lawyersusaonline.com
Lawyers USA
Issue 2012 - 4/2012 LUSA 85 YOUR BUSINESS PARTNER April 2012 $26.00 per copy

Legal world awaits ruling in High Court health care case

By Kimberly Atkins
Staff writer

WASHINGTON – As the nation awaits the U.S. Supreme Court ruling that will decide the fate of the federal health care reform law, legal experts are still searching for clues in the unprecedented six hours of oral arguments that were held on the issue in March.

Over the course of three days, the justices peppered attorneys for the government and those challenging the constitutionality of the Patient Protection and Affordable Care Act with questions about Congress' authority under the Commerce Clause, the severability of the provision requiring uninsured Americans to purchase health insurance from the rest of the massive law, and the question of whether the penalty attached to the law is a tax, rendering it unreviewable by the Court before it is fully implemented in 2015.

Protesters on both sides of the issue crowded the sidewalks and held rallies at the foot of the Court's marble steps each day, as boldface Washington names likes White House senior advisor Valerie Jarrett, Health and Human Services Secretary Kathleen Sebelius, Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., and Senate Minority Leader Mitch McConnell, R-Ky., watched the historic debate in the courtroom.

Split decision?

The arguments kicked off with a debate over whether the penalty for not obtaining health care coverage is a tax and, if so, whether the Anti-Injunction Act is a jurisdictional bar preventing the Court from hearing the challenges at all.

That is the only issue that the government and the law's challengers largely agree upon, urging the Court to take up the law now. (See "Let's put the whole thing off?" on page 14.)

But when the Court addressed the constitutionality of the individual mandate the next day, the parties were back on opposite sides. (See "Supreme Court

Health care: Reform law sits in the hands of two justices.
Continued on page 14

AP Photo/AP Photo/Carolyn Kaster

Protesters chant in front of the U.S. Supreme Court as the justices conclude three days of hearing arguments on the constitutionality of the Patient Protection and Affordable Care Act.

Google's changes to privacy policy may have impact on law practices

By Sylvia Hsieh
Staff writer

Changes to Google's privacy policies have created an uproar globally over concerns that the Internet behemoth has consolidated its information gathering without revealing how it will use that information and giving users no chance to opt out.

Lawyers who use Google's platforms may be aware of the general debate but not of the specific impact on their day-to-day use of Google.

The major change is that the company will unify data collection across all Google services, including its search engine, YouTube, Gmail, and other applications. While search data might seem innocuous, privacy groups note that it can reveal sensitive information such as location, sexual orientation, religion, health concerns and other personal interests.

In the run-up to the changes that took effect March 1, attorneys general from 35 states signed a letter to Google CEO Larry Page outlining their concerns about privacy, increased vulnerability to hackers and cost if consumers want to switch from Google and Android phones to alternatives.

"Google explicitly reached out to businesses, and lawyers among them, to say, 'Use our applications.' Then after [businesses made] the investment of money into doing just that, Google changes its policy," said Douglas Gansler, the Attorney General of Maryland and author of the letter.

Gansler said he wrote the letter after states received a deluge of calls from worried consumers.

"They don't tell you what they're going to do with the info, where they are going to store it, whether it will be protected from hackers or to whom they are going to sell the information. They're saying, 'We're a monopoly, we are going to impose this upon you and you have no choice but to submit,'" he said.

An electronic privacy group has sued to enforce a consent agreement that Google made with the Federal Trade Commission in which the company promised greater transparency in its privacy policies and that it would not change policies without users' consent.

European governments are also investigating whether Google's change in policy violates EU privacy restrictions.

At least one Android user has sued Google

Google: Read terms of service.
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INSIDE

USA BRIEFS

No deal: Indiana bar cautions attorneys about coupon sites

Using group coupon or daily deal marketing is "fraught with peril" and likely not permitted under the Indiana Rules of Professional Conduct, the State Bar Association's Legal Ethics Committee recently said.

A burgeoning form of social media marketing, group coupon sites – Groupon being the most popular and well-known – establish a price for a good or service in conjunction with a business. A predetermined number of customers must purchase the coupon; once the number is met, customers receive the coupon via email or text.

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But the format of the program presents several ethical problems for attorneys, the Committee said. It highlighted three areas of concern:

• **Establishing a relationship.** The potential client's initial contact would occur with the site, which makes it impossible for the lawyer to assure that no conflicts exist. This creates a violation of Rule 1.7(a)(2), as well as a state guideline that makes establishing an attorney-client relationship a non-delegable duty of the lawyer, the Committee said. Because that duty rests with the lawyer, the "proposed coupon arrangement may be an abrogation and/or violation of that duty."

• **Money problems.** Rule 1.15 mandates how attorneys should handle client funds. By allowing advance legal fees to be paid to the coupon site and held at its discretion, the attorney violates the rule by transferring title to a client's property to a third party, the Committee said. Further, the site typically solicits clients, takes advance payments of legal fees and then remits only a portion of the fees to the lawyer at a time. Such an arrangement makes refunding a client's fee complicated, as a lawyer receiving funds incrementally may not be able to refund a client's entire fee paid, including the coupon site's share of the fee.

• **Advertising and fee-sharing.** Attorneys are prohibited under Rule 5.4 from fee-sharing with non-lawyers and under Rule 7.2 from having others channel them professional work. The Committee said that the use of the site to channel buyers of legal work to a specific lawyer would violate both the advertising and fee-sharing rules.

"[T]his Committee finds that it is likely not appropriate for a lawyer licensed in Indiana to advertise through a group coupon program," the opinion concluded. "Therefore, the Bar is advised to conduct rigorous research before entering into such an advertising arrangement, and any lawyers contemplating such action would be well served to employ competent, private counsel to guide the lawyer through the dangers inherent in such marketing, including discussion of alternative courses of action that may comply with the Rules."

Given the increasing popularity of coupon and daily deal social marketing, Indiana is not alone in struggling with the application of ethics rules to such sites.

In a pending opinion from North Carolina, the State Bar's Ethics Committee expressed concern about potential violations of the fee-sharing rule, similar to those noted in Indiana.

However, the New York State Bar Association Committee on Professional Ethics issued an opinion in support of using such sites, so long as the advertisement is not "false, deceptive or misleading;" South Carolina has also approved "daily deal" websites, albeit with caution.

– Correy E. Stephenson

Facebook password requests cause concern

After recent reports that employers were requesting Facebook passwords from job applicants, state and federal legislators quickly responded with possible legislation and a request for a federal investigation into the legalities of the practice.

News outlets ran stories about job applicants being asked to share their Facebook passwords or other personal information from social networking sites. Employers like the city of Bozeman, Mont. had a policy of asking applicants for passwords to their email addresses, social networking sites and other accounts, while the sheriff's office in McLean County, Ill. requested that applicants sign into social media sites for interviewers to review as part of the screening process.

While applicants could refuse such requests, some might hesitate to do so with a possible job hanging in the balance.

In response, lawmakers in Illinois and Maryland have already introduced legislation that would ban public employers from making such a demand.

In Illinois, the Right to Privacy in the Workplace Act would permit job-seekers to file a lawsuit if asked for their access to Facebook or similar sites, although it would allow employers to ask for a user name to view public information on the site.

Maryland is considering two pieces of legislation. In the Senate, a bill was introduced limiting employers' access to the private information of employees, while the House version only applies to state employees.

Legislators in California and New Jersey are also reportedly working on similar laws.

Meanwhile, Sen. Richard Blumenthal, D-Conn., announced that he is working on a federal bill that would outlaw the practice, similar to a ban on administering polygraph tests to applicants.

Blumenthal joined with Sen. Charles Schumer, D-N.Y., in requesting that the Department of Justice and Equal Employment Opportunity Commission conduct an investigation into reports of employers requesting passwords to social media sites.

The senators are seeking a determination concerning whether such requests violate federal laws, specifically the Stored Communications Act or the Computer Fraud and Abuse Act. In their letter to the EEOC, the lawmakers query whether access to private information about applicants may be used to unlawfully discriminate.

– Correy E. Stephenson

Illinois considers ban on cell phone driving

Continuing the trend of a nationwide crackdown on distracted driving, the Illinois House recently passed a bill that would ban drivers from using handheld cell phones.

Hands-free cell phone usage would still be allowed.

The bill now moves to the state Senate for consideration.

Under the proposed law, using a cell phone while driving would constitute a moving violation. State law mandates that drivers lose their license after three moving violations in one year.

In addition to hands-free or voice-operated cell phone use, the bill contains exceptions for cell phone use during emergencies as well as use by law enforcement and commercial drivers.

Drivers would also be allowed to use their cell phones while parked on the shoulder of a roadway or when the vehicle is stopped "due to normal traffic being obstructed" and the vehicle transmission is in neutral or park.

Illinois would join nine other states that currently ban the use of cell phones while driving, as well as a number of local municipalities, including the city of Chicago.

The National Highway Traffic Safety Administration recently proposed new guidelines for U.S. automakers in an attempt to reduce accidents caused by distracted driving, and the National Transportation and Safety Board has recommended a nationwide ban on all cell phone talking and texting while driving.

– Correy E. Stephenson

Judge dismisses fraud suit against N.Y. law school

A judge in New York has dismissed the first lawsuit against a law school for inflating job statistics of graduates.

The case is just one of dozens of class actions filed against law schools across the country.

Nine plaintiffs sued New York Law School claiming the employment data published by the school on graduates' placement and salaries is misleading, fraudulent and constituted unfair business practices.

The plaintiffs, all graduates who are either still looking for work or working in non-legal jobs, alleged that the school's marketing materials claiming that graduates are working in "business" could include pouring lattes for Starbucks, while a "private law practice" could include doing glorified paralegal work such as temp jobs and document review.

They sought damages for the difference

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What's on your desk?

Darren Friedman

Friedman is a partner at Foreman Friedman in Miami, where he specializes in complex civil litigation, representing cruise lines, cargo lines and individuals involved in the hospitality and tourism industry.

- A photo of me with Ben & Jerry. It was taken when I was in college. They came to speak and I was and am an ice cream fan. That probably has one of the more prominent placements in my office.

- A tomahawk/peace pipe. It's a tomahawk, but the handle is hollowed out so you can smoke through it. I found it in a Native American show in Colorado. I love the idea. If you think of litigating as war, you want to have your weapon, but when the case calls for it, you're prepared to settle.

- An old wooden boat that is a candy dish.
- An old nautical clock.
- A stainless glass sailboat.
- A pendulum of a guy in a sailboat. I've just collected these over the past 15 years I've been doing maritime work.

IN THE NEWS

Plaintiffs face uphill battle for FMLA suits

By Steve Lash and Correy E. Stephenson
Staff writers

State employees seeking to file suit under the Family and Medical Leave Act's self-care provision face an unlikely future after a recent U.S. Supreme Court ruling.

Last week, the Court issued a plurality decision in *Coleman v. Maryland Court of Appeals* holding that Congress could not abrogate states' sovereign immunity from suit without first documenting "a pattern of constitutional violations" and then creating "a remedy congruent and proportional to the documented violations," Justice Anthony M. Kennedy wrote. "It failed to do so when it allowed employees to sue the state for violations of the FMLA's self-care provision."

In a statement, Maryland Attorney General Douglas F. Gansler, whose office represented the state, said that the "Court's opinion reaffirms the sovereignty of states that is so critical to Maryland and to the function of our country's federal system of government."

But Sarah Crawford, director of workplace fairness at the Washington-based National Partnership for Women & Families, called the decision "very troubling."

"The Court failed to appreciate what Congress was intending to do," said Crawford, whose group submitted an amicus brief supporting the plaintiff. "Congress clearly intended to provide for state workers to validly exercise their rights to self-care leave."

Charlotte Fishman, an employment law attorney and executive director of a discrimination research organization in San Francisco called Pick Up the Pace, noted that the decision will only directly affect state employees who are seeking monetary damages for a violation of FMLA's self-care leave provisions and are not also covered by a comparable state law.

> "The Court failed to appreciate what Congress was intending to do."
>
> – Sarah Crawford

But the ruling will have a negative impact on individuals seeking self-care leave in states that do not provide for it, she said.

Gender discrimination and self-care

The case began when Daniel Coleman, once the executive director of procurement and contract administration at the Administrative Office of the Courts in Annapolis, Md., claimed he was illegally fired in August 2007 for requesting sick leave for a condition related to hypertension and diabetes.

After he was fired, Coleman filed suit. Both a U.S. District Court Judge and the 4th Circuit dismissed his FMLA claim on sovereign immunity grounds.

The Supreme Court granted certiorari and heard oral arguments in January.

Under FMLA, Congress expressly provided that states can be sued for violating the statute's self-care and family-care provisions.

In an earlier case, the Supreme Court upheld the right to sue states for violating the family-care provisions, based on evidence of gender discrimination before FMLA was enacted in 1993.

While Coleman is male, he argued that the same rationale supported a claim under the self-care provision.

But in ruling against him, the Court said that Congress had insufficient evidence that state governments had discriminated against female employees who took sick leave to care for themselves and not covered family members.

Justice Ruth Bader Ginsburg issued a strong dissent from the majority plurality, which was made up of Justices Kennedy, Clarence Thomas, Samuel A. Alito, Jr., and Chief Justice John G. Roberts, Jr.

Reading her dissent from the bench, Ginsburg said self-care leave "is a key part of Congress' endeavor to make it feasible for women to work and have families."

Ginsburg's dissent was joined by Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan.

Up to the states?

Michael L. Foreman, who represented Coleman before the Court, said he was "disappointed and frustrated" with the decision.

In the plurality opinion, Kennedy "goes out of his way" to state that job discrimination against women is a "persistent, unfortunate reality," said Foreman, who directs the civil rights appellate clinic at Pennsylvania State University's Dickinson School of Law. "Yet [he] is unwilling to respect Congress' ability to deal with it."

The Court's decision creates a bifurcated analysis of the intent of the FMLA, providing that plaintiffs may recover damages in suits alleging violations of the family-leave provisions, but not the self-care provision, said Kara DelTufo, a partner at Hirsch Roberts Weinstein, an employment firm in Boston.

The decision "will cause a lot of states and state agencies to evaluate what their [leave] policies are and how to apply them," she said.

But the lack of a financial remedy for these plaintiffs doesn't render the statute meaningless, said Frank Alvarez, a partner in the White Plains, N.Y. office of national employment law firm Jackson Lewis.

The decision "doesn't authorize state

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LAWYERS USA (ISSN-1931-9584.) is publishedmonthly by Lawyers Weekly Inc., 10 Milk St., 10th Floor, Boston, MA 02108. Price is $26 per copy plus shipping and handling, $249 per year, $144 for 6 months. POSTMASTER: Send address changes to LAWYERS USA, 10 Milk St., 10th Floor, BOSTON, MA 02108. Periodicals postage paid at Boston, MA and additional mailing offices.

THE DOLAN COMPANY

SIDEBAR

Rethinking the roles of your office support staff

PRACTICE MANAGEMENT

By Jim Calloway

The old school model for staffing in a small law firm was often one secretary or legal assistant per lawyer, and that's still true for many firms.

While some small law firms also had a full or part-time receptionist, in many cases the other staff took turns answering the phone. And some firms had a part-time or full-time billing staffer, filing clerk or runner.

Under this model, the core delivery of legal services by the firm was done by two-person lawyer and secretary teams. A job description for those positions might be: "Personal assistant for Fred Lawyer – Does all of his typing, filing and scheduling, along with anything else he doesn't like doing. A typical day will include being summoned to the lawyer's office several times a day to be verbally given assignments with unreasonably short deadlines."

However, the old model of the legal secretary as personal assistant is becoming increasingly incompatible with business reality.

With some exceptions, today's technology tools often make it more efficient for a lawyer to do something him or herself instead of relying on staff. Email is used for most routine correspondence, and many lawyers are using some combination of speech recognition tools and dictation transcription services.

Many of the things that a personal assistant would have done in the 1950s are now more easily done by the lawyer directly on the computer, such as scheduling an appointment with a client while talking to him or her on the phone. After the call, the lawyer can also record the billing entry for the phone call electronically. (Even a two-fingered typist can enter a single, simple billing entry.)

That does not mean that the lawyer should always enter all of his or her own calendar entries. Setting up a series of depositions or scheduling a meeting for several lawyers can be time consuming and is often better handled by a staff person.

It has traditionally fallen to the legal secretary to juggle tasks like scheduling depositions along with all of the other work for his or her assigned lawyer. But what if one secretary at the firm hates talking on the phone, and is better at formatting briefs, such as the one that is due tomorrow?

Take for example a small firm of three lawyers with three full-time secretaries and maybe one part-time administrative employee.

Typically, each secretary might spend about 15-20 percent of work time dealing with scheduling for his or her lawyer.

Instead, a better business model would be to have one assistant handle all scheduling-related tasks requiring staff support for all of the lawyers. Everyone would still have access to electronic calendars and could enter appointments, but one person would be the scheduler-in-chief.

For that person, managing the office calendar and scheduling meetings and depositions would be a primary job function. He or she would keep a "work in progress" list of pending scheduling projects that would make it easier for someone to fill in during an absence. He or she would invest in learning about online scheduling tools and determine when using those tools made sense.

The firm scheduler might ask to be given time at office staff meetings for discussions or new announcements about improved scheduling procedures for everyone. He or she would view talking with people about their calendars as a primary reason for his or her employment rather than an annoying detail keeping him or her from doing essential work. He or she would also keep an eye on the big picture of the firm's time commitments.

Over time the firm would likely see a remarkable improvement in scheduling processes, with fewer problems and mistakes. Perhaps fewer total staff hours would be taken up with scheduling.

Staff members as experts

The idea of giving one person the opportunity to become good at something and handling that task for the entire firm is a lesson with broad application beyond scheduling.

Training staff to become experts with more focused assignments better reflects the needs of the contem-

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Jim Calloway is the Director of the Oklahoma Bar Association Management Assistance Program. He publishes the weblog Jim Calloway's Law Practice Tips. He is a frequent speaker on law office management and technology issues.

INSIDE THIS ISSUE

SIDEBAR

Could your practice be a virtual success?

PRACTICE MANAGEMENT

By Ed Poll

The Internet has created a revolution in the way that lawyers and clients interact.

The most familiar form of the online revolution's impact on small and solo law firms is the use of the Internet for everything from websites and blogs to client updates and webinars. Social networking allows lawyers to access literally a world of potential clients through sites such as LinkedIn. And clients can be contacted instantaneously for anything from a quick question to a document review through texting and email.

It's just a small step to the next transformation: the virtual law practice, in which lawyer, staff and clients conduct legal practice primarily through the Internet. For a lawyer in a larger firm, the phenomenon is labeled telecommuting; for a solo practitioner it involves the establishment of a virtual office.

In either instance the concept is the same: minimal expenditures on physical office space; contact with clients or professional colleagues largely by email, Internet portal or telephone; and the use of online "virtual assistants" at another remote location for staff support.

Ethical framework

Some futuristic thinkers declare that where lawyers practice is irrelevant, as long as clients can call or email them. In an abstract sense that may be true. Certainly there is no formal ethical prohibition against having a virtual office. In fact, the eLawyering Task Force of the ABA's Law Practice Management Section has prepared guidelines for conducting a virtual practice.

"To be successful in the coming era, lawyers will need to know how to practice over the Web [and] manage client relationships in cyberspace," the Task Force states, adding that "eLawyering encompasses all the ways in which lawyers can do their work using the Web and associated technologies."

But even if a virtual law office or law practice is acceptable, a virtual lawyer is not. The attractions of a virtual office must be balanced by consideration of their limitations.

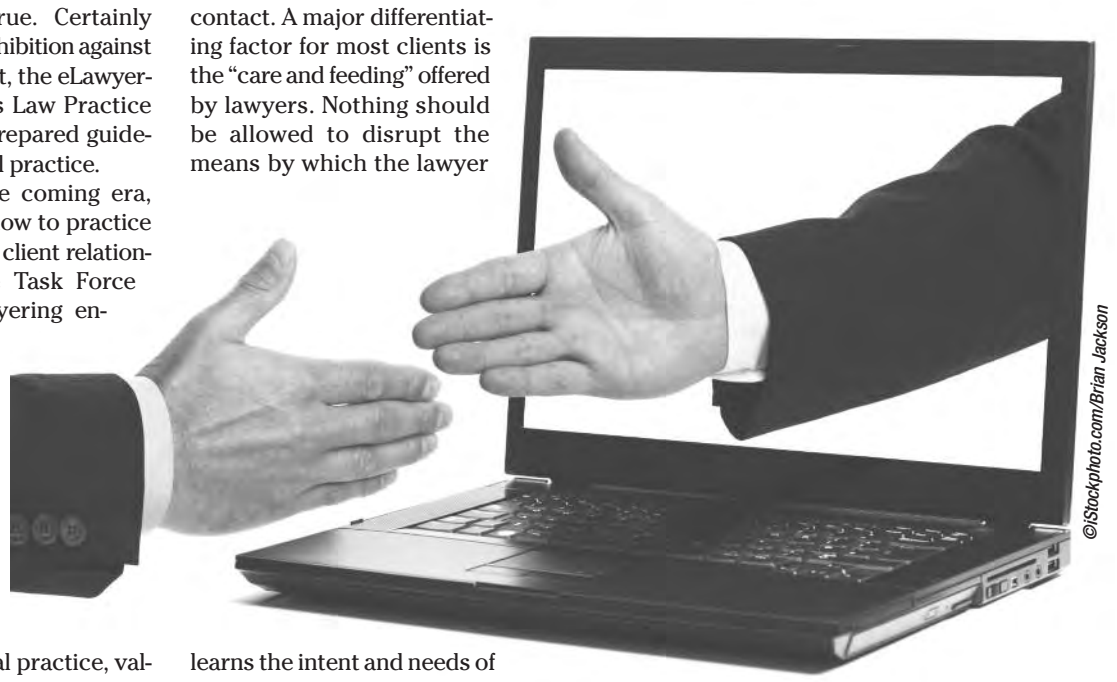
When it comes to a virtual practice, value is determined by the client, not the lawyer. If the lawyer does not educate the client about the cost and convenience of a virtual practice, and the client does not recognize and agree to this value, the result is misunderstanding and miscommunication, and possibly a bar disciplinary hearing and/or malpractice suit.

The key to avoiding ethics problems in a successful virtual practice is to fulfill all ethical requirements while conveying the value of the arrangement to the client.

Client service

If lawyers are perceived as inaccessible, fees become an issue and client complaints are a problem. The ability to respond quickly is essential to answering the visibility question. Clients may be more inclined to flexibility about where a solo practice is if they have the assurance that they can always get in touch when they need to. Consider what could be called a quasi-virtual practice, one in which a lawyer may have a physical office space but does the majority of legal work offsite and online.

Keep in mind that while the flexibility offered by voicemail, email and other electronic tools is real, it can become dangerous when used as a replacement for client contact. A major differentiating factor for most clients is the "care and feeding" offered by lawyers. Nothing should be allowed to disrupt the means by which the lawyer learns the intent and needs of the client. No matter what technology makes possible, it is not the answer if it makes life more difficult for the client.



Confidentiality and security

Along with the responsibility for service comes the need for confidentiality. Wireless laptops and smartphones are prerequisites for virtual practice. But the eLawyering Task Force has emphasized the need for a secure, encrypted website for maintaining client confidentiality in representation, in retainer agreement terms and in online payment.

Otherwise, the Task Force notes, it would be "difficult or impossible to comply with the rules of professional conduct that deal with … client confidentiality."

It is a lawyer's ethical duty to protect all documents on behalf of clients. So if a lawyer conducts a virtual practice over wireless laptop or smartphone connection, it is absolutely essential to address such issues as the security of email and file encryption. If the client has specified that wireless communication is not confidential enough, or that a particular kind of communication must be encrypted, the lawyer must comply with that request or risk a malpractice claim. An inadvertent disclosure of privileged or confidential information or work product through insecure wireless connections would have severe consequences and needs to be guarded against at all costs.

These issues are cautions, not prohibitions. If service and security demands can be met, the virtual law office could ultimately be the salvation of the legal profession, keeping lawyers from the fate of other once respected professions increasingly rendered obsolete by Internet speed and convenience.

The issue is the customer's evaluation of cost versus benefit. With incomes shrinking and access to information on the Internet expanding, many people assume they cannot afford a lawyer and that they can do just as good a job for themselves using what they find on the web. If lawyers embody the efficiency and low cost of the Internet while bringing their creativity and experience to the table, they will maintain their professional positions, even if those positions are virtual ones.

A coach, syndicated columnist and speaker on topics relating to The Business of Law,® Edward Poll, J.D., M.B.A., CMC is a strategic law firm planner whose ideas have helped thousands of lawyers increase their revenue, improve their profitability and enhance their satisfaction with the practice of law. Contact Ed at (800) 837-5880 and see more at www.lawbiz.com, www.lawbizblog.com and www.lawbizforum.com.

