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Judy Danelle Snyder: Professionalism Award

By Ronald H. Hoevet of Hoevet Snyder & Boise, PC

Judy Danelle Snyder was awarded the Fourth Annual Owen M. Panner Professionalism Award at the Winter Meeting of the Litigation Section at Skamania Lodge. The award is named for Judge Panner, who, in a distinguished career as a trial lawyer and United States District Court Judge, exemplifies professionalism. Judy's husband, Paul Ellis, their children, Taylor and Danielle, Judy's mother Thelma Snyder, and Judy's brother and fellow trial lawyer, Daniel Snyder, joined Judy at the Awards Banquet on Friday night. Clackamas County Circuit Court Judge Eve Miller, Jim McCandlish, and I got to talk about Judy and what she meant to each of us in our careers. More than anyone else, I know how deserving Judy is of this award since she has had to ride herd on me for nearly 20 years.

Judy has been a role model for (dare I say) more than one generation of women lawyers who followed her into the Bar. Judy came to Oregon in 1973 after graduation from Notre Dame Law School to work as a law clerk for then-United States District Court Judge Otto Skopil. Judy saw firsthand how courtesy to lawyers and litigants can raise the quality of the law being practiced in federal court. Judy next worked for District Attorney Harl Haas as a deputy prosecuting sex abuse and violent crime cases. She left the District Attorney's Office in 1978 to open her own practice, and Judy and I formed our firm, now Hoevet, Snyder & Boise, in 1983.

Her impressive service to the Bar and the greater community includes the presidencies of the Oregon Trial Lawyers Association and the Multnomah Bar Association and the chairmanship of the Psychiatric Security Review Board.

Judy's energy seems limitless. One of my favorite examples happened during Rose Festival not so long ago. After a long and arduous week, Judy learned late one Friday afternoon that the Rose Festival was shorthanded—volunteers were needed to finish decorating floats for the Grand Floral Parade the next day. Judy spent Friday night and much of Saturday morning putting flowers on floats. She then saved places for the firm in the street in front of our office building from which to watch the parade.

Judy's litigation career is proof that one can be passionate about her clients and her cases without being disagreeable. I have never seen Judy lose her cool even when others (including her partner) were losing theirs. She respects the bench and her colleagues in the Bar and it shows. Being a zealous advocate for your clients does not mean that one should take unreasonable positions on their behalf. Judy is honest with her clients and opposing counsel about the value of their cases. Judy's professional approach to litigation reduces its cost and promotes settlement. When settlement of a case is not possible, Judy's great skill as a trial lawyer insures that her client gets the highest quality legal representation. I know that Judy feels honored to be included with last year's honoree, Gene Hallman, and the other members of the Litigation Section who have received this award. Her fellow litigants are proud of her. ❐

In This Issue

Comments From the Editor

"CREDIBILITY"

Dennis P. Rawlinson
Miller Nash LLP

Dennis Rawlinson

Most jurors are suspicious and skeptical of lawyers.

After all, they expect us to be advocates for our clients. Most assume that we are smart enough to fool them. They expect us to want to prevail. They figure that we want to buy some more expensive jewelry or another sports car.

In the end, what they really want to know is whether we're the kind of people who want to win so badly that we will lie to them or will hide the truth.

With this background of skepticism and suspicion, we have the challenge of establishing our credibility. Set forth below are a few suggestions for becoming more credible.

1. Be Interested, Not Interesting.

Most everyone likes someone who is interested in them. If you and your spouse go out to dinner with a new couple and spend the evening asking them questions about themselves, the new couple will go away thinking you are delightful. People like people who are interested in them.

As we know, the proper way to conduct voir dire is to let the jurors do the talking, not the lawyer. If we do it correctly and act interested in the jury's responses, they will like us, and our work toward establishing credibility will have begun.

2. Be Evenhanded.

At least initially when the jury expects us to overstate our case and our position, we should work hard on being evenhanded. For instance, when we are given an opportunity to make a mini opening statement during voir dire, we should strive to make it sound impartial. Such an approach will begin establishing an impression that we are attempting to be fair and helpful.

3. Be Polite.

During voir dire when one of the jurors tells us something that obviously hurts our case or our client, we should thank the juror for his comment and candor (even though we may be dying on the inside). Next we should ask whether any jurors on the panel have a contrary view (and pray that they do). After eliciting the contrary view, we should go back to the initial juror and ask him whether he could leave a little room to consider the contrary position.

Politeness, however, goes beyond communications during voir dire. It extends to being polite to the court staff and respectful to the judge, the parties, and the jurors.

Politeness also extends outside the courtroom. Credibility will be more readily established by a lawyer who holds an elevator, opens a door, or greets others with a smile than by a lawyer who honks his horn and shakes his fist when someone beats him to a parking space or curses under his breath when someone else is using the only public telephone downstairs. Jurors listen to and watch us, particularly outside the courtroom.

4. Give Something Away.

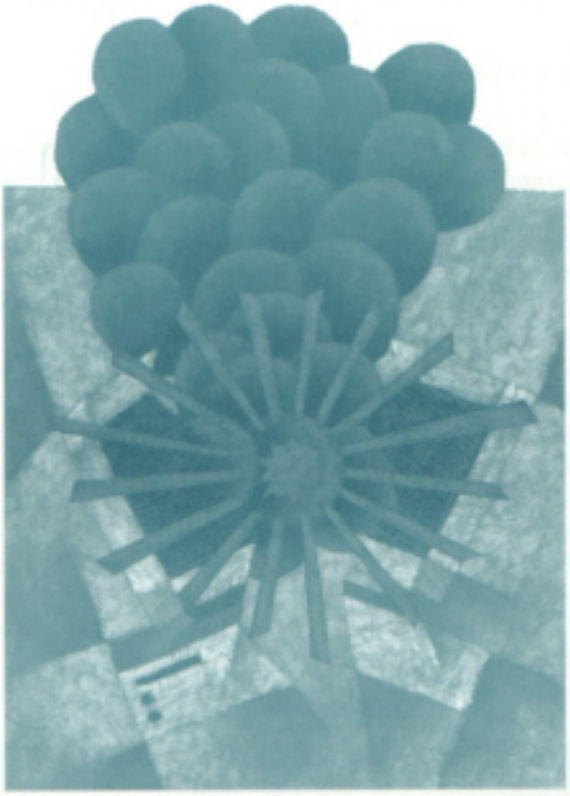
We all know that during voir dire and opening statement, we need to disclose the problems we have with our case before our adversary discloses those problems in a way that is less flattering and makes us look as though we have been hiding the truth. Disclosing a problem with our position creates credibility. If we were truly one of those greedy advocates who would stop at nothing to win, why in the world would we be telling the jurors about weaknesses in our case?

