS*, (OSB CLE Program Materials 2003); Donna R. Meyer, *Tips and Traps for Minors and Disabled Clients Receiving Funds*, (Multnomah Bar Association CLE, May 29, 2002); Cynthia L. Barrett, *Creating and Operating the Payback Special Needs Trust*, OREGON ELDER LAW 2002: THE FACE OF THE FUTURE (OSB CLE Program Materials, 2002); Donna R. Meyer, *Special Needs Trusts*, ELDER LAW BOOK (OSB Handbook, 2002), in revision 2004.
- 7 See 42 USC 1396p(d)(4)(A); 42 USC 1382(b)(e)(5).
- 8 See also OAR 461-145-540(10)(a).
- 9 42 USC 1396p(d)(4)(C)
- 10 For more information about the operation of special needs trusts, see Wesley D. Fitzwater and Richard Pagnano, "Special Needs Trusts," Oregon State Bar CLE publication, *Administering Trusts in Oregon*, 1995, updated 2000, 2004 revision in process.
- 11 See Donna R. Meyer, *Tips and Traps for Minors and Disabled Clients Receiving Funds*, (Multnomah Bar Association CLE, May 29, 2002) for a more thorough treatment of this issue.
- 12 See *Tips and Traps for Minors and Disabled Clients Receiving Funds*, *supra* note 11, for information about who to contact.
- 13 *Cricchio v. Pennisi*, 683 N.E.2d 301 (N.Y. 1997), *Medica v. Billingslea*, 618 NW 2d 616 (Minn.App.2000)
- 14 See *Great-West Life and Annuity Insurance Co. v. Knudson*, number 99-1786 (January 8, 2002). Affirming 208 F3d 221 (9th Cir 2000).

Final Judgments in State Courts Not Necessarily Preclusive in Bankruptcy Courts

By Tara Schleicher
Farleigh, Wada & Witt, PC

What effect does the state court judgment you are seeking have if one of the parties is or was a debtor in bankruptcy court? It may have no effect depending on two things: (1) whether the bankruptcy court has granted relief from the "automatic stay;" and (2) whether the issues involved are "core proceedings" under federal bankruptcy law.

Once a debtor files for bankruptcy, federal law imposes an "automatic stay" that prohibits the continuation or commencement of judicial proceedings against the debtor that could have been brought or were brought pre-bankruptcy.¹ It also stays the enforcement of any judgment obtained against a debtor pre-bankruptcy and any act to obtain possession of property of the bankruptcy estate. You may file a motion with the bankruptcy court to obtain relief from the automatic stay to continue litigation against a debtor. If, instead, you continue to litigate against the debtor in state court without having obtained relief from the automatic stay, any judgment or other relief you obtain may be void if challenged by the debtor in bankruptcy court. Furthermore, if you willfully violate the automatic stay, the bankruptcy court could award any party injured by your violation of the automatic stay actual damages, including costs and attorney fees, and possibly punitive damages.



Even if the automatic stay is not in effect at the time you obtain a state court judgment, your judgment against a former debtor may be subject to collateral attack if the subject matter of the litigation is within the exclusive jurisdiction of the federal courts. Congress has granted the district courts² exclusive jurisdiction over "cases under title 11" (the Bankruptcy Code). That means that the petition and the rights established by title 11 are within the exclusive jurisdiction of the bankruptcy courts. Additionally, Congress granted the district courts exclusive jurisdiction over all of the property, wherever located, of the debtor as of the commencement of the case and of property of the estate.³

Congress has also granted non-exclusive jurisdiction over matters "arising under," "arising in," and "related to" bankruptcies.⁴ Such matters include certain proceedings called "core proceedings." Core proceedings include, but are not limited to, a number of types, such as counterclaims by a bankruptcy estate against persons who have filed claims against the estate;



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the termination, annulment or modification of the automatic stay; determinations regarding the dischargeability of debts; and the determination of the existence, extent, or priority of liens against property of the estate.⁵

In 2000, the Ninth Circuit Court of Appeals stated in *In re Gruntz*, that "final judgments in state courts are not necessarily preclusive in United States bankruptcy courts. Indeed the rule has long stood that 'a state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts.'"⁶ Because of the bankruptcy court's plenary power over core proceedings, the state courts cannot have concurrent jurisdiction over them absent relief from the automatic stay.