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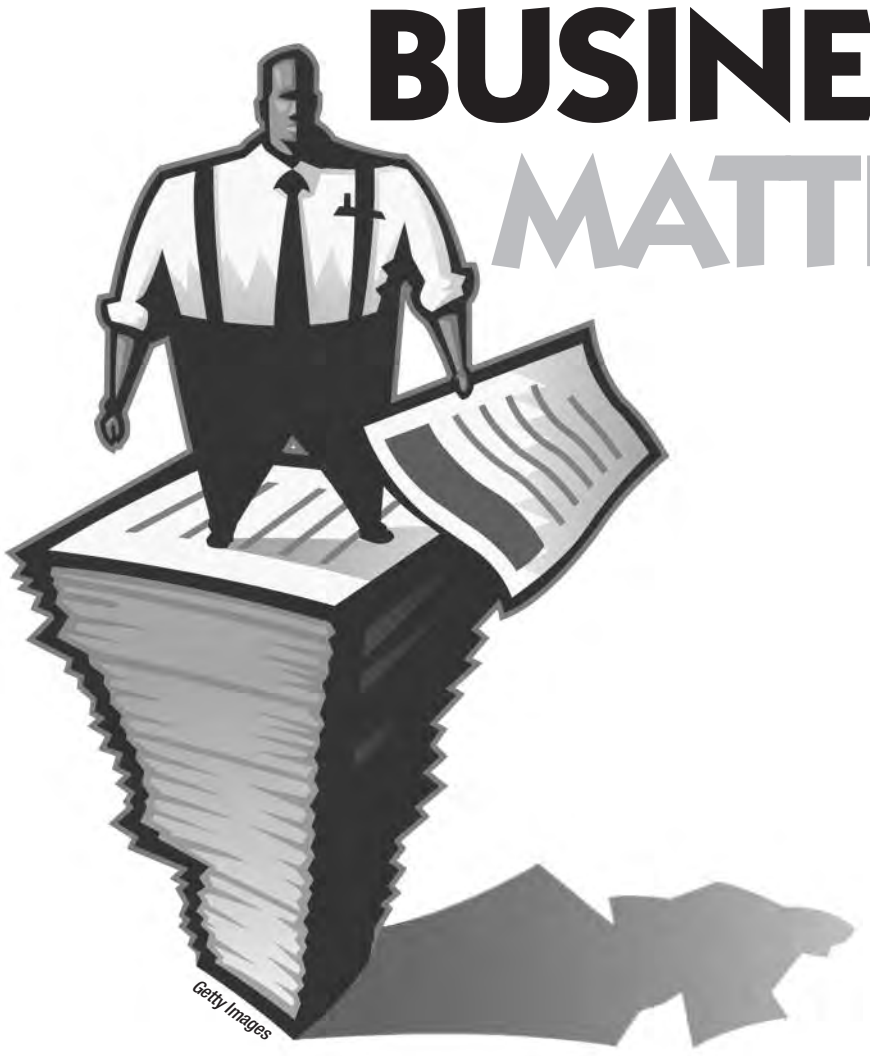


Getty Images

Tips for conducting the business of law

Pssst … want to hear a secret?

Coach and management consultant Ed Poll wants to share a few in his new book, "Secrets of The Business of Law: Successful Practices for Increasing Your Profits."

Compiled from Poll's LawBiz blog as well as other publications, each chapter functions as a stand-alone piece of advice on a given topic.

Chapters are grouped by subject matter, such as "Client Relations," "Financial Management" and "Law Office Technology."

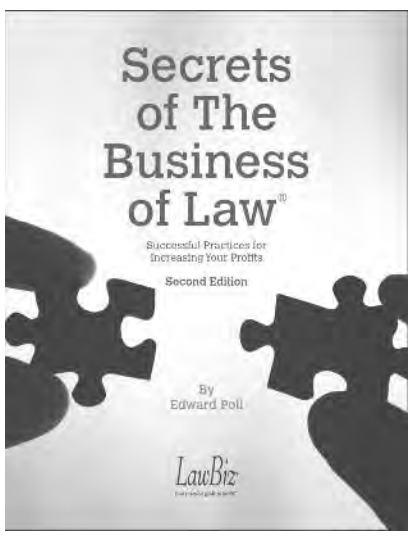
The book covers a broad range of issues, from the pros and cons of legal partnerships to the importance of scanning documents from both a records management and electronic discovery perspective.

Poll's book is filled with practical tips for lawyers. Some chapters even contain step-by-step guides, like how to prepare a law firm business plan and ways to improve collection efforts.

Poll also offers solutions for common problems facing attorneys.

Clients hate talking to a machine instead of a person, he writes, so ensure that a receptionist or secretary – a real person – answers the phone for the initial call to the firm. Addressing ways to hold onto clients, Poll suggests ignoring the clock. Work-life balance is important, he acknowledges, but the client is a customer who writes the check. If he or she calls at 7 p.m., it is the lawyer's job to find a solution to the problem, regardless of the hour.

Small firm lawyers and sole practitioners can learn from chapters on accounting – which include definitions of key terms for the true beginner – and discussions of whether to accept credit cards as payment.



http://www.lawbizstore.com

A section on technology covers good tech investments for attorneys and the importance of a return on that investment, as well as advice on blogging policies and best practices. Even small firms can benefit from a formalized policy, according to Poll, that offers guidance on the purpose, expense and time to be spent on the blog, as well as the professional responsibility implications.

In addition to covering marketing and rainmaking strategies for growing your practice, the book also addresses the flip side: the sale of a law practice and considerations for lawyers beyond retirement.

Poll uses his decades of coaching and consulting to draw upon real-life situations that readers can relate to. For example, he discusses a sole practitioner who struggled with assessing the growth of her practice and whether to add an associate, as well as an attorney who was exhausted by his busy practice and needed guidance on how to do a good job for his clients while attracting more business.

The book closes with a reminder that the recent recession has greatly impacted both the practice and business of law. Poll provides a "Checklist for Lawyer Success" to help attorneys learn from the mistakes of the practices that were forced to close their doors because they failed to adapt to changing times.

To buy the book, go to http://www.lawbizstore.com/books/secrets-of-the-business-of-law.php

– CORREY E. STEPHENSON

Putting client testimonials to work for you

The matter's resolved, your work is done and the client is happy. But don't flip to the last page before you consider asking your client for a testimonial about your service.

With a testimonial, your client's enthusiasm can benefit more than your morale.

"The best advertising is a personal referral, but a client testimonial is the next best thing. It's a third-party endorsement of a lawyer's work," said Allison Shields, a New York-based legal practice management and marketing consultant and the president of Legalese Consulting.

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Here are some suggestions on how to get the most from client testimonials:

'Would you mind putting that in writing?'

While asking for a testimonial in person can be a bit too high-pressure, it is worth trying if a "client comes to the lawyer without being asked and expresses gratitude or satisfaction," Shields said. "Another good time is when you're closing out a matter and sending the final documents. Include a very quick written survey."

"Send a gentle request by email to a likely candidate. I don't think mass emails work here," said David Abeshouse, a business mediator, arbitrator and litigator on Long Island, N.Y.

Stephen McDonough, an attorney with The Divorce Collaborative LLC who has used client testimonials in his practice, recommends asking clients to leave reviews on third-party sites such as LexStop or Avvo, and then asking to use the reviews in your own promotional materials.

Quality and quantity

"When it comes to testimonials, more is more," said Abeshouse. "Gather numerous testimonials from a wide variety of sources. That way, your prospective clients will be able to find someone who is like them in some way."

Shields said that the most effective testimonials include a specific story about working with the attorney.

"It gives people a better idea of what you do, and it's more powerful," she said.

Identifying the client

While testimonials ideally identify the speaker, "some people are uncomfortable posting testimonials with their names attached," noted Shields. She recommends offering to post a testimonial anonymously, with initials or the city and state of the client's residence.

"Maybe a criminal attorney [should] suggest that [a client] might want to be identified only by their initials," said Abeshouse.

Where to put them?

How to specifically use testimonials depends on the lawyer's marketing strategy.

"There can be a page of testimonials [on your website], but they can also be sprinkled throughout the page," Shield says. "There's no hard and fast rule."

"I once saw a promotional brochure with 95 percent testimonials," said Abeshouse. "The only other things were the logo and contact information."

– TONY OGDEN

Budgeting time, money for marketing

Despite all the financial demands solos and small firm attorneys face, it's crucial to make some room in the budget for marketing expenditures, says Jared Correia, a practice advisor at the Law Office Management Assistance Program in Boston.

Start with the basics of a budget – determine how much the firm has in the bank, and how much it costs to run the firm, and then decide how much of what remains can be spent on marketing.

It may not be much, Correia acknowledges, but knowing what you have to spend and planning ahead can help focus a marketing plan.

He notes that many current forms of marketing are free, including social media platforms like Twitter and Facebook, and blogs.

However, the firm should still budget for the "soft costs" associated with these activities, such as the time spent writing blog posts and participating in trade association events. Anything that takes away from billable time should be accounted for and tracked, says Correia. Although a plan to devote a set amount of time per week may be hard for a solo or small firm practitioner to adhere to, it is important to know how your time is being spent.

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This can make future budgeting easier, as well as help lawyers determine if they are getting a sufficient return on their marketing investment.

For example, if a lawyer spends two hours (with time billed at $100 per hour) working on a blog post that results in two new clients and a total of $1,600 in billable time, that would be a good investment, Correia says.

Some free services, such as Google analytics or tweetwhen.com, can allow users to get a sense of the success of their blogging and Tweeting.

But if you don't crunch the numbers and statistics, "it will be harder to decide whether or not to give certain marketing efforts more time or to let them go," he says.

Correia doesn't suggest a set dollar amount or percentage of budget for marketing, noting that it depends on the circumstances of an attorney or practice.

For example, James B. Reed is a partner at the four-lawyer Ziff Law Firm in Elmira, N.Y., which focuses on personal injury and medical malpractice cases.

Because of the nature of the firm's practice, "our revenue is like a roller coaster, which makes annual budgeting virtually impossible," Reed says. So the firm devotes a minimum of five percent of revenue to marketing, adding more to the budget in better years.

– CORREY E. STEPHENSON

Exercises to set goals and see them through

If you have lots of ideas for your law firm but they remain in the realm of the abstract year after year, here are some 10-minute exercises that can help you set specific goals and turn them into reality.

First, write down your goals for the year.

"Do you go to Costco with a list? If you don't, you take more time and spend more money," notes Cordell Parvin, a lawyer and management consultant in Dallas.

He recommends listing the things you want to accomplish in the coming year or quarter. The list could include anything from getting two new clients to speaking at three industry meetings to expanding your business by x dollars to meeting with a referral source twice a month.

Once you have created your stream-of-consciousness list, ask yourself, "If I could only do one of these things, which would it be?"

Then ask why that goal is important to you.

"If you don't have a good answer, you won't stick to it," says Parvin. "When lawyers know the what and the why, the how comes quite creatively."

The next exercise is to break down your goal into action steps, and calendar them.

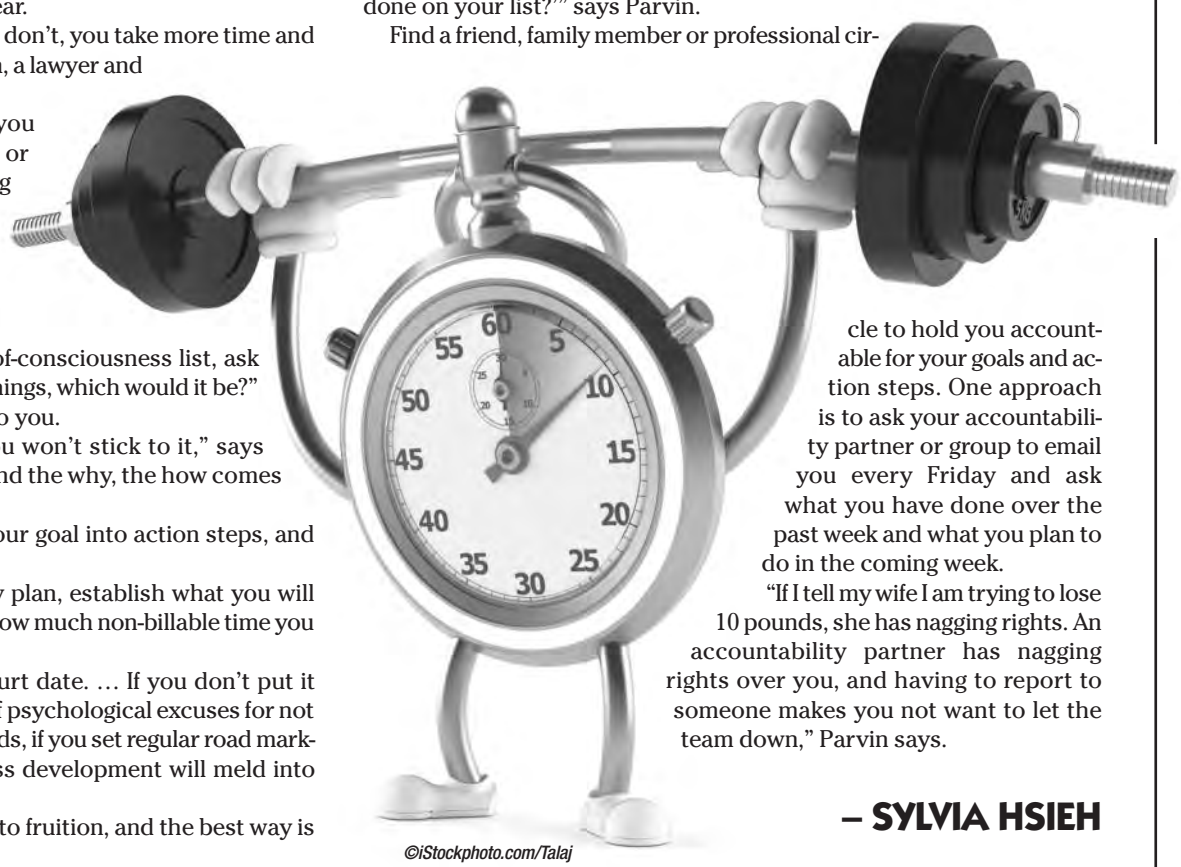
For example, if you create a quarterly plan, establish what you will do every Friday toward those goals and how much non-billable time you will spend on each step.

"Put it on your calendar like it's a court date. … If you don't put it down on paper you can create all kinds of psychological excuses for not doing something," Parvin says. But, he adds, if you set regular road markers in short increments of time, business development will meld into your regular habits.

Follow-up is key to seeing goals come to fruition, and the best way is to have a coach or an accountability partner or group.

"When I meet with lawyers in person every quarter, then follow up with a coaching call, they know my first question is, 'What have you done on your list?'" says Parvin.

Find a friend, family member or professional circle to hold you accountable for your goals and action steps. One approach is to ask your accountability partner or group to email you every Friday and ask what you have done over the past week and what you plan to do in the coming week.



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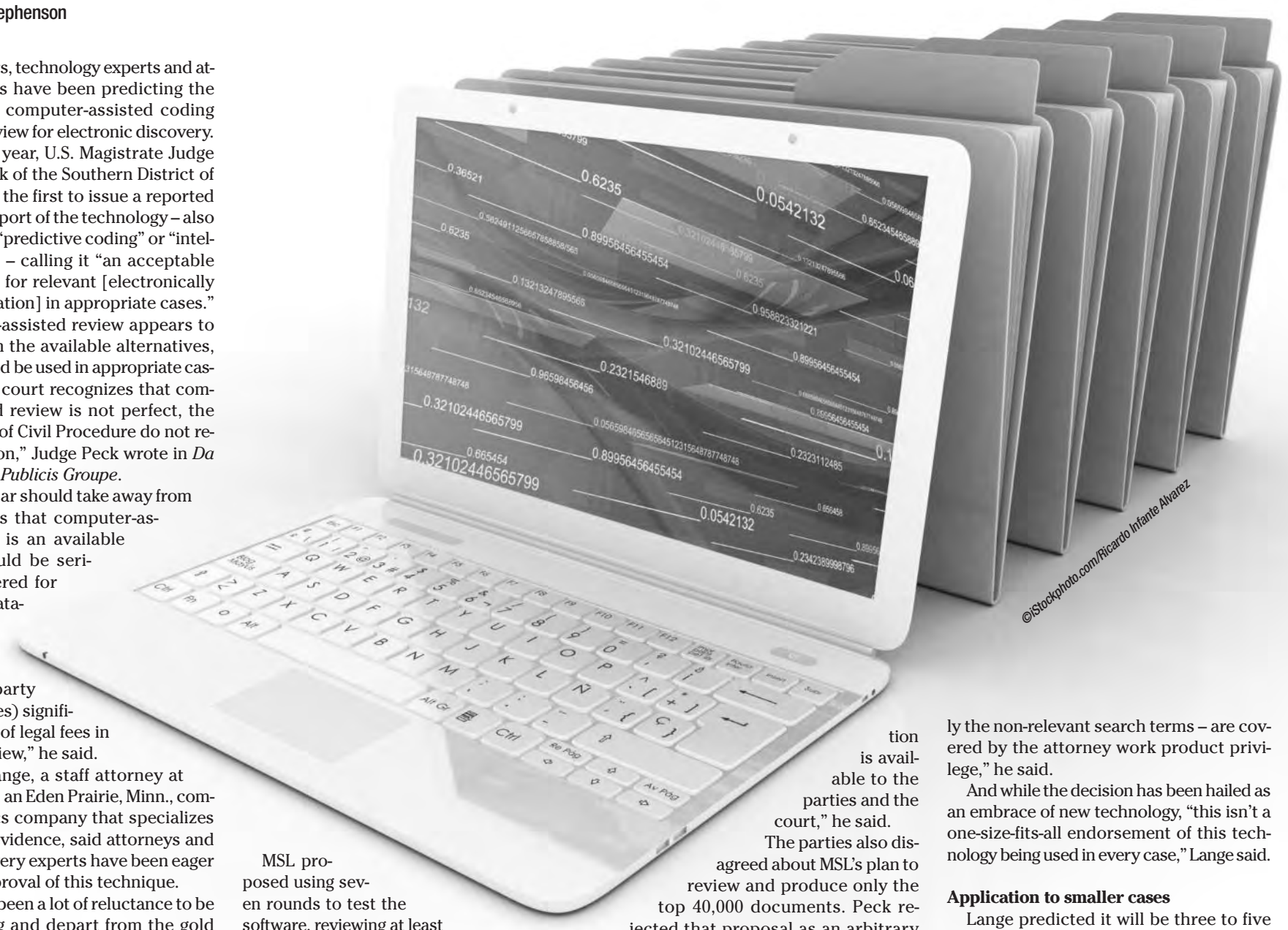
"If I tell my wife I am trying to lose 10 pounds, she has nagging rights. An accountability partner has nagging rights over you, and having to report to someone makes you not want to let the team down," Parvin says.

– SYLVIA HSIEH

BUSINESS MATTERS

E-discovery: Court approves computer-assisted review

By Correy E. Stephenson
Staff writer



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For years, technology experts and attorneys have been predicting the rise of computer-assisted coding and review for electronic discovery.

Earlier this year, U.S. Magistrate Judge Andrew J. Peck of the Southern District of New York was the first to issue a reported opinion in support of the technology – also referred to as "predictive coding" or "intelligent review" – calling it "an acceptable way to search for relevant [electronically stored information] in appropriate cases."

"Computer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases. While this court recognizes that computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection," Judge Peck wrote in *Da Silva Moore v. Publicis Groupe*.

"What the Bar should take away from this opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review," he said.

Michelle Lange, a staff attorney at Kroll OnTrack, an Eden Prairie, Minn., computer forensics company that specializes in electronic evidence, said attorneys and other e-discovery experts have been eager for official approval of this technique.

"There has been a lot of reluctance to be the guinea pig and depart from the gold standard of having a lawyer's eyes on every document in a document review," said Lange. "People have been waiting for the bench to officially bless the use of this technology and the wait is now over."

Dispute over protocol

The issue arose in a suit brought by five female plaintiffs alleging that public relations company MSL Group and its parent company, Publicis Groupe, engaged in systemic, company-wide gender discrimination in violation of Title VII and New York state law.

Initial discussions about discovery revealed an estimated three million electronic documents from the agreed-upon custodians that needed to be reviewed.

Both parties expressed interest in computer-assisted review. But issues remained to be hashed out as part of the protocol, including the sources of the electronically stored information (ESI) and the sampling protocol.

MSL proposed to create a random sample of 2,339 documents from the entire e-mail collection to determine which documents were relevant and not relevant for a "seed set" to train the software.

Working from the seed set, the software identifies properties of the documents that it uses to code other documents, and through a series of sample rounds overseen by a senior reviewer, who is typically a senior partner, the computer learns to predict the reviewer's coding. The system is deemed ready to take on the entire document set when the software's predictions and the reviewer's coding sufficiently coincide (in this case, a 95 percent confidence level was established).

MSL proposed using seven rounds to test the software, reviewing at least 500 documents per round. MSL also agreed to show the plaintiffs all the documents, even those deemed not relevant, throughout the process.

While the plaintiff expressed concern about the reliability of MSL's methodology, the court said such objections were premature.

"[P]laintiffs will see how MSL has coded every e-mail used in the seed set (both relevant and not relevant), and the court is available to quickly resolve any issues," Peck wrote.

> **"People have been waiting for the bench to officially bless the use of this technology and the wait is now over."**
>
> **– Michelle Lange**

Further, the judge said, the parties needed more information, such as how many relevant documents would be produced and at what cost to MSL, whether the case would remain limited to the named plaintiffs or be broadened to a class action, and whether any "hot" or "smoking gun" documents would be found that require the software to be re-trained, all of which are issues that could only be examined as the protocol unfolds, he said.

"These types of questions are better decided 'down the road,' when real information is available to the parties and the court," he said.

The parties also disagreed about MSL's plan to review and produce only the top 40,000 documents. Peck rejected that proposal as an arbitrary cutoff point.

Where the "line will be drawn [as to review and production] is going to depend on what the statistic show for the results," he said. "And if stopping at 40,000 is going to leave a tremendous number of likely highly responsive documents unproduced, [MSL's proposed cutoff] doesn't work."

Parties working together

Andrew Cosgrove, a senior attorney at Redgrave LLP in Minneapolis, noted that the opinion focuses more on the process of meeting and conferring, agreeing to a protocol and exchanging information than it does on the technology itself.

"The most important takeaway is how the court paid quite a bit of attention to the parties working together, building a protocol they both can live with and doing the vast majority of the work outside the context of hearings and the courtroom," said Cosgrove, who has an information law practice focusing on e-discovery, information management, privacy and data protection.

The message to litigants is to seriously consider computer-assisted e-discovery.

"The real strong undercurrent of this case is the obligation between the parties not to dismiss these types of options but to discuss, collaborate and be as transparent as you can be," Cosgrove said.

But Robert Brownstone, technology and e-discovery counsel and co-chair of the electronic information management practice group at Fenwick & West in Silicon Valley, warned that some parties are concerned about aspects of the seed set-sharing cooperation. "A lot of in-house lawyers and litigants feel very strongly that those kinds of tidbits of information – particularly the non-relevant search terms – are covered by the attorney work product privilege," he said.

And while the decision has been hailed as an embrace of new technology, "this isn't a one-size-fits-all endorsement of this technology being used in every case," Lange said.

Application to smaller cases

Lange predicted it will be three to five years before computer-assisted review trickles down to smaller cases.

However, she said, "it is only a matter of time before solos see this in their own practice."

Cosgrove agreed, adding that the growth of information shared by society generally will result in an increase in electronically stored information in all cases.

"Today we talk about millions of documents in cases, but in the future, we will be looking at tens of millions or hundreds of millions of documents," he said. "That inevitability has the courts looking to potential solutions for countering this information growth in the litigation context, and traditional methods of brute force – with hundreds of review attorneys reading every page – are proving to be absurd," forcing both the bar and the bench to increasingly turn to technology for support.

Brownstone noted that over the last few years, state bar ethics committees have issued opinions stating that lawyers must use reasonable care and due competence to keep abreast of current technology.

While the directives are typically focused on information security or storage of client data, "it's fair to say that with this bell-ringer of an opinion by Judge Peck, litigators need to make sure to stay abreast of current [ESI] search technology," Brownstone cautioned.

Even if a sole practitioner may not be ready to use computer-assisted review, he or she will need to know how to respond when the other side offers or asks the attorney to take part in such a protocol, he added.

Questions or comments can be directed to the writer at:
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BUSINESS MATTERS

More whistleblowers are reporting tax fraud, but cases moving slowly

By Sylvia Hsieh
Staff writer

As tax season ends, tax fraud is in the air too.