5. Conclusion.

We all want to be perceived as credible. Thankfully, for most of us it's simply a matter of acting as we would most of the time but perhaps being a bit more thoughtful about it.

Make no mistake: the suspicion and skepticism about our profession are real. Equally real, however, is the willingness of most jurors to be convinced that the suspicion and skepticism are not well-founded.

WARRANTIES FOR THE SALE OF GOODS UNDER ARTICLE 2 OF THE UCC



By David A. Bledsoe and Chin See Ming

Article 2 of the Uniform Commercial Code is generally user-friendly for the practicing lawyer. After all, Article 2 is not the result of common law development, but rather is a codified set of statutes resulting from a conscious effort to reflect commercial practices for the sale of goods. All the same, a UCC Article 2 case can present a variety of issues to the commercial litigator.

David A. Bledsoe

Chin See Ming

A. APPLICABILITY OF ARTICLE 2 OF THE UCC

Article 2 of the Oregon UCC, ORS 72.1010 to ORS 72.7250, governs "transactions in goods" only. ORS 72.1020. "Goods" are "all things...which are moveable at the time of identification to the contract for sale[.]" ORS 72.1050(1).

Article 2 recognizes (1) express warranties, which are governed by ORS 72.3130; (2) implied warranties of merchantability, governed by ORS 72.3140; and (3) implied warranties of fitness for particular purpose, governed by ORS 72.3150.

B. GENERAL UCC WARRANTY ISSUES

1. Statute of Limitations

The Oregon UCC period of limitations is "four years after the cause of action accrues," but may be shortened by agreement to "not less than one year." ORS 72.7250(1). Accrual is governed by ORS 72.7250(2):

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Because an *implied* warranty, by definition, cannot "*explicitly* extend[ ] to future performance," a claim for breach of an implied warranty "accrues at the time of delivery." *Sponseller v. Meltebeke*, 280 Or. 361, 365 n.2, 570 P.2d 974 (1977).

The question of when a claim for breach of express warranty accrues depends on whether the particular warranty "explicitly extends to future performance." ORS 72.7250(2). If it does, the claim accrues when the "breach is or should have been discovered." *Id.* If it does not, the claim accrues at the time of delivery. Oregon appellate courts have yet to spell out the meaning of the phrase "explicitly extends to future performance." However, the Ninth Circuit, in construing identical language under the Washington UCC, has held that in order to "explicitly extend[ ] to future performance," "there must be specific reference to a future time in the warranty." *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1550 (9th Cir. 1984) (adhesive manufacturer's alleged warranty that its product would work as well on fiberglass as on aluminum did not explicitly extend to future performance) (quoting *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 820 (6th Cir. 1978), *cert. denied*, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979)).

Further, the "warranty of future performance must be unambiguous, clearly stated, or distinctly set forth." *Id.* (quoting *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 822 (8th Cir. 1983)). The Ninth Circuit characterized its holding as the "majority rule." *Id.; see also South Burlington Sch. Dist. v. Clacagni-Frazier-Zajchowski Architects, Inc.*, 138 Vt. 33, 410 A.2d 1359, 1366 (1980) ("[S]ince all warranties in a sense extend to future performance of goods, courts will not lightly infer from the language of express warranties terms of prospective operation that are not expressly stated.") (quoted by the *Western Recreational Vehicles* opin-

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ion); 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 11-9, at 608 (4th ed. 1995) [hereinafter White & Summers] ("[I]t should be clear that this extension of the normal warranty period does not occur in the usual case, even though all warranties in a sense apply to the future performance of goods.").

2. Notice

The claimant must provide the seller with "reasonable" notice of any alleged breach of warranty, be it express or implied. ORS 72.6070(3)(a) provides:

> (3) Where a tender has been accepted:
>
> (a) The buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]

The purpose of the notice requirement is to "permit the seller to investigate the claim," to "minimize any damages or correct the defect," and to "protect himself."

ORS 72.6070(3)(a) applies to breach of warranty claims, *Metro Inv. Corp. v. Portland Rd. Lbr.*, 263 Or. 76, 501 P.2d 312 (1972), and is an "essential element of [a] plaintiff's case." *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 284, 512 P.2d 776 (1973).

The purpose of the notice requirement is to "permit the seller to investigate the claim," to "minimize any damages or correct the defect," and to "protect himself." *Metro Inv. Corp.*, 263 Or. at 80. The notice is also "to let the seller know that the transaction is still troublesome and must be watched." ORS 72.6070 1958 official text cmt. 4. How much time can pass prior to notice before it constitutes unreasonable delay will generally be a case-specific determination. In some cases, courts have held that a delay for as short as three and a half months after the discovery of a breach is "unreasonable." *Cole v. Keller Indus., Inc.*, 872 F. Supp. 1470, 1474 (E.D. Va. 1994) (ladder); *P & F Constr. Corp. v. Friend Lumber Corp.*, 575 N.E.2d 61, 64 (Mass. App. Ct. 1991) (doors).

C. UCC EXPRESS WARRANTY

1. Elements

Under the Oregon UCC, express warranties may be created by "[a]ny affirmation of fact or promise," by "description," or by "sample or model," which becomes or is made part of the "basis of the bargain." ORS 72.3130(1)(a)-(c).

2. "Affirmation of Fact or Promise" Versus Puffing

Under ORS 72.3130(2), "puffing," in the form of the seller's opinion or commendation, does not create an express warranty:

> it is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

However, the distinction between puffing and making a warranty is at best an unclear one:

> the recognition that some statements are not warranties tells one nothing about where he should draw the line between puff and warranties, and anyone who says he can consistently tell a "puff" from a warranty is a fool or a liar.

White & Summers, § 9-4, at 487. If there is "conflict in evidence whether an express warranty exists, the question is one for the jury[.]" *Autzen v. Taylor Lumber Sales, Inc.*, 280 Or. 783, 790, 572 P.2d 1322 (1977).

3. Reliance

In order to prevail on an express warranty claim, the claimant must have relied on the express warranty. *See Newman v. Tualatin Development Co., Inc.*, 287 Or. 47, 54, 597 P.2d 800 (1979) (affirming trial court's decision not to certify a class action for breach of express warranty because "reliance in this case would have to be individually determined[.]").

4. Privity

Privity — a direct sale between the plaintiff and defendant — "is not required to recover economic loss on an express warranty." *Dravo Equipment Co. v. German*, 73 Or. App. 165, 167, 698 P.2d 63 (1985).

