Oregon State Bar

Litigation Journal

FALL 2010 VOLUME 29 • NUMBER 3

In This Issue…

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A Different Measure of Damages:

Qualitative v. Quantitative

By William A. Barton
Barton & Shrever, P.C.

The idea is to shift the damages analysis from an extrinsic or numeric one of subtracting objective losses to a more personalized and intrinsic view. Rather than calculating what your client has lost, the analysis focuses on where the plaintiff is left after their injury.

This alternate approach shortens trials and improves your credibility with the judge, jury and yes, even your worthy opponent. Once you've read this article, reflect upon its potential use in the cases you've tried, and then those you may try in the future. The ideas within this model are both old and new, and if their wisdom isn't obvious on the first reading, then it will be by the second. This template is particularly suited to psychological injury claims. This article is extracted from the first chapter of the 3rd edition of my book *Recovering for Psychological Injuries.*[1]

William Barton

How You Deductively Think, or The Quantitative Subtraction Model

During the first week of torts class, you were taught that in order for a civil negligence cause of action to exist four elements must occur: a duty, a breach of that duty, an injury, and finally, causation, meaning that the injury was produced by the breach of the duty. When

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FROM THE MANAGING EDITOR

IT'S ONLY A MATTER OF TIME

By
DENNIS RAWLINSON
MILLER NASH LLP

The value of time is not taught in law school. Instead, we are taught to be careful, detailed, and thorough. Somewhere in our quest to be the best lawyer we can be, we tend to lose our layperson's recognition of such universal truths as "Time is our most valuable possession."

Experience has taught me that time is the most valuable possession of a fact-finder. Honor this principle, and you will succeed. Squander the fact-finder's time, and you will be punished.

Dennis Rawlinson

A few months ago in this column, I evaluated a book on trial strategy entitled *Sponsorship Strategy.* [1] One of the principles of the book is worth repeating. The more of a fact-finder's time you take, the better use you should make of it. Otherwise, the use of that time will be held against you.

A case in point is the direct examination by the prosecution in the O. J. Simpson case of the prosecution's pathologist. The direct examination lasted six days. The cross-examination conducted by Robert Shapiro of the defense team was brief, creating a stark contrast. Shapiro's cross-examination included the admission by the pathologist that after six days, all he could really tell the jury was that:

1. The victims had bled to death.
2. They had been stabbed with a sharp instrument, probably a knife.
3. The murder weapon was probably a single- rather than a double-edged knife.

We can all imagine what the jury (which several times nearly mutinied because of the length of the trial) thought about a direct examination that lasted six days, but that resulted in only three pieces of information. Under sponsorship strategy, the prosecution's use ("waste") of the jury's time will be, and was, held against it.

The lesson here for the rest of us is a simple one. It is a lesson recognized by the advertising industry. In our fast-paced world, advertisers provide us with information by sound bites and pictures that change seemingly every nanosecond. The message is that we should be "brief, powerful, and clear."

Applying this message to a trial, we notice that several principles become apparent:

1. Use as few witnesses as possible.
2. Make your direct examinations "brief, powerful, and clear [simple]."
3. Don't waste the first 60 seconds of each opportunity you have to speak. These golden moments should not be wasted on preliminaries, procedural and evidentiary foundations, and "warming up."

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4. Objections and courtroom interruptions should be kept to a minimum (object only if you are right and if it is crucial).

5. Cross-examinations should be brief. (Making any more than your three strongest points may dilute the impact of the examination.)

6. Sidebar conferences and requests for conferences with the court (causing the jury to recess) should be kept to a minimum.

Next time you are trying to determine how long to make your direct examination, think about how you enjoy being caught in a traffic jam, waiting in line at a grocery store, or circling the block looking for a parking place. Your direct examination should be no longer than you wish to engage in any of these activities.

Similarly, when you prepare cross-examination, think about how long you can comfortably stand on one foot. In fact, perhaps some trial judges should start forcing us to conduct our cross-examinations while standing on one foot.

I suspect you will find that if you force yourself to be brief and condense your case, you will consciously or unconsciously separate the wheat from the chaff and create a presentation that is not only brief, but also more "powerful and clear."

Make good use of the fact-finder's time. You will be rewarded for your effort. ❐

[1] Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy,* (1990) (see October 1994 issue of *Litigation Journal).*

Oregon State Bar

Fall Calendar

November 18

Speaking to Win
8:30 a.m. to 4:15 p.m.
Oregon State Bar Center
Tigard, Oregon
6.75 General CLE credits or Practical Skills credits

November 19

Claims, Liens, and Surety in Construction Law
OSB CLE Quick Call
10 a.m. to 11 a.m. Pacific time
1 General CLE credit

November 29

Time Mastery for Lawyers: Agenda for Success
11 a.m. - 1:05 p.m.
2 Personal Management credits

December 2, 3, 8, 10

Recognizing, Understanding, and Litigating Trauma Disorders
9:00 a.m. to 4:30 p.m.
Oregon Convention Center
Portland, Oregon
6.5 General CLE credits or
3.25 General CLE credits and
3.25 Access to Justice credits

December 3

Constitutional Law 2010: Courts in Transition
8:30 a.m. to 4:30 p.m.
World Forestry Center
Portland, Oregon
6.75 CLE credits
(including .5 General CLE credit for optional lunch presentation)

December 9, 10

Successfully Litigating a Civil Rights Case
9:00 a.m. to 4:45 p.m.
Oregon State Bar Center
Tigard, Oregon
5 General CLE credits, .75 Access to Justice credit, and
1 Ethics credit

The Basics for Deposing Entities Under Rule 30(b)(6)

By David B. Markowitz & Lynn R. Nakamoto
Markowitz, Herbold, Glade & Mehlhaf PC

A party may depose "any person," Fed. R. Civ. P. 30(a)(1), including a "public or private corporation, a partnership, an association, a governmental agency, or other entity." Fed. R. Civ. P. 30(b)(6). To do so, in its notice or subpoena, the deposing party must "describe with reasonable particularity the matters for examination." *Id.* The notice triggers the organization's duty to "then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf," and the organization "may set out the matters on which each person designated will testify." *Id.* The designees "must testify about information known or reasonably available to the organization." The rule itself provides little guidance on these three primary elements. This article addresses some of the basics for taking and defending 30(b)(6) depositions.

David Markowitz

Lynn Nakamoto

Duty to provide notice of deposition.

The notice or subpoena should include a list of topics relevant to the claim or defense of any party. The extent of that list and the detail for any particular item makes all the difference; whether you can get answers and then charge the organization with them starts here.

We typically send a tentative notice of deposition containing the topics to deponent's counsel so that the designation, along with an appropriate place and time for the deposition, can be planned. *See* Rule 30(b)(1) ("reasonable notice"); L.R. 30-2 (good faith effort to confer required before serving notice of deposition). If the organization's counsel objects to any topics, and no resolution with the noticing attorney occurs (e.g., clarification or narrowing the scope of certain topics), the organization must get a protective order pursuant to Fed. R. Civ. P. 26(c) to prevent it from being forced to provide answers. Simply raising the objection is insufficient. *See, e.g., Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 67 (D.P.R. 1981).

A typically successful objection is that the list of topics cannot be open-ended ("including but not limited to"). *See, e.g., Tri-State Hospital Supply Corp. v. U.S.*, 226 F.R.D. 118, 125 (D.D.C. 2005). And, direct attempts to obtain work product may also be rejected. *See, e.g., JPMorgan Chase Bank v. Liberty Mutual Insurance Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002). On the other hand, topics requiring testimony to explain grounds for affirmative defenses or denials of allegations have been allowed. *See, e.g., Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 34 (D. Conn. 2003).

Other common objections we encounter fare badly in court, such as other witnesses already testified about listed matters, the organization produced documents already, or the deposing party could pose an interrogatory. Because the testimony of an individual does not bind an entity as a 30(b)(6) witness does, and a designee must provide all relevant information known or reasonably available to the entity, such objections fail. *See, e.g., United States v. Taylor*, 166 F.R.D. 356, 362-63 (M.D.N.C., 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996). Generalized objections to having to work to prepare the witness also are not likely to succeed. *See, e.g., K.S. Ambassador Programs, Inc.*, No. CV-08-243-RMP, 2010 WL 1568391 (E.D.Wash. Apr. 14, 2010) (that information was difficult to obtain when not kept on computers was no excuse to limit deposition).

The majority view is that questions outside the scope of the notice are permissible. *E.g., Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366 (N.D. Cal. 2000). But, you risk getting "I don't know" responses, and deponent's counsel should object and state that any substantive answers given are those of the individual witness alone. If at the 30(b)(6) deposition you seek comprehensive knowledge of the individual outside the scope of the notice, you may also face an argument that you had your one bite at the apple and are precluded from deposing that witness in an individual capacity again.

Duty to designate individuals testifying for the deponent.

Under Rule 30(b)(6), the deponent "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the party noticing the deposition] and to prepare those persons in order that they

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Rule 30(b)(6)
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can answer fully, completely, unevasively, the questions posed…as to the relevant subject matters." *Mitsui & Co.*, 93 F.R.D. at 67. The designation probably should be in writing, *see* Fed. R. Civ. P. 37(a)(3) (party may seek order for failure to provide such discovery response), and the deposing attorney should learn which individual will testify concerning each topic listed. The duty to designate applies whether or not the organization employs or knows of an individual with personal knowledge of the matters noticed. *See, e.g., Commodity Futures Trading Comm'n v. Noble Metals Intern., Inc.*, 67 F.3d 766, 771 (9th Cir. 1995) (sanctions for failing to designate based on excuses that people were no longer employed, would not consent, or would invoke the Fifth Amendment); *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993) (sanctions when designees lacked knowledge and party failed to designate readily identifiable witness with knowledge). And, even if an initial designation is made in good faith, if it becomes apparent at the deposition that the witness lacks knowledge, the organization must designate an appropriate witness. *Great American Ins. Co. of New York v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 540 (D. Nev. 2008).

Duty to prepare the designee.

The organization has a duty to prepare its designee as to knowledge of the subject matter identified in the notice, including information that is reasonably available to it through review of documents within its control, conversations with current or former employees, reading relevant testimony in the matter, or other sources of information. *Bank of New York v. Meridian Biao Bank Tanzania, Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997); *Great American*, 251 F.R.D. at 539; *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Company, Inc.*, 201 F.R.D. 33, 37-39 (D. Mass. 2001). The witness who already has some personal knowledge of the topic cannot testify solely from personal knowledge, but must also testify about information reasonably known to the deponent. *Great American*, 251 F.R.D. at 539; *Poole v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000).

Good preparation is key to fulfill obligations under Rule 30(b)(6) and to ensure that the designee understands his or her vicarious role as the organization and how to respond to questions. During preparation, care should be taken not to show the witness privileged material. *See Suss v. MSX International Services, Inc.*, 212 F.R.D. 156, 165 (S.D.N.Y. 2002) (privilege waived if witness relies on review of privileged material in providing testimony).

But all too commonly, witnesses show up unprepared and ignorant of noticed topics. If that is a strategic choice, it can backfire. A natural part of the 30(b)(6) deposition concerns the designee's place in the organization, how the designee was selected and prepared, and what the designee knew before and after designation, so lack of preparation is easily exposed. To combat the unprepared witness, the deposing lawyer can request that the deponent designate another witness and thereby gain another opportunity to depose the organization. The deposing lawyer can also attempt to get as much information as possible and then file a motion to compel another 30(b)(6) deposition and seek reimbursement for the expenses of the first deposition. Fed. R. Civ. P. 37(a)(3)(B) (failure to answer or make a designation); Fed. R. Civ. P. 37(a)(4) (evasive or incomplete disclosure, answer, or response is treated as a failure); Fed. R. Civ. P. 37(d) (party's failure to attend deposition after proper notice); *Resolution Trust*, 985 F.2d at 197; *In re Vitamins Antitrust Litigation*, 216 F.R.D. 168, 171-72 (D.D.C. 2003) (client and counsel required to pay for motion).

In addition, a deposing lawyer may be able to hold the organization to testimony from the designee that it lacks knowledge concerning a topic noticed. Courts are split on this issue. Some courts will treat an organization like other deponents, so that the organization cannot defeat a summary judgment motion by relying on a declaration that conflicts with its own deposition testimony. *See, e.g., Rainey v. American Forest & Paper Assoc., Inc.*, 26 F.Supp. 2d 82, 94 (D.D.C. 1998). At trial, the court may preclude the organization from introducing evidence on that topic, unless the information was unknown and not accessible at the time. *See, e.g., United States v. Taylor*, 166 F.R.D. at 362. Other courts will allow conflicting testimony but permit the designee's testimony as impeachment. *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001).

For serious disregard of discovery obligations and orders, sanctions may include severe penalties, such as deeming allegations of a complaint as having been established. *See Commodity Futures*, 67 F.3d at 772. Otherwise, the court must engage in an analysis of whether the expenses of a discovery motion should be assessed under Rule 37. *See, e.g., K.S.*, 2010 WL 1568391 at *4.