Lawyers have seen an uptick in people reporting employers, financial companies or high-worth individuals for ripping off the Treasury.

Under a relatively new and lesser known whistleblower law, anyone can report suspected tax fraud to the IRS, and if the government prosecutes the case and recovers unpaid taxes, the individual shares in the recovery.

"It's definitely recently started picking up speed. People are realizing they have an opportunity to receive a reward," said David Scher, a principal of the Employment Law Group in Washington, a plaintiffs' firm. "We've had several cases walk in the door in the last couple of months."

Lawyers who represent either employers or employees in workplace retaliation matters may come across potential tax fraud cases.

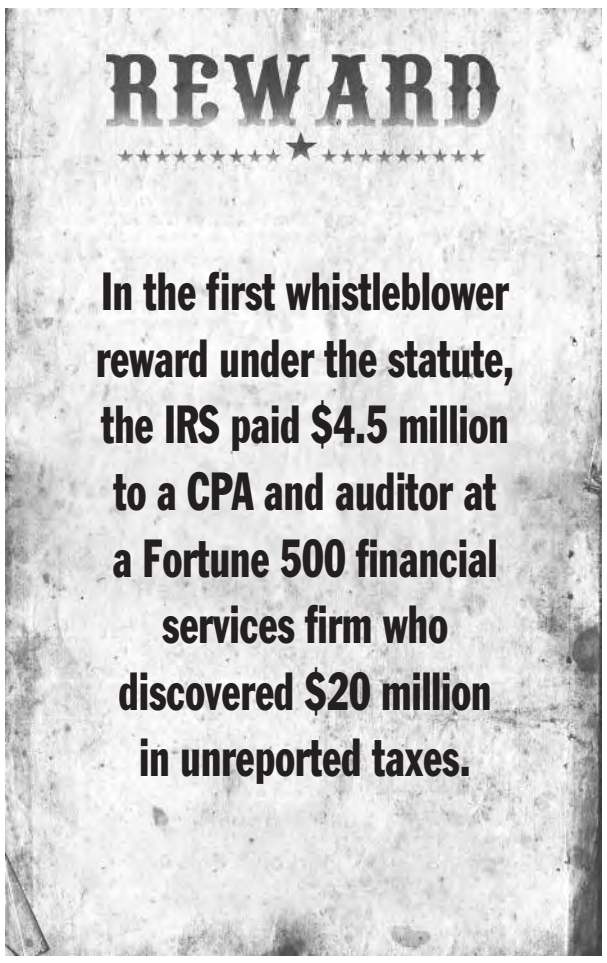
"It's a real possibility. Clients may be fired because they were complaining to their company about tax noncompliance or a problem with the company's accounting or tax reporting," said Bryan C. Skarlatos, an attorney with Kostelanetz & Fink in New York, N.Y. Skarlatos is a tax litigator who has several pending IRS whistleblower claims totaling $2 billion.

In one recent week alone, he fielded calls on both sides of the tax whistleblower law, one from an employee who claimed his job was downsized after his CFO and CEO told him to stop being such a stickler about the company's accounting, and the other from an employer who just received a letter from an accountant it fired six months ago notifying it that he blew the whistle on the company and it might be hearing from the IRS.

Another area where the IRS has expressed interest is uncollected taxes derived from the misclassification of employees as independent contractors.

But these cases are not for the generalist or those new to whistleblower claims.

Not only is the process unlike that under other whistleblower statutes like the False Claims Act, but it can also take 10 years to hear back from the IRS.



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"My strongest recommendation is to partner with somebody who has been down this road before. The IRS whistleblower pipe is a narrow and tough road," said Patrick Burns, communications director for Taxpayers Against Fraud in Washington.

IRS whistleblower program

The whistleblower program was included in the Tax Relief and Health Care Act of 2006 and required the IRS to set up an office and pay rewards to those who blow the whistle on tax fraud beginning in 2007.

Unlike with qui tam statutes, there is no lawsuit; the whistleblower reports the claim directly to the IRS.

For claims of unpaid taxes under $2 million, a whistleblower can collect up to 15 percent of what the IRS collects. For claims over $2 million against a taxpayer that had at least $200 million in income, the whistleblower can collect 15 to 30 percent.

The $2 million benchmark includes penalties that are often significant and mount very quickly, so "it's not that hard to get to $2 million," said Scher.

If someone other than your client has already blown the whistle on the taxpayer or if the IRS is already auditing the taxpayer, your client cannot collect a reward, so it's important to find out if someone else has already submitted a claim.

"Your best source of information is your client in terms of probability of whether or not someone else has submitted on the issue," said Paul D. Scott of the Law Offices of Paul D. Scott in San Francisco, a former Department of Justice trial lawyer who now represents whistleblowers.

In the first whistleblower reward under the statute, the IRS paid $4.5 million last April to a CPA and auditor at a Fortune 500 financial services firm who discovered $20 million in unreported taxes.

"He reported what he believed was just an accounting error but the company decided to turn a blind eye to it," said Eric L. Young, a partner at Egan Young in Philadelphia.

Young got involved in the case after the client filed his claim pro se but had heard nothing from the IRS after more than two years.

Once a whistleblower files a claim, it disappears into a black hole of secrecy, so lawyers have to make sure the filing is as solid as possible.

"For the most part, if the IRS isn't interested in the claim, that's the end of it," said Young.

The right to appeal to the Tax Court only kicks in if the IRS has gotten a recovery, such as where the taxpayer appeals the audit or where the whistleblower appeals the reward.

So "if you file a claim and the IRS gives you 20 percent of the recovery and you think it should be 30 percent," you can appeal to the Tax Court, said Skarlatos.

However, for claims valued under $2 million the whistleblower doesn't have the right to appeal.

Huge backlog

Lawyers are also frustrated with the program because of the long delays in getting claims resolved.

"Even in a meritorious claim, you may not get the money for seven to 10 years," lamented Skarlatos.

Approximately 10,000 tax whistleblower cases have been filed and are backlogged, representing at least $20 billion in uncollected taxes, said Burns.

Compounding what seems to be a lack of priority for whistleblower audits is the confidentiality required in tax cases.

"The IRS and the whistleblower office cannot tell anybody about what they're doing with respect to a taxpayer. They can't … say whether they've opened an audit, what's happening in an audit, if they've collected taxes or whether they're waiting for the statute of limitations to run on a refund claim. They can't say anything," said Skarlatos.

Delays are also lengthened by an IRS policy that requires the agency to wait for the statute of limitations to run on the taxpayer's refund claim before it will pay a successful whistleblower his or her reward money.

According to Burns, the IRS will be resolving a few significant cases within the next year, and he hopes that will put some teeth into the law.

"A lot of law is just developing now. It's … taking a surprisingly long time for the government to investigate these matters and reach a resolution. … The Service isn't making it easy for whistleblowers," said Scott.

Questions or comments can be directed to the writer at: sylvia.hsieh@lawyersusaonline.com

BUSINESS MATTERS

Law firm grows along with mesh suits

By Ben Mook
Contributing writer

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So far this year, 69 product liability cases have been filed in U.S. District Court in Maryland.

All but eight of them have been filed by one Baltimore law firm – Discepolo LLP.

And all but nine have been filed against makers of vaginal mesh products, currently one of the hottest areas of national mass tort litigation.

Nationwide, more than 500 individual cases have been filed in federal court since last summer and the pace is picking up. Late night television ads by other lawyers exhort women who have suffered complications after using the products to call and file lawsuits against the four main manufacturers and their subsidiaries: C.R. Bard Inc.; American Medical Systems Inc.; Johnson & Johnson Services Inc. and Boston Scientific Corp.

A. Donald C. Discepolo, founder of the 13-lawyer firm that bears his name, said he has another 200 cases in the pipeline that he expects to file by the end of the year.

Discepolo said he was not even aware of the mesh litigation until he received a call last summer from a woman looking for representation. From that call, more started to come in and more involvement led to more clients.

"It wasn't by design, it just kind of happened," Discepolo said. "The more we investigated the litigation, the more the calls started to come in."

Surgical alternative

Surgical mesh products were created as an alternative to invasive surgery to treat two medical conditions: pelvic organ prolapse and stress urinary incontinence, the involuntary loss of urine cause by laughing, coughing or lifting.

According to the American College of Obstetricians and Gynecologists, more than 350,000 women undergo surgery for pelvic organ prolapse each year. Most common after childbirth, the condition impacts the pelvic floor muscles and connective tissues.

"When these muscles become torn or stretched, pelvic organs can drop down and bulge into the vagina causing pelvic organ prolapse," Dr. Cheryl B. Iglesia, former chair of ACOG's Committee on Gynecologic Practice, said in a statement last November.

Boston Scientific launched the first vaginal mesh product in 1996. The product did not require clinical testing because of its "substantial equivalence" to products used to repair hernias.

However, 20,000 of the meshes were pulled a little more than a year later after Boston Scientific received 123 reports of problems.

Other manufacturers then launched similar products in the following years, pointing to the approval of Boston Scientific's product. Roughly 100 mesh devices have been cleared by the U.S. Food and Drug Administration, but only about 20 percent were, and are, actively marketed.

Mesh-makers continue to market and sell the devices and say they are safe. Matthew Johnson, a spokesman for Johnson & Johnson whose Ethicon subsidiary has been the target of many of the lawsuits, said in an email to Bloomberg News in February that the company acted responsibly.

"Throughout this process, our actions were responsible, appropriate and consistent with FDA regulations," he told Bloomberg. "Numerous clinical studies suggest that when combined with proper surgical technique, surgical mesh can improve patient outcomes, and Ethicon's devices are among the most studied devices on the market for this condition."

The lawsuits were sparked by a July 2011 report from the FDA which said it was not clear whether the mesh implants had any more benefit than traditional surgery when used to treat pelvic organ prolapse. The agency also noted that, from October 2008 through December 2010, there had been approximately 3,874 reports of complications associated with the devices, including erosion of the mesh, infection, pain during intercourse, bleeding and urinary problems.

Discepolo fielded that first phone call around the same time as the FDA report. Now, he said, he normally receives four or five inquiries from prospective vaginal-mesh clients in a day.

In the hour or so he spent being interviewed for this story last week, four emails from prospective clients popped into the inbox on his smartphone.

Building the firm

While Discepolo's firm has long handled product liability cases as part of its general practice, the volume of these cases makes them different.

Discepolo hung out his shingle not long after his 1998 graduation from the Southern New England School of Law in Dartmouth, Mass. The school, now part of the University of Massachusetts system, was unaccredited at the time and failed to gain accreditation after he graduated. This limited him to work in Massachusetts after passing the state bar there. But after passing the Maryland Bar Exam and getting an exception, he was able to practice in Maryland – with only one problem.

"No one would hire me," Discepolo said. "Everywhere I went, they wouldn't hire me."

Struggling as a solo initially, Discepolo said his first case was a bankruptcy matter. He charged the client $386, pretty much what he owed the power company for that month.

Since that time he has worked on some high-profile personal injury cases, including acting as co-counsel in a carbon monoxide poisoning case brought by steak-house workers that resulted in a $34 million verdict against the Pier 5 hotel in Baltimore. Discepolo LLP continues to handle national tort litigation involving carbon monoxide poisoning as well as other medical device lawsuits, such as hip replacements.

> "The more we investigated the litigation, the more the calls started to come in."
>
> – A. Donald C. Discepolo

It is the mesh litigation, though, that Discepolo said could really grow the firm in the coming years.

With three cases filed on one recent day alone, and plenty more to come, Discepolo said that his small firm has had to struggle to find the right balance of staff to handle the cases without driving costs too high. But, he said, given the existing caseload and the amount in the pipeline and likely to come in down the road, he sees the firm growing further.

"We're adding staff all the time to address this litigation," Discepolo said. "We've added three attorneys and a paralegal in the last few months alone."

The work is spread throughout the firm, with most of the associates spending anywhere from 60 to 70 percent of the time handling mesh cases.

"It's kind of like the Marine Corps," he said. "Everyone has to be a rifleman first and then specialize in other things."

He said the expectations for resolving the mesh litigation range anywhere from a few years to a decade. While Discepolo has filed all of the cases in Maryland, the United States Judicial Panel on Multidistrict Litigation has moved most of the cases to the U.S. District Court in Charleston, W.Va. All of the cases are still in the early stages of litigation and being organized by manufacturer.

By the end of next year, Discepolo said, he envisioned hiring another dozen lawyers and 10 support staff to help work on the cases.

The project is big for Discepolo's firm in another way. From what he's seen of the impact on the women who contact him, he feels it is one of those situations where they can really help people who need it.

"I'm no stranger to personal injury law, but these cases have some tragic outcomes – you have young women whose ability to go to the bathroom when they want is taken away, and it's destroying sex lives and marriages as well," Discepolo said. "It's really tragic."

Questions or comments can be directed to the editor at: susan.bocamazo@lawyersusaonline.com

A version of this story originally appeared in Lawyers USA's sister publication, the Maryland Daily Record.

VERDICTS & SETTLEMENTS

Michigan chiropractor awarded $7 million

When Dr. Micheil Hanczaryk was faced with a chiropractic-malpractice claim, he didn't suspect that his 35-plus-year reputation as an expert in the field would be ruined.

But it wasn't the malpractice claim leveled against him that did it. Rather, it was how his insurance carrier handled it.

Or, according to attorneys Loyst Fletcher Jr. and Lawrence Acker, how it mishandled the claim.

A Michigan jury has awarded the chiropractor and his practice, Bristol Chiropractic Centre, nearly $7 million on claims of breach of contract, negligence, failure to honor good faith duties and false light invasion of privacy against his carrier, Podiatry Insurance Co. of America (PICA).

The case also involved legal malpractice claims that Hanczaryk filed against the attorney who was assigned to represent him in the chiropractic-malpractice claim. The attorney settled with Hanczaryk confidentially.

Acker said that Hanczaryk was "manhandled" by PICA through no fault of his own. And with around two years left before he reaches retirement age, there's no way he can get his business back to where it was before.

"You're really known for your last significant achievement, and that's where I really feel for the doctor," said St. Clair Shores, Mich. attorney John Perrin, who offered claims guidance to Acker in preparation for the trial.

Whose interests at heart?

Although PICA worked out a settlement for the chiropractic-malpractice claim, Fletcher and Acker contended that it wasn't done in good faith.

They explained that the attorney PICA assigned to the case failed to file a timely affidavit of meritorious defense or a timely motion for reconsideration and application for leave to appeal. In addition, the attorney, with the help of PICA, reported misleading information in order to justify settlement of the claims.

Acker said PICA thought that if the settlement was done within Hanczaryk's insurance limits, so he didn't have to pay anything out of pocket, "he would be willing to be shuffled aside."

But something wasn't right.

"We had to acquire the insurance company adjusting file and understand from the content of that file confirmation that, in fact, they knew the attorney they hired made a critical error," Acker said. "And that, instead of protecting their insured from that point forward, they were far more interested in protecting the lawyer."

Fletcher said that in reviewing more than 2,000 documents, the broad picture began to form.

"Keywords in those documents showed self-interest, as opposed to a protective interest," he said. "'We've got to be careful.' 'Explore our options.' 'If this happens or this happens or this happens, what happens here?'"

It got worse for Hanczaryk, who was well-known throughout the country as an expert in the chiropractic field.

Hanczaryk was part of a national advisory board controlled by PICA, and at PICA-sponsored conferences and meetings across the country he was advising others on how to handle risk management and how to manage their policies.

Fletcher and Acker explained that PICA thought Hanczaryk might tell others what a bad experience he had based on the way the malpractice claim was handled. So the carrier fired him from the board.

"When you take a guy who's that visible

Continued on page 13

Jury awards $167.7 million in record employment verdict

By Correy E. Stephenson
Staff writer

In the largest verdict to an individual employment plaintiff in United States history, a California jury has awarded $167.7 million to a cardiac surgery physician assistant who suffered sexual harassment and wrongful termination.

Of the total verdict, $125 million was for punitive damages.

Plaintiff Ani Chopourian worked for two years at Mercy General Hospital in Sacramento, Calif. She experienced harassment that included sexual advances, vulgarity, inappropriate touching and trash talk on a daily basis, said her attorney, Lawrance Bohm, a sole practitioner at the Bohm Law Group in Sacramento.

Chopourian's repeated complaints – which also included details about patient safety problems and meal and rest break violations – went ignored and she was terminated in 2008.

"Being harassed in a normal work environment is bad enough, but being sexually harassed, demeaned and belittled while people's lives hang in the balance is truly unbelievable," said Bohm.

To make things worse, the hospital blackballed Chopourian after she filed suit, he said, and she has been unable to find work as a result.

A call seeking comment from Julie Clark Martin of LaFollette Johnson in Sacramento, who represented the hospital, was not returned; the hospital also declined to respond to a request for comment on the case.

'Nightmare' work environment

Chopourian, a Yale-educated physician assistant, worked in Mercy General's cardiovascular operation department from 2006 to 2008. She assisted surgeons during open heart surgery in positioning the heart, harvesting veins or arteries and retracting the sternum, among other responsibilities.

But from the beginning, Chopourian experienced a "nightmare" of a work environment, Bohm said.

Both in and out of the operating room, she was subject to verbal and physical sexual harassment that went unchecked by hospital management, he said.

Over a two-year period, Chopourian made a total of 18 written complaints, along with numerous other verbal reports. Her final complaint, delivered via certified mail, was stamped "received" on July 31, 2008. She was terminated on Aug. 7, 2008.

Under California law, any negative employment action is presumed retaliatory if it is made within 120 days of a complaint, Bohm noted.

Chopourian was allegedly terminated for failing to show up for on-call rounds. But at trial, Bohm produced the original schedule for the week, which did not indicate that she was on call on the day in question.

The defense submitted a photocopied version of the schedule that showed Chopourian was supposed to be on duty, but no one could verify when that version was created, Bohm said.

The three week trial included a total of 25 witnesses for both sides.

Chopourian testified about repeated crude sexual advances and obscene facial gestures, as well as a surgeon who complained about his lack of sex with his wife. Another surgeon spoke about his fondness for prostitutes while another made frequent, inappropriate references to women's breasts.

One doctor commonly even greeted others in the surgery suite by announcing, "I'm horny."

Plaintiffs' attorney Lawrance Bohm

Patient safety claims

But while the sexual harassment Chopourian experienced was severe, "this was also a huge safety whistleblower case," Bohm said.

"It's not bad enough to come into work and get your butt slapped, get sexually propositioned and suffer rude and crude behavior, but surgeons were also endangering the lives of patients," he charged.

Chopourian reported instances of a surgeon unnecessary breaking patients' ribs as well as being berated and ordered to stand in the corner for hours during surgery – a real danger to a patient on the table, Bohm said.

AT-A-GLANCE

- The plaintiff experienced harassment that included sexual advances, vulgarity, inappropriate touching and trash talk on a daily basis, according to her attorney.
- Her repeated complaints, which also included details about patient safety problems and meal and rest break violations, were ignored and she was terminated in 2008.

> "This was also a huge safety whistleblower case."
>
> – Lawrance Bohm

In addition, the plaintiff recounted for the jury a multitude of instances where she informed a doctor that she couldn't harvest a particular patient's veins because they were compromised or of poor quality, and the surgeon responded that she was a "stupid chick" and ordered her to take the vein, Bohm said.

When it subsequently proved to be unusable, the surgeon would berate Chopourian for her incompetence and then instruct her to harvest in the other location she had suggested in the first place.

Bohm flew in two former Mercy General nurses – one currently living in Canada, the other in New Jersey – who testified in support of his client. The Canadian nurse told a story about how the same surgeon Chopourian said called her a "stupid chick" had hidden a sponge behind a patient's heart during surgery.

She was on the verge of calling a radiologist to help find the sponge when the doctor pulled it out and threw it across the table at her, Bohm said.

The defense argued that Chopourian was terminated because she was not a "team player," citing failing to report for her on-call shift and napping in the break room. The defense also denied that any sexual harassment took place, citing its "zero tolerance" policy, Bohm said.

But the hospital undermined its credibility, he said, by telling the jury at the beginning of the trial that they wouldn't hear any salacious stories and that some surgeons would come to testify. Neither of these assertions turned out to be true.

Chopourian has had difficulty finding work because after she gave a deposition in her case and named names, Mercy General claimed that she had violated privacy laws by sharing information about patients and doctors, Bohm said. That allegation cost her the one job she has held since 2008, and since then, "she has not had even a job interview," he said.

After deliberating for three and half days, the jury found for Chopourian on all seven of her legal theories: sexual harassment, Title VII retaliation, wrongful termination in violation of public policy, retaliation for reports regarding patient safety, intentional interference with economic advantage, defamation and violation of meal and rest break requirements. They awarded $39 million, with an additional $3.7 million in economic damages.

Bohm suggested a punitive award of $100 million to "have the hospital take notice." But the jury went even further, awarding Chopourian $125 million in punitives.

According to Bohm, one juror told him after the trial, "the pain of staying the same must be greater than the pain of change and then you will change."

He expects the trial court will consider reducing the compensatory verdict.

Plaintiff's attorneys: Lawrance A. Bohm of the Bohm Law Group in Sacramento, Calif.; Erika M. Gaspar of the Law Office of Erika M. Gaspar in Sacramento. Calif.; Gregory R. Davenport of the Law Office of Gregory R. Davenport in Stockton, Calif.

Defense attorneys: Julie Clark Martin and David A. Ditora of LaFollette Johnson in Sacramento, Calif.

The case: *Chopourian v. Catholic Healthcare West*; Feb 29, 2012; U.S. District Court for the Eastern District of California; Judge Kimberly J. Mueller.

Questions or comments can be directed to the writer at: correy.stephenson@lawyersusaonline.com

VERDICTS & SETTLEMENTS

Damaged crops yield $40 million verdict

By Correy E. Stephenson
Staff writer

Two farmers received a total of almost $40 million from a Portland, Ore. jury after their nursery crops, including blueberry, rhododendron and Japanese maple plants, were destroyed by a faulty fertilizer.

The plaintiffs switched to a new fertilizer that was marketed as a controlled release product but was in fact a watered-down slow release with other nutrients mixed in, explained their attorney, Larry Baron of the Baron Law Firm in Portland.

On the left, the above picture shows healthy plants. On the right, it shows damaged plants that were treated with the fertilizer at issue in the case.

AT-A-GLANCE

✦ The plaintiff's attorney alleged that the company never tested its product before promoting it to farmers.

✦ Both farmers explained that they lost good will among their customers, who turned to other farms to provide their plants.

The result: dead plants, a damaged reputation for the farmers and huge financial losses.

Baron argued that Sun Gro, the maker of the Multicote 15-9-12 fertilizer, essentially tried to create a cheaper product than the market leader by adding components that killed off the plants it treated. Worse, he alleged, the company never even tested its product before promoting it to farmers.

"Sun Gro put this together on the cheap," Baron said. "They wanted to get into the controlled release market but put no money into research or development and just mixed [Multicote] together themselves, never field testing it before they started marketing it."

After five weeks of trial, a 12-person jury responded with an award totaling just under $40 million for the two farmers.

Calls seeking comment from the attorneys for the defendants – Everett Jack of Davis Wright Tremaine in Portland for Woodburn Fertilizer and Wilbur-Ellis and William G. Earle of Davis Rothwell Earle Xochihua in Portland for Sun Gro – were not returned.

Derek Fee, a spokesperson for Sun Gro, said the company disagreed with the verdict but hasn't yet decided whether to appeal.

Plaintiffs' attorney Larry Baron

Toxic fertilizer

Jag Aujla, owner of JRT Nurseries in Aldergrove, British Columbia and Lynden, Wash., ran a large operation, primarily growing blueberries for sale to farmers who grow the plants as crops.

He also sold ornamentals like rhododendrons to nurseries, Baron said.

Aujla first used Multicote in 2007 based on the advice of his local salesperson, who recommended a switch from the market leader, Scott's Osmocote Plus fertilizer.

His crops suffered that year, said Baron, but Aujla had been absent from day-to-day operations at the firm in the wake of his teen-age son's death in a motor vehicle accident, and he assumed the crop failures were attributable to that absence.

But when he used Multicote again in 2008 and again saw his plants die, he concluded that the fertilizer was to blame.

The second plaintiff, Eelco De Zwaan, operated a much smaller farm, DeZwaan Nurseries, in British Columbia and only used Multicote in 2008 on Japanese maple trees.

According to Baron, a controlled fertilizer releases its nutrients over a defined period of time and is commonly used for nursery plants like those grown by the plaintiffs. A quick release fertilizer can be toxic to such plants because it releases its nutrients too fast.

During discovery, Baron learned that Sun Gro had purchased other components, including a product called Fritt 503G, to mix with the controlled release nutrients in Multicote in order to make a cheaper product.