D. IMPLIED WARRANTIES

1. Implied Warranty of Merchantability

Goods sold by "merchants," defined at ORS 72.1040(1), carry an implied warranty of merchantability. ORS 72.3140(1). To be merchantable, goods must:

> (a) Pass without objection in the trade under the contract description; and

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Article 2 of the UCC

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> (b) In the case of fungible goods, are of fair average quality within the description;
>
> (c) Are fit for the ordinary purpose for which such goods are used; and
>
> (d) Run with the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) Are adequately contained, packaged and labeled as the agreement may require; and
>
> (f) Conform to the promises or affirmation of fact made on the container or label.

Id. The seller's "fault" is irrelevant. *Valley Iron & Steel v. Thorin*, 278 Or. 103, 110, 562 P.2d 1212 (1977). The buyer's reliance is "not a prerequisite to the creation of an implied warranty of merchantability." *B. W. Feed v. General Equipment Co.*, 44 Or. App. 285, 292, 605 P.2d 1205 (1980).

2. UCC Implied Warranty of Fitness for Particular Purpose

The Oregon UCC's implied warranty of fitness for particular purpose is codified at ORS 72.3150:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under ORS 72.3160, an implied warranty that the goods shall be fit for such purpose.

The elements of this cause of action are thus:

> (1) The seller must have reason to know the buyer's particular purpose.
>
> (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods.
>
> (3) The buyer must, in fact, rely upon the seller's skill or judgment.

Swan Island Sheet Metal v. Troy's Custom Smoking Co., Inc., 49 Or. App. 469, 473, 619 P.2d 1326 (1980). This warranty arises "regardless of the seller's intent." *Controltek, Inc. v. Kwikee Enterprises, Inc.*, 284 Or. 123, 129, 585 P.2d 670 (1978). Again, the seller's "fault" is irrelevant. *Valley Iron*, 278 Or. at 110.

As a threshold matter, a "particular" purpose is something other than an "ordinary" purpose:

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which the goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally made for walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

ORS 72.3150 1958 official text cmt 2; *see Controltek, Inc.*, 284 Or. at 128 (1978) ("ORS 72.3150 provides for the implied warranty of fitness for a particular purpose, as contrasted with the implied warranty of merchantability under ORS 72.3140, which includes a warranty of fitness for ordinary purposes"); *see also Landers v. Safeway Stores, Inc.*, 172 Or. 116, 124, 139 P.2d 788 (1943) (construing Oregon's Uniform Sales Act, the precursor to the UCC; holding that where the particular purpose for which the laundry bleach was required was the same as the bleach's general purpose, the only applicable implied warranty was the warranty of merchantability, not the warranty of fitness for particular purpose).

Oregon's Court of Appeals has held that, "There can be no justifiable reliance by a buyer possessing equal or superior knowledge or skill with respect to the product purchased by him." *Swan Island Sheet Metal*, 49 Or. App. at 474.

Oregon's Court of Appeals has held that, "There can be no justifiable reliance by a buyer possessing equal or superior knowledge or skill with respect to the product purchased by him."

3. Disclaimers

Implied warranties may be disclaimed. Under ORS 72.3160(2):

> to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that, "There are no warranties which extend beyond the description on the face hereof."

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Article 2 of the UCC

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In addition:

> Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

ORS 72.3160(3)(a). Cases addressing the enforceability of disclaimers under Oregon law have held that such disclaimers need to be in writing and be conspicuous. *See, e.g., Agristor Credit Corp. v. Schmidlin*, 601 F. Supp. 1307, 1314 (D. Or. 1985); *Frazier v. Consolidated Equip. Sales, Inc.*, 64 Or. App. 833, 841, 670 P.2d 153, 159, *rev. denied*, 296 Or. 236, 675 P.2d 490 (1983); *Seibel v. Layne & Bowler, Inc.*, 56 Or. App. 387, 390, 641 P.2d 668, 670, *rev. denied*, 293 Or. 190, 648 P.2d 852 (1982).

The no privity defense may apply even if the claimant bought the goods from a distributor who was the defendant-manufacturer's agent.

a. Conspicuousness

Whether or not a disclaimer is conspicuous is a question of law. *Seibel*, 56 Or. App. at 390 (*citing* ORS 71.2010(10)). Under ORS 71.2010(10):

> [a] term or clause is not conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. Whether a term or clause is "conspicuous" or not is for decision by the court.[1]

b. Timeliness

A disclaimer made after a sale is completed is not effective to the extent it materially alters the agreement. *See* ORS 72.2070(2)(b); *see also Gaha v. Taylor-Johnson Dodge, Inc.*, 53 Or. App. 471, 477 (1981) (post-transaction attempt to limit liability will not be given effect).

c. Unconscionability

"[U]nconscionability is an issue of law to be decided by the court, and the party asserting unconscionability must demonstrate that the clause in question was unconscionable at the time the contract was made." *W.L. May, Co. v. Philco-Ford Corp.*, 273 Or. 701, 707, 543 P.2d 283, 286 (1975). In determining whether a disclaimer is unconscionable, Oregon courts find guidance in the standard enunciated in the official comment to UCC § 2-302, which provides:

> The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

Id., 707 (citations omitted). Thus, for example, it might be "unconscionable" to enforce a completely inconspicuous disclaimer because to do so would impose an unfair surprise upon the buyer. *Cf. Seibel*, 56 Or. App. at 391-92. Generally speaking, determining whether a disclaimer is unconscionable requires a review of "the circumstances existing at the time of the execution of the contract" and an examination of the disclaimer "in light of both the general commercial background and the special commercial needs of the particular trade involved." *W.L. May, Co.*, 273 Or. at 707.

d. Effect of Invalidating Disclaimer

In the event a disclaimer is ruled unenforceable, any disclaimed warranties will apply. *See Frazier*, 64 Or. App. at 841-42. This simply means that an implied warranty claim may be available; the party asserting the claim must still prove that the warranty was breached in order to recover under that warranty.

4. Privity

The Oregon Supreme Court has held that privity — a direct transaction between the buyer and seller — is required when the only loss claimed under a breach of implied warranty theory is economic loss. *Hupp v. Metered Washer Service*, 256 Or. 245, 247, 472 P.2d 816 (1970).

The no privity defense may apply even if the claimant bought the goods from a distributor who was the defendant-manufacturer's agent. In *Davis v. Homasote Company*, 281 Or. 383, 574 P.2d 1116 (1978), plaintiff apartment-complex owners brought UCC implied warranties of merchantability and fitness claims against a floor decking manufacturer. Plaintiffs had bought their product from the manufacturer's distributor and not the manufacturer itself. *Id.* at 386. The Oregon Supreme Court held that there was no privity of contract between the plaintiffs and the manufacturer, and af-

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firmed the trial court's refusal to submit the claims to the jury. *Id.* at 386. In so holding, the court appeared to assert the surprising proposition that a plaintiff is not in privity with the manufacturer, even if the plaintiff bought the product at issue from a distributor who is the manufacturer's agent. *Id.* at 386 n.5.[2]

E. CAUSATION

A claimant's damages must have been caused by the breach of the warranty, that is, by a defect in the product, and not by "improper techniques of installing" the product. *Amer. Hdw. Ins. v. Griffith Rubber*, 252 Or. 182, 185, 448 P.2d 515 (1968); *Roe Roofing v. Lumber Products*, 70 Or. App. 93, 96-97, 688 P.2d 425, *rev den*, 298 Or. 427, 693 P.2d 48 (1984). In other words, the claimant must not have caused the damages. The burden of proof is on the claimant:

> The question of causation is one of fact and defendants [the warranty counterclaimants] had the burden of establishing with reasonable certainty that, of the possible causes of the pipe failure, it was most probable that the cause was one within plaintiff's control and was not due to defendants' own error.