Rule 30(b)(6) depositions can be a powerful tool to obtain admissions for a case involving an organization, and not limited to those cases where the individual deponents appear to lack knowledge of key issues. Such depositions can increase a party's available deposition time as of right because the 30(b)(6) deposition is counted as a single deposition, and if there are multiple designees, each individual can be deposed for the full seven hours permitted by Rule 30(d)(1). *See* Advisory Committee's note to Rule 30(d) ("for purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition"). Rule 30(b)(6) depositions also can raise complex issues concerning work product immunity and require careful planning and consideration, whether you are taking or defending them. ❐

Avoiding Removal and Dismissal Under the Securities Litigation Uniform Standards Act of 1998

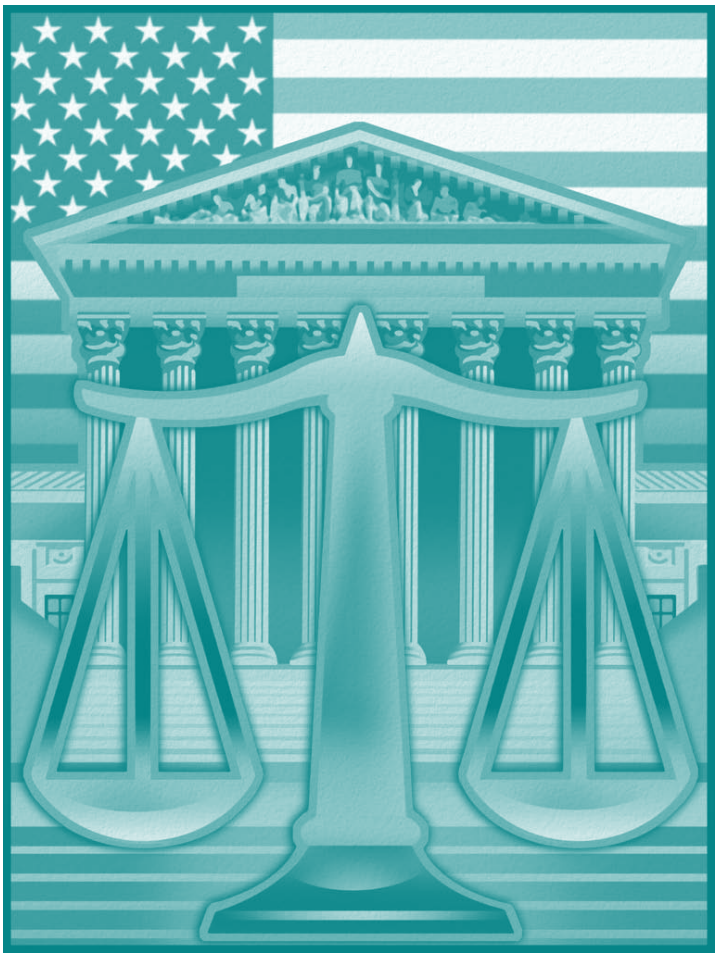
By Keil M. Mueller
Stoll Berne

As most Oregon business litigators are aware, bringing claims in state court under the Oregon Securities Law has a number of advantages for plaintiffs. As is equally well known, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes certain state law claims when those claims are brought in the form of a "covered class action."[1] By allowing defendants to remove such claims to federal court and by instructing federal courts to dismiss the claims, SLUSA effectively limits plaintiffs to bringing federal claims in federal court. Thus, plaintiffs' counsel will want to know in advance whether potential state law claims would be removed to federal court and dismissed, as SLUSA permits.


Keil Mueller

The Supreme Court has made clear that SLUSA does not preclude all state-law claims relating to the purchase or sale of securities. Rather, because it applies only to covered class actions, SLUSA "simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff…the right to enforce any state-law cause of action that may exist."[2]

SLUSA defines "covered class action" as, among other things, (1) "any single lawsuit in which…damages are sought on behalf of more than 50 persons or prospective class members," or (2) "any group of lawsuits… in which…damages are sought on behalf of more than 50 persons" and that "are joined, consolidated, or otherwise proceed as a single action for any purpose."[3] As Brad Daniels pointed out in a recent Litigation Journal article, determining whether SLUSA precludes a particular claim is not as simple as counting the number of plaintiffs in caption. However, recent case law, including a case from the District of Oregon, shows that a plaintiff's claims are not necessarily precluded by SLUSA even if more than fifty persons stand to benefit from a favorable judgment. In cases where more than fifty persons stand to benefit, plaintiffs' counsel will need to consider who is bringing the claim and, if the claim is brought by an entity (or fifty or fewer entities), whether the entity was established primarily for the purpose of pursuing litigation.



I. The Entity Treatment Exception

In addition to defining covered class

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action as a lawsuit or group of lawsuits in which damages are sought on behalf of more than fifty persons, SLUSA also gives guidance on how to determine the number of persons or prospective class members on whose behalf damages are sought. Specifically, SLUSA provides that "a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action."[4] In *LaSala v. Bordier et Cie,* the Third Circuit stated that this provision "means that the court is to follow the usual rule of not looking through an entity to its constituents unless the entity was established for the purpose of bringing the action, i.e., to circumvent SLUSA."[5]

Courts that have considered this provision have held uniformly that an entity not established primarily for the purpose of bringing litigation must be treated as one person under SLUSA. For instance, in *Cape Ann Investors LLC v. Lepone,* the court held that, under SLUSA's definition of "person," an entity is not one person – and, therefore, each of the entity's constituents must be included in the number of persons on whose behalf damages are sought – if the entity's "primary purpose" is to pursue causes of action.[6]

The Ninth Circuit adopted this "sensible definition" in *Smith v. Arthur Andersen LLP,* where it held that a bankruptcy trustee whose appointment provided that he was to "'act as the Estates' representative for all purposes,' and not just for the purpose of pursuing causes of action," was one person and that the action brought by the trustee therefore was not a covered class action under SLUSA. While the Ninth Circuit assumed that, if the trustee was not entitled to entity treatment under SLUSA, the court would be required to treat each of "the beneficiaries of the plan trust" as a person for purposes of determining whether the action was a covered class action, it held that trustee was entitled to entity treatment because the trust was not established primarily for the purpose of participating in the action.[7]

Similarly, in *Lee v. Marsh & McLennan Cos.,* the court held that twenty-six trusts "created with the primary purpose of managing…family property" met "SLUSA's requirements for entity treatment" and therefore "should be counted, without reference to the number of beneficiaries, as twenty-six persons under SLUSA."

Similarly, in *Lee v. Marsh & McLennan Cos.,* the court held that twenty-six trusts "created with the primary purpose of managing…family property" met "SLUSA's requirements for entity treatment" and therefore "should be counted, without reference to the number of beneficiaries, as twenty-six persons under SLUSA."[8]

Finally, in *RGH Liquidating Trust ex rel. Reliance Group Holdings, Inc. v. Deloitte & Touche LLP,* the court found that a trust established to oversee the liquidation of an estate in bankruptcy was not established primarily to pursue litigation. The court therefore held that the trust constituted a "single entity under SLUSA."[9]

SLUSA's legislative history supports the interpretation of "covered class action" favored by the courts. The Senate Banking, Housing, and Urban Affairs Committee Report reported that, in the final version of the SLUSA bill:

> The class action definition has been changed from the original text of S. 1260 to ensure that the legislation does not cover instances in which a person or entity is duly authorized by law, other than a provision of state or federal law governing class action procedures, to seek damages on behalf of another person or entity. Thus, a trustee in bankruptcy, a guardian, a receiver, and other persons or entities duly authorized by law (other than by a provision of state or federal law governing class action procedures) to seek damages on behalf of another person or entity would not be covered by this provision.[10]

In short, there is significant authority that SLUSA does not preclude actions brought by a single entity that is legally authorized to bring suit on behalf of more than fifty persons unless the entity was established primarily for the purpose of pursuing causes of action.

II. Common Questions of Law or Fact

In addition to defining "covered class action" as an action that seeks damages on behalf of more than fifty

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persons, SLUSA also requires that the action involve "questions of law or fact common to those persons."[11] Thus, another way of approaching the question of whether an entity should be treated as a single person – or, alternatively, whether the entity's constituents each must be treated as a separate person – is to consider whether the action involves questions of law or fact common to the entity's constituents. On the one hand, if plaintiff must prove that defendant made material misstatements to an entity's constituents and that the entity's constituents relied on those misstatements in purchasing securities, then each constituent likely must be counted as a separate person for purposes of determining whether the action is a covered class action. On the other hand, if plaintiff need not prove anything regarding the entity's constituents, but rather must prove, for example, that defendant made misstatements to the entity itself and that the entity relied on those misstatements, then the entity likely is entitled to be treated as a single person.

In *LaSala,* plaintiffs – trustees of a trust created to take title to and prosecute the claims of a bankrupt corporation on behalf of purchasers of the corporation's stock – asserted, among other things, breach of fiduciary duty claims against two banks that allegedly assisted the corporation's directors in concealing insider trading. The district court dismissed these claims on the ground that the claims were brought on behalf of the 6,000 beneficiaries of the trust and therefore were precluded by SLUSA. On appeal, the Third Circuit stated that, in determining whether a trust should be counted as a single person under SLUSA or, instead, whether each beneficiary of the trust should be counted as a separate person, "it is first necessary to recall the nature and ownership of the[] claims." The court noted that the breach of fiduciary duty claims originally belonged to the corporation, but passed to the corporation's bankruptcy estate when the corporation entered bankruptcy. The bankruptcy estate, in turn, assigned the claims to the trust. While the court admitted that, "[a]t first glance, one might think that the claims are brought 'on behalf of' the [p]urchasers," it found that a closer examination of SLUSA's language demonstrated that this initial impression was incorrect.[12]

... even if an entity has more than fifty constituents or beneficiaries, SLUSA does not preclude the entity from bringing state law claims if those claims belong to the entity and if the entity, rather than its constituents, was damaged by defendant's conduct.

First, the court noted that "[t]here are no questions of law or fact that involve [the purchasers], much less common ones that predominate over individual ones." Instead, the relevant facts were whether the directors owed fiduciary duties to the corporation, whether the directors violated those fiduciary duties, whether the banks aided and abetted the directors' violations of their fiduciary duties, and whether the corporation has thereby been damaged. As the court stated, "[t]he Purchasers need not prove anything regarding themselves in order to succeed; indeed, they need not even prove that they were injured . . ."[13]

Second, the court found that SLUSA "seems to use the terms 'persons' and 'members of the prospective class' to refer to the original owners of the claim – those injured by the complained-of conduct, as those are the persons who might have common questions of law or fact related to the claim that predominate over individual questions of law or fact." The corporation, not the purchasers, was the party damaged by the alleged breaches of fiduciary duty. The court therefore concluded that the breach of fiduciary duty claims were brought – for purposes of SLUSA – on behalf of the corporation, rather than on behalf of the purchasers. SLUSA did not preclude the breach of fiduciary duty claims.[14]

In short, even if an entity has more than fifty constituents or beneficiaries, SLUSA does not preclude the entity from bringing state law claims if those claims belong to the entity and if the entity, rather than its constituents, was damaged by defendant's conduct. Such claims will involve questions of law or fact relating to the entity itself, not to its constituents.

III. *Oregon v. OpenheimerFunds, Inc.*

These principles recently were tested in a case brought in state court by the State of Oregon, on behalf of the Oregon College Savings Plan Trust, against OppenheimerFunds, Inc. ("Oppenheimer") and two related defendants. The State alleged, among other things, that defendants violated the Oregon Securities Laws.[15] Defendants removed

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SLUSA

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the case to federal court and moved to dismiss the State's claims, arguing that SLUSA precluded the State's claims, while the State moved for remand, arguing that SLUSA did not apply.

The central issue presented by both motions was whether SLUSA required the court to count each of the thousands of beneficiaries of the OCS Plan as a person on whose behalf damages were sought. The State conceded that any damages awarded against Oppenheimer ultimately would be distributed to OCS Plan beneficiaries. It argued, however, that – because the Oregon College Savings Plan Trust was an entity and was not established to pursue litigation – SLUSA instructs that the Trust "shall be treated as one person." Moreover, the program management agreement between the Oregon 529 College Savings Board, which was the trustee of the Trust, and Oppenheimer provided that the beneficiaries had no interest in the Trust's assets. Therefore, the State argued that the claims asserted in its complaint belonged to the Trust, not its beneficiaries.

Judge Michael R. Hogan granted the State's motion to remand and denied as moot Oppenheimer's motion to dismiss. Judge Hogan relied in particular on the Ninth Circuit's reasoning in *Smith,* which he found both persuasive and applicable.[16] While Judge Hogan noted that, "[a]t first blush,…the Oregon 529 College Savings Board seeks damages on behalf of the thousands of OCS [P]lan participants," he also noted that "only the Board and Trust may bring the action and the Plan beneficiaries have no legal interest in the assets of the Trust."[17] Moreover, "[t]he Trust and the Board were not created for the purposes of bringing this or any other action."[18] Judge Hogan concluded, therefore, that the Trust "is a single person for purposes of SLUSA."[19]

… when evaluating potential securities fraud claims, Plaintiffs' counsel should consider whether the claims could be brought by an entity and, if so, whether that entity was established primarily to pursue claims. If it was not, plaintiffs likely can avoid preclusion under SLUSA.