Even assuming that the state courts had concurrent jurisdiction, their judgments would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings because of the congressional grant of exclusive jurisdiction to the federal courts, which includes the implied power to protect that grant.

In *Gruntz*, the debtor was convicted post-petition in state court for failure to support his dependent children. After conviction, the debtor requested that the bankruptcy court declare the state court proceedings void as a violation of the automatic stay. The Ninth Circuit Court of Appeals held that the state court did not have the power to modify or dissolve the automatic stay, but that the automatic stay did not apply to enjoin state criminal actions.

Since *Gruntz*, the Ninth Circuit Court of Appeals has effectively overturned state court judgments when those judgments involved core proceedings.⁷ The Ninth Circuit held that the bankruptcy court did not need to give the state court judgments full faith and credit.

In *McGhan*, the debtor filed bankruptcy shortly after pleading guilty to

It may be more productive and efficient to litigate once in bankruptcy court if you are dealing with core proceedings, like the effect of the discharge received by the debtor in his or her bankruptcy; the effect of the automatic stay; or the extent, priority, or validity of a lien against property of the estate.

sexually molesting his stepson. There was an issue regarding whether the stepson received adequate notice of the bankruptcy. The stepson failed to challenge the debtor's discharge during the bankruptcy proceeding and the debtor received his discharge. Post-discharge, the stepson sued the debtor in state court and the state court determined that the notice of the bankruptcy to the stepson was inadequate. The debtor then sought to reopen his bankruptcy case, which the bankruptcy court denied, holding that the state court had jurisdiction to make that decision. The Ninth Circuit held that the state court had no jurisdiction to effectively modify the discharge order and injunction, and the state court decision was invalid and infringed upon the bankruptcy court's jurisdiction.

In *Dunbar*, clients of the debtor-contractor commenced actions against the debtor with the state licensing board after the debtor filed bankruptcy. The state licensing board issued a decision that its exercise of powers was excepted from the automatic stay and it issued an award of monetary damages to the claimants. The debtor then sued the claimants in bank-

ruptcy court. The bankruptcy court held that the determination of the state licensing board that its proceedings were exempt from the automatic stay was binding under the principle of collateral estoppel and denied the debtor's request for an injunction. The Ninth Circuit reversed, holding that the state licensing board's decision regarding the scope of the automatic stay was not binding on the bankruptcy court. The court stated, "[a]t least with respect to 'core' bankruptcy proceedings (of which hearings to determine the scope of the automatic stay are a type) the federal courts have final authority."

These cases indicate that debtors (and former debtors) may take their chances in state court, and take a second bite at the litigation apple in bankruptcy court if they are dissatisfied with

the state court's decisions. It may be more productive and efficient to litigate once in bankruptcy court if you are dealing with core proceedings, like the effect of the discharge received by the debtor in his or her bankruptcy; the effect of the automatic stay; or the extent, priority, or validity of a lien against property of the estate. □

(Endnotes)

- 1 11 USC §362(a).
- 2 28 USC §1334(a). Federal district courts refer cases and proceedings under title 11 of the United States Code (the "Bankruptcy Code") to bankruptcy courts pursuant to 28 USC §157(a).
- 3 28 USC §1334(e).
- 4 28 USC §1334(b).
- 5 28 USC §157(b)(2)(K).
- 6 202 F3d 1074, 1079 (9th Cir 2000).
- 7 *In re McGhan*, 288 F3d 1172 (9th Cir 2000); *In re Dunbar*, 245 F3d 1058 (9th Cir 2001).