Davison v. Parker, 50 Or. App. 129, 133, 622 P.2d 1113, *rev den*, 290 Or. 853, 642 P.2d 307 (1981).[3] Where the defect is latent, the claimant may prove circumstantially that a defect existed because the claimant used the product in a normal manner. *Id.*

F. DAMAGES AND LIMITATION OF REMEDIES

1. Damages Available Under the UCC

Under the Oregon UCC, the measure of damages for breach of warranty is:

> the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

ORS 72.7140(2). The buyer may also recover incidental and consequential damages. ORS 72.7140(3). Incidental damages include "reasonable expense incident to . . . breach." ORS 72.7150(1). Consequential damages include:

> Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

ORS 72.7150(2)(a).

2. Limitation of Remedies

Parties may "limit or alter the measure of damages recoverable [under the UCC]" by agreement, ORS 72.7190(1)(a), and may provide that their agreed-upon remedy is exclusive. ORS 72.7190(1)(b). The agreement must not be unconscionable. ORS 72.3020. Limitation of consequential damages for injury to the person in the case of commercial goods is prima facie unconscionable, but limitation for commercial loss is not. ORS 72.7190(3).

Remedy limitations will generally be upheld when they were bargained in fact between the parties. *K-Lines, Inc. v. Roberts Motor Co.*, 273 Or. 242, 248-54, 541 P.2d 1378 (1975); *Anderson v. Ashland Rental, Inc.*, 122 Or. App. 508, 510, 858 P.2d 470 (1993); *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 38 Or. App. 111, 114, 589 P.2d 1134 (1979). However, there need not be "explicit evidence that there were offers and counteroffers on the limitation terms or comparable evidence of 'haggling.'" *K-Lines, Inc.*, 273 Or. at 253-54. Instead, "[t]o be part of their bargain in fact, the provision limiting the defendant's liability must have been bargained about, brought to [claimant's] attention or be conspicuous." *Atlas Mut. Ins. Co.*, 38 Or. App. at 114; *see also K-Lines, Inc.*, 273 Or. at 253-54; *Anderson*, 122 Or. App. at 510. Most decisions turn on whether the limitation was conspicuous.

The law relating to conspicuousness of remedy limitations parallels the law relating to conspicuousness of disclaimers of implied warranties.

a. Conspicuousness

The law relating to conspicuousness of remedy limitations parallels the law relating to conspicuousness of disclaimers of implied warranties. *See* section D.3.a above.

Cases finding remedy limitations *conspicuous* include: *Northwest Pine Prods., Inc. v. Cummins Northwest, Inc.*, 126 Or. App. 219, 222-23, 868 P.2d 21 (1994) (provision print was bold, capitalized, and larger and set off from other text); *Duyck*, 94 Or. App. at 116 (warranty provision including limited remedy was on the front of a single page contract with critical portions in boldface), *rev. denied*, 307 Or. 405, 769 P.2d 779 (1989); *Atlas Mut. Ins. Co.*, 38 Or. App. at 114 (provision written in boldface in the center of a single page document).

Cases finding remedy limitations *inconspicuous* include: *Anderson*, 122 Or. App. at 510 (noting that contract was a "typographical nightmare" containing a "hodgepodge of print sizes" and "various attention getting devices, including bold type, capital letters, red type and reverse lettering" and that parts were "barely legible"); *Seibel*, 56 Or. App. at

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390-91 (type was smaller than the footnote type in the court's opinion in the official reporter, lines were longer and more closely spaced than footnotes, there was no extra spacing or indentation between paragraphs, and the print was generally difficult to read).

b. Failure of Essential Purpose

To be valid, a limited remedy must not "fail of its essential purpose." ORS 72.7190(2). A limited remedy fails of its essential purpose when events subsequent to contracting cause the limited remedy to deprive a party of the substantial value of his or her bargain. *See* UCC § 2-719 official cmt. 1.

Two fact patterns support a finding that a limited remedy failed of its essential purpose:

A limited remedy fails of its essential purpose when events subsequent to contracting cause the limited remedy to deprive a party of the substantial value of his or her bargain.

i. The seller provides exclusively a repair remedy and then, by its action or inaction, causes the remedy to fail by being unwilling or unable to repair the product. *See Young v. Hessel Tractor & Equip. Co.*, 99 Or. App. 262, 267, 782 P.2d 164 (1989) (defendant's inability to repair product caused repair remedy to fail), *rev. denied*, 309 Or. 522, 789 P.2d 1387 (1990).

ii. There are latent defects in the goods that are not discoverable on reasonable inspection. *See Agristor*, 601 F. Supp. at 1315 (noting that a repair remedy may fail if a product is inherently defective and cannot be repaired).

"Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in the Uniform Commercial Code." ORS 72.7190(2); *see Young*, 99 Or. App. at 266.

c. Timeliness

Post-transaction attempts to limit remedies will not be given effect. *Gaha v. Taylor-Johnson Dodge, Inc.*, 53 Or. App. 471, 477, 632 P.2d 483 (1981). ❐

[1] Cases finding disclaimers conspicuous include: *Agristor*, 601 F. Supp. at 1314 (disclaimer labeled as a disclaimer and in large, boldface print in capital letters); *Duyck v. Northwest Chem. Corp.*, 94 Or. App. 111, 116, 764 P.2d 943 (1988) (disclaimer in capital letters on the front of a single page contract with critical portions in boldface), *rev. denied*, 307 Or. 405, 769 P.2d 779 (1989); *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 38 Or. App. 111, 114, 589 P.2d 1134 (1979) (provision written in boldface in the center of a single page document).

Cases finding disclaimers inconspicuous include: *Frazier*, 64 Or. App. at 841-42 (disclaimer was on back of page in type not significantly larger than other text); *Seibel*, 56 Or. App. at 390-91 (disclaimer type was smaller than the footnote-type of the court's opinion in the official reporter, lines were longer and more closely spaced than the footnotes, there was no extra spacing or indentation between paragraphs, and the print was generally difficult to read).