IV. Conclusion

SLUSA remains a significant obstacle to bringing state law securities fraud claims where more than fifty persons stand to benefit from a favorable judgment. However, when evaluating potential securities fraud claims, plaintiffs' counsel should consider whether the claims could be brought by an entity and, if so, whether that entity was established primarily to pursue claims. If it was not, plaintiffs likely can avoid preclusion under SLUSA. ❐

Endnotes

1 *See* 15 U.S.C. § 78bb(f)(1). SLUSA amended both the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"). The 1933 Act amendments are codified at 15 U.S.C. § 77p, et seq. The 1934 Act amendments, which are functionally identical, are codified at 15 U.S.C. § 78bb(f) , et seq. For convenience, this article cites only to the 1934 Act.

2 *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,* 547 U.S. 71, 87 (2006).

3 15 U.S.C. § 78bb(f)(5)(B).

4 15 U.S.C. § 78bb(f)(5)(D).

5 519 F.3d 121, 132-33 (3d Cir. 2008).

6 296 F. Supp. 2d 4, 10 (D. Mass. 2003).

7 421 F.3d 989, 1007-08 (9th Cir. 2005).

8 2007 WL 704033, *4-*5 (S.D.N.Y. 2007).

9 2007 WL 4097413, *2-*3 (N.Y. Sup. Ct. 2007).

10 S. Rep. 105-182, 1998 WL 226714, at *7 (May 4, 1998) (emphasis added).

11 15 U.S.C. § 78bb(f)(5)(B)(i)(I) (emphasis added).

12 519 F.3d at 126-27, 133-34.

13 *Id.* at 133-34.

14 *Id.* at 133-37.

15 *Oregon v. OppenheimerFunds, Inc.,* 09-CV-6135 (D. Or. Aug. 13, 2009).

16 *Id.* at 8-9.

17 *Id.* at 7.

18 *Id.* at 9.

19 *Id.* at 8-10.

Becoming a Trial Lawyer

By Monica Wells
Bullivant Houser Bailey, PC

I learned very early in my career – while I was in law school clerking for Bill Wheatley at Jaqua & Wheatley – one of the best and critical qualities of a civil litigator is being a confident and skilled trial lawyer. It is not only that a confident and skilled trial lawyer knows how to litigate a case; it is that a confident and skilled trial lawyer is willing and able to actually try a case – and to try a case with confidence, thorough and calculated preparation, and know – how. Bill taught me that a lawyer's ability to try a case gives the client a key advantage – that the client and its lawyer are willing and able to take the case to trial.

Monica Wells

I remember my first hearing as a baby lawyer. Before the hearing, I paced the halls of the Multnomah County Courthouse, filled with nerves and an almost unbearable level of fear. With each court appearance, I became more comfortable and the nerves and fear decreased. Unfortunately, as a civil litigator, it is difficult to make enough court appearances to continue to grow my comfort and confidence to the level of a great lawyer, a great trial lawyer.

As a result, you can imagine that I felt fortunate to be asked to participate in Jury Trial Experience Project of the American College of Trial Lawyers. The Jury Trial Experience Project gives civil litigators the opportunity to work for either the Multnomah County District Attorney's Office or one of the several Multnomah County public defender firms. The goal of this program is simple and straightforward – to provide civil lawyers with trial experience.

I chose the Multnomah County District Attorney's Office. I spent four weeks working at the District Attorney's Office and was welcomed as a fully fledged member of "misdemeanor row." Over the four weeks, I tried four cases – one jury trial and three bench trials. I had numerous other court appearances; I was in court every day and appeared before several judges. These daily appearances increased my confidence and comfort level to the point that I was not nervous before a court appearance or trial. Instead, I was confident, focused, prepared, and excited – exactly what you

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Becoming a Trial Lawyer
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There is a serious issue in the current practice of law – the number of opportunities for young litigators to try cases is very small or even nonexistent. It is not unheard of – and is unfortunately common – that lawyers make shareholder/partner in litigation firms before they try their first case.

want to be before trial. My experience in the program was successful because of hard work and persistence in seeking out as many court appearances as possible. In addition, Senior Deputy District Attorney Jeff Howes made sure that I had enough files on my desk to guarantee as many trials as possible in four weeks.

The trial judge for my jury trial was the Honorable Kenneth Walker. I had the pleasure to speak with him about my trial and the Jury Trial Experience Project in general. He is a supporter of the program and of lawyers obtaining courtroom and trial experience. Judges and juries notice when a lawyer is not confident or comfortable in the courtroom, which translate into an appearance of the lawyer's lack of belief in their own case and can create a disconnect with the jury. Confidence, organization and likability are key characteristics of a trial lawyer – which all come from experience.

This program was one of the best – if not the best – things that I have done in my career. It made me a better lawyer, a better advocate, and helped me transform from a civil litigator into a trial lawyer. The most important lesson that I learned – which you cannot learn until you try a real case – is that I love jury trials. I am the lawyer that I am today because of the great mentors and opportunities that I have had throughout my career. I am committed to passing this on to younger lawyers, and I am committed to being an advocate for others to participate in the Jury Trial Experience Project. You become a good lawyer by doing and I advocate for young lawyers to have the opportunity to do real legal work. I urge you and your firms to be committed to the next generation of trial lawyers and to support the next generation in becoming trial lawyers.

There is a serious issue in the current practice of law – the number of opportunities for young litigators to try cases is very small or even nonexistent. It is not unheard of – and is unfortunately common – that lawyers make shareholder/partner in litigation firms before they try their first case. It is completely understandable that clients want the experienced, gray haired lawyers to try their cases. However, these lawyers will someday retire and without investment in the next generation of lawyers, clients will not have experienced trial lawyers to handle their cases. It is to every litigation firm's and client's benefit to invest in the next generation of trial lawyers and to help them acquire the skills and know how to try cases. ❐

The Oregon Litigation Journal is published three times per year by the Litigation Section of the Oregon State Bar with offices at 5200 S.W. Meadows Road, P.O. Box 1689, Lake Oswego, Oregon 97035-0889, 503/620-0222.

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Discharging Environmental Claims in Bankruptcy:

Or, What Do You Mean That I Still Have to Clean That Up?

By David Bledsoe & Jessica Hamilton
Perkins Coie, LLP

Under principles of bankruptcy law, reorganized debtors are given a "fresh start" by being released from liability from certain debts. Under principles of environmental law, "the polluter pays." These two important policies often conflict. So what happens when a company with environmental problems declares bankruptcy? When are those claims discharged? And which claims survive reorganization?

David Bledsoe

Jessica Hamilton

The conflict between the often competing policies behind the bankruptcy code and the environmental laws, particularly the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 et seq., arises frequently and can be profound. Courts struggle with reconciling these two competing bodies of law, which results in less certainty than either set of laws is intended to provide.

Background of Relevant Bankruptcy Law

The Bankruptcy Code "discharges the debtor from all debts that arose before the date of the order of relief." 11 U.S.C. § 727(b). A "debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12). As noted below, "claim" is defined very broadly. 11 U.S.C. § 101(5).

Bankruptcy discharge gives the debtor two critical things: (a) a release from liability on all claims subject to the discharge; and (b) an injunction preventing others from taking action against the debtor to enforce the discharged claims. The scope of the discharge is very broad and binds all creditors who received either actual or constructive notice, even if the creditor did not file a proof of claim with the bankruptcy court. 11 U.S.C. §1141.

Because some environmental obligations do survive bankruptcy, an analysis regarding discharge of environmental claims is an important consideration when deciding whether to proceed under a chapter 11 reorganization or chapter 7 liquidation.

Background of Relevant Environmental Law

CERCLA was enacted in 1980 to respond to environmental and public health disasters created by the disposal of hazardous substances. Its purpose is to promote the speedy cleanup of contaminated sites and to ensure that the parties responsible for the contamination bear the cost of cleanup.

A person is liable under CERCLA if (a) a person falls within one of the four categories of responsible parties (present owners or operators; past owners or operators; generators of hazardous substances; or arrangers or transporters of hazardous substances); (b) hazardous substances are disposed of at the facility; (c) there is a release or threatened release of a hazardous substance from the facility into the environment; and (d) the release results in response costs. 42 U.S.C. § 9607. Liability under CERCLA is strict and is generally joint and several. Importantly, there are very few defenses to CERCLA liability. This is consistent with the overarching principle that "polluter pays." A responsible party may be held liable for cleanup costs or may be compelled to clean up a contaminated site through a judicial injunction or administrative order.

When Is an Environmental Claim Dischargeable in Bankruptcy?

Environmental claims are one of three basic types: (a) an obligation to pay money; (b) an obligation to perform

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a cleanup; or (c) an obligation to refrain from polluting in the future. As a general matter, environmental claims that consist of an obligation to pay money are dischargeable in bankruptcy. An obligation to clean up a site is dischargeable to the extent that the creditor could perform the cleanup itself and sue for response costs, because it is an equitable claim that can be discharged through the payment of money. This type of claim is discussed further below. Finally, an obligation to refrain from polluting in the future is not dischargeable since payment cannot be made in lieu of stopping continued pollution.

Three questions drive the analysis of whether an environmental claim is discharged. First, is the particular obligation a "claim"? Second, if so, when did the claim arise? Third, was due process satisfied?

Is the Obligation a Claim?

A "claim" is defined very broadly as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured or unsecured.

11 U.S.C. § 101(5). In general, cleanup costs incurred before bankruptcy will be treated as dischargeable debts. *In re Chateaugay Corp.,* 112 B.R. 513 (S.D.N.Y. 1990), *aff'd* 944 F.2d 997 (2nd Cir. 1991). Legal rights (i.e. for which money damages are available) are covered under Section 101(5)(A). Equitable remedies that give rise to a right to money damages are also claims in accordance with Section 101(5)(B). Purely equitable rights, that is, those that cannot be converted into money damages, are not claims under the Bankruptcy Code.

The Supreme Court addressed the issue of injunctive orders and their discharge in *Ohio v. Kovacs,* 569 U.S. 274 (1985). In that case, the debtor was responsible for remediating a waste handling site. The state had issued an injunctive order requiring the debtor to conduct a cleanup. However, the debtor was no longer in possession of the site. Therefore, the debtor could comply only by monetarily reimbursing the state. Because the injunctive order could only be satisfied by the payment of money, the Court held it was discharged in the bankruptcy.

The Second Circuit has further refined this analysis. In *In re Chateaugay Corp.,* 944 F.2d 997, 1008 (2d Cir. 1991), the court held that orders for injunctive relief are dischargeable if they do no more than impose an obligation entirely as an alternative to a payment duty. However, if the injunctive relief requires the debtor to cease ongoing pollution, then the order is not deemed a claim and is not dischargeable.

In August 2009, the Seventh Circuit issued an opinion in *United States v. Apex Oil Company, Inc.,* 579 F.3d 734 (7th Cir. 2009). In that case, Apex Oil was appealing the grant of an injunction under the Resources Conservation and Recovery Act ("RCRA") requiring Apex Oil to clean up a contaminated site. The issue decided by the court was whether the government's claim for an injunction was discharged in bankruptcy. The court held that because RCRA does not entitle a plaintiff to demand, in lieu of an actual cleanup, the payment of money damages, the injunction was not discharged. While this case was not inconsistent with other case law, it adds to the uncertainty of the level of protection provided by bankruptcy discharge.

When Does an Environmental Claim Arise?

For an environmental claim to be dischargeable in bankruptcy, it must have arisen pre-petition; that is, before the debtor files its petition for bankruptcy. A debtor remains liable for all claims arising after the bankruptcy plan has been confirmed. Therefore, determining when the claim arises is often key.

Courts in the Ninth Circuit have held that environmental obligations are "claims" and thus potentially subject to discharge. However, an environmental claim is often unmatured, unliquidated or contingent at the time of discharge. There is conflict among the circuits as to when a claim "arises." In the Ninth Circuit, the claim arises when sufficient, prepetition knowledge of the debtor's potential liability exists. In *re Jensen,* 995 F.2d 925 (9th Cir. 1993).

What Notice Is Required?

A debtor may need to provide notice of the bankruptcy filing to potential environmental claimants in order to have its environmental obligations discharged. Courts have held that environmental claims were not discharged when adequate notice to potential environmental claimants was not given. For instance, in *AM Int'l Inc. v. Datacard Corp.,* 106 F.3d 1342 (7th Cir. 1997), environmental liabilities arising out of a debtor's contaminated property were not discharged when the acquiring company lacked sufficient information to tie the debtor to the contamination prior to discharge. In *United States v. Union Scrap Metal,* 123 B.R. 831 (D. Minn. 1990), the court held that the Environmental Protection Agency's ("EPA") claim survived because EPA did not know or have reason to know of its environmental claims against the debtor and did not incur any response costs until after the plan of reorganization was confirmed.