But because those other components were not controlled release and were not intended for a nursery setting, Baron said, their nutrients were released too quickly and

Continued on page 25

VERDICTS & SETTLEMENTS

Continued from page 11

among his peers and remove him from the board without explanation, you raise the ear of everybody as to what happened," Fletcher said.

"People begin to talk."

And, after that, an erroneous report against Hanczaryk was filed by PICA with the National Practitioner Data Bank.

"It implies that anyone who's on it in a negative fashion is a bad doctor," Fletcher said. "So, in a negligent manner, they portrayed him in a false light, which in essence said to the world, 'He's a bad doctor.'"

There's no mechanism for removing it, Fletcher said, and any attempts by Hanczaryk to correct it would appear self-serving.

In addition, after 21 years, PICA inexplicably canceled Hanczaryk's policy.

Harm to practice

At trial, Acker and Fletcher had experts breaking down economic damages based on what Hanczaryk would have earned through the present day and through 2014 (the year that he would be of retirement age).

But it was the testimony of Dr. Solomon Cogan, chairman of the Michigan Department of Chiropractic, that gave the jury the best sense of emotional damages. He explained the adverse impact on Hanczaryk's reputation via board dismissal, insurance cancellation and mistaken information in the Data Bank.

"[Cogan] also is on the National Board of Chiropractic Examiners, and he is a delegate for the state of Michigan to a lot of national activities, so he knew our client had really been harmed on a national level by having this information," Acker said.

"Every time this man applies to be renewed on his right to bill insurance companies like Blue Cross or other third-party payors, they can look at the Data Bank report and decide, 'He's a bad guy; we're not going to endorse him for insurance.' It would cause considerable harm to his practice."

The defense contended that Hanczaryk consented to the malpractice settlement; that PICA was ready, willing and able to go to trial for the malpractice claims if he had wanted so; and that PICA was only doing what it thought would be in his best interests and what he wanted it to do.

The jury broke down its award as $178,669 for damages to Bristol Chiropractic Centre through the present day; $229,549 for business losses through 2014; $3.718 million for lost reputation and emotional damages through the present day; and $2,861,400 for lost reputation and emotional damages through 2014.

Southfield-based attorney Melvin Schwartz, who represented Podiatry Insurance Co., deferred comment to Frank O'Neil, spokesman for the carrier's parent group, ProAssurance Corp. O'Neil said the case would be appealed.

Plaintiffs' attorneys: Loyst Fletcher Jr. in Flint, Mich., Lawrence Acker in Bloomfield Hills, Mich.

Defense attorney: Melvin Schwartz in Southfield, Mich.

Case: *Hanczaryk v. Podiatry Insurance Co. of America*; March 6, 2012; Genesee County Circuit Court; Judge Geoffrey Neithercut.

– Douglas J. Levy

A version of this story originally appeared in Lawyers USA's sister publication, the Maryland Daily Record.

Oklahoma jury awards $4.55M in sex abuse case

An Oklahoma jury has handed down a $4.55 million verdict in a gross negligence lawsuit against a mental health counseling center and one of its employees who failed to report sexual abuse.

The jury awarded $1 million in actual damages to each of the three children involved in the case after notes from a counseling session revealed the children's moth-

Continued on page 16

$41 million tobacco verdict breaks recent defense streak

By Sylvia Hsieh
Staff writer

Dorothy Alexander (right) won $41 million against Lorillard after her husband, Coleman (left), died of lung cancer after smoking since he was 14 years old.

Dorothy was the vivacious captain of her cheerleading squad in the tenth grade when she set her heart on the hunky captain of the football team, Coleman Alexander.

She would marry her high school sweetheart soon after they graduated from their segregated school in Coconut Grove, Fla. and they would raise three children together, she as a nurse, he as the owner of a cleaning company, until Coleman died at age 59.

Last week, Dorothy Alexander's fairy tale romance that ended in widowhood too soon was one of the reasons a jury awarded her $41 million – a verdict that broke a recent string of low verdicts and hung juries in the ongoing *Engle* litigation against tobacco companies.

"They had an exceptional relationship … and a very close family, so there was no baggage. It was an all-American love story," said winning attorney Alex Alvarez.

Dorothy sued Lorillard Tobacco Co., the maker of the Kent cigarettes that Coleman smoked for four decades, alleging they caused his death from lung cancer.

David Woods, who represented Lorillard at trial, said the company will appeal the verdict and will be filing post-trial motions this week, but he declined to comment further on the case.

'He believed the hype'

Coleman began smoking in 1950 at age 14, around the same time he began courting Dorothy. In 1958, he switched to Kents, a filtered cigarette touted as a safer alternative to the unfiltered brand he was accustomed to.

"They sold the illusion if you smoke filtered cigarettes it will make it safer. … He believed the big corporations wouldn't sell a product they knew was dangerous. He believed the hype," said Alvarez of the five-lawyer Alvarez Law Firm in Coral Gables, Fla.

Alvarez argued that even as warning labels started to be placed on cigarette packages beginning in 1966, the tobacco companies counteracted that message with public campaigns to throw into doubt any link between smoking and illness.

He also presented a Federal Trade Commission study that found the warnings were ineffective because the manufacturers of tobacco products spent so much money on marketing.

Internal industry documents showed the tobacco companies knowingly covered up what they knew.

"They said they knew at some point in time they would be subject to the charge of providing the public with false and misleading statements and that they knew they were trying to create a 'campaign of doubt'" around the dangers of nicotine, Alvarez said.

He said the defense argued that Coleman should have known that smoking was bad for him yet he continued to smoke.

But as in all *Engle* cases, which require that a plaintiff prove an addiction to nicotine that caused him or her to smoke, Alvarez put on lay and expert testimony about Coleman's addiction.

Nicotine addiction expert Dr. David Drobes testified that nicotine is as addictive as heroin or cocaine, and pointed to studies showing that the younger a person starts smoking, the harder it is to kick the habit, with 95 percent of all regular smokers having started smoking before 18 years old.

> "They sold the illusion [that] if you smoke filtered cigarettes it will make it safer."
>
> – Alex Alvarez

Dorothy testified about how desperately Coleman tried to quit his two-packs-a-day habit after he was diagnosed with lung cancer, and how he begged and cried when family members would not let him at his cigarettes.

More than he asked for

In the damages phase, Alvarez asked the jury to award Dorothy $12.6 million.

The jury came back with a total of $20 million. However, the award will be reduced to $16 million based on the jury's apportionment of 20 percent fault against Coleman.

In the punitive damages phase, Alvarez told the jury that the tobacco companies never admitted their products were harmful or addictive until 2000.

"Not only did they know smoking was hazardous, they purposefully went out and spent money to say [they] didn't. … They kept telling people 'We need more studies' while they spent over $450 million in advocacy groups to espouse these misconceptions," said Alvarez, whose suggestion of a $25 million punitive damages award was followed by the jury.

The defense moved several times for a mistrial. Alvarez called the defendant's last effort a "frivolous motion" in which the company argued that the judge should have called a mistrial because the jury came back with its verdict while he had stepped out for a friend's funeral, and waited an hour for him to return.

"It's not unusual in tobacco cases for defendants to move four or five times for a mistrial. In normal trials, nobody wants a mistrial," complained Alvarez, noting that the last four tobacco trials have ended with hung juries for various reasons.

He said the defense only has itself to blame for the jury coming back with more damages than the plaintiff asked for. In closing arguments, according to Alvarez, the defense told the jury that the case came down to whether Dorothy should become a millionaire and suggested that a $500,000 award would suffice because it was far more than her husband, a janitor, would have earned.

"I think those are insensitive remarks that could tend to anger somebody," said Alvarez. "She suffered a significant loss. … She met him in the tenth grade, he died in 1995 and she has never dated or been with another man since. This was the love of her life."

AT-A-GLANCE

- Eight years after he started smoking, the decedent switched to Kents, a filtered cigarette touted as a safer alternative to the unfiltered brand he was accustomed to.
- According to the plaintiff's attorney, the defense suggested that a $500,000 award would suffice because it was far more than the decedent, a janitor, would have earned.

Plaintiff's attorneys: Alex Alvarez of The Alvarez Law Firm in Coral Gables, Fla.; Gary M. Paige of the Paige Law Firm in Belle Glade, Fla.; Jordan Chaikin of Parker Waichman LLP in Bonita Springs, Fla.

Defense attorneys: David Woods of Hughes Hubbard in Kansas City, Mo.; Edward K. Cheffy of Cheffy Passidomo in Naples, Fla.

The case: *Estate of Alexander v. Lorillard Tobacco Co.*; Feb. 29, 2012 (compensatories); March 6, 2012 (punitives); Florida Circuit Court, Miami-Dade County; Judge Peter Lopez.

Questions or comments can be directed to the writer at: sylvia.hsieh@lawyersusaonline.com

Legal world awaits Supreme Court health care ruling

Health care – Continued from page 1
justices divided" on this page.)

The Obama administration argued that the constitutional provision grants broad authority to act, authority that surely includes the ability to mandate health care coverage.

States and individuals challenging the law say the clause only grants lawmakers the authority to regulate action, not inaction.

The justices also seemed split, and in questioning the attorneys, some searched to find the line limiting Congressional power under the Commerce Clause.

On the third day, in considering the issue of severability, the justices still seemed split, focused on whether the law could stand without the individual minimum coverage mandate. (See "Dissecting the reform law?" on this page.)

Big stakes, uncertain result

After the arguments, there was only one thing legal experts and stakeholders in the case could agree on: no one knows for sure what the justices will do.

"I never make predictions," said Michael A. Carvin, a partner in the Washington office of Jones Day, after arguing the case for the National Federation of Independent Businesses, one of the parties challenging the law's constitutionality.

Last year, Walter Dellinger, a partner in the Washington office of O'Melveny & Myers who served as acting solicitor general in the Clinton administration, predicted that the Court would uphold the health care law by a vote of 7-2 or 8-1.

After oral arguments, he said it was clear that there were three firm votes against it: those of Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito, Jr.

With the Court's four more liberal justices seemingly in the law's corner, that leaves the law in the hands of two people: Chief Justice John G. Roberts, Jr., and Justice Anthony M. Kennedy, who asked probing questions of both sides.

Dellinger said he'd be "shocked" if Roberts and Kennedy voted to strike down the law altogether, "because it would take us back to the jurisprudence of the 1920s," long before Congress dared to take on major legislation such as the Social Security Act, aimed at addressing serious nationwide crises.

The impact of the ruling could be staggering, particularly if the Court strikes the entire law down as unconstitutional. Such a scenario would mean the end of a number of provisions that affect employers, particularly small businesses, such as the health care tax credit. Important nondiscrimination requirements would also be invalidated, as well as a provision that prohibits insurers from denying coverage based on a pre-existing condition.

Even if the law is upheld in its entirety, a number of unforeseen consequences could occur. For example, many employers could choose to drop health care coverage.

"Employers may be more inclined … let people go to the exchanges" to buy their own coverage individually, said Alson R. Martin, a partner in the Overland Park, Kan., office of Lathrop & Gage. Health care exchanges are state-based entities that offer individuals a choice of plans, options and prices.

This effect could be seen more frequently with small- to medium-sized employers who are covered under the law, since many large corporations tout health insurance as part of their overall compensation package.

The impact will also be felt on Capitol Hill, experts said.

"The immediate consequences would be enormous," Dellinger said. "The pressure on Congress to come up with an emergency solution [for the health care issues addressed in the law] would be enormous. … [And the] effect on the ability of Congress to get legislation … [passed would] be extraordinary."

Questions or comments can be directed to the writer at: kimberly.atkins@lawyersusaonline.com

HEALTH CARE REFORM ON TRIAL

Let's put the whole thing off?

DAY ONE

WASHINGTON – The U.S. Supreme Court began its three-day examination of the challenge to the federal health care law by taking up an issue that could stop the case in its tracks: whether the Anti-Injunction Act bars courts from considering challenges to the law before it is fully implemented in 2015.

If the penalty for not obtaining health care coverage is deemed a tax, the AIA could serve as a jurisdictional bar preventing courts from hearing any challenges.

In an odd twist, the administration and the challengers to the health care law joined in urging the Court to find that the insurance penalty is not a tax and allow the challenge go forward now instead of waiting until 2015.

"Congress has authority under the taxing power to enact a measure not labeled as a tax, and it did so," Solicitor General Donald Verrilli, Jr., argued to the justices.

Gregory G. Katsas, a partner in the Washington office of Jones Day who represented the state challengers, agreed.

"The purpose of this lawsuit is to challenge a federal requirement to buy health insurance," Katsas said. "That requirement itself is not a tax."

The Court had to appoint an attorney to defend a 4th Circuit ruling holding that the penalty was a tax, and that the AIA barred challenges until 2015.

Robert A. Long, a partner in the Washington office of Covington & Burling, was given the job.

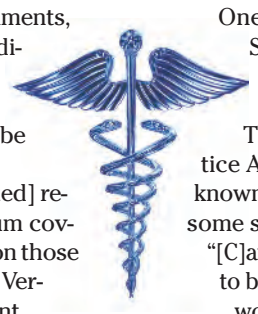
"First … you have to pay the tax or the penalty first and then litigate later," Long argued before the Court. "Second, you have to exhaust administrative remedies, even after you pay the tax you can't immediately go to court. [Third,] even in the very carefully defined situations in which Congress has permitted a challenge to a tax or a penalty before it's paid, the Secretary [of the Treasury] has to make the first move [by sending] a notice of deficiency to start the process."

The justices did not seem swayed by that argument.

"Congress has nowhere used the word 'tax'" in the law, Justice Stephen G. Breyer pointed out. "What it says is 'penalty.'"

– Kimberly Atkins

Supreme Court justices divided



DAY TWO

WASHINGTON – On the second day of oral arguments, the justices of the U.S. Supreme Court seemed divided over the constitutionality of the provision in the federal health care law requiring uninsured Americans to purchase health insurance or be charged a fee.

"Under the Commerce Clause, Congress [enacted] reforms of the insurance market [and] the minimum coverage provision is necessary to carry into execution those insurance reforms," said Solicitor General Donald Verrilli, Jr., during an extended two-hour oral argument session.

But states and individuals challenging the law say the clause only grants lawmakers the authority to regulate what some Americans are doing, not what some Americans are not doing.

"The Commerce Clause gives Congress the power to regulate existing commerce. It does not give Congress the far greater power to compel people to enter commerce," Paul Clement, a partner in the Washington office of Bancroft, argued on behalf of the states challenging the law.

The justices seemed split on the issue. Justices Antonin Scalia and Samuel A. Alito, Jr., expressed doubt over the law's constitutionality during arguments, and Justice Clarence Thomas, while silent during oral arguments for the past six years, has expressed strict views on the Commerce Clause's power during speeches outside the Court.

One the other side, Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan seemed to lean in favor the law's constitutionality.

That left Chief Justice John G. Roberts, Jr., and Justice Anthony M. Kennedy as unknowns – and Roberts expressed some serious concerns.

"[C]an the government require you to buy a cell phone because that would facilitate responding when you need emergency services?" Roberts asked Verrilli at one point during the arguments.


AP Photo/Carolyn Kaster

Paul Clement

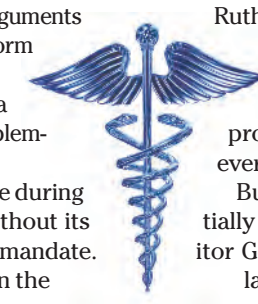
Michael A. Carvin, a partner in the Washington office of Jones Day who represented the challengers, argued that the law forces people into the health care market. But Sotomayor noted other examples of government regulation affecting choice.

"You can't buy a car without emission control," Sotomayor said. "I don't want a car with emission control. It's less efficient in terms of the horsepower. But I'm forced to do something I don't want to do by government regulation."

"You are not forced to buy a product you don't want," Carvin replied.

– Kimberly Atkins

Dissecting the reform law?



DAY THREE

WASHINGTON – On the last of three days of oral arguments on the constitutionality of the federal health care reform law, the justices of the U.S. Supreme Court pondered whether they should act as virtual surgeons, taking a scalpel to the statute to excise constitutionally problematic portions while leaving the rest in place.

But the justices seemed stuck on a central issue during the arguments: whether the law can function without its heart, which is the individual minimum coverage mandate.

On the issue of severability, the justices – as on the second day when they considered the mandate's constitutionality – seemed split.

"It's a choice between a wrecking operation, which is what you are requesting, or a salvage job," Justice Ruth Bader Ginsburg said to Paul Clement, a partner in the Washington office of Bancroft, who represents business groups seeking to strike down the law entirely. "And the more conservative approach would be salvage rather than throwing out everything."

But Justice Anthony M. Kennedy, seen as a potentially crucial vote in the case, later asked Deputy Solicitor General Edwin S. Kneedler if severing parts of the law, thereby creating a statute different than the one passed by Congress, was not "an awesome exercise of judicial power" leaving the Court unsure of "what the consequences might be."

– Kimberly Atkins

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PACU – Post Anesthesia Care Unit

Susan Hatfield, RN, CRLS, CLNC	214.622.0809
Nora Kinney, RN, BSN, CLNC	919.676.3468
Michelle Neufeld, RN, CLNC	520.444.1297

Pain Management

Brian Galbreath, RN, BSN, CLNC	302.287.7173

Pediatrics

Lisa Gilliam, RN, MSN, CPNP, CLNC	559.978.3909

Pharmaceuticals

Jacquelyn Castaldo, RN, MS, CLNC	914.909.2561

Psychiatric/Behavioral Health

Kathleen Dryer, RN, BSN, CLNC	505.603.0084

Quality Assurance/ Improvement

Dana Culhane, RN, CLNC	386.951.6670
Sarah Shellenberger, RN, MSN, CLNC	432.770.3218

Rehabilitation

Shantel Wallace, RN, CLNC	224.440.7638

Regulatory Compliance

Brenda Norris, RN, IBCLC, SMQT, CLNC	806.794.9113

SICU – Surgical Intensive Care Unit

Franklin Aitken, RN, BSN, PHN, CLNC	650.307.9585
Shirley Mayfield, RN, CLNC	770.432.6277
Lorraine Medina, RN, BSN, CLNC	480.457.0582
Jeri Yoder, RN, MNHP, CNL, CCRN, CLNC	319.321.5050

Skilled Nursing Facility

Toni Becker, RN, CMT, CWT, CLNC	734.765.0212
Vanessa Mueller, RN, CLNC	228.872.7082

Trauma

Melodie Hill, RN, CLNC	561.244.8333

Wound Management

Amy Cooper, RN, BSN, CWCN, COCN, CLNC	805.610.2075
Jeane Covey, RN, BA, CLNC	503.828.7719
Theresa Hoffman, RN, WCC, CLNC	336.708.1308
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VERDICTS & SETTLEMENTS

Continued from page 13

er had admitted to molesting one of them. The counselor, who was unlicensed, did not report the abuse and testified at two court hearings in order to help the woman obtain custody of her children.

The jury also levied $1.5 million in punitive damages against Okmulgee, Okla.-based Creoks Mental Health Services and $50,000 in punitive damages against unlicensed counselor Krista Roseborough, a Creoks employee who withheld information about the abuse from Department of Human Services investigators, according to court testimony.

"I think the jury was really angry about Mrs. Roseborough lying to the DHS investigators; her client told her in very graphic terms that she had molested her 3-year-old daughter," said Seminole, Okla. attorney Jerry Colclazier, who represented the plaintiff.

Roseborough withheld notes from a counseling session with the children's mother after DHS subpoenaed her medical records, according to the lawsuit. The notes revealed that the woman admitted to abusing one of her children, Colclazier said.

A judge awarded the mother, Louella Plett, emergency custody of the children based in part on Roseborough's testimony at a custody hearing, Colclazier's client claimed in the lawsuit.

The children's father, Brian Plett, filed the lawsuit against Creoks and Roseborough in 2005 on behalf of his children, who were ages 3, 5 and 8 when the alleged abuse occurred.

The judge later barred Louella Plett from having unsupervised contact with the children after the alleged abuse came to light. The jury handed down the multimillion-dollar verdict after a six-day trial in Okfuskee County District Court. In its verdict, the jury found that Roseborough had acted intentionally and with malice, and that Creoks had acted with reckless disregard to the right of others.

Colclazier said two unsuccessful attempts were made to reach a settlement with Creoks and Roseborough before the case went to trial.

"I don't think they ever took the case very seriously and I don't know why," he said.

Attempts to reach Creoks or Oklahoma City, Okla. attorney William Threlkeld, who represented the counseling center at trial, were unsuccessful.

Creoks plans to appeal the case, CEO Brent Black said in a statement posted on the counseling center's website.

"Since 2006, while under my direction, I believe it is clear that Creoks takes great pride in offering quality services to its clients and in complying with its legal obligation to those clients," he wrote. "We also take great pride in the quality of our employees. Creoks is taking the necessary legal steps to challenge the jury verdict which we believe was unfounded and unsupported by the evidence in the case."

– Brianna Bailey

A version of this story originally appeared in Lawyers USA's sister publication, The Journal Record.

Va. jury awards $1.9M in construction accident

On a spring day in 2006, Michael Boguess went to help his brother Todd pour concrete at a friend's house. By that evening, the 39-year-old mill worker found himself lying in a hospital bed, paralyzed from the neck down.

Boguess' life changed in a matter of seconds when a falling tree limb struck him on the head.

The facts of the incident were undisput-

Continued on page 24

Coma victim and her lawyers beat the odds in $22M verdict

By Sylvia Hsieh
Staff writer

Five years ago, Robyn Frankel's family debated whether to take her off life support. Doctors advised that she had only a three percent chance of coming out of a coma, and that even if she did she would be a vegetable. But her family remembered her last words – "I don't want to die" – and could not bring themselves to pull the plug.

On a rainy day six weeks later, against all odds, Frankel awoke. Her first words were "I'm alive."

AT-A-GLANCE

- The plaintiff's attorneys alleged that it was negligent for the defendant to have ordered the test when previous MRIs already told them everything they needed to know.
- They argued that the defendant lost credibility with the jury by simultaneously arguing it didn't order the test and that the test was necessary.

Last week, she and her family celebrated a legal victory against the medical center that ordered an angiogram test to treat the migraine headaches that had plagued the 42-year-old since she was a teenager.

There were other reasons why the case almost never happened.

Lead plaintiffs' attorney Jeffrey Mitchell had rejected the case as unwinnable years earlier and referred it out.

"I looked at it as a stroke treatment case – whether they treated the stroke appropriately. I thought it was too tough to win," said Mitchell, a partner at Emison, Hullverson & Mitchell in San Francisco.

Another plaintiffs' med-mal attorney took the case, but later dismissed it with prejudice.

In a last-ditch effort, the victim's sister, Kimber, reached out to a friend for help.

David Bovino, a real estate lawyer in Aspen, Colo., waded into unfamiliar territory to help, successfully arguing that the dismissal should be vacated because it was done without the plaintiff's knowledge or consent.

In a karmic twist, Mitchell got a second look at the case when Bovino referred it to him, not knowing he had rejected it before.

With fresh eyes, Mitchell decided it was not a post-stroke case at all, instead asking, "Why did she even have the angiogram?"

Mitchell and Bovino tried the case on the theory that it was negligent for Palo Alto Foundation Medical Group to have ordered the test when previous MRIs already told them everything they needed to know.

Frank Schimaneck, an attorney who represented the defendant, did not return a call seeking comment for this article.

'Fell through the cracks'

In October 2006, Frankel complained of migraines to her primary neurologist.

Days after seeing a neurosurgeon, Dr. Paul Jackson, she received a letter telling her to appear at Stanford Hospital for an angiogram.

But on the day of the test, as soon as the contrast dye was injected, a blood vessel in Frankel's brain spasmed, sending her into a coma.

The sole defendant, Palo Alto Foundation Medical Group where Jackson worked, claimed he did not order the test. It blamed Stanford Hospital.

The hospital settled with the plaintiff on the first day of trial.

According to the plaintiff's attorneys, the defendant lost credibility with the jury by simultaneously arguing it didn't order the test and that the test was necessary.

"They were trying to argue out of both sides of their mouth," said Mitchell.

During the four-week trial, Frankel, a quadriplegic who was told she would never talk or walk again, testified in person that she believed she "fell through the cracks of the system."

"She got put into the pipeline to have the test, but there was a missing order," said Bovino.

While Jackson denied having ordered the angiogram, he admitted having a "curbside consultation" with a neuro-radiologist at Stanford Hospital during which he shared some slides and discussed possible treatment.

But the Stanford doctor testified he would never order an invasive diagnostic procedure for a patient he had never met.

And Frankel's neurologist, who had treated her for years, wrote in her medical record that Jackson had ordered an angiogram.