[2] A contrary interpretation may be that the *Davis* plaintiffs had somehow conceded lack of privity by somehow characterizing the defendant as "remote," and that the court was merely holding the plaintiffs to their concession.

[3] The Oregon Court of Appeals subsequently clarified, in *Roe Roofing*, 70 Or. App. at 97 n.1, that the standard of persuasion is "preponderance of the evidence," not "reasonable certainty."

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Dennis P. Rawlinson, Editor
Miller Nash LLP
111 S.W. Fifth Avenue
Portland, Oregon 97204 • 503/224-5858

ASSERTING THE FIFTH AMENDMENT PRIVILEGE IN CIVIL LITIGATION

By Patricia McGuire of Davis Wright Tremaine LLP[1]

Most civil litigators don't pay much attention to privilege issues other than attorney-client or work product privilege issues. However, you may face a witness or opposing party in a civil case who asserts her Fifth Amendment privilege, which may preclude getting answers at depositions or documents responsive to certain discovery requests. Therefore, any civil litigator should know something about how other privileges impact civil cases, particularly because Oregon law views privileges very broadly.

How does assertion of the Fifth Amendment privilege impact civil litigation?

Perhaps you are suing a client's former employee who has embezzled a substantial amount of money from your client's company. Because your client is angry with this former employee, she reports the embezzlement to the State or the US Government, who pursues criminal charges against the former employee while your civil lawsuit is pending. However, at the defendant's civil deposition, he asserts his Fifth Amendment right against self-incrimination and refuses to answer most of your questions.

Or perhaps you represent a corporation who faces RICO criminal charges and a civil lawsuit based in part on the alleged acts of former employees. At deposition or trial, the former employees assert their Fifth Amendment rights against self-incrimination and refuse to testify, and your client is concerned how it may impact the case against the corporation.

How does the assertion affect your civil case, and what can you do about it?

The scope of the Fifth Amendment privilege against self-incrimination.

The general scope of the Fifth Amendment privilege provides that a person may not be compelled to give testimony in any proceeding, civil or criminal, formal or informal, before administrative, legislative, or judicial bodies, when that person's answers may tend to incriminate her in future criminal proceedings. *Lefkowitz v. Turley*, 414 US 70, 77 (1973); *Lefkowitz v. Cunningham*, 431 US 801, 805 (1977).

The privilege may be asserted to preclude not only oral and written testimony but may also bar production of documents. *Fisher v. United States*, 425 US 391, 410 (1976) ("[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced."). *Fisher* suggests that by producing documents, the producer affirms the existence of the item sought, his possession of it and his belief that the document matches what was sought—all of which may involve testimonial self-incrimination.

The privilege is easy to assert and hard to challenge. It is validly asserted whenever the witness has a reasonable cause to fear incrimination from a direct answer, in light of the circumstances, content of the questions, and the setting in which the questions are asked. *Hoffman v. United States*, 341 US 479, 486 (1951). Therefore, an attorney's claim that the witness has reasonable cause to fear incrimination will often be taken as conclusive. Furthermore, because responses which may not appear to be incriminating could reasonably provide "a link in the chain of incriminating evidence," the scope of the privilege is construed liberally in favor of the witness. *Blau v. United States*, 340 US 159, 161 (1950).

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A party or witness may assert the privilege at any stage of the litigation, by refusing to answer a complaint,[2] refusing to respond to interrogatories,[3] or refusing to answer questions at deposition[4] or at trial.[5] The privilege ends when the possibility of prosecution for any crime disclosed by the statement ceases. This may happen by conviction or acquittal of the crime, pardon, amnesty, running of the statute of limitations, or because the witness has been granted immunity from prosecution. *State v. Abbott*, 275 Or 611, 614 (1976). The possibility of prosecution continues until the end of the appeal process following conviction. *State v. Sutterfield*, 45 Or App 145, 147 (1980); *State v. Barone*, 329 Or 210, 230 (1999) ("real and appreciable" fear of prosecution required to assert privilege against testifying; witness's intent to seek habeas relief was insufficient). Finally, if the privilege is asserted but the court determines, after a hearing, that the privilege does not exist, the court is required to order the witness to testify at trial unless requiring the testimony clearly would be contrary to the public interest. *State v. Sanders*, 294 Or 41, 45 (1982).

How the Oregon Evidence Code treats assertion of the Fifth Amendment privilege.

OEC 513(1) prohibits the finder of fact in a civil action from drawing an inference from a party's assertion of his Fifth Amendment privilege not to testify against himself. *John Deere Co. v. Epstein*, 307 Or 348, 769 P2d 766 (1989). In that case of first impression, the Oregon Supreme Court held that no adverse inferences could be drawn from the refusal to testify in a civil proceeding pursuant to OEC 513.

OEC 513 states:

> (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of commentary by judge or counsel. No inference may be drawn from a claim of privilege.
>
> (2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> (3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

In reversing the lower court's ruling allowing an adverse inference from the assertion of the privilege, the *John Deere* Court determined that the word "privilege" in OEC 513(1) is not modified by any qualifying language, so (in conjunction with OEC 514, which recognizes all privileges available under state law) it must be interpreted to prohibit drawing an inference from the use of *any* privilege[6] —including the Fifth Amendment privilege against self-incrimination, which is applicable to state court proceedings through the Fourteenth Amendment. The Court also noted that the OEC drafters' commentary to OEC 513 states that the rule prohibits any comment upon a claim of privilege, and mandates procedures to avoid any inference by a jury based on such a claim.

How Oregon law differs from federal law.

Unlike Oregon law, federal law appears to incorporate a "balancing test"—if assertion of the privilege is too costly, no adverse inference may be drawn from it. However, if assertion of the privilege is just one factor to be weighed in the final decision, it isn't too costly for a defendant to bear.

The U.S. Supreme Court has held that the Fifth Amendment does not prohibit the drawing of adverse inferences in civil actions for refusal to testify. However, the Supreme Court's decisions allowing an adverse inference to be drawn have occurred in circumstances where there was other evidence available, making the adverse inference only one evidentiary factor in the ultimate decision. *Baxter v. Palmigiano*, 425 US 308, 334-35 (1976) (allowing adverse inference to be taken against prisoner who refused to testify in disciplinarian proceeding, because inference was only one of a number of factors to be considered in reaching decision). The Ninth Circuit has allowed an adverse inference to be taken from assertion of the privilege in civil cases.[7] *Campbell v. Gerrans*, 592 F2d 1054, 1058 (9th Cir 1979). However, no adverse inference may be drawn if the assertion alone will cause the automatic imposition of severe economic sanctions. *Spevack v. Klein*, 385 US 511 (1967); *Garrity v. New Jersey*, 385 US 493 (1967) (holding unconstitutional a statute where police officers who asserted the privilege were automatically dismissed).