The Bankruptcy Code does not require in all cases that a creditor receive

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actual notice of the bankruptcy for its claim to be discharged. In a Chapter 11 case, the court sets a bar date by which all proofs of claim must be filed. Fed. R. Bankr. P. 3003(c). Fed. R. Bankr. P. 2002(a)(8) requires that all creditors receive notice of the bar date. A key inquiry is thus whether the creditor had sufficient knowledge or notice about the bankruptcy proceeding and its claims so that the claim or debt can be discharged.

The type of notice is dependent on whether the creditor is a "known" or "unknown" creditor. Actual notice must be given to all known creditors, which includes creditors actually known to the debtor as well as creditors whose identities are "reasonably ascertainable." *Matter of Crystal Oil Co.,* 158 F. 3d 291 (5th Cir. 1998). "Reasonably ascertainable" means that the creditor could be identified through reasonably diligent efforts. *Id.* In contrast, formal notice of the bankruptcy proceeding is not necessary to satisfy due process if the creditor is unknown. Constructive notice, where the creditor is unknown, is sufficient. *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.,* 195 B.R. 716 (N.D. Ind. 1996); *see also Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 974 F. 2d 775 (7th Cir. 1992) (Bankruptcy Act does not require that all potential creditors receive actual notice of bankruptcy case; rather, actual notice is necessary only as to known creditors, and constructive notice is sufficient for unknown creditors).

For a contingent claim to be discharged, the claimant must have had sufficient knowledge of the release or threatened release so that it could have effectively asserted its right in the bankruptcy proceedings in a timely manner. *In re Chicago,* 974 F.2d at 787. The claimant must also have had sufficient knowledge or notice that the debtor was a potentially responsible party. *Id.*

State Law Environmental Claims

A debtor must not only consider potential federal law claims, but also state law environmental claims. Most states, including Oregon and Washington, have statutes similar to CERCLA that impose cleanup obligations on potentially responsible parties. See ORS § 465.200 et seq; RCW 70.105D.010 et seq. Many of these statutes contain important substantive differences from CERCLA, however, such as covering the release of petroleum products (both Oregon and Washington), or providing for prevailing party attorney fees (in Washington). Therefore it is important to be familiar with the state statutes.

An issue that arises more frequently than one would expect is whether a state law claim is discharged when the state law is enacted subsequent to the discharge. The simple answer is: it depends. Generally, if there could be no cause of action prior to the discharge because the statute did not yet exist, then there can be no discharge. Many provisions of CERCLA are replicated in state law cleanup statutes, without much substantive difference, but are frequently enacted years or even decades after CERCLA. In those cases, courts have compared the state statutes to CERCLA and prior state statutes to determine to what extent a creditor could have pursued substantively similar claims against the debtor under CERCLA. To the extent that the state law imposes different or additional liabilities that were not present at common law or in another statute, then at least one court has held that to be sufficient to survive discharge. *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 3 F.3d 200 (7th Cir. 1993).

Practical Consequences of Discharge or Non-Discharge of Claims

Debtors who believe they may be liable for an environmental claim should consider providing broad notice to all potentially affected parties so that the environmental obligation will be dischargeable. However, there are circumstances where a debtor may not want to provide information about a potential environmental liability, so these competing considerations must be weighed. Failure to provide adequate notice, however, may lead to the debtor not having its environmental debts discharged. An important consideration when deciding whether to give broad notice is that often reorganized companies face environmental claims years or even decades after the bankruptcy proceedings have concluded and having a claim discharged can be an affirmative defense or entitle a reorganized company to an injunction.

Environmental claimants must be aware of the claims bar date and file a timely claim in the bankruptcy proceeding or risk having their claim discharged. Because the definition of claim is broad, a potential creditor should consider filing a claim, even if its "claim" is unliquidated or contingent. Once a claim has been discharged, then the discharge effectively acts as an injunction preventing others from seeking recourse against the debtor for the discharged debt.

By no means is this article intended to cover all issues that arise when companies with environmental problems contemplate bankruptcy. Claims for contribution require special analysis under 11 U.S.C. § 502(e)(1)(B), which may provide for disallowance of certain claims under the Bankruptcy Code. In addition, 11 U.S.C. § 502(c) provides for an estimation process to allow for resolution of contingent or unliquidated claims. Finally, once an environmental obligation is a "claim," questions still remain as to its priority. Because the complexity of and the conflict between environmental laws and bankruptcy laws often guides decisions of companies facing significant environmental obligations, it is critical that a comprehensive evaluation of alternatives be made before committing to a strategy of filing for bankruptcy. ❐

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The Perils of Inattention—Discussion of Recent Decisions on Discovery Sanctions for Improper Preservation of Evidence[1]

Elleanor Chin & Ryan D. Derry[2]
DavisWright Tremaine LLP

Lawyers may be surprised to learn the extent to which they risk sanctions for not preserving electronically stored information (ESI) correctly. Indeed, recent headlines regarding judicial action in the electronic discovery area reveal a minefield of sanctionable conduct. Fortunately, court decisions regarding the preservation of ESI provide practical insights into common mistakes that, once understood, are easy to avoid.


Elleanor Chin


Ryan Derry

Courts have defined "spoliation" as the "destruction or significant alteration of evidence, or the failure to preserve evidence for another's use in pending or future litigation."[3] In January 2010, a federal district court in New York stated, "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence."[4] This statement, from the court's decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, captures the state of the law as it has developed in the past six years. It is expected to be the standard in the area of electronic evidence preservation for some time to come.

The *Pension Committee* decision also illustrates an emerging theme of judicial intolerance for litigants who convey to the court their inattention to detail in discovery practice and thus their lack of respect for the judicial process. *Pension Committee*'s author, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, also authored the seven opinions in *Zubulake v. UBS Warburg LLC*, known as the *Zubulake* line of cases, which are the standard-setting decisions in modern electronic discovery.[5] *Pension Committee* summarizes a number of key decisions in the intervening years since the last *Zubulake* opinion and contains the implicit admonition to lawyers that they clearly have not been paying attention to what the court held before.

The tone from the bench should make litigators sit up and take notice. The duty to preserve documents falls on both litigants and counsel. For this

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reason it is important for litigators to understand not only the substantive requirements in this area, including issuing a written instruction to preserve documents, but also the potential consequences—including sanctions against counsel personally.

Practice and precedent in the area of electronic discovery have been evolving since the late 1990s, with an increasing formalization since the adoption of amendments to the Federal Rules of Civil Procedure in 2006.[6] State courts have also adopted rules to address the handling of electronic evidence in discovery and trial, including the adoption in California of Assembly Bill 5 in 2009, the Electronic Discovery Act.[7] Federal and state courts around the country have issued detailed decisions analyzing many nuances of attorney decision making, providing practical guidance on handling ESI.

The California Court of Appeals recently explained that spoliation is condemned because it "can destroy fairness and justice." Without access to complete evidentiary information, the risk of an erroneous decision increases.[8] Most practitioners are well aware of the impact of spoliation and condemn the conscious destruction of evidence. However, "spoliation" encompasses far more than intentional destruction of materials. The culpability for spoliation ranges from negligence to intentional conduct.[9]

While many decisions addressing spoliation focus on intentional destruction of evidence, those rulings are not particularly enlightening to the average litigator. If parties or counsel cannot figure out on their own that such behavior is inappropriate, telling them so will not help. Cases involving the deliberate purging of data on BlackBerries (*Southeastern Mechanical Services v. Brody*)[10] or disposing of laptops during litigation (*Arista Records LLC v. Usenet.com*)[11] make entertaining reading in the sensational manner of reality television. Less clear is how lawyers can avoid conduct that could result in a finding of spoliation in which something less than conscious destruction occurs. For example, *Pension Committee* stands for the proposition that certain basic standards of practice regarding litigation are so commonplace and widely understood that ignorance, even if innocent, is no longer an excuse that will avoid sanctions.

The California Court of Appeals recently explained that spoliation is condemned because it "can destroy fairness and justice." Without access to complete evidentiary information, the risk of an erroneous decision increases.

Like the types of sanctions available for spoliation under the Federal Rules of Civil Procedure, the sanctions that the California Code of Civil Procedure provides, for example, are equally broad and far ranging. Following notice and opportunity for a hearing, a court may impose several types of sanctions: 1) monetary sanctions (against a party or attorney), 2) issue sanctions, 3) evidence sanctions, or 4) terminating sanctions.[12] As a general rule, sanctions imposed for spoliation are not intended to punish the offending party but are instead supposed to remedy the underlying discovery abuse that has been committed.[13] Issue or terminating sanctions are typically requested to remedy the loss of relevant evidence due to spoliation.[14] An issue sanction would result if a court orders that "designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process."[15] Or a court may issue terminating sanctions for particularly egregious cases of intentional spoliation of evidence.[16]

Federal and State Spoliation Tests†

Federal courts typically apply a three-part test in determining whether a party is responsible for spoliation. The party seeking sanctions must show that:

1) The party that has control over the evidence had an obligation to preserve it at the time it was destroyed.

2) The records were destroyed with a culpable state of mind.[17]

3) The relevance of the destroyed evidence to the party's claim would allow a reasonable trier of fact to find that the evidence would support that claim or defense.[18]

Courts have held that relevance can be established in a number of ways. They have found that relevance "may be inferred if the spoliator is shown to have a sufficiently culpable state of mind."[19] Also, the "moving party may submit extrinsic evidence tending to demonstrate that the missing evidence would have been favorable to it."[20]

Application of the federal test continues to evolve. In *Scalera v. Electrograph Systems, Inc.*,[21] a federal district court in the Eastern District of New York found the defendant negligent because counsel communicated the preservation obligation orally, and the defendant did not commence the process to search hard drives until after the human resources director had retired and her hard drive had been erased.[22]

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Nevertheless, the court ultimately did not impose any sanctions. Instead, the court held that the plaintiff had submitted no extrinsic evidence "tending to demonstrate" that the deleted materials would have been helpful to her case.[23]

The more recent *Pension Committee* case presents a slightly different analysis. In *Pension Committee*, a case originally filed in February 2004, the court held that a group of plaintiffs who failed to issue a written litigation hold until 2007 were not only negligent but grossly so.[24] The court also found that one or more of the plaintiffs failed to collect or preserve any electronic documents prior to 2007 and continued to delete documents after the duty to preserve arose. The court concluded that "it is fair to presume the responsible documents were lost or destroyed. The relevance of any destroyed documents and the prejudice caused by their loss may also be presumed."[25] The court held that a spoliation instruction was the appropriate sanction.[26]

Subsequent to *Pension Committee*, Judge Lee Rosenthal in the Southern District of Texas issued her ruling in *Rimkus Consulting Group v. Cammarata*[27]— a decision commentators sometimes treat as a companion to *Pension Committee*. In *Rimkus*, Judge Rosenthal applied a slightly different standard for finding culpable negligence.[28] The *Rimkus* test includes an analysis of reasonableness and proportionality, compared to what many perceive as a bright-line test in *Pension Committee*. According to Judge Rosenthal, "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards."[29] Accordingly, under the *Rimkus* test, the extent of preservation efforts should be analyzed in light of factors such as the size of the lawsuit and the burden of the preservation efforts.

In California, courts apply a burden-shifting approach that requires the accused spoliator to disprove any prejudice:

> [A] party moving for discovery sanctions based on the spoliation of evidence must make an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense.[30]

In *Williams v. Russ,*[31] the California Court of Appeal's application of this burden-shifting test resulted in the imposition of terminating sanctions. The court determined that the plaintiff had intentionally allowed material unfavorable to his claims to be destroyed. As to the relevance test, the trial court applied a burden-shifting test that was affirmed on appeal: "Because [the plaintiff] bore the burden of disproving prejudice [under the burden shifting test], he was required to show that any other documents from the file that he claimed existed [and did not spoliate] would in fact have allowed [the defendant] to adequately reconstruct the client file. He did not."[32]

A useful resource for lawyers analyzing the issue of electronic discovery sanctions can be found at the blog e-Discovery Team, written and moderated by electronic discovery scholar Ralph Losey.[33] Losey's blog offers a holistic approach that is informed but not driven by case law. In an article posted on the blog, William Hamilton presents an "E-Discovery Sanctions Cube" demonstrating how sanctions become increasingly likely as a party or counsel progresses along a graph of vertical and horizontal axes that represent willfulness, prejudice, and time.[34] For example, discovery errors that occur with a low degree of willfulness but perhaps create prejudice may be less likely to result in sanctions than a more willful, equally prejudicial mistake. As time to correct or remedy the error before trial decreases, the likelihood of sanctions also increases.

Hamilton's analytical framework is useful for considering *Pension Committee* and a number of other decisions in the electronic discovery arena, including the infamous *Qualcomm v. Broadcom*[35] series of decisions. These are often referred to as "judicial frustration" or "angry judge" cases. Without regard to the exact legal factors in a particular jurisdiction, it is simple and reasonable to look at a case and posit, "The longer you wait, the worse the problem gets; the worse the problem gets, the more prejudice to the party; and if you compound the problem by incompetence or inattention, you will offend the court." Under these circumstances, woe betide the litigator.

Beyond *Zubulake*

The decisions in the electronic discovery cases are fact-intensive. Reading them requires a time investment, but practitioners can derive practical benefits from the mistakes of others in this area. The rulings apply critical judicial hindsight to litigation decision processes (or sometimes the lack of decisions).