The clincher was tearful testimony from a nurse at Stanford Hospital who confirmed she had received a fax from Jackson ordering the angiogram. Jackson had previously performed successful spinal surgery on the nurse.

"She said, 'It breaks my heart that my doctor, whom I have entrusted my life to and whom I think the world of, is not being truthful,'" said Bovino.

"She cried on the witness stand," Mitchell recalled. "You could hear a pin drop in the courtroom."

iPad trial

Even though the case involved a mountain of documents, the trial team decided to try the entire case on the iPad.

One attorney from Bovino's firm, Summer Woodson, was tasked with calling up any of the more than 1,000 exhibits stored on the iPad using the Trial Pad app.

"Before each witness, we would go over our cross examination outlines for what we decided to present to the jury. Summer would basically know which exhibits were important, whether it was a deposition transcript, a film from the angiogram, or an email. We were synchronized and it worked very smoothly and effectively," said Bovino.

It was their first time using the iPad at trial, but it won't be their last.

"I personally believe everything matters, even the little things," Bovino said. "When you have a lot of paper and you're trying to show exhibits or using an Elmo [projector], there's just a lot more to manage than when you have everything within a 10" square radius at the touch of your fingers. There was not a lot of shuffling around."

One critical piece of evidence that the team highlighted, expanded and put on screen over and over was the note from the neurologist saying Frankel was to undergo an angiogram ordered by Jackson.

> "They were trying to argue out of both sides of their mouth."
>
> – Jeffrey Mitchell

"We had it up on screen quite a bit. It was burned into all of the jurors' minds," said Bovino.

Mitchell was so pleased with how seamlessly the technology was working that at one point he burst out, "Thank God for Steve Jobs!" making everyone in the courtroom laugh.

Tort reform in play

The $22 million verdict included $6 million earmarked for pain and suffering, which will likely be immediately reduced at judgment.

Under a California tort reform measure dating back to 1975, pain and suffering damages in med-mal cases are capped at $250,000.

Mitchell, who has challenged that measure before, senses a more receptive environment in which to challenge the cap and plans to argue it violates the right to a jury trial.

"There is more of a movement here to overturn it," he said. "This is a good case to take it up the flagpole: it's gotten a lot of media coverage and it's a tragic case where she's got to live the rest of her life like this." He said that the jury reacted in disbelief when he told them after the trial that their verdict would be reduced.

Plaintiff's attorneys: Jeffrey Mitchell of Emison, Hullverson & Mitchell in San Francisco; David Bovino of Law Office of David A. Bovino and Associates in Aspen, Colo.

Defense attorney: Frank Schimaneck of Dryden, Margoles, Schimaneck & Wertz in San Francisco.

The case: *Frankel v. Palo Alto Foundation Medical Group Inc.*, March 19, 2012; California Superior Court, Santa Clara County; Judge Carol Overton.

Questions or comments can be directed to the writer at: sylvia.hsieh@lawyersusaonline.com

JUST FILED

Family of motorcyclist killed in crash files suit

The family of a motorcyclist killed in a Burbank, Calif. tractor trailer crash has filed a wrongful death suit against Sarasota, Fla.-based JCI Jones Chemicals, Inc.

The complaint, filed in the U.S. District Court for the Central District of California on behalf of Galo Ulloa's oldest son and representative of his estate, Dave Ulloa, alleges that JCI Jones Chemicals, Inc. was negligent, careless and reckless in operating the tractor trailer that caused the fatal crash. According to the lawsuit, JCI breached its duty of care in operating the truck and in obeying applicable laws related to the safe and lawful operation of a commercial motor vehicle transporting goods, including hazardous materials.

On Nov. 30, 2010, Galo Ulloa was hit by a tractor-trailer driven by JCI Jones employee Jesus Hernandez. Ulloa, on his way to work, was traveling southbound on Buena Vista Street as he approached the intersection with Burbank Boulevard. At the same time, the JCI Jones truck was traveling northbound on Buena Vista Street.

The suit claims that the tractor trailer failed to yield to oncoming traffic when it illegally turned left at the intersection, striking Ulloa and his motorcycle head-on. Ulloa was dragged an estimated 100 feet and was pronounced dead at the scene.

The suit is seeking general and special damages, including the cost of funeral, burial and related expenses.

– Tony Ogden

Suit: Website not liable for bad lawyer reviews

A review website for attorneys has filed a proactive lawsuit, arguing that it is not liable for negative reviews posted about lawyers on the site.

LawyerRatingz.com was threatened with legal action by the Ft. Lauderdale, Fla.-based Law Offices of Adrian Philip Thomas, over allegedly defamatory reviews.

So the site, which currently has over 42,000 lawyer ratings, sued first, seeking a declaratory judgment that it is protected by the First Amendment and the Communications Decency Act from liability over comments made by third parties.

The site is represented by the Electronic Frontier Foundation, which filed the suit in federal court in California after LawyerRatingz received multiple cease-and-desist letters from the firm. Complaining of lost clients, the firm threatened a suit for tortious interference with business relationships if its ratings and comments were not removed.

One commenter said that the firm "accomplished nothing" while another exhorted, "DO NOT HIRE THIS LAW FIRM!"

In a press release about the suit, EFF senior staff attorney Matt Zimmerman called the firm's claims "meritless," adding that they "run afoul of bedrock legal principles protecting website operators."

"Section 230 of the [Communications Decency Act] categorically protects providers of 'interactive computer services' from suits such as this one seeking to make them responsible for the speech of their users. Without such protections, valuable sites like LawyerRatingz.com – or Facebook or Yelp or individual blogs that rely upon user comments – simply could not exist," Zimmerman said in the statement.

– Correy E. Stephenson

Civil rights groups sue NYPD over private building patrols

Civil rights groups have filed a federal lawsuit against the New York City Police Department regarding their Operation Clean Halls program, which allows officers to patrol private apartment buildings throughout the city.

The New York Civil Liberties Union and other groups announced the lawsuit, saying tenants of buildings enrolled in the program are at a "heightened risk of unjustified and unlawful" stop-and-frisks or trespassing arrests.

Last year, officers stopped and questioned more than 680,000 people on the street. The so-called stop-and-frisks totaled 684,330, a record since the NYPD began yearly tallies of the tactic in 2002.

Civil rights advocates claim that the practice unfairly targets innocent blacks and other minorities, and that many stops are made without proper cause. The department calls it an essential crime-fighting tool.

Parents sue school district over alleged child porn

The parents of 10 girls are suing an Oklahoma school district where a former elementary school teacher is charged with manufacturing child pornography.

The lawsuit was filed in Pottawatomie County District Court against the McLoud School District, which employed teacher Kimberly Crain. The civil suit claims that Crain used her position as a third-grade teacher to force young girls to pose for pornographic photos and videos.

The suit claims that the alleged abuse happened at McLoud Elementary School and that school equipment was used to videotape and photograph the girls. The parents are seeking damages in excess of $10,000.

Crain and former professor Gary Doby are in jail on $1 million bond each.

Woman sues ex-cop who groped her

A California woman is suing a former Provo, Utah police officer who said he would not arrest her if she provided him with sexual favors.

The suit, filed in Salt Lake City federal court, claims that Jeffrey Westerman detained Leslie Bryson for 50 minutes and forced her to expose her breasts after a July 2010 traffic accident.

The complaint contends Westerman groped Bryson after threatening to arrest her for driving under the influence.

The suit, which seeks unspecified damages, alleges the experience caused Bryson to "suffer extreme shock" and "embarrassment."

Westerman, who was later fired, was sentenced in 2011 to 180 days in jail after pleading guilty to charges of felony attempted forcible sexual abuse and misdemeanor obstruction of justice in the case.

Mother sues hospital for cutting off baby's finger

A young mother is suing a central Florida hospital after a nurse accidentally snipped off the end of her baby's pinky finger.

An attorney for Veronica Olguin says the nurse at the Heart of Florida Regional Medical Center in Polk County cut off the 3-month-old child's finger with scissors in October while snipping an intravenous tube attached to her hand. Doctors tried to unsuccessfully to reattach the finger.

Olguin sued the nurse and the hospital for negligence. Her attorney says the lawsuit was necessary because a settlement couldn't be reached.

Hospital officials called it an "unfortunate accident" that they deeply regret. The nurse is still working at the hospital.

The suit seeks at least $15,000.

Widow of detainee files wrongful death suit

The widow of a Mexican citizen who died while in immigration custody in South Georgia has filed a wrongful death suit against the federal government.

The American Civil Liberties Union filed the lawsuit on behalf of Sara Hernandez-Gonzalez. Roberto Medina-Martinez died in March 2009 after having been held for about a month at a U.S. Immigration and Customs Enforcement facility. An autopsy showed he died of myocarditis, an inflammatory heart disease.

The lawsuit alleges the medical staff at the Stewart Detention Center was negligent and didn't provide proper medical care to Medina-Martinez. It seeks $1 million in damages for his wife.

In September 2011, ICE rejected a previous claim for $1 million from Hernandez-Gonzalez.

Law center sues jail over difficult conditions

The Southern Poverty Law Center has filed a class action that accuses New Orleans jail officials of routinely subjecting prisoners to brutal and inhumane conditions.

The federal suit against Orleans Parish Sheriff Marlin Gusman and other jail officials claims Orleans Parish Prison is oversized and understaffed, leaving prisoners vulnerable to rapes, sexual assault and beatings. The suit also says prisoners with mental illnesses languish without treatment.

The law center is seeking a court order that would require jail officials to cease all "unconstitutional and unlawful practices" and improve living conditions and care for prisoners.

The suit says the facility currently houses roughly 3,400 prisoners but isn't adequately staffed or supervised.

Patriots owner's company sues Massachusetts town

New England Patriots owner Robert Kraft's company has filed a federal civil rights lawsuit against the town of Foxborough, Ma. in which its alleges that Kraft's representatives have been repeatedly denied the right to speak at public meetings.

The suit seeks a declaration that the town has violated The Kraft Group's constitutional free speech rights, damages and an order against further violations.

The complaint filed in Boston stems from a dispute between Kraft and town government over two billboards on Kraft-owned land near Gillette Stadium.

The Kraft Group has managed the marketing of the billboards and split revenue with the town. The town wants to put the management contract out to bid and Kraft says the town lacks the authority to solicit bids for billboards on company property.

First Pradaxa suits filed in federal court

What are believed to be the first three product liability suits over the blood thinner Pradaxa were filed in March in federal courts in Kentucky, Louisiana and Tennessee.

Texas law firm Watts Guerra Craft LLC is behind the lawsuits, which in many instances assert identical claims against drug maker Boehringer Ingelheim Pharmaceuticals.

The plaintiffs in each lawsuit allege that patients who use Pradaxa are at increased risk for developing life-threatening bleeds. Each lawsuit alleges that, "[d]ue to the flawed formulation of Pradaxa … its levels in the blood are difficult or impossible to assess and bleeds cannot be stopped since there is no known reversal antidote for this dangerous drug."

In October 2010, the Food and Drug Administration approved Pradaxa for the prevention of stroke and blood clots in patients with abnormal heart rhythm (atrial fibrillation).

But in a December 2011 safety announcement, the FDA revealed that it was investigating reports of "serious bleeding events" in patients taking the popular blood thinner. The just-filed federal lawsuits state that Boehringer Ingelheim has confirmed that Pradaxa users suffered "at least 260 fatal bleeding events" worldwide between March 2008 and October 2011.

The new lawsuits were filed in U.S. District Court. In *Lege v. Boehringer Ingelheim* – filed in the Western District of Louisiana – Garland Lege alleges that he suffered gastrointestinal bleeding that required hospitalization and the removal of part of his colon after taking Pradaxa for less than a month in 2011.

Bivens v. Boehringer Ingelheim was filed in the Eastern District of Tennessee. In that lawsuit, Bertha Bivens claims that her mother, Nancy Brummett, suffered gastrointestinal bleeding and died in 2011 after taking Pradaxa for six weeks.

In *Hawkins v. Boehringer Ingelheim* – filed in the Eastern District of Kentucky – Helen Jean Hawkins claims that she was hospitalized with gastrointestinal bleeding in March 2011, a month after being prescribed Pradaxa.

The *Hawkins* complaint alleges that "as a direct and proximate result of Pradaxa use, [Hawkins] suffered severe mental and physical pain and suffering and has and will sustain permanent injuries and emotional distress, along with economic loss due to medical expenses."

The three federal lawsuits allege failure to warn, design defect, negligence, breach of warranty and fraud, among other claims. In addition to the Watts Guerra Craft lawyers representing the plaintiffs, Attorney Lee L. Coleman, of Bowling Green, Ky., appeared as local counsel in the Kentucky and Tennessee cases.

– Pat Murphy

BILLS, RULES & REGS

Senators unveil plan to tighten drug safety rules

A bipartisan group of senators has unveiled a draft of legislation aimed at tightening safety rules on prescription and over-the-counter drugs.

Sens. Michael Bennett, D-Colo., Tom Harkin, D-Iowa, Mike Enzi, R-Wyo., Richard Burr, R-N.C., Chuck Grassley, R-Iowa and Sheldon Whitehouse, D-R.I., released a discussion draft of a bill that would strengthen drug manufacturing standards and increase the Food And Drug Administration's authority to track drug supply chains, enforce safety rules and increase the penalty for counterfeiting drugs.

"Over the past few years, we have seen record recalls and case after case of tainted or ineffective medicine reaching our hospitals and drug store shelves," Bennett said in a statement. "This bill would provide the necessary authority for the FDA to ensure our drugs are safe and to hold drugs manufactured abroad to the same standards we hold those manufactured in the United States."

The new rules would apply regardless of whether the drugs were manufactured domestically or abroad. According to Bennett's office, up to 80 percent of the active ingredients and 40 percent of the finished drug products distributed within the U.S. are now made overseas. Many of those origin countries do not have the strict regulatory oversight that the U.S. requires.

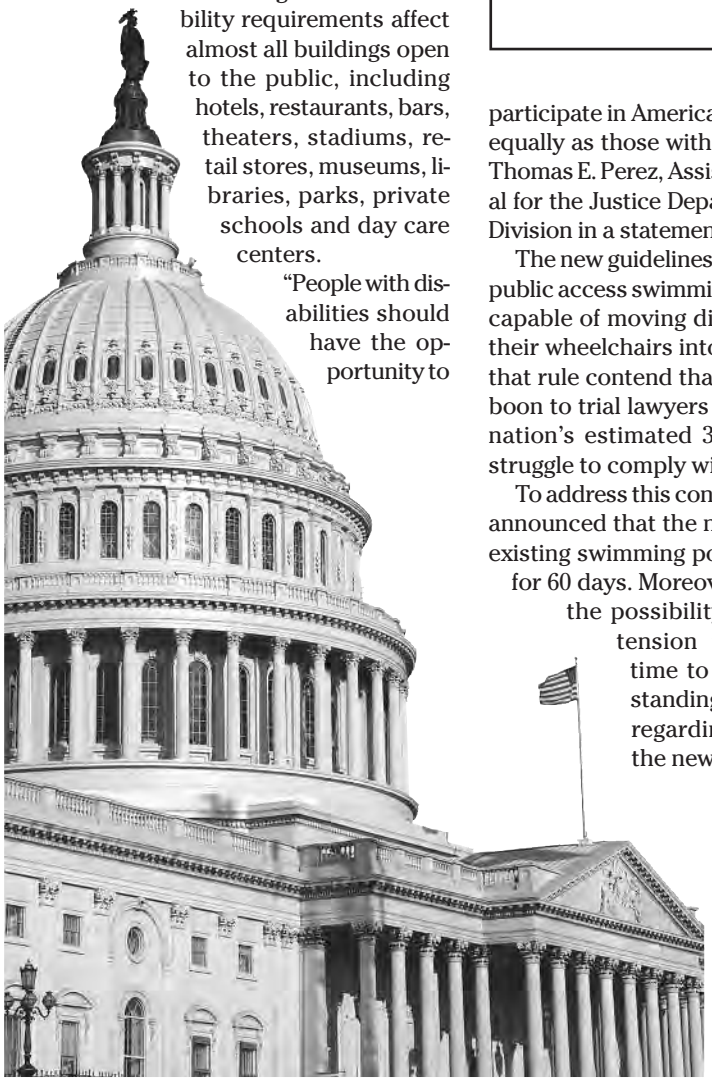
Bennett cited the 21 deaths traced to the drug thinner Heparin in 2008. That investigation led to a tainted supply of the active ingredient, which was manufactured at a plant in China.

The measure is intended to be included in legislation to reauthorize the Medical Device User Fee and Modernization Act.

New ADA accessibility standards take effect

The Justice Department's new rules updating standards for accessible design under the Americans with Disabilities Act have gone into effect – with the exception of a controversial requirement for the modification of existing public swimming pools.

The 2010 ADA Standards for Accessible Design generally became effective March 15. The heightened accessibility requirements affect almost all buildings open to the public, including hotels, restaurants, bars, theaters, stadiums, retail stores, museums, libraries, parks, private schools and day care centers.



"People with disabilities should have the opportunity to participate in American society as fully and equally as those without disabilities," said Thomas E. Perez, Assistant Attorney General for the Justice Department's Civil Rights Division in a statement.

The new guidelines include a rule that all public access swimming pools provide a lift capable of moving disabled patrons from their wheelchairs into the water. Critics of that rule contend that it will prove to be a boon to trial lawyers as the owners of the nation's estimated 300,000 public pools struggle to comply with the new mandate.

To address this concern, the Department announced that the new requirements for existing swimming pools will be extended for 60 days. Moreover, the DOJ left open the possibility of a six-month extension to allow additional time to address "misunderstandings" pool owners have regarding compliance with the new standards.

On July 26, 2010, President Barack Obama announced the new ADA regulations. The final regulations were published in the Federal Register on Sept. 15, 2010.

Since then, businesses have been preparing for the new standards, which among other things increase the number of parking spaces that must be van accessible and require that all shelves, counters, fire alarms and other reachable objects be no more than 48 inches high.

– Pat Murphy

Bills, Rules & Regs is written by Kimberly Atkins. You can contact her at kimberly.atkins@lawyersusaonline.com.

Anti-criminal hiring policies could spur bias suits

For employers, policies that forbid the hiring of convicted felons may seem like a very good, common-sense idea, especially for companies in the hospitality industry or any other trade involving frequent contact with customers.

But under an initiative from the Equal Employment Opportunity Commission designed to root out race-based systemic hiring practices, blanket policies against hiring applicants with criminal histories could land employers in hot water.

And that can leave some employers feeling like they are stuck between a rock and a hard place.

"It's certainly an issue in the hospitality industry. The employer is guarding against a negligence claim if they are hiring someone with a criminal background," said Andria Ryan, a partner in the Atlanta office of Fisher & Phillips and chair of the firm's Hospitality Industry Practice Group. Ryan said she has a client who is being investigated based on decisions not to hire hotel workers with criminal convictions.

The EEOC's E-RACE initiative, started in 2008 with a goal of being fully implemented by 2013, is designed to increase the agency's ability to identify, track, investigate and prosecute allegations of discrimination, according to the Commission.

But attorneys said that program, which allows the EEOC to launch investigations not only into specific allegations of race bias, but also to initiate probes of employers' systemic hiring practices, can be spurred by claims of adverse hiring decisions based on criminal history.

If an employee or applicant claims an employer's policy against hiring or retaining employees with checkered criminal pasts is actually aimed at keep out minorities, the employer can find itself the subject of an EEOC probe.

©iStockphoto.com/John Fugett

"If an employer finds itself with what appears to be a single charge of discrimination, you are almost guaranteed a systemic investigation" under the initiative, Ryan said.

The best thing a company can do is to avoid blanket policies against hiring felons. That may seem counterintuitive, but such a policy is the very approach that will raise the suspicion of EEOC investigators.

"The EEOC wants you to look at every applicant [or employee] on a case-by-case basis," Ryan said. "They want to know specifics. What position was involved? What was the conviction for? Were you hiring a housekeeper who would have close contact with guests, or a landscaper who would have little contact with them?"

This makes it easier for employers to show that adverse employment decisions were made out of business necessity, which is a key defense to such actions.

"Right now, start looking at your policies," Ryan said. "Even if you don't have a blanket prohibition on hiring felons, if the language seems to indicate that it is a blanket no-felon policy, it could lead to an investigation."

– Kimberly Atkins

Senate probes alleged NLRB ethics breach

After the release of an investigative report alleging that National Labor Relations Board member Terry Flynn violated ethics rules by disclosing confidential information to two former Board members, the Senate is launching a probe of the matter.

In March, a report by NLRB Inspector General David Berry was released, claiming that Flynn, while serving as chief counsel to Board member Brian Hayes, leaked information to former NLRB members Peter Kirsanow and Peter Schaumber which could be used for their private benefit. Kirsanow now serves as outside counsel for the National Association of Manufacturers, and Schaumber now serves as a labor advisor to the presidential campaign of former Massachusetts Gov. Mitt Romney.

In his report, Berry found that Flynn provided the former members with information about case lists, pre-decisional votes, case status, and other "deliberative, pre-decisional information that was protected from disclosure and considered by the NLRB to be the most confidential of Agency information."

Such disclosures "violated the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview," Berry wrote. "Given Mr. Flynn's position as a Chief Counsel and his years of service, he knew, or should have known, that he had a duty to maintain the confidence of the information that he received in the performance of his official duties."

Rep. George Miller, D-Calif., ranking Democrat on the House Education and the Workforce Committee, forwarded the report to Attorney General Eric Holder. It is unclear whether the Justice Department will launch an investigation.

But Sen. Tom Harkin, D-Iowa, Chairman of the Senate Health, Education, Labor and Pensions Committee, sent Flynn a letter asking him to release information and documents relating to Berry's findings.

"With all of the external political attacks

Continued on page 27

TOP DECISIONS

More coverage of recent decisions can be found at www.lawyersusaonline.com

ATTORNEYS

Firm needn't disclose malpractice documents

A law firm was not required to disclose communications between its attorneys and outside counsel relating to a client's allegations of legal malpractice, the Illinois Appellate Court has ruled in reversing a discovery order.

The defendant represented the plaintiff in a fight over control of a family-owned company. After the plaintiff was ousted as company president and CEO, he sued the defendant for legal malpractice.

During discovery, the trial court ordered the defendant to produce certain documents and communications between the defendant's attorneys and its in-house and outside counsel regarding the plaintiff's malpractice claim. The trial court ruled that the attorney-client privilege and work product doctrine did not apply with respect to the period of time that the defendant continued to represent the plaintiff.

But the appellate court concluded that the communications at issue were privileged and that the plaintiff failed to demonstrate the applicability of any exception to the privilege.

"The mental impressions [the plaintiff] seeks to obtain are not those related to his attorney's representation of him in the [underlying] litigation, but those related to the adversarial proceedings between himself and his attorney. Under Illinois law, the work-product of both in-house and outside counsel is not discoverable here where [the plaintiff] has not shown that it is impossible for him to obtain information related to his malpractice claims from similar sources. …

"Indeed, [the plaintiff] is entitled to, and has obtained, all documents relating to [the defendant's] representation of him in the [underlying] litigation, out of which his malpractice claims arise. Thus, the circuit court erred in ordering the disclosure of [the defendant's] in-house and outside counsel's work product related to [his] legal malpractice claims," the court said.

Illinois Appellate Court. Garvy v. Seyfarth Shaw, No. 1-11-0115. March 1, 2012. Lawyers USA No. 993-3615. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

ATTORNEYS

Law firm didn't violate Fair Debt Act

A law firm didn't violate federal debt collection law by submitting a client affidavit and legal memorandum arguing that the plaintiff was liable for her former husband's unpaid credit card balance, the 8th Circuit has ruled in affirming a summary judgment.

Discover Bank retained the firm to collect an unpaid balance on a credit card account opened by the plaintiff's husband before their marriage. After the plaintiff's divorce, the firm filed a collection action in state court against both the plaintiff and her ex-husband. The state court dismissed the collection action against the plaintiff, concluding her ex-husband was solely responsible for the debt.

The plaintiff sued the firm in federal court under the Fair Debt Collection Practices Act. According to the plaintiff, the firm violated §1692e of the Act by making false statements and misrepresentations in its filings in the state court collection action.

The court here found that the firm did not violate the Act by arguing for joint liability in the state proceeding.

"It was not false or misleading to submit a client affidavit and legal memorandum arguing [the firm's] legal position that [the plaintiff] was liable for the unpaid account balance, even if [her ex-husband] was the only one who used the credit card and made partial payments on the account, when Discover's records reflected that [he] submitted the initial application, added [the plaintiff] to the account by phone, neither spouse questioned statements identifying it as a joint account, partial payments were made by checks from a joint account, and a [divorce agreement] signed by [the plaintiff] listed it as a joint obligation for the couple's 'living expenses.'…

"The fact that a state court judge rejected the contention, unaware that [the plaintiff] had personally made at least one payment on the account, does not prove that those assertions were false or misleading for purposes of §1692e," the court said.