This ability to draw an adverse inference in federal court may have particular impact on corporate clients. For example, if a corporation faces RICO claims in federal court based on the acts of former employees, those former employees may assert the privilege and refuse

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to testify. If so, the corporation may bear the burden of an adverse inference based on a former employee's refusal to testify. *Brink's Inc. v. City of New York*, 717 F2d 700 (2d Cir 1983) (treating the former employee's invocation as a vicarious statement of the employer, and allowing the adverse inference against the employer); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F2d 509 (8th Cir 1984).

What happens when a witness or party asserts the Fifth Amendment in your case?

If you have a case in which you suspect the defendant may assert his Fifth Amendment rights, there are a number of steps you can take. First, you should figure out whether the defendant or his civil attorney intends to assert his Fifth Amendment rights in the civil case. You may be able to determine this without educating opposing counsel on the law in Oregon: for example, in a scheduling call with opposing counsel, discuss how long you think the deposition will take, specify the areas of questioning and indicate just how long you expect to spend on each. If the defendant intends to assert her Fifth Amendment privilege and refuse to testify on those issues, opposing counsel should chime in at that point.

If you want to take a more straightforward route, you can simply ask opposing counsel if her client intends to assert the privilege at deposition. If so, you can try to schedule two depositions, if there are issues upon which you can conduct discovery which aren't impacted by the privilege. The traditional prohibition against more than one deposition shouldn't apply under those circumstances; you aren't really taking "two bites at the apple," but one very extended "bite" with a long break in between.

If you can't reach agreement on two depositions, or all of the issues in the case will be impacted by the privilege, you can try to schedule the deposition after the criminal proceeding is over and the privilege no longer exists. If the criminal proceeding will not be completed in time for you to prepare for the civil case, you may have to request a stay of discovery until the criminal proceedings are resolved, or abate your case pending resolution of the criminal proceeding. Oregon courts will usually grant a motion to abate for up to two years, but be sure that abatement now won't lead to any statute of limitations problems later. Finally, if the statute of limitations isn't pressing, you may want to wait to file your civil case until the criminal case is completed, and use any decisions or evidence presented in that case. If so, you could work in conjunction with the District Attorney or Assistant US Attorney to put together evidence which can be used in both proceedings.

Conclusion

You may never practice any criminal law, but the assertion of the Fifth Amendment privilege could impact your civil litigation practice. Knowing the difference between Oregon law and federal law may impact where you decide to litigate the case. Knowing how the assertion works, and what (if any) adverse inferences may be drawn from it, will enable you to properly investigate your civil case and conduct the discovery you need. ❐

FOOTNOTES:

1 Associate, Davis Wright Tremaine LLP, specializing in commercial litigation with a focus in construction and product liability.

2 *National Acceptance Co. of America v. Bathalter*, 701 F2d 924, 928-29 (7th Cir 1983).

3 *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.*, 14 FRD 333 (ED Pa 1953).

4 *Justice v. Laudermilch*, 78 FRD 201, 202-03 (MD Pa 1978).

5 *Kastigar v. United States*, 401 US 441, 444-45 (1972).

6 The privileges specified in the Oregon Evidence Code are attorney-client, psychotherapist-patient, doctor-patient, nurse-patient, school employee-student, social worker-patient, husband-wife, clergy-penitent, counselor-client, stenographer-employer, public officer, disabled person-sign language interpreter, non-English speaking person-interpreter, and government-informer. There are also privileges outside of the Oregon Evidence Code, which are expressly recognized under OEC 514. See the legislative commentary to OEC 514 for a listing of some of the privileges outside of the Oregon Evidence Code.

7 However, while the Ninth Circuit allows an adverse inference to be taken, it has held that dismissal of a party's action for asserting the privilege makes resort to that privilege "costly" and is therefore inappropriate. *Campbell v. Gerrans*, 592 F2d 1054, 1058 (9th Cir 1979).

THE OPINION RULE, KNOWLEDGE RULE, AND ADMISSIONS: Part One

by John W. Stephens

In a recent deposition I was taking, one defendant testified that he believed, but was not 100% sure, that his co-defendant was present at a meeting he attended. His lawyer interrupted with an objection, told him to stop speculating, and moved to strike his testimony. When I asked, after laying a foundation, whether the people present at this meeting had each agreed to their next course of action, she again objected saying that the question called for speculation and a legal conclusion. Ignoring the deposition rules, she directed her client not to answer. Having had enough, I contacted the judge for a telephone ruling. The judge overruled the objections and threatened to sanction the other lawyer if she continued to interject herself in the examination process. The judge observed that my opponent suffered from a serious misunderstanding of the Opinion Rule and the Knowledge Rule, and particularly how the two rules work together.

Most trial lawyers know this kind of testimony usually comes in. But as lawyers spend more and more time in depositions and less and less time in trial, more and more lawyers have come to believe that the rules of evidence some lawyers attempt to apply in depositions represent the real rules of evidence. They do not.

Some of the worst abuses relate to the standard objections, "Calls for a legal conclusion" and "Calls for speculation." These objections are raised most frequently—and incorrectly—when a witness is less than certain what happened, when a witness testifies using words that have some legal significance in the action, and when a witness is asked about the state of mind of another (discussed in Part 2 of this article).

In general, these common objections derive from misunderstandings of the Opinion Rule, Rule 701; the Knowledge Rule, Rule 602; the exceptions for admissions, Rule 801(d)(2) (discussed in Part 2 of this article); and particularly how all these rules work together. The purpose of this article is to clear up some of these misunderstandings. In this article, the cited rules are found in the Federal Rules of Evidence and, with different subsection numbering, in the Oregon Evidence Code. The cited Advisory Committee Notes are to the federal rules, but an edited version of the same notes is found in the Legislative Commentary to the Oregon code.

I. THE KNOWLEDGE RULE AND THE OPINION RULE

The "Knowledge Rule" provides that a witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter. Rule 602. The Knowledge Rule is an important corollary to the basic rules of relevancy and unfair prejudice. In general, unless a witness has personal knowledge, the witness's testimony does not make the existence of any fact more probable or less probable. Rule 401. When a witness does not have personal knowledge, there is still a risk a juror will give the testimony weight, thus creating a danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403.

Personal knowledge means that the witness actually observed the fact. It focuses on that which can be perceived by the senses—sight, sound, smell, taste, touch. Personal knowledge is not an absolute. It may consist of what the witness "thinks" he or she knows from personal perception. Notes of Advisory Committee, Rule 602.