Pension Committee[36] involved parties who were accused not of misconduct but merely of carelessness. The case involved claims of securities fraud by multiple investors against a group of funds. Judge Scheindlin found that numerous plaintiffs had been aware of the likelihood of litigation and yet failed to issue written

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litigation holds or undertake practical steps to preserve procedures, that e-mail had actually been deleted and lost, and the circumstances warranted a finding that the lost material would have been relevant. Ultimately a number of plaintiffs were sanctioned for spoliation in the form of an adverse jury instruction.[37]

Judge Scheindlin took the opportunity to outline standards for finding negligence, gross negligence, and willfulness, as those terms are used regarding spoliation of evidence. Also, with respect to the actions of the plaintiffs, she discussed the type of conduct that falls into each of these categories, both generally and specifically. The judge found that in addition to the failure to issue written preservation instructions, the processes that the plaintiffs had followed to collect documents were inconsistent and unreliable, often including failure to identify and collect large amounts of e-mail. Some of these failures were a result of allowing the plaintiffs' executives or employees to decide individually what information might be relevant, and some resulted from having the data collection overseen by those with little knowledge of the parties' IT infrastructure or the steps necessary for proper collection.

The basic lessons of *Pension Committee* are first, when the party anticipates litigation, the party should issue instructions—in writing—to preserve documents and ESI. Second, those accountable for implementing the litigation hold should have sufficient personal knowledge of the technical processes to determine whether they are appropriate and are actually likely to capture all relevant information. *Pension Committee*'s explicit requirement that the litigation hold notice must be in writing arguably changes the existing standard. However, the accountability requirement is not new. Instead, it simply restates what litigators should already know. They must understand the evidence—most specifically, what it is, and where it resides.

Swofford v. Eslinger,[38] a September 2009 decision from the Middle District of Florida, is a decision in which the facts are straightforward, the language is blunt, and the take-home message for attorneys is unambiguous. If attorneys had not learned from *Zubulake* and its progeny that counsel is responsible for implementing and monitoring effective preservation of evidence, including specifically ESI, they cannot miss that message in *Swofford*.

The court captures the time frame for ESI preservation (or lack thereof) with precision. The claim was a state law tort and 42 USC Section 1983 action brought by Robert Swofford against the sheriff of Seminole County, Florida, and two individual deputies. The deputies had shot Swofford multiple times during the pursuit of an unrelated fleeing criminal suspect onto Swofford's property. The incident with Swofford and the deputies occurred in April 2006. In August 2006 and February 2007, Swofford's counsel sent letters to the sheriff's office requesting that evidence relating to the incident be preserved. Both deputies permanently deleted e-mails from their accounts between April 2006 and April 2007. The laptop of one of the deputies was erased in October 2007. Key physical evidence—including the guns, radios, and uniforms the deputies wore during the incident—were recycled, misplaced, or destroyed at various times after the plaintiff sent the preservation requests to counsel.

The court found that the steps taken by the sheriff's office to preserve documents were so ineffective as to warrant a finding of deliberate misconduct.[39] The in-house counsel of the sheriff's office acknowledged receiving the letter to preserve evidence, but admitted that he had done nothing to see that evidence was actually preserved other than to send copies of the letter to the sheriff and several high-ranking officers within the sheriff's office. The two individual defendants never personally saw the request to preserve evidence, although the court found they had received notice through the in-house counsel and were accountable for complying. The court cited *Zubulake* and noted, "It is well established that counsel may not simply distribute a single written request to preserve evidence and do nothing more."[40]

The *Swofford* court granted the plaintiff's motion for sanctions for bad faith spoliation, including the recycling of the deputies' laptops and the deletion of e-mail. The order also sanctioned the in-house counsel personally for not effectively implementing the hold as well as issuing monetary sanctions in the form of a fee award and an adverse inference instruction.

Swofford and *Pension Committee* are cases in which the facts were complex and the stakes were high. Moreover, those high stakes were most likely apparent from the inception of the case. Both *Scalera v. Electrograph Systems, Inc.*[41] and *Estrada v. Delhi Community Center*[42] involved sanctions for spoliation of ESI in single-plaintiff employment discrimination cases. *Rimkus v. Cammarata*, a noncompetition case, falls somewhere in the middle.

One of the common questions that arises in discussions of electronic discovery is how to manage its impact in smaller cases, including those involving small business contracts, collections, and single-plaintiff employment claims. Practitioners should know that the underlying ethical and process management requirements in a small case are no different than in a large case and should in some ways be easier to address.

In *Scalera*, the plaintiff brought suit under the Americans with Disabilities Act and New York's human rights law for claimed failures to accommodate her chronic illness. She had a fall on the job and filed a workers' compensation claim.

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Her employment ended, she made a claim with the EEOC, and then she brought suit. The decision addressed her motion for sanctions for spoliation. The plaintiff alleged that the defendant had been negligent in not properly implementing a litigation hold and in failing to produce e-mail communications that would have revealed the plaintiff's requests for accommodation. The defendant contended that various types of ESI were unrecoverable,[43] and the plaintiff requested an adverse inference instruction.

The court found that the employer's determination of when the duty to preserve arose was the right one. The defendant was on notice when it received the EEOC notice, not when the plaintiff fell or when she retained a lawyer or sent a demand letter to the landlord on a slip-and-fall injury.[44] Thus, because the EEOC charge was received after the date the plaintiff's hard drive and e-mails were erased pursuant to the defendant's policies, no duty to preserve potential evidence was breached.[45] In contrast, the hard drive of the director of human resources was erased following her retirement, which occurred over a month after the defendant received the plaintiff's EEOC charge. Thus, the court found that the defendant had been negligent in failing to preserve those documents, because the obligation to preserve already existed.

Given the influence of Judge Scheindlin's rulings in this area, the standard in *Pension Committee* is likely to be cited over the *Scalera* analysis of culpability and nonimposition of sanctions. However, the facts in *Scalera* remain illustrative of common discovery problems that crop up in smaller cases. Much of the defendant's initial response to litigation appears to have been conducted in house—probably because the claim was straightforward, and keeping costs low was a priority.

In-house counsel called a meeting to instruct employees to preserve data but did not circulate a formal litigation hold instruction. The company's IT group began collecting data from individuals designated by counsel at the first meeting as sufficiently relevant to the case. The key HR executive's computer was wiped and recycled. (This is a common risk when a litigation hold goes only to individuals with knowledge of case-specific facts and not to institutional custodians of information, such as management for IT and HR.) Individual employees had idiosyncratic ways of retaining e-mail outside of the company's backup system, and the company did not account for this, claiming that its HR records process provided for all pertinent records, such as e-mail requests for accommodation, to be printed out and placed in personnel files. The plaintiff produced e-mails that had not been printed and had not been produced by the defendant.

The defendant escaped sanctions because the court concluded that the lost data would not have helped the plaintiff. But the fact remains that the court found in this case that the discovery response was negligent.

Estrada v. Delhi Community Center, an unpublished 2009 California Court of Appeals decision, is an unusual case because the plaintiff received terminating sanctions for electronic discovery violations (as well as other discovery problems). A close reading of the facts indicates that plaintiff's counsel was making multiple inappropriate tactical decisions and abusing the discovery process in more ways than just those concerning the electronically stored evidence. The electronic discovery issue was the plaintiff's conduct in taking her personal computer to a repair shop and having the operating system reinstalled during the course of the litigation. It is not clear how technically sophisticated she was personally (or how sophisticated her counsel was), but the court held that the plaintiff was informed about the reinstallation process and aware that it would result in the deletion of data.[46] There was no question that the plaintiff was on notice of the need to preserve data, because her counsel was closely involved in ongoing discovery, and the computer was alleged to contain material relating to her claims.

Guidance for Litigators

By the time a problem with the preservation of ESI comes to light, courts are left to reconstruct decisions made months if not years before, as in *Pension Committee*. The body of law on spoliation of ESI has now evolved well enough to be very useful for litigators generally, if not for the parties in the already decided sanctions decisions.

Pension Committee has attracted voluminous, detailed commentary and analysis, including discussions on the standards of care and whether the decision mandates that failure to issue a written litigation hold is negligence per se. *Pension Committee* does not address counsel conduct separate from that of the party, but *Swofford* received attention because it addresses the part of the *Zubulake* decisions establishing that evidence preservation is a lawyer's personal and ethical responsibility, separate from the obligation of his or her litigant client. While *Swofford* involves no written instruction to preserve documents other than the request of the plaintiff's counsel, the activity in that case occurred when *Zubulake* was a well-known and well-publicized legal standard. *Zubulake* and *Swofford* teach that a lawyer must have personal knowledge of the measures taken to implement a litigation hold. The cases further instruct that a party (and thus the party's lawyer) must conform to a specific standard of conduct to ensure that documents do not actually get deleted or disappear.

Attorneys are required to perform their duties competently in the representation of their clients.[47] Competence includes the ability to advise clients

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about preservation—both the timing of preservation obligations and the actual substance and process of preservation, including the type of data and format for collection, but also what kind of ESI is likely to be inadvertently lost. Judges now expect counsel to be competent in electronic discovery. In admonishing counsel, a judge stated, "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI…It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this."[48]

Effective electronic discovery starts with properly implemented preservation, including the issuance of clear, practical preservation instructions. The duty to preserve is a dual duty, falling on both counsel and parties. Decisions like *Swofford*[49] make it clear that attorneys have an independent duty to preserve information as well as a duty to ensure that the client also does so. Failure to properly preserve electronic evidence is a breach of an attorney's professional obligations as well as a breach of the attorney's duty to provide competent professional service to the client. Counsel who breach their dual duties place themselves and their clients at risk for sanctions.

What *Pension Committee* requires for parties regarding their conduct indirectly creates more specific and detailed requirements for counsel.[50] In *Pension Committee* the absence of a written litigation hold was part of the problem.[51] Most counsel will probably deduce that they must issue a formal written communication for a litigation hold. This is a prudent default approach but, like all rules, proper application depends mostly on lawyers having a nuanced, context-sensitive understanding of what the rule means. For example, if a client is a very small entity with very few computers (as were some of the sanctioned plaintiffs in *Pension Committee*), counsel may question whether it is really necessary to issue a written preservation instruction. However, if the employees in the small organization are not tech savvy and have no understanding how to prevent deletion of documents, counsel's obligations include the development of that understanding on the part of both counsel and client employees and instructing the client to make a record of the necessary instruction and its implementation.

By contrast, in a large and complex organization with a well-informed and sophisticated IT staff, the client presumably is capable of implementing a litigation hold. Indeed, the client may have an existing litigation hold protocol and a written form for issuing the holds. However, if the claim concerns sexual harassment, for example, or stealing by an executive or a technically sophisticated employee with a high security clearance, issuing a written litigation hold may be affirmatively harmful because it may alert a significant witness or codefendant to delete e-mail. In that case, the best implementation of a litigation hold strategy may include a directive from outside counsel to inside counsel only, as well as a call for an immediate forensic investigation documented solely in counsel's files.

It is easy to say that the cure for preservation problems is to issue litigation holds consistently and document the steps to implement them. However, these actions are only part of counsel's responsibility. The real solution is for practitioners to take the issuance and implementation of litigation holds seriously and treat the evidence preservation process as an integral part of the litigation response and investigation.

Early evidence assessment and preservation sets the stage for executing the rest of the case correctly. Practitioners should be flexible and consider the possibility that litigation may terminate early and not require a detailed and prolonged investigation and collection of data. Nevertheless, counsel's preservation model should prepare for a launch into the full-scale collection of ESI.

Cases like *Swofford* critique (and impose consequences for) the unexamined and mechanistic circulation of litigation holds. Most litigators understand that at some point they should acquaint themselves in detail with witnesses and evidence. The requirement to issue a litigation hold ensures that counsel will do so sooner rather than later, because issuing a litigation hold correctly requires counsel to understand precisely where potential evidence resides and how witnesses communicate with one another.

All litigators learn—or should learn—the difference between, and the consequences of, doing their jobs while fully engaged or practically asleep. The lesson of *Pension Committee* may just be that simple.

Endnotes

1 Originally published with the title "alt-delete" in Los Angeles Lawyer, July/August 2010 pp. 35-41. Reprinted here in full with permission. Substantive alterations from the original are noted by (†).

2 Elleanor Chin is a partner with the Portland, Oregon office of Davis Wright Tremaine LLP. Her practice is a mix of commercial litigation, complex litigation and electronic discovery consulting. She is a frequent writer and speaker on electronic discovery topics. Ryan Derry is an associate with the Los Angeles office of Davis Wright Tremaine. His practice includes representation of employers in class actions and employment discrimination matters.

3 *Williams v. Russ*, 167 Cal. App. 4th 1215, 1223 (2009) (citing *Willard v. Caterpillar, Inc.*, 40 Cal. App. 4th 892, 907 (1995)). *See also Kearney v. Foley & Lardner, LLP*, 582 F.3d 896, 908-09 (9th Cir. 2009).

4 *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D. N.Y. Jan. 15, 2010). †Judge Scheindlin issued a second amendment to her opinion by order dated May 28, 2010.