EVOLUTION OF TRIAL LAWYER

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2. The Vanishing Trial Lawyer

Given the rise of alternative dispute resolution methods either contractually agreed to by the parties or mandated by the courts, the above-cited statistics likely come as no surprise to most civil litigators. Moreover, and as reported in the New York Times article, the decrease in actual trials is likely also due to a growing "antagonism to trials by lawyers and judges [and clients] who consider them costly and risky. They prefer negotiated settlements" and other alternative dispute resolution avenues that provide—in contrast to the expensive win-or-lose trial—a level of certainty in the outcome at substantially less cost. In today's world, the "sheer complexity and cost of litigation" simply makes "settlements more attractive" to litigators on both sides of the table.⁵

The New York Times article also raises

during negotiation, as well as in obtaining the best result for the client, is significantly buttressed if the other side knows that that litigator is ready, willing, and more than able to take a case to trial.

3. Capital Consultants: A Case Study on Negotiation and the Value of Cooperation by and Between Counsel for Plaintiffs and Defendants.

The Capital Consultants matter resulted in 22 suits which were filed against over 50 defendants in Oregon. Given the sheer number and complexity of the claims involved, full blown litigation would have been a nightmare, stretching over decades and resulting in little or no return of funds to those affected, with defense costs and damages far in excess of insurance policy limits.

With this in mind, the skilled Oregon lawyers retained to represent both sides of the case worked cooperatively to develop a creative negotiation strategy that would—in the end—help to resolve the case in record time and with an unprecedented recovery,

while preserving the assets of the insurers and the defendants. (*Hazzard v. Capital Consultants*, USDC Oregon No. CV0-1388HU). This unconventional—and ultimately successful—resolution strategy involved, among other things, the voluntary exchange of limited documents under a confidentiality order and then mediation a mere six months after the filing of the initial complaint, a tall order given the amount of documents involved and the complexity of the claims.

Why was this resolution strategy so successful? A principal reason was the high level of cooperation and professionalism exhibited by the Oregon lawyers. Another reason was the instrumental involvement

of retired Ninth Circuit Judge Edward Leavy, whose earlier successful mediation of the Wen Ho Lee spy case made him a logical choice to serve as the mediator in this complicated case. Finally, it was clear from the outset of the process that many of the counsel involved for both plaintiffs and defendants would bring to bear strong trial skills and experience if the cases did not settle.

The lessons learned here can be applied to the resolution of complex cases of any nature:

a. Creative solutions are necessary and are frequently the only realistic alternatives to protracted litigation; "scorched earth" tactics can be counterproductive to a business solution;

b. Parties on both sides of the litigation must have an incentive to cooperate in creative alternatives, including a way for defendants and their insurers to have airtight settlements within policy limits;

c. Although the concept of truncated discovery to facilitate early mediation runs counter to a trial lawyer's instincts to uncover all facts before discussing settlement, you don't always need to know every fact to settle a case; and

d. If the attorneys involved are known to have a strong reputation and will proceed to trial if needed, a request for negotiation or mediation shows strength, not weakness.

Even with exceptional resolution skills, it is clear that, in many cases, a more advantageous result can be obtained during mediation if the other side is convinced that you are more than willing, able, and prepared to go to trial. The question is, however, how can such skills be honed, and honed early by newer associates, given the dearth of cases actually going to trial?

Even with exceptional resolution skills, it is clear that, in many cases, a more advantageous result can be obtained during mediation if the other side is convinced that you are more than willing, able, and prepared to go to trial.

another reason why so few cases filed in state and federal courts end up going to trial. Specifically, as a result of this "dearth of trials," many "lawyers who call themselves litigators have little trial experience, which, in turn, may in turn make them wary of taking cases to trial," the proverbial vicious circle.

Although the trends discussed here may speak volumes about the fact that trial lawyers are fast becoming the last, true legal artisans, they also reveal that, in order to thrive in today's evolving legal reality, litigators and litigation firms must be skilled in the art of negotiation and settlement. At the same time, however, experience shows that a litigator's success

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4. Innovative Way To Establish and Maintain Trial Skills—The Internal Trial Academy.