The "Opinion Rule" provides that a witness's testimony should not be given in the form of opinions or inferences unless the opinions or inferences are rationally based on the perception of the witness, and are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Rule 701. The Opinion Rule incorporates the Knowledge Rule in the sense that the witness must have perceived something and that the opinions or inferences must be rationally connected to that perception. Notes of Advisory Committee, Rule 701; 2 Wigmore, Evidence (Chadbourn rev. 1979) § 659, at 897:

> [W]hen Sherlock Holmes tells his companion that the neatly dressed person who is seen passing on the street is a banker, the father of six children, and a German by birth, the ordinary intelligence wonders at a statement based on such apparently invisible data. Yet if a man passed by in working clothes daubed with lime and brickdust, the ordinary intelligence would admit that

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> any observer had the right to assert positively that the man was a bricklayer. Thus it is that the law may reject testimony which appears to be founded on data so scanty that the witness' alleged inferences from them may at once be pronounced absurd or extreme.

Inferences and opinions "must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from...experience." *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1991)(Posner, J.).

The Opinion Rule is designed to encourage detailed accounts from witnesses and to discourage broad assertions. Advisory Committee Notes, Rule 701. Broad assertions may "mask guesswork and lack of knowledge." 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE (2d ed. 1994) § 343, at 580. The Opinion Rule is not a rule of absolute exclusion except where, for example, an attempt is made to introduce a meaningless assertion that amounts to little more than choosing up sides, of merely telling the jury what result to reach. Such assertions are not helpful in determining facts in issue. Notes of Advisory Committee, Rules 701 and 704. Weinstein and Berger explain:

> The closer the subject of the opinion gets to critical issues the likelier the judge is to require the witness to be more concrete, not because of the outmoded ultimate issue doctrine abolished in Rule 704, but because the jury is not sufficiently helped in resolving disputes by testimony which merely tells it what result to reach.

Weinstein & Berger, Weinstein's Evidence Manual (2000) § 10.02[2], at 10-13.

To the extent the Opinion Rule allows testimony in the form of opinion or inference, it relies on the nature of the adversary system to lead to a proper result; *i.e.*, detailed accounts carry more conviction than broad assertions; lawyers can be expected to display witnesses to their best advantage; and if they fail to do so, cross-examination and argument will point up the weakness. Advisory Committee Notes, Rule 701.

To the extent the Opinion Rule allows testimony in the form of opinion or inference, it relies on the nature of the adversary system to lead to a proper result.

There are two reasons usually given for the Opinion Rule: one philosophical, one practical. The philosophical reason is that, analytically, it is impossible to separate "facts" from opinions and inferences—"since Kant we have known that there is no unmediated contact between nature and thought." *Agfa-Gavaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989) (Posner, J.). The Opinion Rule is, in this sense, an elaboration of the Knowledge Rule. As Judge Posner said in *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990):

> The [opinion] rule is a sensible elaboration of Rule 602, which requires that a lay witness's testimony be based on personal knowledge. All knowledge is inferential, and the combined effect of Rules 602 and 701 is to recognize this epistemological verity but at the same time to prevent the piling of inference upon inference to the point where the testimony ceases to be reliable.

The second reason for the Opinion Rule, the practical reason, is that many witnesses have a difficult time expressing themselves in language that is not an opinion or conclusion. This is not surprising given the observation that all knowledge is inferential. As Judge Learned Hand said in *Central R. Co. v. Monahan*, 11 F.2d 212, 214 (2d Cir. 1926):

> The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness. ...Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way that he knows how, and the result of the nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

Following from Judge Posner's observation, it may help to see the Knowledge Rule and the Opinion Rule as creating a continuum on which inference is progressively compounded on inference. Following from Judge Hand's observation, the Opinion Rule establishes the upper bounds on that continuum, but that upper bound is not necessarily the same in each case. Where possible, the judge will push the witness down the continuum toward fewer levels of inference. Where, however, it would be "helpful," the judge will allow the witness to move up the continuum. The absolute upper bound in every case is where the inference is a meaningless assertion that amounts to little more than choosing sides, of merely telling the jury what result to reach.

II. TESTIMONY RATIONALLY BASED UPON THE PERCEPTION OF THE WITNESS

A. TESTIMONY IN THE FORM OF BELIEF OR IMPRESSION

There is one class of testimony that facially involves opinion and inference,

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and which the Knowledge Rule typically governs, but not the Opinion Rule. This is testimony that begins with the words "I believe," "I can't remember exactly, but...," "I'm not sure, but...," "it was my impression that...." Some lawyers object that a witness is speculating every time they hear these words. In a deposition setting (most lawyers have sense enough not to do this in trial), if a witness is uncertain whether an event happened one day or the next, a lawyer may advise the witness not to guess. The witness then answers "I don't remember."

In many cases, probably most, this is not a proper objection. By extension of the rule that "personal knowledge" is not an absolute, but may consist of what the witness "thinks" he or she knows from personal perception, "personal knowledge" does not mean the witness's testimony must indicate absolute certainty about the facts testified to. In fact, sometimes when a witness says "I believe...," it strengthens the testimony. It indicates the witness does not want to overstate the facts. Ladd, *Expert and Other Opinion Testimony*, 40 MINN.L.REV. 437, 440 (1956). "[T]he most assertive witness is not invariably the most reliable one." *Clemons v. United States*, 408 F.2d 1230, 1242 (D.C. Cir. 1968).

Wigmore categorized "belief or impression" testimony into four categories. 2 Wigmore, EVIDENCE (Chadbourn rev. 1979) § 658, at 894-97. The following example illustrates Wigmore's analysis:

> You are in a personal injury action. Your witness, Peter, is prepared to testify:
>
> "I believe Dusty was driving the car."
>
> Does this testimony come in? The answer depends on the foundation.

1. *Foundation No. 1*

Other evidence shows that Peter knows what Dusty looks like and saw someone driving the car who looked like Dusty. The belief or impression testimony indicates the degree of positiveness of the witness's original observation of the facts. The testimony comes in. *Joy Mfg. Co. v. Sola Basic Industries, Inc.*, 697 F.2d 104, 110-12 (3d Cir. 1982).

...the more detailed the account a witness gives, the more likely any error will be harmless whether the judge admits or excludes the opinion testimony.

2. *Foundation No. 2*

Other evidence shows that Peter was in a position to actually observe who was driving the car—*e.g.*, Peter was a passenger in the car—but Peter's recollection has dimmed. Here the belief or impression testimony indicates the degree of positiveness of the witness's recollection. Again, the testimony comes in. *United States v. MMR Corp.(LA)*, 907 F.2d 489, 496 (5th Cir. 1990); *United States v. Krulewitch*, 167 F.2d 943, 948 (2d Cir. 1948)(Chase, J.), *rev'd. on other grounds*, 336 U.S. 440 (1949):

> Here the witness, as commonly occurs, was trying in vain to reproduce the identical language used in a conversation he had had so long before that his memory was unequal to the task. As he said, "It has been quite some time ago, but it is to the best of my recollection; I was trying to find out what was going on upstairs." He then was permitted to give his understanding of what was said to him—in effect the substance of what was said. The evidence was the best that the circumstances permitted and was properly put before the jury for whatever it was worth.