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5 *See Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536 (2005) (*Zubulake VII*), 231 F.R.D. 159 (2005) (*Zubulake VI*), 229 F.R.D. 422 (2004) (*Zubulake V*), 220 F.R.D. 212 (2003) (*Zubulake IV*), 216 F.R.D. 280 (2003) (*Zubulake III*), 230 F.R.D. 290 (2003) (*Zubulake II*), 217 F.R.D. 309 (2003) (*Zubulake I*).

6 *See* FED. R. CIV. P. 16, 26, 33, 34, 37, 45 (amended 2006); *see also* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, EXCERPT OF THE REPORT OF THE JUDICIAL CONFERENCE (2005), available at http://www.uscourts .gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf.

7 *See also* STATE BAR OF CALIFORNIA, LITIGATION SECTION, E-DISCOVERY POCKET GUIDE (Aug. 2008), available at http://www.calbar.ca.gov/calbar/pdfs /sections/litigation/e-discovery-pocket-guide.pdf.

8 *See Williams v. Russ*, 167 Cal. App. 4th 1215, 1223 (2009).

9 *See id*. at 1221 (discussing a finding of negligent spoliation by discovery referee); *In re NTL, Inc. Sec. Litig*. (*Gordon Partners v. Blumenthal*), 244 F.R.D. 179, 198 (S.D. N.Y. 2007) ("The culpable state of mind requirement is satisfied in this circuit by a showing of ordinary negligence.").

10 *Southeastern Mech. Servs. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

11 *Arista Records LLC v. Usenet.com*, 2009 WL 1873589 (S.D. N.Y. June 20, 2009).

12 *See* CODE CIV. PROC. § 2023.030.

13 *See Williams*, 167 Cal. App. 4th at 1223 ("Sanctions should be tailored to serve that remedial purpose [of remedying the underlying discovery abuse], [they] should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery.…").

14 *See, e.g., id*. at 1227 ("'Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action.'" (quoting *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 14 (1998)).

15 *See* CODE CIV. PROC. § 2023.020(b).

16 *See R. S. Creative, Inc. v. Creative Cotton, Ltd*., 75 Cal. App. 4th 486, 497 (1999).

+ Oregon law on the definition and sanctions for spoliation is sparse but generally it is the case that willful destruction of "documentary evidence raises an unfavorable presumption against the party who destroyed it." *Booher v. Brown*, 146 P.2d 71, 75 (Or. 1944).

17 Negligence can be a sufficient "culpable state of mind" for a finding of spoliation.

18 *See Scalera v. Electrograph Sys., Inc*., 262 F.R.D. 162, 2009 WL 3126637, at *8 (E.D. N.Y. Sept. 29, 2009).

19 *Id*. at *16.

20 *Id*.

21 *Id*. at *1.

22 *Id*. at *16 ("[H]ad clearer instructions been provided, [the] hard drive would have been searched (rather than erased) at or before the time she retired.").

23 *Id*. at *17.

24 *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *3 (S.D. N.Y. Jan. 15, 2010) ("[D]efinitely after July, 2004 when the final relevant *Zubulake* opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.").

25 *Id*. at *12.

26 *Id*.

27 *Rimkus Consulting Group v. Cammarata*, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

28 *Id.*

29 *Id*. at *5.

30 *Williams v. Russ*, 167 Cal. App. 4th 1215, 1226-27 (2009).

31 *Id*.

32 *Id*. at 1227 ("In fact, the record does not show that [the plaintiff] ever supplied the trial court with, or has ever described, the contents of the 11 file boxes he did copy. Without those documents as a starting point, it seems impossible to determine whether those documents might have been sufficient for [the defendant] to mount an adequate defense.").

33 http://www.e-discoveryteam.com.

34 http://e-discoveryteam.com/2009/11/29/the -e-discovery-sanctions-cube/.

35 *Qualcomm v. Broadcom*, Case No. 05cv1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). This is the final of a series of decisions concerning the failure to produce documents until after trial. Despite an order to show cause in 2008, the court determined counsel would not be sanctioned personally.

36 *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D. N.Y. Jan. 15, 2010).

37 *Id*. at *23.

38 *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 2009 WL 3818593 (M.D. Fla. 2009).

39 *Id*. at *8.

40 *Id*. at *5-8.

41 *Scalera v. Electrograph Sys., Inc*., 262 F.R.D. 162, 2009 WL 3126637, at *1 (E.D. N.Y. Sept. 29, 2009).

42 *Estrada v. Delhi Cmty. Ctr.*, Superior Court Case No. 06CC12880, Cal. App. 4th Dist. No. G040405, 2009.

WL 3359194 (2009) (unpublished).

43 *Scalera*, 2009 WL 3126637, at *12-13.

44 *Id*. at *12.

45 *Id*.

46 *Estrada*, 2009 WL 3359194, at *3-8.

47 CAL. RULES OF PROF'L CONDUCT 3-110; ABA MODEL RULES OF PROF'L CONDUCT 1.1.

48 *William A. Gross Constr. Assoc., Inc. v. American Mfrs. Mut. Ins. Co*., 256 F.R.D. 134 (S.D. N.Y. 2009).

(Judge Andrew Peck admonishing counsel over the creation of key words).

49 *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 2009 WL 3818593 (M.D. Fla. 2009).

50 *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (2003) (*Zubulake IV*); *see also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (2003) (*Zubulake I*) (setting forth seven cost and relevance factors to determine whether cost-shifting is appropriate).

51 The *Zubulake* series of decisions set forth the standard under which a court should consider the relative importance and accessibility of electronic information in the context of backup tapes.

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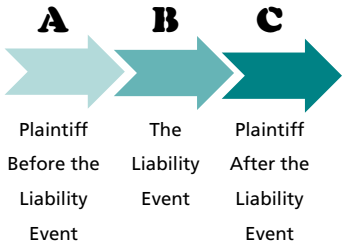
facts support these four elements, then a tort or civil wrong has occurred. What all this means is injured parties can then sue the wrongdoer and be redressed by receiving a money damages award for their resulting injuries.

There's a simple way to algebraically express this:

$ = (A- C) x B

Our formula involves two axes. The first is horizontal and involves a time continuum from A, the plaintiff's pre-injury status, to C, the plaintiff's post-injury future. Somewhere along this time line the liability event, we call it B, occurred, which caused injury.

Our time continuum is expressed as follows:



This model is generic and fits all circumstances. The liability breach can be anything from a discrete one-time failure to heed a stop sign, to multiple and ongoing allegations of sexual harassment.

The second axis is vertical and expresses the extent of damages. Assume we have a scale of health (A [before] and C [after] in our model above), which ranges from 10 to 0. We'll call the person who is a 10 in great health, and at the opposite end, if the person is 0, they're dead. If they're like most of us, their health is average and falls in between 4 and 6.

Applying the above model with its two axes, assume the plaintiff is walking down the street, in generally good health (6) and the defendant, in a clear liability case, blows a stop sign (B), striking the plaintiff in a crosswalk. The injuries caused by the defendant's conduct reduce the plaintiff physically from 6 to 2 (C). After a year of rehabilitation, the plaintiff recovers to a 4. The difference between A (6) and C (4) involves the permanent difference, meaning the loss is the difference between the pre-injury condition of the plaintiff (A) and the way he is now (C). This is expressed as:

$ = (6- 4) or (2xB)

Causation is expressed by the liability event, B, being placed outside of and after the bracketed damages proof. This communicates the idea that the injuries are interactive and caused by the liability event. Our formula is grossly oversimplified and the subtraction within the damages component obviously doesn't express the period of time the injured party may have been in recovery or any specials, but you get the idea.

This is the traditional torts model taught in all law schools. It's all pretty straightforward. Most law school professors became who they are in rather traditional paths. They excelled as law students, spent time clerking for an appellate judge, went on to work as an associate at a large and prestigious firm for a few years, and then reentered academia. They possess little clinical experience in application and argument before juries of the principles upon which they're paid to instruct. Most of them have never tried a civil jury trial as lead counsel. The result? A generation of bright thinkers passes on sterile and aseptic legal recipes to future generations of lawyers.

Keep in mind that you, as a lawyer, aren't typical. You don't mirror the thought processes of average citizens and jurors. You had to take an LSAT to even get into law school. That exam tests your capacity for multi-factorial analysis and logical thinking.

What's being taught, and intellectually fossilized, is correct in every linear sense. It's a numeric, quantitative model of analysis that reflects Aristotelian modes of thought. It's a paradigm that's logical, and therefore seems "right" to every lawyer. Its effective application literally defines just how smart or effective you are.

Keep in mind that you, as a lawyer, aren't typical. You don't mirror the thought processes of average citizens and jurors. You had to take an LSAT to even get into law school. That exam tests your capacity for multi-factorial analysis and logical thinking.

Capacities in these areas are the *sine qua non* of commercial litigators. These are the advocates who live in the numerical world of actuaries, accountants, business records, and tax returns. These lawyers understandably revel in data-driven analysis and value certainty and precision. They're intellectually uncomfortable discussing pain and suffering in terms of dollars, or losses that can't be precisely quantified. They dislike ambiguity.

It's news to some lawyers, but jurors and most people don't think deductively, meaning "from the bottom up" by following facts to their logical conclusion. They instead think inductively or "top down," meaning they form early impressions and then filter the incoming facts or evidence to support their conclusions. I know what the court's instructions say about how

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the jurors must wait to hear all the evidence before forming opinions, but it's simply not how the human mind naturally works.

Shifting from the Quantitative to the Qualitative

I advocate a different paradigm than extrinsic subtraction. It's a qualitative approach. It's *intrinsic.* Conclusions derived from a qualitative methodology are radically different from those born of the quantitative method.

The traditional quantitative or numeric approach views a person in the context of the whole, and defines losses by extrinsically referring to how the group or community values similar losses amongst its various members. Call this a comparable or a deductive right-brain way of seeing things. You can find illustrations in any insurance company's scheduled approach to valuing losses. This is the adjuster's mind-set when he says "my company's rule of thumb is, we don't pay general damages in an amount more than three or four times the specials." Further examples include the scheduled losses in worker's compensation claims and tort reform attempts to level losses through caps on non-economic damages awards.

The quantitative method increases predictability, which is something business values and *stare decisis* produces. The Ford Pinto litigation from the 1970s is an example. It's against this backdrop that punitive damages find their most persuasive arguments. Predictability increases the prospect manufacturers will pursue profits by analyzing consumer injuries as simply a cost of doing business. The intellectual headwaters of this are found in the political philosophy of Jeremy Bentham (1748-1832) and utilitarianism, that is, "the greatest good for the greatest number."

On the other hand, the qualitative model doesn't focus on the group; rather it shifts the spotlight to the individual within the group. The quantitative model derives conclusions by focusing on the uniqueness of the loss to the specific individual within the group. The political writing of John Locke (1632-1704), with his philosophical view that the rights of the individual are preeminent to those of the group, supports this thinking.

The qualitative model says we're all unique and different; and that when the rights of the least among us are fully protected, then the rest of us are beneficiaries because it assures that our rights are also protected.

The qualitative model says we're all unique and different; and that when the rights of the least among us are fully protected, then the rest of us are beneficiaries because it assures that our rights are also protected. This argument has protected the right of free speech for advocates of unpopular and extremist positions. We reason that if the rights of those on the fringe are protected, then the rest of us closer to the center are also safe. I call this a kind of perimeter or "tripwire" analysis. Advocates argue every individual within the group is a beneficiary if there are full economic consequences when anyone within the group is injured. This encourages deterrence because the fullness of the economic consequences are spiced with a certain level of unpredictability.

It's true that "the law is the law," and the jury should apply the rules charged by the court; but that's only the starting point of good advocacy. When a rule is actually applied by a committee of the community, meaning a jury, is when it comes to life. As Oliver Wendell Holmes said, "The life of the law has not been logic; it has been experience . . ."[2] Jury verdicts are the energizing headwaters of our common law tradition. This is where an appreciation and understanding of the policy reasons supporting a rule are essential. Discernment is found in the creative application of the rules. Here's where advocacy finds some of its loftiest expressions. If you use the law as a cookie cutter with sharp edges, and each trial is but another rote application of uniform rules, then you really don't understand the power of advocacy.

Learning to Ask the Right Questions

When a jury returns a large verdict, my defense friends will sometimes express surprise saying it was a "runaway" jury. What often happened is a good plaintiff's lawyer persuaded the jury to analyze the facts with a qualitative or intrinsic approach instead of from a quantitative or subtraction model.

Let's illustrate the differences between quantitative and qualitative models of analysis by considering the multiple possible responses to the simple question: "Who has lost more?" Assume we have two persons; one is a millionaire, and the other a beggar with only one dollar. Take away half of what each possesses and then ask, "who's lost more?"