Given the present dearth of trials and the trend toward settlement, the current and next generation of litigation lawyers will have fewer and fewer opportunities to get trial experience. In order to address this problem, litigation firms, over the last few years, have taken advantage of trial practice academies offered by outside entities such as the Oregon Bar's Trial Advocacy College, the National Institute for Trial Advocacy and other programs such as DA-For-A-Day.

In addition to these programs, litigation firms should also consider providing an additional avenue for gaining trial experience that is both cost-effective and can be tailored to the needs of individual litigators and firms. Specifically, some Oregon law firms now offer an internal trial academy to incoming summer associates and new associates needing trial experience. Such programs are administered entirely by seasoned, in-house trial lawyers and support staff, and generally take place over a two to three day period.

These internal trial academies usually commence with mini-courses relating to, among other things, evidence, pre-trial motions, trial decorum, witness preparation, examination and cross-examination of lay and expert witnesses, jury instructions, voir dire and opening and closing statements. This is followed by an investigation/discovery phase where the students review and select exhibits and then meet with and interview "clients" and "witnesses" who are provided with a set of known facts and certain unknown (but discoverable) facts. Finally, a full-blown mock trial is conducted in front of a senior litigation partner serving as the judge and panel of associates acting as jurors. To the extent it can be arranged, it adds a sense of reality if the trial can be conducted in an actual courtroom. In addition, and for evaluation purposes, it is

helpful if the trial is video-taped.

The value of such internal trial academies is clear:

- It provides a "real" trial experience for associates that will better prepare them for the actual event;

- It hones trial skills early in an associate's career, which will be put to good use in subsequent negotiations and trials;

- It is an effective marketing and negotiation tool, showing existing and potential clients and adversaries that the firm is committed to providing—and can put forward—associates with real trial skills;

- It attracts and retains top-level summer and first-year associates interested in pursuing careers as trial lawyers;

- It is a cost-effective alternative to other traditional trial academies;

- The content of the program can be specifically tailored to the needs of the associates involved; and

- The law firm maintains quality-control over the program.

In order to be successful in today's evolving legal landscape, today's litigators and litigation firms must possess strong and creative resolution skills. Related to this, members of our bar must foster and maintain between themselves a high degree of cooperation and professionalism. Nowhere is this more important than in the area of complex litigation. Lastly,

litigators and their firms can significantly increase the chances of a successful outcome during negotiations if they can demonstrate that they are ready, willing and able to take any case to trial. □

(Endnotes)

1 The New York Times, Sunday, December 14, 2003, Adam Liptak.

2 As reported in the New York Times article, the National Center for State Courts has studied available data and states that the patterns in state courts around the country are "consistent with those in the federal courts."

3 The following statistics were obtained on-line from the State of Oregon Law Library at www.ojd.state.or.us/osca.

Given the present dearth of trials and the trend toward settlement, the current and next generation of litigation lawyers will have fewer and fewer opportunities to get trial experience.

Statistics from earlier years were not available at the time this article was published.

4 On a state-wide basis, approximately one-half of the cases going to trial are tried to a jury.

5 Settlement may be more attractive, but "some studies suggest that individuals suing companies fare considerably better before juries than they do in settlement." Liptak, Adam, NY Times, Dec. 14, 2003.

I. Claims for Relief

A. Tort claims.

The Supreme Court clarified the law on the issues of duty, causation and foreseeability in a negligence action in *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, ___ Or. ___, Case No. S48978 (Jan. 23, 2004). Plaintiff sued its accounting firm for negligence, seeking to recover damages it suffered when the market price of its stock declined. The trial court granted defendant's motion for



summary judgment, holding that defendant was not liable because market factors—not defendant's negligent accounting practices—caused the decline in the price of plaintiff's stock. The Court

of Appeals reversed, applying the "foreseeability" test of *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1 (1987). The Court of Appeals concluded that whether defendant's actions "foreseeably caused" plaintiff's damages "presents a triable question for the factfinder." 176 Or. App. at 322. The Supreme Court reversed. The court explained that the focus should not be on causation because "[t]here is sufficient evidence of factual causation, and proximate cause is not a useful inquiry in Oregon tort law." Slip op. at 8. Instead, "the critical issue is whether plaintiff's market losses were a reasonably foreseeable result of defendant's wrongful conduct." *Id.* Resolution of that issue in this case did not present a jury question because defendant could not be liable as a