U.S. Court of Appeals, 8th Circuit. Hemmingsen v. Messerli & Kramer, No. 11-2029. March 16, 2012. Lawyers USA No. 993-3644. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

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BANKRUPTCY

'Fee-only' plan is allowed in bankruptcy

A Chapter 13 plan that in essence only ensured the payment of attorney and trustee fees should not have been automatically rejected as having been filed in "bad faith," the 1st Circuit has ruled in reversing judgment.

The debtor could not pay his legal fees at the time he retained his bankruptcy attorney. Instead, his attorney agreed to receive payment over time under the debtor's Chapter 13 plan. Accordingly, the debtor's bankruptcy plan called for the debtor to pay into the bankruptcy estate $100 per month for 36 months for a total of $3,600. Of that amount, only about $300 would be available for distribution to general creditors. Of the remainder, the debtor's attorney would receive $2,900 for his legal services and the trustee would receive $400 for his professional fee.

The bankruptcy court rejected the plan, concluding that such "fee-only" Chapter 13 plans are per se submitted in bad faith. This forced the debtor to convert his case to Chapter 7.

The bankruptcy court subsequently awarded the attorney only $299 of the $2,900 in fees he requested, concluding that a bankruptcy lawyer is not entitled to professional fees for time spent preparing a Chapter 13 plan that he knows is submitted in bad faith.

But the 1st Circuit rejected a blanket rule against fee-only plans.

"While fee-only plans should not be used as a matter of course, there may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified," the court said.

It remanded the matter for the bankruptcy court determine the appropriateness of the attorney's fee request after reexamining whether, under the "totality of the circumstances," the debtor's proposed Chapter 13 plan was submitted in good faith.

U.S. Court of Appeals, 1st Circuit. Berliner v. Pappalardo, No. 11-1831. March 22, 2012. Lawyers USA No. 993-3660. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

Bankruptcy estate doesn't include inherited IRA

Chapter 13 debtors could exempt from their bankruptcy estate an individual retirement account inherited from a relative, the 5th Circuit has ruled in affirming judgment.

The debtors are a husband and wife. The wife's mother passed away and the wife received her mother's IRA as the named beneficiary. The wife established her own IRA to receive the distributions from her mother's IRA. The wife's IRA was established as an inherited IRA under the Internal Revenue Code

When the debtors subsequently filed for bankruptcy, they sought to exempt $170,000 contained in the inherited IRA pursuant to §522(d)(12) of the Bankruptcy Code. Section 522(d)(12) allows debtors to exempt certain "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain provisions of the Internal Revenue Code.

The bankruptcy trustee argued that inherited IRAs do not qualify for exemption under §522(d)(12).

The court disagreed, first concluding that such IRAs constitute "retirement funds" within the meaning of the statute. Next, the court decided that post-transfer, inherited IRAs are exempt from taxation by reason of §408(e) of the Internal Revenue Code, rendering the debtors' inherited IRA exempt from their bankruptcy estate.

"Because §408 is one of the sections named in [§522(d)(12)], inherited IRAs are contained in an 'account' that is 'exempt from taxation' as that phrase is used in §522(d)(12)," the court said.

It noted that bankruptcy courts are divided on this issue.

U.S. Court of Appeals, 5th Circuit. Chilton v. Moser, No. 11-40377. March 12, 2012. Lawyers USA No. 993-3632. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

BUSINESS

Yaz plaintiff cannot proceed with class action

A California user of the oral contraceptive Yaz is not entitled to class certification on a claim that she suffered economic harm as a result of the drug maker's allegedly misleading advertisements, a U.S. District Court in Illinois has ruled.

The case is one of a number of actions involving Yaz and Yasmin that have been consolidated in multidistrict litigation in the U.S. District Court for the Southern District of Illinois. (See "First bellwether Yaz, Yasmin trial set for 2011," Lawyers USA, Oct. 21, 2010. Search terms for Lawyers USA's website: Yaz and Herndon)

The plaintiff in this case sued Bayer under California consumer protection law. She alleged that she selected Yaz as an oral contraceptive, instead of a cheaper drug, based allegedly misleading advertising concerning the effectiveness of Yaz in treating premenstrual symptoms.

The plaintiff sought certification of a class California consumers who suffered economic rather than physical harm as a result of purchasing Yaz.

But the court concluded that the plaintiff could not meet the requirements for class certification under federal law. In particular, the court said that the plaintiff "cannot establish conduct that was 'likely to deceive' on a class-wide basis because uniformity is lacking and materiality is not subject to common proof."

With respect to the issue of uniformity, the court explained that there was "no evidence of uniform misrepresentations and/or omissions to the putative class members' prescribing physicians. …

"[E]ven assuming putative class members and their prescribing physicians were exposed to the same alleged misrepresentations or omissions, the varied information conveyed by each prescribing physician to putative class members prevents a finding of uniformity."

U.S. District Court for the Southern District of Illinois. Burns v. Bayer Healthcare Pharmaceuticals, No. 3:09-cv-20001-DRH-PMF. March 13, 2012. Lawyers USA No. 993-3663. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

New tobacco warning statute constitutional

The new federal statute requiring tobacco companies to include graphic warnings on cigarette packages does not violate the First Amendment, the 6th Circuit has ruled in affirming judgment.

The Family Smoking Prevention and Tobacco Control Act was signed into law in 2009. The Act requires tobacco manufacturers to reserve a significant portion of to-

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bacco packaging for the display of health warnings, including graphic images intended to illustrate the hazards of smoking.

Pursuant to the Act, in 2011 the Food and Drug Administration unveiled nine new graphic warnings that must be placed on all cigarette labels and advertising in the United States by September 2012. The warnings depict images such as diseased lungs, cancerous mouth sores and even a dead body post-autopsy. (See "FDA unveils new, graphic cigarette warnings," June 24, 2011. Search terms for Lawyers USA's website: Sebelius and cigarette)

Sellers of tobacco products sued the federal government, alleging that Act's graphic-warnings provision violated their First Amendment rights.

But the court held that "the Act's warnings are reasonably related to the government's interest in preventing consumer deception and are therefore constitutional."

While the court here rejected a facial challenge to the statute, the U.S. District Court for the District of Columbia has struck down as unconstitutional the actual warnings adopted by the FDA. (See "FDA can't mandate graphic cigarette warnings," Lawyers USA, March 1, 2012. Search terms for Lawyers USA's website: graphic and Lorillard)

The 6th Circuit in this case further upheld the Act's restrictions on the marketing of modified-risk tobacco products; bans on event sponsorship, the branding of non-tobacco merchandise, and free sampling; and the requirement that tobacco manufacturers reserve significant packaging space for textual health warnings.

U.S. Court of Appeals, 6th Circuit. Discount Tobacco City & Lottery v. U.S., No. 10-5234. March 19, 2012. Lawyers USA No. 993-3658. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

CIVIL PRACTICE

Justices rule on statute of limitations for securities

The two-year statute of limitations period under §16(b) of the Securities Exchange Act begins to run when the plaintiff becomes aware of the facts underlying the claim, not upon an insider's filing of a disclosure statement required by the Act, the U.S. Supreme Court has ruled.

The justices reviewed a 9th Circuit decision in a derivative lawsuit filed by a shareholder under §16(b) against 55 underwriters who she alleged defrauded the public by engaging in a host of accounting mechanisms that artificially inflated the price of the issuers' securities to get a higher demand for their initial public offerings.

The defendants argued that her suits were barred by the Act's two-year statute of limitations, and a U.S. District Court agreed.

But the 9th Circuit reversed, holding that the statute of limitations was tolled because the underwriters failed to file proper disclosures for the alleged transactions as required by §16(a).

The Court granted certiorari and heard oral arguments in November.

Justice Antonin Scalia authored the majority opinion reversing the 9th Circuit.

Section 16 itself "quite clearly" does not extend the statute of limitations period in the manner allowed by the lower court, he wrote.

"Congress could have very easily provided that 'no such suit shall be brought more than two years after *the filing of a statement*…' But it did not."

Further, the plaintiff's claim was not appropriate for equitable tolling, the Court said, as the normal, long-standing principles apply under the Act: that the plaintiff has been pursuing his or her rights diligently and that some extraordinary circumstances stood in the way of suit.

But in the case at hand, the defendants have yet to file their §16(a) statements, meaning the plaintiff would still have two years to bring her suit even though she "is so well aware of her alleged cause of action that she has already sued," Justice Scalia noted.

Chief Justice John G. Roberts Jr. did not participate in hearing the case, presumably due to ownership of Credit Suisse-related stock.

U.S. Supreme Court. Credit Suisse Securities LLC v. Simmonds, No. 10-1261. March 26, 2012. Lawyers USA No. 993-3666. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

CIVIL PRACTICE

Toyota can't arbitrate sudden acceleration claims

Toyota can't compel the arbitration of class claims brought by customers who seek damages for diminution in the market value of their vehicles as a result of alleged defects that lead to incidents of sudden, unintended acceleration, a U.S. District Court in California has ruled.

Toyota became the target of numerous personal injury and consumer protection lawsuits after being forced to recall millions of vehicles due to reports of sudden acceleration problems. (See "Plaintiffs' lawyers expect more claims against Toyota," Lawyers USA, Jan. 29, 2010. Search terms for Lawyers USA's website: Toyota and "sudden acceleration") The cases have been consolidated for multi-district litigation in U.S. District Court for the Central District of California. (See "Toyota MDL consolidated in Calif.," Lawyers USA, April 12, 2010.)

Here, the MDL court addressed Toyota's motion to compel arbitration against 20 putative class representatives whose economic loss claims are scheduled for a bellwether trial set to begin July 31, 2013. The arbitration provisions at issue are in new and used vehicle purchase and lease agreements. Toyota is not a party to any of those agreements.

The court concluded that Toyota, by its "full engagement" in mounting a defense in the case, waived its right to arbitration with respect to 15 of the plaintiffs.

"By continuing to actively defend the present MDL and, more specifically, the economic loss claims, without a whisper of the intent to seek an order compelling arbitration, Toyota has engaged in numerous acts that are inconsistent with the right to compel arbitration," the court said.

With respect to the remaining five bellwether plaintiffs, the court decided that Toyota, as a non-signatory, could not enforce the arbitration agreements found in their purchase and lease agreements with Toyota dealers.

U.S. District Court for the Central District of California. In re Toyota Motor Corp. Unintended Acceleration Marketing Sales Practices and Products Liability Litigation, No. 8:10ML 02151 JVS. March 12, 2012. Lawyers USA No. 993-3669. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

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E-discovery charges not 'costs' under statute

Charges imposed by electronic discovery vendors to assist in the collection, processing and production of electronically stored information generally were not taxable as "costs" against the losing party in an antitrust case, the 3rd Circuit has ruled in slashing a $365,000 award.

Under 28 U.S.C. §1920(4), a losing party generally may be taxed "fees for exemplification" or the "costs of making copies" of any materials needed in discovery.

In this case, the plaintiff and the defendant are competing racing tire suppliers. The plaintiff sued the defendant for antitrust violations. Both parties hired electronic discovery vendors to assist in the extensive discovery of electronically stored information in the case.

After granting the defendant a summary judgment on the plaintiff's claims, the district court concluded that more than $365,000 in charges imposed by the electronic discovery vendors, covering such activities as hard drive imaging, data processing, keyword searching and file format conversion, were taxable as costs under §1920(4).

But the 4th Circuit concluded that none of the electronic discovery vendors' activities in the case could be regarded as "exemplification" of materials under the statute.

"There is no need to decide whether Congress used the term 'exemplification' in its narrow 'legal sense,' or in the broader sense adopted by [other circuits]. The electronic discovery vendors' work in this case did not produce illustrative evidence or the authentication of public records. Their charges accordingly would not qualify as fees for 'exemplification' under either construction of the term," the court said.

Moreover, the court concluded that only the vendors' scanning and file format conversion activity could be considered to be the making of copies within the meaning of §1920(4). The court estimated that only $30,000 of the more than $365,000 in electronic discovery charges in the case fell within this category.

U.S. Court of Appeals, 3rd Circuit. Race Tires America, Inc. v. Hoosier Racing Tire Corp., No. 11-2316. March 16, 2012. Lawyers USA No. 993-3646. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

CIVIL RIGHTS

U.S. Supreme Court OKs strip searches for minors

Jailhouse strip searches of inmates arrested for non-indictable offenses are constitutional as long as the policy for conducting such searches strikes a reasonable balance between inmate privacy and the needs of the institutions, the U.S. Supreme Court has ruled.

The lead plaintiff in a class action alleging §1983 civil rights violations was arrested on a bench warrant for civil contempt for failing to pay a fine. He asserted that the fine had been paid and he'd been arrested in error, but he was taken to county jail and required to strip, lift his genitals and shower in front of jail officials.

He was then transferred to another county jail, strip searched again, and directed to squat, cough and shower in front of a correctional officer before being sent to the general population.

After seven days he was released and the charges were dropped.

He and other arrestees who had been similarly searched sued the county and various individuals and municipal entities under §1983, claiming the jails' strip search policies violated the Fourth and Fourteenth Amendments.

The plaintiffs moved for summary judgment, and the defendants filed a cross motion for summary judgment, alleging qualified immunity.

A U.S. District Court granted the plaintiffs' motion, and denied the defendants' motion.

But the 3rd Circuit reversed, holding that the strip search procedures were reasonable.

The Supreme Court heard oral arguments in October 2011.

In a 5-4 ruling, the justices affirmed the 3rd Circuit.

In a majority opinion authored by Justice Anthony M. Kennedy, the majority stressed the importance of prison policies designed to keep weapons, drugs and other contraband out of jailhouses, and noted that even those accused of minor offenses can be dangerous. Limiting searches to only those arrested for major offenses could impose unreasonable risks.

"The restrictions suggested by petitioner would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility, including the less serious offenders themselves," Kennedy wrote.

Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. filed concurrences emphasizing the limited nature of the Court's ruling – specifically that the ruling applies to inmates who will be released into the general jail population, and that the ruling does not foreclose the possibility that constitutional violations can be found in ex-

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ceptional cases.

Justice Stephen G. Breyer filed a dissent, which was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

U.S. Supreme Court. Florence v. Board of Chosen Freeholders of the County of Burlington, No. 10-945. April 2, 2011. Lawyers USA No. 993-3690.

Witness isn't liable for false grand jury testimony

A government investigator was entitled to absolute immunity from liability for allegedly providing false testimony to a grand jury, the U.S. Supreme Court has ruled in a unanimous decision.

The decision affirms a ruling from the 11th Circuit.

The plaintiff was indicted three times in Georgia for assault and making harassing telephone calls. The complaining witness in each case was the defendant, a chief investigator for a local district attorney's office. The plaintiff succeeded in having all three indictments dismissed.

The plaintiff subsequently sued under §1983, alleging that the defendant conspired to present and did present false testimony to the grand jury.

The defendant argued that a witness in a grand jury proceeding is entitled to the same absolute immunity afforded trial witnesses sued under §1983. (See "Is official who lied to grand jury immune from liability?" Lawyers USA, Nov. 2, 2011. Search terms for Lawyers USA's website: Rehberg and Paulk)

The Court agreed, explaining that the "factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony. … Since perjury before a grand jury, like perjury at trial, is a serious criminal offense, there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony."

Moreover, the Court concluded that there was no reason to distinguish law enforcement witnesses from lay witnesses in this regard.

Justice Samuel A. Alito Jr. wrote the opinion of the Court.

U.S. Supreme Court. Rehberg v. Paulk, No. 10-788. April 2, 2012. Lawyers USA No. 993-3689. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

CRIMINAL

Courts can order consecutive sentences

A U.S. District Court has the authority to order that a federal criminal sentence run consecutively to an anticipated state sentence that has yet to be imposed, the U.S. Supreme Court has ruled.

The case involved a defendant who pleaded guilty in federal court to drug possession with the intent to distribute. He was also set to be charged in state court on drug charges from an incident which had resulted in revocation of his parole for an earlier state offense.

A federal court judge sentenced the defendant to 151 months of imprisonment to be served concurrently with any subsequent state sentence – but served consecutively to any sentence imposed for his parole violation.

The defendant appealed his federal sentence, arguing that the district court lacked the discretion under the Sentencing Reform Act to impose a sentence to run consecutively to a state sentence yet to be imposed.

The 5th Circuit disagreed. The Supreme Court granted certiorari and heard oral arguments in November.

Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings, Justice Antonin Scalia wrote for the majority.

"We find nothing in the Sentencing Reform Act, or in any other provision of law, to show that Congress foreclosed the exercise of district courts' sentencing discretion in these circumstances," the Court said.

A dissent was filed by Justice Stephen G. Breyer, which was joined by Justices Ruth Bader Ginsburg and Anthony M. Kennedy.

U.S. Supreme Court. Setser v. U.S., No. 10-7387. March 28, 2012. Lawyers USA No. 993-3675. You can link to the full text of this opinion by going to www.lawyersusaonline.com and searching the Lawyers USA website.

CRIMINAL

Justices to decide if crime justifies deportation

The U.S. Supreme Court will decide whether an alien's state-law conviction for possessing marijuana with intent to distribute constitutes an "aggravated felony" justifying deportation, even though the record of conviction does not show that the underlying conduct would constitute a felony under federal law.

The Court will review a 5th Circuit decision holding that a Georgia marijuana conviction should be considered a felony under the federal Controlled Substances Act and an aggravated felony for purposes of immigration law.

The defendant is a native of Jamaica with permanent residency status in the U.S. He pleaded guilty to possessing marijuana with intent to distribute in Georgia. Federal immigration authorities subsequently commenced removal proceedings, concluding that the defendant had committed an aggravated felony within the meaning of federal immigration law.

The defendant argued that his state conviction should not be considered a deportable felony offense because the Georgia drug law at issue encompasses misdemeanors. More specifically, the defendant contended that, because the record of his conviction failed to disclose the amount of marijuana involved or that he sought remuneration, his drug conviction should be treated as a federal misdemeanor.

But the court observed that, under 5th Circuit precedent, the "default" sentencing range for a marijuana distribution offense is the felony provision rather than the misdemeanor provision of §841 of the Controlled Substances Act. Here, the court adopted the same interpretation of §841 for immigration purposes as for sentencing purposes.

"[The defendant] pled guilty to possession of marijuana with intent to distribute under [the Georgia criminal code]. Even if that section of the Georgia code could cover conduct that would be considered a misdemeanor under §841(b)(4), [the defendant] bore the burden to prove that he was convicted of only misdemeanor conduct. Otherwise, as is true for federal defendants charged under §841, his crime is equivalent to a federal felony," the court said. It noted that the federal circuits are divided on this issue.

A decision from the Supreme Court is expected next term.

Moncrieffe v. Holder, No. 11-702. Certiorari granted: April 2, 2012. Ruling below: 662 F. 3d 387 (5th Cir. 2011).

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Immigration travel ban is not retroactive

An immigration statute limiting a legal permanent resident's right of reentry does not apply retroactively to a felony conviction before the effective date of the law, the U.S. Supreme Court has ruled 6-3.

The decision reverses a ruling from the 2nd Circuit.

The defendant is a native of Greece and became a lawful permanent resident of the U.S. in 1989. He pleaded guilty to a felony in 1994.

In 2003, the defendant traveled to Greece to visit his parents. Upon his return to the U.S., the government treated him as an inadmissible alien and placed him in removal proceedings pursuant to a provision enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The statute effectively precludes foreign travel by lawful permanent residents who have a felony conviction.

The defendant argued that he was subject to federal immigration law in effect at the time of his felony conviction. (See "Does immigration travel ban apply retroactively?," Lawyers USA, Jan. 19, 2012. Search term for Lawyers USA's website: Vartelas) In 1994, aliens in his situation could travel abroad for brief periods.

The Court agreed that the IIRIRA did not apply retroactively to bar the defendant's reentry.

"In sum, [the defendant's] brief trip abroad post-IIRIRA involved no criminal infraction. IIRIRA disabled him from leaving the United States and returning as a lawful permanent resident. That new disability rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA's enactment. The anti-retroactivity principle instructs against application of the new proscription to render [the defendant] a first-time arrival at the country's gateway," the Court said.

Justice Ruth Bader Ginsburg wrote the majority opinion. Justice Antonin Scalia wrote a dissent, joined by Justices Clarence Thomas and Samuel A. Alito Jr.

U.S. Supreme Court. Vartelas v. Holder, No. 10-1211. March 28, 2012. Lawyers USA No. 993-3674. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

Justices to decide if dog sniff justified vehicle search

The U.S. Supreme Court will decide whether probable cause for a motor vehicle search is established by an alert from a well-trained narcotics detection dog certified to detect illegal contraband.

The Court will review a Florida Supreme Court decision holding that the interior search of a defendant's truck was unconstitutional because the state failed to establish the reliability of a drug-detection dog (See "Government must show reliability of dog sniff," Lawyers USA, April 25, 2011. Search terms for Lawyer USA's website: Harris and pseudoephedrine)

Police discovered pseudoephedrine, a drug used to make methamphetamine, in the defendant's truck after a drug-detection dog alerted to the driver's side door handle.

The defendant argued that the evidence should have been suppressed because the prosecution failed to introduce sufficient evidence to establish the reliability of the dog. The dog used in his arrest allegedly had a history of false alerts.

Addressing a threshold issue, the state supreme court decided that the state has the burden of proving the reliability of a drug-detection dog rather than the defendant needing to establish a dog's lack of reliability.

Moreover, the court held that "evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause."

Instead, the court decided that the state "must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle."

In this case, the court decided that the state failed to meet this standard.

A decision from the Supreme Court is expected later this term.

Florida v. Harris, No. 11-817. Certiorari granted: March 26, 2012. Ruling below: 71 So. 3d 756 (Fla. 2011).

Court recognizes post-conviction counsel right

A criminal defendant had a narrow right to the effective assistance of counsel in a post-conviction proceeding, the U.S. Supreme Court has ruled in a 7-2 decision.

The decision reverses a ruling from the 9th Circuit.

The defendant was convicted in Arizona state court of engaging in sexual conduct with a minor. Under Arizona law, prisoners may raise claims of ineffective assistance of trial counsel only in post-conviction pro-

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ceedings, not on direct review.

The defendant's lawyer failed to raise an ineffective assistance of counsel claim in his first state post-conviction proceeding. He subsequently obtained a new lawyer who filed a second petition for post-conviction relief, alleging ineffective assistance on the part of his trial lawyer. The state trial court dismissed the petition, ruling that the failure to raise the claim in the first post-conviction petition constituted a default under state law.

On federal habeas review, the defendant argued that he received ineffective assistance both at trial and in his first state post-conviction proceeding. He also claimed that he had a constitutional right to an effective attorney in the post-conviction proceeding because it was the first place to raise his claim of ineffective assistance at trial. (See "The limits of post-conviction right to effective counsel?" Lawyers USA, Oct. 4, 2011. Search terms for Lawyers USA's website: Mariano and Martinez)

The state contended that Arizona's default rule was an adequate and independent state-law ground barring federal review. Moreover, the state argued that, under *Coleman v. Thompson* (501 U. S. 722), the attorney's errors in the post-conviction proceeding did not qualify as cause to excuse the procedural default.

But the Court recognized an exception to the *Coleman* rule under the narrow circumstances of this case.

"Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective," the Court said.

Justice Anthony M. Kennedy wrote the majority opinion. Justice Antonin Scalia wrote a dissent in which Justice Clarence Thomas joined.

U.S. Supreme Court. Martinez v. Ryan, No. 10-1001. March 20, 2012. Lawyers USA No. 993-3648.You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

EMPLOYMENT

Medical employer waived arbitration rights

An employer waived its right to enforce an arbitration clause in its employee's contract when sued for retaliatory discharge and disability discrimination, the New Jersey Appellate Division has ruled in reversing judgment.