We know under a quantitative model it's obviously the millionaire because he's lost $500,000, which is far, far greater than the fifty cents the beggar's lost. Smug with the knowledge that half a million is always more than

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half a dollar, shift the focus of the same question using a qualitative analysis and ask which loss means more to each of them.[3] As you do this, reflect upon the biblical parable of the "Widow and the Mites." It's found in two places in the King James version of the New Testament. The second gospel, Mark 12:41-44, reads:

> And Jesus sat over against the treasury, and beheld how the people cast money into the treasury: and many that were rich cast in much. And there came a certain poor widow, and she threw in two mites, which make a farthing. And he called [unto him] his disciples, and saith unto them, Verily I say unto you, That this poor widow hath cast more in, than all they which have cast into the treasury: For all [they] did cast in of their abundance; but she of her want did cast in all that she had, [even] all her living.

Luke, in the third gospel, at Luke 21:1-4, narrates the experience slightly differently:

> And he looked up, and saw the rich men casting their gifts into the treasury. And he saw also a certain poor widow casting in thither two mites. And he said, Of a truth I say unto you, that this poor widow hath cast in more than they all: For all these have of their abundance cast in unto the offerings of God: but she of her penury hath cast in all the living that she had.

This scriptural material is powerful, and not necessarily because of any historical authenticity, but for the social and moral values it embodies. Regardless of anyone's particular religious orientation, this parable expresses core values of our culture's Judeo-Christian heritage.

Protection of person and property is the primary purpose of our laws. Think about it. The bully needs no protection. It's the weakest amongst us that most needs the law's protection.

Are aspects of these values expressed in any of your jury instructions? Pause and reflect upon this, then consider the "as is" rule, commonly called the "previous infirm condition," "thin skull," or "eggshell" plaintiff instruction:

> "If you find that plaintiff had a bodily condition that predisposed [him/her] to be more subject to injury than a person in normal health, nevertheless the defendant would be liable for any and all injuries and damage that may have been suffered by the plaintiff as a result of the negligence of the defendant, even though those injuries, due to the prior condition, may have been greater than those that would have been suffered by another person under the same circumstances."[4]

Essentially what it says is a wrongdoer takes his victim "as is," and therefore can't defend on the infirmities or short-comings of his victim. Stated more abstractly, the law protects the weakest among us. Philosophers agree. Protection of person and property is the primary purpose of our laws. Think about it. The bully needs no protection. It's the weakest amongst us that most needs the law's protection. Continuing with our extrapolation, within the machinery of American government, the ballot box protects the expressed will of the majority; it's within the judiciary, or the third branch of government, that the rights of the individual find their most explicit protection through judicial interpretation of the Bill of Rights and the Seventh Amendment's guarantees to a civil jury trial and its state equivalents.

When the injuries and damages are serious and self-evident, such as fractures, burns, and amputations, then there's no reason to stray from an objective and extrinsic subtraction driven analysis; after all, you've got "the facts." In big quantitative cases the damages are usually so self-evident the challenge is to not over-try the case, hence enters the artful use of the understatement.

The qualitative model lends itself to situations where before the B event occurred, the plaintiff was disadvantaged or possessed less than what's considered normal. Examples include people with shortened life expectancies or others with serious pre-B challenges. Also included are the "problem" cases and clients with prior injuries blurring medical causation, or with lots of personal baggage causing them to be unattractive to a jury.

I know how important it is to have a presentable plaintiff; and, if you're really lucky, you might also have a target defendant. I don't know about you, but these types of cases are rare, and when they do occur, they usually settle for obvious reasons. A more typical scenario

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involves an unpresentable plaintiff with less serious injuries and dubious liability. So you want to be a plaintiffs' jury trial lawyer? Welcome to the real world. Here's where the qualitative approach can be far more effective than subtraction.

Let's be specific. Suppose you have someone with modest losses. Many cases in every office's inventory fit this description. Applying the formula introduced at the beginning of this chapter, let's say they're a 2 or 3 in health (A) before the liability (B) event, with a loss of 1 because of the defendant's misconduct. Obviously this isn't a big case on an extrinsic basis. Now consider the following approach: instead of forfeiting credibility by trying to make your client look worse or more damaged than he really is (through the use of excessive subtraction by stretching before and after), consider focusing on what your client is left with. How do you do this?

Let's start with the A list and think creatively. Rather than your client being a 4, 5, 6, or 7, honor all his preexisting foibles and freckles and honestly call him a 2 or 3. In other words, you generate credibility by embracing the naked truth. Ninety percent of competent defense lawyers' cross-examination is driven by plaintiffs' lawyers and their clients trying to stretch the facts in furtherance of perceived self-interest. There's no need for this.

Once the client is accurately positioned down low on the A list, then assess the client's losses quantitatively. If the objective losses aren't much, then be comfortable in telling the jury this. It's okay. Honesty is a great start. The losses may not be much to someone else, say for you, me, or perhaps most of the jurors, but they may be profound to this particular person. Remember, when you don't have much, losing even a little means a lot. Think here of the beggar losing half.[5]

To be effective, you must be confident the jury will follow you. Unless you believe and really understand why the principles within the "as is" instruction are so important, you'll receive many compromise verdicts.

We plaintiffs' lawyers do this every time we argue the importance of a client's disability rather than a minimal or mild impairment. An impairment is an objective assessment of a loss of some bodily function, such as range of motion. A disability assessment applies the impairment to the life and activities of a specific person.

For example, two persons can have exactly the same injury or impairment, yet it can have dramatically different implications for the purposes of a disability assessment. If a professional baseball pitcher with a 94 mph fastball loses 2 percent of the range of motion in his pitching arm, then he's probably 100 percent vocationally disabled as a professional baseball player; yet to most other people the same impairment is probably a nuisance at most. In my case, I have an injured left knee; however, it has no employment implications to me because of my chosen career as a trial lawyer.

To be effective, you must be confident the jury will follow you. Unless you believe and really understand why the principles within the "as is" instruction are so important, you'll receive many compromise verdicts. This takes us back to understanding and embracing the philosophy behind the "as is" rule discussed earlier. Qualitative arguments aren't appeals for sympathy, instead they're an invitation for the jury to apply their common sense and the law or "as is" instruction from the judge.

Once the client is positioned low, and accurately, along the pre-injury A scale, say a 2 or 3, the next step is to not overstate the extent of the C or later injury. You don't need to. You do this because you think it's necessary. It's not! If you believe in the legitimacy of the "as is" instruction, and the distinctions embodied in Moe Levine's question focusing upon "not what they took from your client, but what they left him with," then everything falls into place. If you can't or don't embrace this philosophy then you can't effectively make the argument, so don't. Your personal conviction and Aristotelian ethos are a large part of the persuasion calculus.

There are many other benefits to the qualitative approach. You'll have enhanced credibility with juries, opposing counsel, and the court, not to mention your own peace of mind. Trials are quicker because you're up front with a full and complete disclosure of all of your client's preexisting (A) challenges and an accurate and perhaps modest assessment of any objective losses. Judges will welcome you back. You're "ABC," meaning accurate, brief, and clear. If anything, there's a deft bit of overstatement in how low you place your client's pre-injury position on the A list thus lowering their place from 0 to 10, with an added understatement of the extent of any later losses. Can you believe that? A plaintiffs' lawyer effectively advocating with an understatement? Amazing . . .

Remember, most of what good defense lawyers do is point out the potential exaggerations and inconsis-

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A Different Measure of Damages

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tencies within the plaintiff's case. No wonder the adversary model is so aptly named. You've just eliminated half of the defense's justified cross-exam. Now it should be increasingly apparent why "less can be more."

Vary your arguments to fit each jury. During jury selection, learn and actively discuss with each juror what's important and special to them. What are their hobbies? What do they enjoy doing most? What are the little things that mean a lot to them?

Even though the plaintiff's loss may not be big to others, if any of the jurors suffered a loss of something small but of personal importance, you've started the process which you'll later complete during closing of inviting them to consider how profoundly diminished their lives would be in the face of such personal losses. The law protects the weakest among us, "the black and white, old and young, weak and strong, those who shine shoes, and those who wear the shined shoes…" You get the idea, make the plaintiff's "small" losses big to them.

You can think of endless examples. After the plaintiff's loss, what has the defendant now left the plaintiff with, in the largest sense? Enlarge your paradigm. Have they lost a sense of hope? Extrapolate from the impairment-disability model. Don't be linear and self-limiting.

The question is how do you persuade jurors to *qualitatively* apply the "as is" rule? Those who are young, strong, or wealthy have real trouble embracing a more "touchy/feely" or intrinsic way of understanding. You need to access their sense of vulnerability. This is something everyone resists; no one welcomes these feelings. Remind the jurors that, if they're lucky, each of them will someday be old, infirm, and powerless during their final days. So, no matter how strong and independent we may be today, each of us will face our time of weakness and vulnerability. The aging process guarantees this.

Develop your case themes around your case strengths. It may be something about the defendant or a positive aspect of the plaintiff. Be creative, let your imagination go.

Develop your case themes around your case strengths. It may be something about the defendant or a positive aspect of the plaintiff. Be creative, let your imagination go. There's plenty of time to later fine-tune and chisel the specifics of the opening and closing. What are the most attractive features of the case? Find and play to your trump suit.

The Qualitative Template for Maximizing Injuries

Let's summarize what we've said so far. There's a model that's anchored in the law as expressed in the court's jury instructions and driven by merging arguments originally devised by Marvin Lewis and Moe Levine. You're arguing for a legal result from legal rules. Request that the judge instruct the jury before the closing arguments; also ask that a written copy of the instructions be provided to the jurors for reference during deliberations.[6] Enlarge and prominently display the instructions you rely on during your closing arguments to the jury.[7]

1 Start with the language from your instructions declaring that emotional injuries are compensable: "The (pain/mental suffering/emotional distress/humiliation) that the Plaintiff has sustained from the time (he/she) was injured and that the Plaintiff will probably sustain in the future." Consider requesting supplemental instructions on emotional losses. An example is:

> You are further instructed that when the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as 'physical pain.' It includes the various forms that mental suffering may take, which will vary in each case with the nervous temperament, age, and sex of a person, his or her ability to stand shock, and the nature of the injuries. Mental worry, distress, grief, and mortification, where they are shown to exist, are a proper component of that mental suffering for which the law entitles the injured party to redress in money damages.

Fehely v. Senders, 170 Or 457, 134 P2d 283 (1943).

Explain the difference between pain and suffering. Pain has a physical connotation, such as pulling your fingers away from something hot; however, suffering suggests something less immediate and sustained with an emotional dimension.

2 Discuss your client's pre-injury status. Consider counter-intuitively reducing or lowering the plaintiff's pre-injury condition (the A list). This is Marvin Lewis's contribution.

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3 Argue qualitative losses by explaining: "She didn't have much before, but it was everything she had," which is a variation of Moe Levine's "When you take away half, who has lost more, the beggar with a mere dollar or the millionaire?" Moe then added: "It isn't what you take from them, it's what you leave them with."

These arguments are legally grounded in the "previous infirm condition" or "as is" instruction. Plaintiffs' lawyers use variations of these arguments when arguing the serious consequences of an objectively small injury or minor impairment in the life of a specific individual (for example, loss of feeling in a finger of a neurosurgeon). Avoid the aggravation of a pre-existing condition instruction because it generally states there is to be no compensation for the plaintiff's prior condition, while the previous infirm condition instruction doesn't usually say this.

4 Next, argue Oregon's multiple causation rules[8] declared in your jury instructions. They legally explain how a small or benign B liability event can (legally) cause big damages to a fragile plaintiff who is low on the A list. Here's where "one man's meat is another's poison" and "the straw that broke the camel's back" analogies fit. When you have a benign liability event (B), a fragile plaintiff explains why a "modest" impact had such a profound effect.

5 During jury selection ask each of the jurors about their hobbies and leisure interests, then have them discuss what the loss of these activities would mean to them. This dialogue foreshadows your closing argument.

Avoid the aggravation of a pre-existing condition instruction because it generally states there is to be no compensation for the plaintiff's prior condition, while the previous infirm condition instruction doesn't usually say this.

6 During closing ask the jurors to compare the plaintiff's important and personal qualitative losses to what it would mean to each of the jurors if they were to lose something they treasured, even though others may not value the loss similarly.

7 Argue for specific dollars on an enlarged copy of the verdict form. Remember that memorable line Tom Cruise delivered in the 1996 movie, *Jerry McGuire*? "Show me the money!" Justice means full compensation for all of the plaintiff's legal losses, and that means one dollar less than full justice is one dollar of injustice.

Endnotes

1 William A. Barton, *Recovering for Psychological Injuries,* 3rd Edition, Trial Guides 2010.

2 Oliver Wendell Holmes, *The Common Law* (1881), p.1.

3 For my generation the argument belongs to the great Moe Levine who died in 1974. Trial Guides has compiled many of Moe's closings and speeches in Moe Levine, *Moe Levine on Advocacy* (2009).

4 Oregon UCJI No. 70.06 (Modify to fit your facts, be the preexisting problems physical, psychological, or both.)

5 This argument was perfected by the late Marvin Lewis of San Francisco. He was a president of the California Trial Lawyers Association, Western Trial Lawyers, and American Trial Lawyers Association (now known as the American Association of Justice). *Marvin E. Lewis, 84, A Pioneering Lawyer*, NY Times, October 7, 1991, at B10.