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Stephen K. Bushong
Department of Justice

matter of law. The court explained that, "although defendant breached its duty to plaintiff by failing to provide competent accounting services, defendant had no duty to protect plaintiff against market fluctuations in plaintiff's stock price. The decline in plaintiff's stock price in June 1996 was, as a matter of law, not reasonably foreseeable, and defendant cannot be liable for damages based on that decline." Slip op. at 10.

* * * *

An elderly man who was injured when his son's dog "ran into him and knocked him to the ground" had a viable claim for negligence against the son, the Court of Appeals held in *Van Zanten v. Van Zanten*, 190 Or. App. 73, 75 (2003). The trial court granted defendant's motion to dismiss after plaintiff presented

his case-in-chief at trial. The trial court concluded that plaintiff was a "licensee" on his son's property—not an "invitee"—and that "regardless of his status, plaintiff had failed to present any evidence that would put defendant on notice of a potentially dangerous propensity of his dog to run into people," as required to impose liability under *Newport v. Moran*, 80 Or. App. 71 (1986). 190 Or. App. at 76. The Court of Appeals disagreed and distinguished *Newport*, finding that defendant knew that (1) his dog and his neighbor's dog would "run rambunctiously back and forth" when they were together, as they were when plaintiff was injured; and (2) his dog "was both large and immature." 190 Or. App. at 77-78. The court explained that these facts, taken together, "are sufficient to support a finding that it was reasonably foreseeable to defendant that his dog would run into and injure a person who was walking in the fenced-in area while the dogs were running and playing together." 190 Or. App. at 78. The court explained that, for liability under a negligence claim to attach, it was "not necessary for defendant's dog previously to have run into someone while it played with the neighbor's dog in order to make it reasonably foreseeable to defendant that that could happen if the dogs were not controlled." *Id.*

* * * *

Under ORS 18.550(2), a claim for punitive damages may be asserted against a health practitioner who acts with "malice." In *Johannesen v. Salem Hospital*, 336 Or. 211 (2003), the Supreme Court held

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that (1) "malice" includes tortious conduct that is so reckless as to be in disregard of social obligations (336 Or. at 217); and (2) a "no evidence" standard—not clear and convincing evidence—applies in determining whether plaintiff should be allowed to amend her complaint to allege a punitive damages claim. 336 Or. at 218.

* * * *

In *Jensen v. Medley*, 336 Or. 222 (2003), the Supreme Court held that the familiar "right to control" test for determining whether a principal is liable for the tortious acts of its agents applies in the employer/employee agency relationship but *not* in other agency relationships. The court explained that liability outside the traditional master-servant context "depends not only on whether the second entity is an 'agent' of the first for some purpose, but also on whether the principal authorized or intended the agent to act on its behalf with respect to the conduct that gave rise to the third party's claim." 336 Or. at 237.

* * * *

Noneconomic damages are not recoverable in a negligence action arising from an automobile accident, the Court of Appeals held in *Lawson v. Hoke*, 190 Or. App. 92 (2003). ORS 18.592 barred recovery of noneconomic damages in such cases. The trial court ruled, however, that the statute (1) violated plaintiff's right to a remedy under Article I, section 10 of the Oregon Constitution, and (2) interfered with her right to a jury trial under Article I, section 17. The Court of Appeals reversed. The court acknowledged that Article I, section 10 guaranteed plaintiff a remedy against defendant for his negligent operation of a motor vehicle, but concluded that ORS