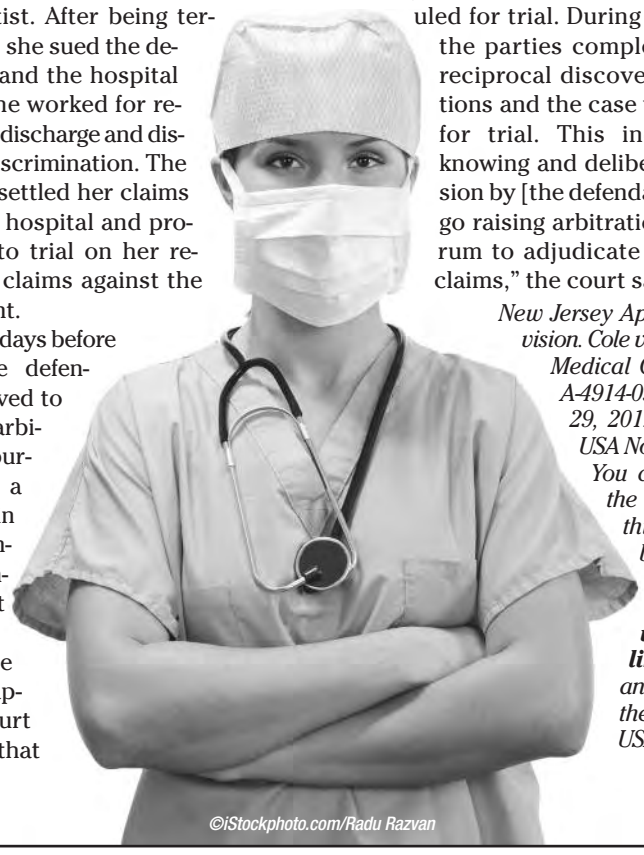
The plaintiff worked for the defendant medical practice as a nurse anesthetist. After being terminated, she sued the defendant and the hospital where she worked for retaliatory discharge and disability discrimination. The plaintiff settled her claims with the hospital and proceeded to trial on her remaining claims against the defendant.

Three days before trial, the defendant moved to compel arbitration pursuant to a clause in the plaintiff's employment contract.

But the state appeals court decided that the defendant had waived its arbitration rights.

"As a matter of litigation strategy, [the defendant] opted to participate in the suit brought in the [trial court] for a period of twenty months and did not raise the issue of arbitration until three days before the case was scheduled for trial. During this time, the parties completed their reciprocal discovery obligations and the case was ready for trial. This indicates a knowing and deliberate decision by [the defendant] to forgo raising arbitration as a forum to adjudicate plaintiff's claims," the court said.

New Jersey Appellate Division. Cole v. Jersey City Medical Center, No. A-4914-09T1. March 29, 2012. Lawyers USA No. 993-3686. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*



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tent with that representation, as he now claims that he was *able* to perform those same duties," the court said.

U.S. Court of Appeals, 3rd Circuit. MacFarlan v. Ivy Hill SNF, No. 11-2307. March 29, 2012. Lawyers USA No. 993-3684. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

EMPLOYMENT

Employee's FMLA claim barred by estoppel

An employee who suffered a stroke was judicially estopped from claiming that he was able to return to work for purposes of pursuing a lawsuit under the Family and Medical Leave Act, the 3rd Circuit has ruled in affirming a summary judgment.

The plaintiff took FMLA leave after suffering a stroke. While on leave, he applied for and began receiving short-term disability benefits. While still on disability, the plaintiff attempted to return to work under certain lifting restrictions ordered by his doctor. His employer terminated him after determining that he would not be allowed to return to work subject to lifting restrictions.

The plaintiff sued, alleging that his termination violated his FMLA rights.

But the court concluded that, because the plaintiff had asserted he was unable to work in claiming disability benefits, he was judicially stopped from asserting that he was able to work for purposes of proceeding with his FMLA claim.

"[The plaintiff] accepted [disability] benefits under coverage for being 'unable to perform the material duties of [his] occupation,' and represented himself as such. There is therefore no question that he did in fact take the position vis-à-vis his insurer that he was medically unable to perform his occupation's material duties. [The plaintiff's] present position is wholly inconsis-

ERISA plan didn't violate anti-cutback rule

A pension plan amendment that eliminated a more favorable Social Security offset for certain retirement benefits did not violate ERISA's anti-cutback rule, the 11th Circuit has ruled in affirming judgment.

The anti-cutback rule in §204(g) of ERISA generally prohibits a pension plan amendment that decreases a participant's "accrued benefit."

The plaintiff in this case is a Delta Air Lines flight attendant. The plaintiff's pension plan has always used a Social Security offset to reduce a participant's pension retirement benefits. In 2007, Delta amended the calculation of the Social Security offset for those participants like the plaintiff who had not yet reached age 52 – the earliest retirement age under the plan

The plaintiff sued, arguing that the amendment to the offset provision violated ERISA's anti-cutback rule because it purportedly decreased her accrued pension benefits.

Delta argued that the amendment did not violate the anti-cutback rule because the change affected only future accruals for persons under age 52.

The court agreed, explaining that the "anti-cutback rule protects only an accrued benefit from being reduced by plan amendment. [The plaintiff] had an expectation for how the Social Security offset would work if she continued to work until age 52 and then retired from Delta, but only that. The anti-cutback rule does not protect a mere expectation based on anticipated years of future employment."

U.S. Court of Appeals, 11th Circuit. Cinotto v. Delta Air Lines, No. 10-14704. March 23, 2012. Lawyers USA No. 993-3668. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

FAMILY

Estate can sue ex-wife to recover ERISA funds

The estate of a divorced man could sue his ex-wife to enforce her waiver of rights to the proceeds of his ERISA retirement plan, the 3rd Circuit has ruled in reversing judgment.

The defendant waived her rights to the proceeds of her husband's 401(k) plan in her divorce. However, the man died without removing the defendant as the plan's designated beneficiary.

When the man's estate sued to enforce the defendant's waiver of her right to funds in the plan, the defendant argued that her waiver was rendered void by ERISA's anti-alienation provision.

But the court held that, while ERISA required the plan to distribute the 401(k) funds to the defendant as the named beneficiary, it did not prevent the estate from suing the defendant directly to recover the funds.

"A number of circuits, including our own, have held that even though ERISA prevents a creditor from encumbering pension funds *held by a plan administrator*, the funds are no longer entitled to ERISA's protections against the creditor's claims *once they are paid to the beneficiary*. …

"In each of these cases, the court held that once the benefits were distributed to the designated beneficiary in accordance with the plan documents, ERISA was no longer implicated. The same principle is equally applicable here. More specifically, if a creditor can enforce its rights against a beneficiary once pension funds have been distributed, we see no reason why the estate should not be able to enforce its contractual rights against [the defendant] once [the plan] disburses the funds," the court said.

U.S. Court of Appeals, 3rd Circuit. Estate of Kensinger v. URL Pharma, Inc., No. 10-4525. March 20, 2012. Lawyers USA No. 993-3656. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

Husband must pay for twins from in vitro fertilization

A husband who consented to the artificial insemination of his wife using donor sperm and eggs cannot avoid paying child support for twins born as a result of the procedure, the Massachusetts Court of Appeals has ruled in affirming judgment.

The parties separated after nine years of marriage and after unsuccessfully attempting to have children through a variety of means. At the time, the husband was in the process of attempting to obtain U.S. citizenship. Despite their separation, the wife remained intent on having children through in vitro fertilization. When donor eggs became available, the wife pressed the husband to consent to the procedure.

The husband consented, but only after the parties executed a written agreement that purported to excuse the husband's obligation to pay child support. According to the husband, he only agreed to the procedure in order to preserve his wife's support for his citizenship application.

The wife gave birth to twins. In the parties' divorce case, a state judge determined that the husband was the legal father of the twins and ordered him to pay child support.

The husband argued that his consent was invalid under the state's in vitro fertilization law because it was conditioned on the terms of the parties' written agreement in which he disclaimed parental responsibility.

But the court held that consent for purposes of the statute means consent to create a child, rather than consent to become a parent.

"Thus, where a husband consents to an artificial insemination or [in vitro fertilization] procedure, knowing that a child may result, parental status should attach," the court said.

Massachusetts Court of Appeals. Okoli v. Okoli, No. 10-P-1351. March 6, 2012. Lawyers USA No. 993-3642. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

PERSONAL INJURY & TORT

Privacy Act doesn't cover mental damages

The Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore, the Government has not waived sovereign immunity for such claims, the U.S. Supreme Court has ruled.

In the case before the Court, a pilot intentionally failed to disclose his HIV status to the Federal Aviation Administration as required to receive a medical certificate to operate aircraft. He later disclosed his condition to the Social Security Administration in order to receive long-term disability benefits.

After the SSA disclosed his medical records to the FAA, the pilot's license was revoked and he was charged with submitting false reports to a federal agency.

He filed suit under the Privacy Act, alleging that the disclosure of his medical

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records resulted in mental and emotional distress.

But a U.S. District Court granted summary judgment for the agencies, holding that the pilot's claimed injuries were not compensable under the Act, which only allows recovery for "actual damages." The 9th Circuit reversed.

The Supreme Court granted certiorari and heard oral argument in November.

Writing for the majority, Justice Samuel A. Alito Jr. said that the scope of the government's waiver to be sued must be construed in favor of the sovereign, reversing the 9th Circuit.

"Actual damages" has been interpreted by courts to include mental and emotional distress, Alito acknowledged, but it has also been construed more narrowly to authorize damages only for pecuniary harm.

"When waiving the Government's sovereign immunity, Congress must speak unequivocally. Here, we conclude that it did not. As a consequence, we adopt an interpretation of 'actual damages' limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires," the Court said.

Justice Sonia Sotomayor authored a dissent which was joined by Justices Stephen G. Breyer and Ruth Bader Ginsburg; Justice Elena Kagan took no part in consideration of the case.

U.S. Supreme Court. Federal Aviation Administration v. Cooper, No. 10-1024. March 28, 2012. Lawyers USA No. 993-3676. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

State law doesn't revive priest sex abuse claims

State law does not authorize the revival of personal injury claims brought by men who alleged that in recent years they discovered that their psychological problems were due to sexual abuse by a priest in the 1970s, the California Supreme Court has ruled in reinstating a dismissal.

The plaintiffs are six brothers who were born in the 50s and early 60s. In 2007, they sued a Roman Catholic diocese for negligent hiring, retention and supervision, alleging that they were sexually abused by their parish priest in 1972 and 1973. According to the plaintiffs, they did not discover until 2006 that the sexual abuse was the cause of their adult psychological problems.

The diocese argued that the plaintiffs' claims lapsed pursuant to a 1998 amendment to the state's child sex abuse statute. The amendment provided that claims against third-party defendants like the diocese must be brought prior to the plaintiff's 26th birthday.

The court agreed, rejecting the plaintiffs' contention that their lawsuit was revived by a 2002 amendment providing that such claims could be brought within three years after the plaintiff discovered his psychological injury was caused by childhood abuse.

"Because plaintiffs did not bring their action within the one-year revival period prescribed by the 2002 amendment, their claims are barred. Our conclusion rests upon three points: The 1998 amendment under which claims against persons or entities other than the direct perpetrator of the abuse could not be brought once a plaintiff reached the age of 26; the usual rule of construction that lapsed claims are not considered revived without express legislative language of revival; and the express – but limited – language of revival contained in the 2002 amendment to [child sex abuse statute]," the court said.

California Supreme Court. Quarry v. Doe I, No. S171382. March 29, 2012. Lawyers USA No. 993-3687. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

PERSONAL INJURY & TORT

Taser needn't pay $10M for wrongful death

A $10 million jury award in a Taser wrongful death case was excessive because it failed to reflect the present value of the services that the decedent would have provided to his parents over his projected lifetime, a U.S. District Court in North Carolina has ruled.

The plaintiff is the estate of a 17-year-old who died from cardiac arrest after police shot him in the chest with a Model X26 Taser at the grocery store where he worked. Police had been called to the store after the young man created a disturbance upon learning that he had been fired. It was undisputed that an officer fired the Taser when the young man moved towards him. The device's readout indicated that the officer held the trigger down to deliver a shock for 37 continuous seconds.

The plaintiff sued Taser International for product liability. A jury found the manufacturer liable for failing to warn users about the dangers of chest shots and awarded $10 million.

In seeking to overturn the verdict, Taser argued that the plaintiff's lawsuit was barred by the decedent's contributory negligence. But the court concluded that, under North Carolina product liability law, contributory negligence does not apply where the injured party is not the user of the product.

"Finding contributory negligence in this circumstance would immunize Taser from ever being liable for a product defect. Police officers do not deploy a taser unless a suspect has acted at least unreasonably. Therefore, a person who has been tased would always be barred by contributory negligence from suing Taser," the court said.

However, the court agreed that the $10 million verdict was excessive, explaining "the highest value the jury could have determined [the decedent] to be worth to his parents over their projected final forty years is $7.5 million. Assuming a one percent discount rate over that term, the present value would be $5,037,399. The court will, therefore, remit the verdict to $5,037,399."

U.S. District Court for the Western District of North Carolina. Fontenot v. Taser International, No. 3:10-cv-125-RJC-DCK. March 27, 2012. Lawyers USA No. 993-3693. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

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State can enforce Medicaid reimbursement deal

A state could enforce an agreement with a Medicaid recipient's attorney providing a dollar-for-dollar reimbursement from a personal injury settlement, the Nebraska Supreme Court has ruled.

The plaintiff was seriously injured in an automobile accident. Although he qualified for Medicaid, the state Medicaid program pursuant to its regulations refused to pay his outstanding medical bills until after he settled his personal injury claim from the accident.

In order to facilitate a settlement, the plaintiff's attorney agreed that, if the state paid the medical bills at the discounted Medicaid rate, the plaintiff would reimburse the state dollar-for-dollar out of the settlement proceeds.

After the state paid $130,000 to the plaintiff's medical providers and the plaintiff settled his personal injury claim for $800,000, the plaintiff argued that full reimbursement was contrary to federal Medicaid law as interpreted by the U.S. Supreme Court in *Arkansas Department of Health & Human Services v. Ahlborn* (547 U.S. 268). (See "State agency can be reimbursed only for medical expenses," Lawyers USA, May 8, 2006. Search term for Lawyers USA's website: Ahlborn)

But the court concluded that the state was entitled to be fully reimbursed.

"By promising that the $130,000 would be reimbursed in full if [the state] paid his outstanding medical bills at the reduced rate, [the plaintiff] agreed that $130,000 of the proffered $800,000 settlement related to medical expenses. This agreement is both consistent with *Ahlborn* and reasonable under the undisputed facts," the court said.

Nebraska Supreme Court. Smalley v. Nebraska Department of Health and Human Services, No. S-11-151. March 23, 2012. Lawyers USA No. 993-3680. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

Asbestos plaintiff didn't show duty of care

A take-home asbestos plaintiff failed to alleged sufficient specific facts for the recognition of a duty of care, the Illinois Supreme Court has ruled.

The plaintiff's father worked for CSX Transportation from 1958 to 1964. The plaintiff's mother died from mesothelioma in 2007. In a lawsuit against CSX for negligence and strict liability, the plaintiff alleged that her mother's mesothelioma was due to exposure to asbestos fibers carried home on her father's work clothes.

The railroad succeeded in having the case dismissed after arguing that, under state law, an employer has no duty to third parties for exposure from asbestos-tainted work clothes.

But a state appeals court recognized that an employer has a duty to prevent take-home asbestos exposure. (See "Employer can be liable for 'second-hand' asbestos," Lawyers USA, June 18, 2010. Search terms for Lawyers USA's website: Simpkins and CSX)

Here, the state supreme court acknowledged that it was *possible* that CSX had a duty to guard against reasonably probable and foreseeable injuries that naturally flowed from the railroad's use of asbestos products.

However, the court concluded that the plaintiff's complaint was deficient on the issue of foreseeability because it lacked specific facts regarding what CSX knew or should have known about the nature and potential harms from asbestos from 1958 to 1964.

"Because foreseeability is such an integral factor to the existence of duty and because the weight to be accorded to that foreseeability (as well as to the other factors) depends on the particular circumstances of the case, without more detailed pleadings we cannot determine whether, if all well-pled facts are taken as true, a duty of care ran from [CSX] to [the plaintiff's mother] in this case," the court said.

Rather than reinstating the trial court's dismissal of the case, the state supreme court remanded the matter to give the plaintiff the opportunity to amend her complaint.

Illinois Supreme Court. Simpkins v. CSX Transportation, No. 110662. March 22, 2012. Lawyers USA No. 993-3667. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

Surgical stapler subject to broad risk-utility test

The risk-utility analysis in a defective design case involving a multi-use surgical stapler was not limited to the particular use that injured the patient, the Pennsylvania Supreme Court has ruled.

The plaintiff is the estate of a woman who died from complications following gastric bypass surgery. The death allegedly resulted from the failure of surgical staples used to seal certain incisions in the woman's abdomen.

The staples were applied by a linear cutting and stapling instrument known as an "endocutter." The endocutter was designed for endoscopic surgery (less invasive procedures involving small incisions), but the manufacturer also marketed the device for traditional surgery involving large incisions, such as the gastric bypass surgery in this case.

The plaintiff sued the manufacturer for defective design, alleging that the endocutter should have incorporated a measuring device to aid surgeons in determining tissue thickness and appropriate staple length.

A jury awarded the plaintiff $5 million, but a state appeals court overturned that verdict, concluding that, under the state's risk-utility test, there was no feasible safer design that would enable the endocutter to accomplish its goal.

Here, the plaintiff argued that the appellate court, in its risk-utility analysis, wrongly looked to endoscopic uses for the endocutter when this case involved traditional

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ed. The concrete delivery company acknowledged their truck driver came into contact with the tree's foliage while backing up to leave. They further acknowledged that this contact caused the large branch to fall.

But when it came to admitting liability, the concrete company's response was unwavering: It's not our fault.

Instead, they pointed the finger at Todd Boguess, who had been acting as a spotter while the truck was backing up. And they blamed the homeowner, who they claimed had improperly pruned the tree.

It took nearly six years for Michael Boguess, who by then had regained use of his limbs, to take his case to trial.

After three days of testimony, it took the six-woman, one-man jury only two and a half hours to hand down a verdict of $1,959,971, plus more than $680,000 in interest.

Covington, Va. attorney Russell W. Updike, who represented Boguess along with his colleagues Nolan R. Nicely Jr. and Jennifer K. M. Crawford, called the defendant's continuous denial of liability a "risky" move that may have helped steer the jury in his client's favor. He also believes the six-year time lapse between the accident and the trial motivated the jury to add interest to their award, bringing the total recovery to $2,644,373.

Initial paralysis

The accident occurred on May 18, 2006. Construction Materials Co. had just wrapped up a concrete delivery. With the task complete, the concrete truck was turning around to leave when the "pony axel" on top of the truck came into contact with the canopy of the tree, rattling the branches just enough to dislodge a large limb that Updike described as "two to two and a half feet long with a diameter of a one-gallon paint can."

Boguess, who was standing beneath the tree, was struck in the head by the falling branch and immediately paralyzed.

After spending six days in the hospital, Boguess began to regain some feeling. He spent 13 additional days in a rehabilitation facility, and continued outpatient treatment for several months following the accident.

The recovery took its toll on Boguess both physically and emotionally. As Updike explained, the married father of three had to rely on his wife to help him with everything, including his most basic needs. His injuries also prevented him from attending his oldest son's high school graduation, Updike said.

Prior to the accident, Boguess had worked as an assembly line assistant at a paper mill. The job required heavy labor, including lifting, pulling and long periods of standing. He was unable to resume his job after the accident, but in March 2007, his doctors released him to light duty work and the company assigned him to a desk job.

In 2009, Boguess underwent a three-level cervical fusion to address some lingering symptoms of his injury, including pain, numbness and tingling in his extremities. As a result of the surgery, he was able to stop taking his pain medication, but he lost a considerable range of motion in his neck.

Boguess still experiences numbness in his extremities, difficulty holding objects in his left hand and trouble walking. His medical expenses were approximately $133,000, and he claimed about $46,000 in lost wages.

But recovering these damages proved to be a challenge.

Construction Materials Co. not only denied all liability for the accident, it also filed counterclaims against the plaintiff's brother and the property owner.

According to plaintiff's counsel, the defense claimed Todd Boguess should have alerted the driver before he came into contact with the tree branches. They also brought in an arborist, who testified that improper pruning of the tree caused the limbs to weaken from rot.

The parties attempted to mediate, but negotiations were unsuccessful.

The case first went to trial in October 2011, but due to issues with the jury, a mistrial was declared.

The rescheduled trial took place in March 2012.

The defendants continued to assert that the truck driver and company were not liable for Boguess' injuries, and that Boguess was contributorily negligent for standing behind the truck at the time of the accident.

The defense also argued that the Boguess' neck surgery was not related to the 2006 incident, Updike said.

Roanoke attorney Sean Workowski, who represented the defendant, could not be reached for comment.

Plaintiffs' attorneys: Russell W. Updike, Nolan R. Nicely Jr. and Jennifer K. M. Crawford of Wilson, Updike and Nicely in Covington, Va.

Defense attorneys: Sean Workowski and Bridget Tainer-Parkins of Frith Anderson & Peake in Roanoke, Va.

The case: *Boguess v. Construction Materials Co.;* March 14, 2012; Alleghany County Circuit Court; Judge Malfourd Trumbo

– Sarah Rodriguez

A version of this article originally appeared in Lawyers USA's sister publication, Virginia Lawyers Weekly.

Harassment suit settles for $6M after $95M verdict

Rental company Aaron's Inc. has settled a sexual harassment suit brought by a former employee for $6 million. The deal comes less than a year after a federal jury awarded the woman $95 million.

"Aaron's has a robust non-harassment policy and accompanying practices designed to protect our associates, and we are pleased to get this litigation behind us," said Aaron's President and CEO Ronald W. Allen in a statement.

On June 7, 2011, a federal jury in Illinois awarded Ashley Alford $95 million – including $80 million in punitive damages – on her Title VII complaint alleging that she was sexually harassed and assaulted by an Aaron's store manager. Alford worked as a customer service representative at an Aaron's store in Fairview Heights, Ill. She was 20 years old at the time that the alleged harassment occurred in 2005 and 2006. The store manager was later acquitted of criminal charges relating to the alleged assault.

Alford's $95 million award was one of Lawyers USA's Top Ten Jury Verdicts of 2011.

However, from the outset it was clear that Alford would not be collecting that amount. Last July, the district court vacated $50 million of the award to bring it in conformity with the statutory damage caps on Title VII claims.

And according to Aaron's, at a Jan. 13, 2012 hearing, U.S. District Judge Michael J. Reagan called the original $95 million verdict "monstrously excessive" and ruled that he would not "sustain the verdict in its current form." Those signals spurred the parties to settle the case before the judge issued his final rulings on the company's post-trial motions to set aside or further reduce the verdict.

Aaron's announced the $6 million settlement in March and the district court accordingly dismissed the lawsuit with prejudice March 26.

– Pat Murphy

Family reaches $6 million settlement with railroad

The family of a Chicago dance instructor who was killed at a railroad crossing in University Park, Ill., almost two years ago has reached a $6 million settlement with the railroad company.

Katie Ann Lunn, 26, taught at the Joffrey Ballet School in Chicago and the School of Performing Arts in Naperville, and danced with the Hip Hop Connxion and the Chicago Dance Theater. She was driving home from watching her students perform at a dance competition at Governor's State University on April 16, 2010, when she was hit by a high-speed train after railroad crossing signals didn't operate properly.

The wrongful death suit, which sought loss of society damages only, was filed by her father Jerry Lunn on behalf of her estate. The suit claimed that the railroad crossing signals were deactivated earlier in the day for maintenance work and were never turned back on. Illinois Central Railroad Company fully admitted liability for Lunn's death after evidence that included a video of the crash was obtained during discovery.

The jury was to decide solely the issue of damages. The defendant agreed to settle the lawsuit for $6 million the night before opening statements were scheduled to begin.

– Tony Ogden

Settlement of hospital workers' suit approved

A Wood County, W.Va. judge has approved a $4.7 million settlement in a class action brought by former workers at St. Joseph's Hospital in Parkersburg over the loss of accumulated sick leave benefits.

Circuit Judge Robert Waters approved the settlement, to be paid to 626 employees.

Nine people who opted out of the lawsuit against the hospital's former parent company Signature Hospital Corp. also will be paid their accumulated sick leave.

Signature sold St. Joseph to West Virginia United Health System, which merged the hospital with Camden-Clark Memorial in 2011 to form one regional medical center.

Restaurant chain agrees to settle identity theft case

A restaurant chain that was sued for failing to follow a federal anti-identity theft law has reached an agreement to settle the case.

Des Moines-based Palmer's Deli & Market has agreed to provide a free soft drink to customers who used a credit or debit card between June 2008 and May 2011.

The settlement still must be approved by U.S. District Judge James Gritzner. If it is approved, Palmer's customers who can prove they used a card for a purchase in the three-year period would get a coupon for a free drink with a $5 purchase.

The lawsuit, filed in June 2011, accuses Palmer's of violating a 2003 federal law that requires credit card numbers and expiration dates to be abbreviated on store receipts.

Residents near landfill win $2.3M verdict

A federal jury has ordered the owner of a Lee County, S.C. landfill to pay $2.3 mil-

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invasive surgery.

But the state supreme court held that the state's courts "are not restricted to considering a single use of a multi-use product in design defect, threshold, risk-utility balancing."