6 ORCP 59 B.

7 James McElhaney, *Trial Notebook* xviii, 189, 693, 4th Edition (2006). Remember again that I'm of the Jim McElhaney school on plagiarism. Scholarship is theft with attribution.

8 Oregon UCJI 23.02, "Many factors or things may operate either independently or together to cause harm. In such a case, each may be a cause of the harm even though the others by themselves would have been sufficient to cause the same harm. If you find that the defendant's act or omission was a substantial factor in causing the harm to the plaintiff, you may find that the defendant's conduct caused the harm even though it was not the only cause."

Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Dept. of Forestry v. PacifiCorp, 236 Or App 326 (2010)

In *Dept. of Forestry*, PacifiCorp sought indemnification from Central Oregon Logging (COL) for property damage and fire suppression costs that PacifiCorp paid after the East Antelope Fire in Jackson County. The fire "originated on privately owned forestland, allegedly when electricity from a high-voltage transmission line owned by PacifiCorp arced to a nearby madrone tree." 236 Or App at 329. PacifiCorp's indemnification claim was based on a contract that required COL to perform logging services near PacifiCorp's transmission lines as directed by PacifiCorp and indemnify PacifiCorp for any deficiencies in its performance. PacifiCorp alleged that the fire resulted from COL's "negligent failure to trim or remove the madrone tree[.]" *Id*. at 331. COL responded that indemnification was not required because the fire "resulted from PacifiCorp's sole negligence in, *inter alia*, failing to identify and remove hazardous vegetation, including the madrone tree." *Id*. The trial court granted COL's motion for summary judgment, concluding that the contract's indemnification clause was unenforceable. The Court of Appeals reversed. The trial court erred, the court explained, "in considering various circumstantial factors…and in concluding, based on that consideration, that the indemnification provision …was unenforceable as a matter of law." *Id*. at 337. Consideration of those circumstantial factors was not appropriate where, as here, "the indemnification language…is not indefinite either with respect to intended coverage of the type of loss at issue…or with respect to its exclusion from indemnification of liabilities caused by the indemnitee's (PacifiCorp's) sole negligence." *Id*. The court also concluded that PacifiCorp was not entitled to indemnification as a matter of law because there are "disputed issues of material fact as to whether the fire was caused by PacifiCorp's sole negligence." *Id*. at 338.

Judge Bushong

Huber v. Dept. of Education, 235 Or App 230 (2010)

In *Huber*, plaintiff's employment as a licensed practical nurse at the Oregon School for the Blind was terminated after he was involved in disputes with his supervisor, a registered nurse at the school. After one disagreement, plaintiff contacted the Oregon State Board of Nursing (OSBN) "to discuss the proper response to a situation where a parent informs a nurse that the written instructions on a bottle of medication are not current." 235 Or App at 233. After other disputes about medical treatment, the supervisor gave plaintiff a written reprimand for insubordination. Plaintiff then filed a grievance and requested a human resources investigation of the supervisor "for harassment and retaliation against him for questioning her orders and contacting the OSBN." *Id*. at 234. Plaintiff also informed the Department of Education's director of special schools that he intended to file a complaint with the OSBN. After plaintiff discovered a clipboard containing students' names and private medical information in an area that was open to visitors and other non-medical personnel, he filed a complaint with the federal Department of Health & Human Services (DHHS), believing that leaving the clipboard in that area violated the Health Insurance Portability and Accountability Act (HIPAA). Plaintiff was then "ordered not to contact outside entities without first notifying" his supervisor's supervisor. *Id*. at 235. Plaintiff complained that that restriction "could put a student's health in danger and put him at risk of losing his nursing license." *Id.* Defendants responded that a "refusal to obey the restriction on contacting outside

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agencies was insubordinate" and plaintiff was ultimately terminated. *Id.* Plaintiff sued for unlawful employment practices, wrongful discharge, and other claims.

The trial court granted defendants' motion for summary judgment, concluding that "plaintiff did not engage in any protected activities and that defendants' decision to terminate plaintiff's employment was motivated solely by his insubordination." *Id*. at 237. The Court of Appeals affirmed on two claims and reversed on two claims. Plaintiff's civil rights claim for violating his First Amendment rights failed, the court explained, because "plaintiff's complaint to the DHHS and threat to complain to the OSBN were not made as a private citizen" as required for constitutional protection. *Id.* Plaintiff's claim for retaliation for initiating a civil proceeding failed because plaintiff's complaint to DHHS and threatened complaint to OSBN "were administrative matters—not criminal or civil actions—and were therefore not protected by ORS 659A.230." *Id*. at 238. The trial court erred in granting summary judgment on plaintiff's "whistleblowing" claim because "there is evidence from which a reasonable jury could find that plaintiff reasonably believed that defendants had violated federal and state law and evidence from which a jury could find that his complaint to the DHHS and threat to complain to the OSBN concerning those violations were substantial factors in defendants' decision to terminate plaintiff's employment in violation of ORS 659A.203[.]" *Id*. at 242. And the trial court erred in granting summary judgment on the common-law wrongful discharge claim, the court concluded, because "the reporting of potentially dangerous substandard nursing practices to the OSBN is an important public duty" and the jury could find that "the nursing practices that plaintiff threatened to report were potentially dangerous enough to trigger the requirement that the nurse report the issue directly to the OSBN instead of merely reporting it to a supervisor." *Id*.

Martin v. DHL Express (U.S.A.), Inc., 235 Or App 503 (2010)

After the plaintiff in *Martin* was terminated from his job as a DHL sales manager, he filed suit, alleging that DHL "breached the parties' employment contract by not paying plaintiff a commission that was due and owing at the time of his termination." 235 Or App at 505. Defendant responded that the "commission" was actually a bonus that plaintiff was not entitled to receive. The trial court found in defendant's favor, and the Court of Appeals affirmed. The court first concluded that the disputed payment was not a commission because "it was payment that was in addition to plaintiff's salary, contingent upon his accomplishing a stated *quarterly* goal." *Id*. at 511 (emphasis in original). The court also rejected plaintiff's contention that "even if the payment was a quarter-end 'bonus,' he was entitled to at least part of it under the theory that the incentive plan was a unilateral contract that he had partially performed." *Id*. at 512. The court explained that, "regardless of whether the bonus is partially earned by part performance or earned only if the employee fulfills the condition precedent of being employed on the vesting date, under neither theory does the employee qualify for the bonus if he or she is terminated for cause." *Id*. at 514. And the trial court found in this case that plaintiff "was terminated for good cause[,]" and that finding "is supported by constitutionally adequate evidence." *Id*. at 515.

Brehm v. Caterpillar, Inc., 235 Or App 274 (2010)

The plaintiff in *Brehm* "was seriously injured when a piece of machinery fell on him" while he was working on a road construction project. 235 Or App at 277. Brehm "was a journeyman laborer employed by Copeland Paving." *Id*. at 276. Copeland Paving and the defendant, Copeland Sand & Gravel, "are closely held corporations owned by the same principals." *Id*. Brehm and other Copeland Paving employees "are sometimes assigned to work on defendant's projects and vice versa." *Id*. On the project at issue, Brehm "received his paychecks from Copeland Paving as usual, [but] Copeland Paving billed defendant for Brehm's wages and benefits and was reimbursed." *Id*. at 277. The trial court granted defendant's motion for summary judgment on negligence, loss of consortium and other claims, concluding that the claims "were barred by the exclusive liability provision of the workers' compensation law." *Id*. at 276. On appeal, plaintiffs contended that there were genuine issues of material fact, and that "as a matter of law, Brehm was not defendant's subject worker for purposes of workers' compensation and, therefore, ORS 656.018 does not bar their claims." *Id*. The Court of Appeals did not decide whether Brehm was defendant's "subject worker" as a matter of law. Instead, the court concluded that (1) "the determination of whether one is the 'subject worker' of another under the statute 'depends on determining who retains the right to control'" (*Id*. at 279, quoting *Schmidt v. Intel Corp*., 199 Or App 618, 622 (2005)); (2) there are "several factors relevant to establishing an employment relationship under the 'right to control' test" (235 Or App at 279); and (3) there are genuine issues of material fact that precluded summary judgment "with respect to at least some" of the pertinent factors. *Id*.

Morehouse v. Haynes, 235 Or App 482 (2010)

The plaintiff in *Morehouse* sought to recover economic and noneconomic damages after he was injured in a car accident. Defendant moved for summary judgment on the noneconomic damages claim, contending that recovery was barred by ORS 31.715 (1) because plaintiff was driving uninsured at the time of the accident. Plaintiff argued in response that recovery was allowed under a statutory exception that applied if defendant's

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driving was reckless. The trial court granted defendant's motion, concluding that "no rational juror could find that defendant drove recklessly." 235 Or App at 485. The Court of Appeals affirmed. The court explained that, for purposes of this statute, recklessness "required a higher level of proof of awareness of a risk" than gross negligence. *Id*. at 487. The court agreed with the trial court that no objectively reasonable juror could find that defendant "was aware of and consciously disregarded a substantial and unjustified risk that the accident with plaintiff would occur" even though defendant entered "a sharp curve at least 20 miles per hour above the posted advisory speed limit of 25 miles per hour and…took his eyes off the road to adjust the radio." *Id*. at 489. The court explained that such conduct "reflects the heedlessness…that is common to negligence cases. It does not demonstrate that defendant drove recklessly." *Id*.

Jury Instructions

Estate of Michelle Schwarz v. Philip Morris, Inc., 348 Or 442 (2010).

In *Schwarz*, a "low-tar tobacco case" (348 Or at 445), the Supreme Court addressed the propriety of jury instructions in light of constitutional limitations that prohibit a jury "from imposing punitive damages to punish a defendant directly for harm caused to non-parties" but permit a jury to "consider evidence of harm to others when assessing the reprehensibility of the defendant's conduct and the appropriate amount of a punitive damages verdict." *Id*. The Court held that the trial court (1) "correctly refused defendant's requested instruction that would have informed the jury on the impermissible uses of evidence of harm to others without also instructing the jury on its permissible use" (*Id*.); and (2) "erred in giving an instruction on punitive damages that was, conversely, incomplete and therefore incorrect." *Id*. On the first point, the Court acknowledged that, "under Oregon law, no party is required to request a jury instruction that advances the other party's theory of the case." *Id*. at 455. However, "[w]here an instruction is necessary to inform the jury of the parameters that it must apply in considering particular evidence, an instruction that does not completely and accurately describe those parameters is erroneous and objectionable, even if the omitted portion of those parameters would benefit the opposing party." *Id*. On the second point, the trial court erred in giving a uniform jury instruction on punitive damages, the Court explained, because the jury "could have understood [that] instruction to permit it to use evidence of harm to others in arriving at its punitive damages verdict and, without an explicit statement of the impermissible use of that evidence,…the instruction was incomplete and unclear." *Id*. at 458.

Procedure

Belknap v. U.S. Bank National Association, 235 Or App 658 (2010)

In *Belknap*, the Court of Appeals held that the trial court did not err when it decertified a class it had previously certified under ORCP 32 because the court "correctly considered the factors relevant to [the decertification] determination…and it concluded, as required by the rule, that 'class treatment is not a superior method of adjudicating the case in a fair and efficient manner.'" 235 Or App at 667. The court further held that the trial court erred in awarding attorney fees to an individual plaintiff who prevailed on her wage claim after the class was decertified, concluding that plaintiff's counsel unreasonably failed to give prelitigation notice of "the wage claim" as required by ORS 652.200 because the notice that was given did not include plaintiff's name. Plaintiff argued that failing to include her name was not unreasonable because "to require that a plaintiff's name be divulged would allow employers to subvert the law by 'buying off' named plaintiffs in class actions." *Id*. at 672. The court disagreed. "Giving employers notice sufficient to allow them to determine the merits of the potential plaintiff's claim and to respond to that potential claim by paying the meritorious claims is exactly the purpose of the statute. It does not 'subvert' the wage and hour statutes for employers to be able to satisfy, without litigation, deficiencies that are brought to their attention. And without the plaintiff's name, the employer cannot do so." *Id*.

Rafferty & Towner, Inc. v. NJS Enterprises, LLC, 235 Or App 286 (2010)

Taylor v. Ramsay-Gerding Construction Co., 235 Or App 524 (2010)

Foster v. Miramontes, 236 Or App 381 (2010)

In *Rafferty*, the Court of Appeals held that a claim based "on an extremely weak but not completely untenable interpretation of various rules of evidence" was not "objectively unreasonable," so defendant was not entitled to recover its attorney fees under ORS 20.105. 235 Or App at 290. In *Taylor*, the Court of Appeals concluded on reconsideration of its prior ruling (published at 233 Or App 272) that the defendant did not preserve for appeal its contention that the trial court erred in declining to submit a statute of limitations defense to the jury. The court explained that, "although the issue of the statute of limitations had been addressed in various contexts during the trial, at the point at which the trial court first ruled that the matter should not go to the jury, defendant did not voice an objection." 235 Or App at 531. And in *Foster*, the Court of Appeals held that "a claim for civil stalking is not 'of like nature' to the common-law claims of assault or battery as respondent contends and, thus, respondent has not demonstrated that the trial court erred in denying his request for a trial by jury." 236 Or App at 390. ❐

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