18.592(1) did not abolish that remedy because "the portion of [plaintiff's] remedy that remains unaffected by that statute is substantial." 190 Or. App. at 108. The right-to-jury theory failed because Article I, section 17 only "guarantees the right to have a jury decide those factual issues that are validly presented by plaintiff's claim[.]" 190 Or. App. at 110. It "does not prohibit the legislature from altering—or even abolishing—common law causes of action, and it does not guarantee a right to particular types of damages recoverable in such claims." *Id.*

B. Contract claims.

A trial court properly reformed a written contract for the sale of an apartment complex, the Court of Appeals held in *Kish v. Kustura*, 190 Or. App. 458 (2003). The written contract prepared by the buyer did not reflect the parties' intent in two respects. First, the document gave the seller—not the seller and his wife—the right to live in an apartment rent-free. Second, it provided that interest payments on the mortgage assumed by the buyer would apply to the purchase price, contrary to the parties' oral agreement. The Court of Appeals concluded that defendant proved each of the required elements of a reformation claim—an antecedent agreement, a unilateral mistake by one party coupled with inequitable conduct by the other, and no gross negligence by the party seeking reformation—by clear and convincing evidence. 190 Or. App. at 462.

* * * *

A business deal gone bad led to claims for breach of contract, fraud, and breach of fiduciary duty in *Pollack v. D.R. Horton, Inc.-Portland*, 190 Or. App. 1 (2003). Pollack sold his real estate development business to Horton-Portland.

Pollack was retained to oversee Horton-Portland's operations after the transaction closed. He resigned when Horton-Portland imposed a limitation on the business's inventory of unsold housing "starts." Pollack believed that the limitation would make it impossible for the business to generate sufficient profits for him to receive compensation under the terms of the contract. Pollack sued, alleging that Horton-Portland's conduct violated the agreement and the implied covenant of good faith and fair dealing. The trial court granted summary judgment to defendant on the grounds that Pollack voluntarily resigned and Horton-Portland did not act in bad faith. The Court of Appeals reversed, finding that genuine issues of material fact existed on whether (1) Horton-Portland breached its contractual obligation of good faith; (2) the breach was material (if it was, then Pollack was justified in resigning); (3) Pollack's personal use of company funds and facilities amounted to "actual fraud"; and (4) Pollack's alleged acts of self-dealing "were entirely fair to the corporation" (and thus could not be a breach of Pollack's fiduciary duties). 190 Or. App. at 23.

* * * *

The plaintiff in *VTech Communications, Inc. v. Robert Half, Inc.*, 190 Or. App. 81 (2003), probably expected to prevail on at least 50 percent of his breach of contract and negligence claims. But the Court of Appeals affirmed a summary judgment in defendant's favor. The defendant—a temporary employment agency—provided a temporary payroll clerk to plaintiff VTech. The clerk ultimately embezzled substantial funds from VTech. The Court of Appeals concluded that defendant could not be liable for breaching a contract to "check references" of the temporary clerk because

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there was "no evidence of mutual assent as to the essential terms of the alleged oral agreement." 190 Or. App. at 89. The negligence claim failed because the parties "entered into an arms-length [business] transaction" that did not give rise to "a duty of reasonable care that was independent of the terms of the parties' contract." 190 Or. App. at 90.

II. Procedure

Filing a timely motion to renew a judgment is insufficient to effectively renew the judgment if the court does not act on the motion and cause the judgment to be entered on the register before the expiration of the ten-year renewal period authorized by ORS 18.360(1). *Citizens Savings & Loan v. McDonald*, 191 Or. App. 45

(2003). A prayer for "such other relief as the court may deem equitable and just" is insufficient to support an award of non-economic damages that were not specifically requested in the complaint. *Rieman v. Swope*, 190 Or. App. 516 (2003).

* * * *

A plaintiff can voluntarily dismiss his complaint without prejudice *after* the trial court rules on defendant's motion for summary judgment, the Court of Appeals held in *Palmquist v. FLIR Systems, Inc.*, 189 Or. App. 552 (2003). The court concluded that, "in enacting ORCP 54A(1), the legislature rejected a rule that would have cut off the right to obtain a voluntary dismissal when the summary judgment has been filed." 189 Or. App. at 558. □