Pennsylvania Supreme Court. Beard v. Johnson & Johnson, No. J-29-2011. March 22, 2012. Lawyers USA Nos. 993-3672 (majority) and 993-3673 (concurrence). You can link to the full text of either opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

REAL PROPERTY & ZONING

Homeowner can't get flood coverage

A homeowner was not entitled to coverage under a policy issued under the National Flood Insurance Program because he failed to strictly comply with the policy's proof-of- loss requirement, the 2nd Circuit has ruled in affirming a summary judgment.

The plaintiff took out a standard flood insurance policy administered by the defendant on behalf of the federal government pursuant to the National Flood Insurance Act. The policy required the plaintiff to promptly file a proof of loss when making a claim.

The plaintiff filed a claim for damage to his home after a nearby creek flooded. In submitting a proof of loss, the plaintiff partially complied, but failed to designate a specific amount of damages as required by the policy.

The defendant denied the plaintiff's claim based on the incomplete proof of loss.

The court agreed that coverage could be denied on that basis, holding that standard flood insurance policy requirements must be strictly construed and enforced.

"In the context of federal insurance policies, the Supreme Court has long held that an insured must comply strictly with the terms and conditions of such policies," the court said.

It noted similar decisions from the 1st, 3rd, 4th, 5th, 6th, 8th, 9th and 11th Circuits.

In addition, the court rejected the plaintiff's argument that the defendant's initial denial of coverage on the basis of his incomplete proof of loss amounted to a "repudiation" under applicable New York law, thereby relieving him of the proof-of-loss requirements.

U.S. Court of Appeals, 2nd Circuit. Jacobson v. Metropolitan Property & Casualty Insurance, No. 11-0220-cv. March 6, 2012. Lawyers USA No. 993-3619. You can link to the full text of this opinion by going to ***www.lawyersusaonline.com*** *and searching the Lawyers USA website.*

WORKERS' COMPENSATION

Longshore Act maximum rate set at date of disability

The maximum workers' compensation benefits available to a longshoreman must be based on the national average weekly wage for the fiscal year in which he became disabled, the U.S. Supreme Court has ruled.

The decision affirms a ruling from the 9th Circuit.

Section 906(c) of the Longshore and Harbor Workers' Compensation Act caps benefits for most types of disability at twice the national average weekly wage for the fiscal year in which an injured employee is "newly awarded compensation."

In this case, the plaintiff was injured in fiscal year 2002 while working at a marine terminal. His employer voluntarily paid his benefits until fiscal year 2005. The plaintiff subsequently filed a claim for benefits under the Act. An administrative judge awarded the plaintiff benefits in fiscal year 2007.

However, the award was based on the fiscal year 2002 statutory maximum rate.

The plaintiff argued that he was "newly awarded compensation" within the meaning of §906(c) in 2007 and, therefore, his award should have been set at the higher statutory maximum rate for fiscal year 2007. (See "In workers' comp case, a question of time," Lawyers USA, Jan. 12, 2012. Search terms for Lawyers USA's website: Roberts and Sea-Land)

But the Court held that "that an employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf."

Justice Sonja Sotomayor wrote the majority opinion. Justice Ruth Bader Ginsburg filed an opinion concurring in part and dissenting in part.

U.S. Supreme Court. Roberts v. Sea-Land Services, Inc., No. 10-1399. March 20, 2012. Lawyers USA No. 993-3649.

Damaged crops yield $40M verdict for two farmers

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in too high of a volume, killing the plants.

Defense: plaintiffs should have tested

The plaintiffs filed suit against Oregon-based Sun Gro and Wilbur-Ellis, a multinational corporation that actually manufactured the fertilizer by mixing the components.

According to Baron, the defense argued at trial that Aujla shouldn't have used the Multicote for two straight years and should have realized what happened to his crops.

Further, they argued that both farmers should have tested the product before using it on a larger scale basis, because not every fertilizer is made for every plant.

The defense "tried to have it both ways," Baron said. "First, they said their fertilizer was not dangerous, and yet they were saying that [the plaintiffs] should have realized it was dangerous" from testing it and stopped its use.

The defendants also presented testimony from a farmer who said his plants had done well with the Multicote, Baron said.

At trial, both plaintiffs took the stand, along with an expert who explained to jurors the losses their farms had incurred.

Aujla told the jury about his 2007 absence and why he used the fertilizer for a second year. Both farmers explained that they lost good will among their customers, who turned to other farms to provide their plants when Aujla and De Zwaan could not do so.

Jurors deliberated for roughly one full day before returning a verdict. Aujla was awarded $12 million in economic losses, an additional $22.5 million for the loss of customers and just under $5 million in interest. De Zwaan received $241,060 for his economic losses.

Plaintiff's attorneys: Lawrence Baron and Robert Udziela of the Baron Law Firm in Portland, Ore.

Defense attorneys: Everett Jack of Davis Wright Tremaine in Portland, Ore. for Woodburn Fertilizer and Wilbur-Ellis; William G. Earle of Davis Rothwell Earle Xochihua in Portland, Ore. for Sun Gro.

The case: *J.R.T. Nurseries, Inc. v. Sun Gro Horticulture Distribution, Inc.*; Feb. 15, 2012; Multnomah County Circuit Court; Judge Stephen Bushong.

Questions or comments can be directed to the writer at: correy.stephenson@lawyersusaonline.com

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lion to six residents who say their lives have been made miserable by the stench from the 140-foot tall piles of trash.

The landfill, owned by Republic Services of Arizona, may appeal and will ask a judge to throw out the award.

But a lawyer for the residents says he will ask the judge to close the landfill or order it to change how it operates at the hearing.

During a two-week trial, people who lived near the landfill testified the smell is so bad at times they cannot stay outside.

Officials at the landfill say state regulators never had a problem with the odors.

Suit against toy maker settles for $1.2 million

The inventor of the iconic G.I. Joe action figure has agreed to pay $1.2 million to end a lawsuit filed by the backers of his follow-up venture, a line of toys based on Old Testament biblical heroes that never quite took off.

When Donald Levine, who invented G.I. Joe for Hasbro Toys in 1963, went looking for funds to launch his Almighty Heroes line, he turned to noted collector Stephen Geppi Sr., owner of Diamond Comic Distributors Inc. Geppi was a logical choice, as his $200,000 purchase of Levine's handmade G.I. Joe prototype in 2003 set a Guinness World Record for toy soldiers.

In October 2004, Levine and his son, Neil, along with Geppi and Kerby Confer, former chairman of the radio division of Sinclair Broadcast Group Inc., formed Family Values LLC to sell Almighty Heroes.

Targeting what was seen as a lucrative Christian marketplace, Almighty Heroes included action figures for such Old Testament stalwarts as David and Goliath, Moses, Samson, Jonah and Queen Esther, starting at $12.99 each. A $3,500 inflatable Noah's Ark was planned, as were tie-in DVDs and a cartoon show.

However, the partnership turned sour after years of missed payments, lack of accounting and the virtual disappearance of Neil Levine. Geppi and Confer filed a lawsuit against the Levines on Oct. 6, 2010, in Baltimore City Circuit Court seeking $688,000 in compensatory damages and $6.8 million in punitive damages.

In a March 20 consent judgment between Donald Levine, Geppi and Confer, the investors agreed to drop the lawsuit in exchange for $1.2 million and to dismiss their claims against Neil Levine without prejudice.

"The parties agree that a consent judgment will resolve the lawsuit," said Sean O'Kelly, a Wilmington, Del., attorney who is co-counsel for Donald Levine. "It's almost like a plea bargain in a criminal case."

The consent judgment has not yet been followed by a payment, according to Geppi and Confer's attorney, Andre R. Weitzman.

Geppi did not return calls for comment. Contact information for Confer was not available.

Reached by phone in Providence, R.I., Nan Levine, Donald's wife, said that Neil Levine was "out of the country" and she was not sure when he would be back. Donald Levine was unavailable for comment.

The partnership

Levine, 83 and a Korean War veteran, left Hasbro in 1975 to start his own toy company. Before the Almighty Heroes line, he created the Kenya doll, an African-American doll that was immensely popular in the 1980s.

Donald and Neil came up with the Almighty Heroes concept in 2004. The goal was to package the toys with biblical stories and appeal to patrons of Christian retailers as well as larger toy sellers such as Toys 'R' Us.

That October, Geppi and Confer agreed to pay a combined $300,000 for a 40 percent stake in the company.

According to court records, the Levines came back in April 2005 for a $504,000 loan to cover operating costs. The first and only payment on that loan came in April 2006 for $19,024.

In February 2008, the Levines asked for another $688,000 to prevent going into default and subsequent legal action against Family Values LLC. Geppi and Confer loaned them the money and increased their stake in the company to 60 percent.

According to the lawsuit, no more was ever paid on the loans and no reports on the company's activities and spending were ever given to Confer and Geppi. The increased stake in the company was never filed.

"There have not been any payments in years," said Weitzman, who practices in Baltimore.

It remains unclear what the status of Family Values and the Almighty Heroes action figures are. The company's website has changed hands and is now an unrelated, infrequently posted-to Japanese-language blog about people changing careers. The toys themselves can be found online at places like Amazon.com, but are sold at a steep discount through unrelated sellers.

Geppi's Diamond Select Toys and Collectibles LLC, which was supposed to distribute the toys, no longer lists them. Neil Levine, the president of Family Values, has been out of contact for some time and his last known address is a post office box at an OfficeMax store in Minneapolis.

"Neil has remained elusive," Weitzman said.

Plaintiffs' attorney: Andre Weitzman, Andre Weitzman & Associates in Baltimore.

Defense attorneys: Sean T. O'Kelly of O'Kelly & Ernst in Wilmington, Del.; Mark T. Mixter in Baltimore; (Martin H. Schreiber II, local counsel, withdrew in March 2012).

The case: Confermation LLLP v. Family Values LLC; March 20, 2012; Baltimore City Circuit Court; Judge John P. Miller.

– Ben Mook

A version of this article originally appeared in Lawyers USA's sister publication, the Maryland Daily Record.

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Rethinking the roles of your office support staff

Continued from page 4

porary workplace. To be more efficient and effective, modern, small law firms operating on the traditional personal assistant-legal secretary model should reevaluate their strategy with that in mind.

That means reviewing outdated and often-forgotten job descriptions to reflect employees' contributions to the firm and then revisiting and updating them on a regular basis.

One key component of having one person handle all of a certain type of task is to require each staffer to document what he or she does in writing and cross train at least one other person to do it.

With this new model, job descriptions might have more entries like these:

Legal Assistant 1 (currently Sandy)

- Reviews all newly opened files in the areas of bankruptcy (BK) and civil litigation (CIV) to determine that all required information is included and the new file opening checklist is completed.
- Works with debtor clients to prepare for filing.
- Creates drafts of pleadings and responses in contested BK and CIV for attorneys to review.
- Makes certain that tasks are timely completed in accordance with scheduling orders in CIV cases.
- Responsible for maintaining status lists on pending BK and CIV cases and running the bi-weekly Litigation Status & Support meeting(s) with all involved attorneys.
- Backup (morning only) reception duties when receptionist is absent.
- Cross trained on Scheduling Assistant duties.

Secretary 2: Billing/Business Coordinator (currently Bob)

- Reviews, corrects and manages billing entries and check requests from lawyers
- Prepares and distributes the Monday Morning Report to partners with revenues and expenses from the prior week and all billing entries received from lawyers for the previous week, year to date and month to date.
- Pays bills and orders supplies in consultation with the Managing Partner.
- Performs light typing and document preparation when others are backed up or absent.
- Backup (afternoon only) reception duties when receptionist is absent.

> **The old model of the legal secretary as personal assistant is becoming increasingly incompatible with business reality.**

- Cross trained on Scheduling Assistant duties.

Reviewing these job descriptions or separate task assignment lists would likely become a regular part of management of the firm. This may be frustrating to the partner who "just wants to practice law." Lawyers must recognize that a law firm itself is still a business. The regular review of assignments and work flow is a business-like approach to monitoring and improving your legal business.

Aligning the law firm staff according to this type of model also reinforces the message that staff work for the entire law firm, not just an individual lawyer. Many lawyers have dealt with the frustration of trying to work with a personal assistant who views his or her job security as keeping old Tom happy while others can fend for themselves.

Understanding the overall work that keeps the whole staff busy every day puts lawyers in a better position to understand when outsourcing typing or reception services might make sense and what kind of employees you are seeking when you next have an opening to fill.

For many firms, economic realities mean that lower staffing levels are a part of the future. Staff members who provide service to clients and generate revenue to the firm along with handling their back office duties demonstrate how valuable they are to the firm, all because their tired, old job descriptions weren't left to gather dust in a filing cabinet.

BILLS, RULES & REGS

Continued from page 18

that the NLRB has faced during this Congress, I am troubled to hear reports of internal ethical misconduct by a Board Member," Harkin said in a statement. "Mr. Flynn's disclosure of confidential information relating to cases pending before the Board while serving as Chief Counsel to a Republican Board Member not only undermines the impartiality of the Board's adjudication process, but also raises the alarming possibility that the recent political attacks on the Board could have been aided and abetted by his unethical activity. To shed more light on this deeply troubling situation, I am asking Mr. Flynn to provide the Committee with additional communications and documents."

Minorities make gains in federal workforce

Minorities are making progress in securing senior level positions in federal agencies, according to an annual report released by the Equal Employment Opportunity Commission.

"Over the last 10 years women, Hispanic or Latino, Black/African American, and Asian employees have made the most gains in securing senior level positions in the federal government," states the Annual Report on the Federal Work Force Part II: Work Force Statistics, Fiscal Year 2010.

According to the report, over the last 10 years women have seen a 57 percent increase in filling senior pay level positions in the federal government. Similarly, Hispanic or Latino, Black/African American and Asian senior-level employees have increased by 52 percent, 41 percent and 126 percent, respectively.

The report, which covers the period from Oct. 1, 2009 through Sept. 30, 2010, includes statistical work force profiles and trends for 64 federal agencies.

According to the report, there has been little change in the overall composition of the federal work force over the years. In fiscal year 2010, there were over 2.8 million federal employees, 56 percent of whom were men. The report found that 65 percent of federal employees were white, 18 percent Black or African American, 8 percent Hispanic or Latino, and 6 percent Asian.

The report acknowledges that for 2010, the percentage of federal employees with "targeted" disabilities like blindness, deafness and paralysis remained at less than 1 percent.

"This report shows that while the federal government is a leader in employing a diverse workforce, specific areas for improvement remain," said EEOC Chair Jacqueline A. Berrien in a statement.

– Pat Murphy

Bankruptcy, appellate case filings drop in fiscal 2011

Caseloads at federal trial courts increased slightly during fiscal 2011, while the number of bankruptcy and appellate cases dropped, according to data from the Administrative Office of the U.S. Courts.

According to the data, civil filings in U.S. District Courts increased 2 percent, up 6,357 cases to 289,252 in fiscal 2011, the 12-month period ending Sept. 30. That is the same percentage increase from the year before. The number of criminal cases in district court was largely unchanged, increasing by 12 cases to 78,440.

Bankruptcy filings fell 8 percent to 1,467,221, the first decline in filings since fiscal 2007, when filings fell dramatically after enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The vast majority of bankruptcy courts – 87 of the 90 across the country – reported a decrease. Three districts saw dramatic decreases of 20 percent or more: the Western District of New York (down 20 percent), the Southern District of West Virginia (down 24 percent), and the District of Vermont (down 26 percent.)

Non-business bankruptcy filings dropped 8 percent while business petitions declined 14 percent.

Filings in federal appellate courts fell 1.5 percent to 55,126 in fiscal 2011. Criminal appeals dropped 5 percent to 12,198, a decrease largely caused because fewer prisoners sentenced for crack cocaine offenses sought reductions of their sentences. Appeals of administrative agency decisions decreased 3 percent to 7,550. Civil appeals were relatively steady, falling by 207 to 30,733.

EEOC adopts strategy for next four years

The Equal Employment Opportunity Commission has approved a strategic plan that maps out the agency's strategy for combating workplace discrimination over the next four years.

The Commission voted 4-1 in February to approve its Strategic Plan for Fiscal Years 2012-2016.

"In approving the strategic plan, the EEOC … is taking a significant step toward realizing the Commission's vision of ending employment discrimination and promoting equal opportunity in the American workplace," said EEOC Chair Jacqueline A. Berrien in a statement.

The plan identifies three strategic objectives: (1) strategic law enforcement; (2) education and outreach; and (3) efficiently serving the public.

In terms of strategic law enforcement, the plan proposes the development of a "Strategic Enforcement Plan," which would replace the current National Enforcement Program and "ensure a targeted, concentrated, and deliberate effort to identify and pursue priority issues and practices that significantly affect applicants, employees and employers."

The new enforcement plan, which may also prioritize types of investigations and cases, includes among its goals the ensuring of remedies that "end discriminatory practices and deter future discrimination" and that provide "meaningful relief" to individual victims.

With respect to education and outreach, the strategic plan requires the EEOC to develop "significant partnerships with organizations that represent vulnerable workers and/or underserved communities."

In particular, the new plan proposes developing partnerships with organizations that represent small or new businesses, explaining that the agency has found that those two employer groups are in the greatest need of assistance with understanding the laws the EEOC enforces.

To achieve the goal of efficiently serving the public, the plan asks the EEOC to "ensure the effectiveness of its systems by leveraging technology to streamline, standardize, and expedite the charge process across its field offices."

The strategic plan was created by EEOC work groups in response to a congressional mandate that federal agencies develop strategic plans every four fiscal years.

In a statement from the Commission, the agency said that the new plan departs from the previous four-year plan in significant ways.

According to the EEOC's statement, the new plan "focuses less on measuring numbers and more on measuring what we need to do in order to achieve our long-term goals. This change is in recognition of the fact that some of the Commission's previous numbers-based performance measures may have had unintended adverse consequences for the agency. Thus, we have taken a step back in the plan, developing performance measures that require us to first establish baselines in various areas and then think critically about what we should measure in order to determine the agency's effectiveness."

– Pat Murphy

Do Google's privacy changes affect your law practice?

Google – Continued from page 1
seeking a refund on his phone and the cost of switching his cell phone contract to avoid Google's new privacy rules.

Nothing new?

There are others who say there's nothing that new about Google's privacy policy and that the brouhaha is coming from people who either haven't read the new policy or were under the mistaken impression that Google didn't already collect data from each of its platforms.

"There really isn't anything fundamentally different in aggregating their terms of service that Google has done, except now they clarified the sharing of data across all applications. They were free to do it before," said John Simek, vice president of Sensei Enterprises Inc., a computer forensics and information security firm in Fairfax, Va.

"I'm not so sure it's really all that significant. I always assumed they shared data [across platforms], now they're just telling you so," said Ben Schorr, CEO of Roland Schorr, an information technology consulting firm in Flagstaff, Ariz.

But critics say the consolidation of different information all in one place makes it more vulnerable to hackers and identity thieves.

Another criticism of the new policy – and something that state attorneys general are negotiating with Google representatives – is that there is no way for a consumer to opt out of being tracked.

To opt out by abandoning Google completely is not a reasonable option, critics say.

"Google's services affect so much of the web that asking people to not use Google verges on the unrealistic," said Rainey Reitman, activism director at the Electronic Frontier Foundation in San Francisco.

"It's almost impossible to use the Internet without touching the Google ecosystem," agreed Gansler, who has met with the head of data security for Google and four or five other representatives.

He said they are seeking a "good middle ground" where users can opt out of having their data collected in certain Google functions, like Gmail, or opt-in to being tracked on other services, like Google maps, if they want.

Steps to take

Lawyers who use Google products in their practice should read the privacy policies.

The new boilerplate terms of service can be read at http://www.google.com/intl/en/policies/terms/ and a comparison to the old policy can be read at http://www.google.com/intl/en/policies/terms/archive/20070416-20120301/.

"There are a lot of lawyers in small and solo firms who want to use free Google Apps rather than paying for Microsoft Office. Surprisingly, lawyers don't read the policies," said Schorr.

But the public outcry over the policies may get more lawyers to read the terms of service.

> **"Google's services affect so much of the web that asking people to not use Google verges on the unrealistic."**
>
> **– Rainey Reitman**

"We've been telling lawyers for years, 'This is a contract – read the damn thing,'" said Simek.

One specific provision with free Gmail that is particularly troublesome for lawyers, Simek said, is that it allows Google essentially to do what it wants with your content, such as share it or give it to law enforcement

He noted that the provision existed before the new policy.

To avoid the issue, lawyers should purchase the Google business version for $50/year, which eliminates that provision and says Google will notify you before responding to a government subpoena to give you an opportunity to get it quashed, Simek said.

Lawyers should also check the policies on individual platforms. Some, such as Google Voice, have secondary policies that may contain exceptions to the boilerplate terms of service, Simek noted.

James Bolan, an ethics attorney and partner at Brecher, Wyner, Simons, Fox & Bolan in Newton, Mass., said he deletes the history in his Google account on a daily basis and always has.

"We recommend it if people are doing searches as part of their conflicts checks," and are concerned about someone gaining access to their account or their computer, he said.

Part of the reason for the dearth of advice on how to deal with Google's new privacy rules is nobody seems to know what Google does with the information, how it's stored or how long the shelf life is.

"I know some people are deleting search history, but I'm not sure how much it really helps if, when you do a search, they find out about it," said Schorr.

Questions or comments can be directed to the writer at: sylvia.hsieh@lawyersusaonline.com

Plaintiffs face uphill battle for FMLA self-care suits

Continued from page 3
employers to violate FMLA or give them a free pass to ignore the self-care provisions," said Alvarez. "It just blocks suits for monetary relief."

Injunctive and prospective relief is still available, Fishman said.

However, she contended that the Court's focus on the self-care leave provision alone, instead of in the context of the entire Act, resulted in a disservice to plaintiffs.

"The plurality did not show much of an appreciation for the fact that employment discrimination remains a significant issue," Fishman said.

Alvarez cautioned employers that four justices made clear in the minority opinion their position that rights must be expanded for all employees in order to combat gender discrimination.

The split among the justices is "one that will linger and may shape employment law" beyond FMLA and the *Coleman* decision, he said, on the issue of how to combat gender discrimination in the workplace.

Questions or comments can be directed to the writer at: correy.stephenson@lawyersusaonline.com

A version of this article was originally published in the Maryland Daily Record, a sister publication of Lawyers USA.

USA BRIEFS

Continued from page 2
between what they claimed was an inflated tuition of $47,800 per year and the "true value" of their degrees.

But New York Supreme Court Judge Melvin L. Schweitzer dismissed the suit as failing to state a claim under the deceptive business practices act of "reasonable consumers acting reasonably."

"It is … difficult for the court to conceive that somehow lost on these plaintiffs is the fact that a goodly number of law school graduates toil (perhaps part-time) in drudgery or have less than hugely successful careers. New York Law School applicants, as reasonable consumers of a legal education, would have to be wearing blinders not to be aware of these well-established facts of life in the world of legal employment," Schweitzer wrote in his opinion.

The ruling may signal what's to come. The plaintiffs' attorney, David Anziska of New York, has filed class action complaints against 14 more law schools on behalf of 75 law school graduates and is investigating 20 additional law schools, including American University, Cardozo Law School and Pepperdine University.

– Sylvia Hsieh

New Wis. damages bill benefits employers

A bill that would eliminate the ability of employees to sue for compensatory or punitive damages in Wisconsin state court is headed to Gov. Scott Walker, who is expected to sign the measure.

The legislation, authored by state senator Glenn Grothman, would repeal a 2009 state law that created a range of compensatory and punitive awards for discrimination cases.

"This is designed to save time and money for both businesses and plaintiffs," Lance Burri, legislative aide for Grothman, said, "so they are not locked into a system that always holds punitive and compensatory damages out there as a potential threat."

If the bill is signed, said Milwaukee labor and employment attorney Pam Ploor of Quarles & Brady LLP, the change will come as a relief to employers.

While she said she isn't aware of any cases since 2009 where plaintiffs sued in state court for compensatory or punitive damages, the process allowed for a disjointed method to unfairly hold employers liable for damages. Damages under the current law are $50,000 for defendants with 100 or fewer employees; $100,000 for defendants with 101 to 200 employees; $200,000 for defendants with 201 to 500 employees; and $300,000 for defendants with more than 500 employees.

"There was always that hammer over the heads of Wisconsin businesses," Ploor said, "because the fact finder of liability was divorced from the process of determining damages."

The law change would still allow individuals who file a complaint with the state department of workforce development to seek reinstatement, back pay and attorney fees and pursue compensatory or punitive damages in federal court.

Critics of the law change say it will lead to an influx of federal cases.

– Jack Zemlicka

A version of this article was originally published in Lawyer USA's sister publication, the Wisconsin Law Journal.