3. *Foundation No. 3*

Other evidence shows Peter never saw the car or observed any other facts on which to base this belief—that the belief is based on nothing better than "that's the kind of thing Dusty would do." Here the belief or impression testimony indicates a lack of personal observation. The testimony runs afoul of the Knowledge Rule and does not come in. Rule 602; *United States v. Lanci*, 669 F.2d 391, 394-95 (6th Cir.); *see Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1991).

4. *Foundation No. 4*

Other evidence shows that Peter observed two people near the car, one of whom was Dusty; Peter observed the car drive off, but did not see whether Dusty was driving; and Peter knows that of the two people he saw, Dusty was the only one who knew how to drive. Here the witness observed and recalls the facts, but the belief or impression testimony indicates the witness is interpreting the facts—that the witness is testifying in the form of opinion or inference. The testimony will probably not come in. Why not? Because this kind of testimony runs afoul of the Opinion Rule. The testimony would not be helpful to the jury. Peter's testimony about what he actually observed and knows is completely understandable without hearing Peter's belief that Dusty was driving. With the benefit of Peter's testimony about what he actually observed and knows, the jury is just as capable as Peter of determining that Dusty was driving the car. Rule 701; *see United States v. Rea*, 958 F.2d 1206, 1219 (2d Cir. 1992). Having said this, the more detailed the account a witness gives, the more likely any error will be harmless whether the judge admits or excludes the opinion testimony. 3 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE (1st ed. 1990) ¶ 701[02], n.25, at 27; *United States v. Rea*, 958 F.2d at 1219-21.

As can be seen, foundation is everything when testimony in the form of belief or impression is offered.

B. OPINIONS EMBRACING WORDS HAVING LEGAL SIGNIFICANCE

Under Rule 704, "testimony in the

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form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." When an ultimate issue involves an issue like a person's state of mind (discussed in Part 2 of this article), it is not too difficult to see how Rule 704 works. But because "ultimate issues" are often mixed questions of law and fact, *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982), Rule 704 is not always so simple. What does the Rule mean when a mixed question is at issue? Can witnesses give legal opinions?

Many courts used to disallow opinion testimony saying they were preventing the witness from "usurping the province of the jury." Advisory Committee Notes, Rule 704. Wigmore dismissed this as "a mere bit of empty rhetoric." 7 WIGMORE, EVIDENCE § 1920(2), at 18 (Chadbourn rev. 1978). As a consequence of Rule 704, courts have now abandoned this concern, but they have not been nearly so quick to allow witnesses to "invade the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983).

Not surprisingly, then, most courts have held that Rule 704 does not permit witnesses to give opinions on questions of law, as such. Rule 704 does, however, permit witnesses to give opinions phrased in terms of adequately explored legal criteria—that is, it permits witnesses to give opinions using words that have legal significance in the action where either the popular meaning of the words is approximately the same as the legal meaning, or the examining lawyer has adequately defined the words for the witness. Advisory Committee Notes, Rule 704; 1 MCCORMICK ON EVIDENCE § 12, at 55 (Strong ed. 1999). The Advisory Committee uses the following example from *McCormick:*

> [T]he question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

Advisory Committee Notes, Rule 704.

Rule 704 does, however, permit witnesses to give opinions phrased in terms of adequately explored legal criteria.

Rule 704 says opinions must be "otherwise admissible." Opinions that merely tell the jury what result to reach remain unhelpful. These opinions supply the jury with no information other than the witness's view of how the verdict should read. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983).

The following example further illustrates Rule 704: At issue in an antitrust action is whether Smith and Jones entered into a combination or conspiracy in restraint of trade or commerce among the several states.

1. *Question No. 1*

You ask your witness:

"Mr. Smith, did you and Mr. Jones enter into a combination or conspiracy in restraint trade or commerce among the several states?"

"Objection. Calls for a legal conclusion."

"Sustained."

Why? This testimony would not be helpful because the terms and conclusions found in "combination or conspiracy in restraint trade or commerce" all demand an understanding of the nature and scope of antitrust law. *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980). The testimony may convey the witness's unexpressed, and perhaps erroneous, legal standards to the jury. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985). The jury might accord too much weight to the legal conclusions implicit in such testimony. *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980).

2. *Question Nos. 2-6*

You pause. You take a deep breath. You lay a foundation and prepare to ask your witness the following questions:

Mr. Smith, did you promise Mr. Jones that if Mr. Jones raised his prices, you would raise yours?

Mr. Smith, did you make a commitment to Mr. Jones that if Mr. Jones raised his prices, you would raise yours?

Did you and Mr. Jones have an understanding that you would both raise your prices?

Did you and Mr. Jones agree that you would each raise your prices?

Did you and Mr. Jones make agreement that you would each raise your prices?

Will this work? Except for the fact the evidence might be cumulative, the answer is yes. *United States v. Standard Oil Co.*, 316 F.2d 884, 889 (7th Cir. 1963). A witness may testify that "there has been an 'agreement,' 'understanding,' 'promise,' or 'commitment' ...because 'those words have well-established lay meanings and do not demand a conclusion as to the legal implications of conduct." *United States v. Misle Bus & Equipment Co.*, 967 F.2d 1227, 1234 (8th Cir. 1992); *United States v. Hearst*, 563 F.2d 1331, 1351-52 (9th Cir. 1977). ❐

TO BE CONTINUED IN NEXT ISSUE OF LITIGATION JOURNAL

CONSUMER EXPECTATIONS TEST: NOW THE CONTROLLING TEST IN DEFECTIVE DESIGN PRODUCT LIABILITY ACTIONS IN OREGON

By Ronald E. Bailey of Bullivant Houser Bailey

> *One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . .*
>
> *Restatement (Second) of Torts, §402A (1965).*

More than 30 years ago, when product liability claims were still brought under the common law, the Oregon Supreme Court adopted the consumer expectations test set forth in Section 402A of the Restatement (Second) of Torts as the standard of liability.[1]

The legal waters were muddied, however, when the court subsequently adopted a reasonable manufacturer test as a second standard for liability.[2]

In 1979, the Oregon Legislature enacted ORS 30.920, which not only codified the common law of product liability, but expressly stated that the statute "shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965)."[3] On May 10, 2001, the Oregon Supreme Court buried the reasonable manufacturer test. In *McCathern v. Toyota Motor Corp.*,[4] the court deferred to an apparent legislative intent and held that, "[i]n light of the clear choice embodied in the wording of ORS 30.920, there is no room to argue that the reasonable manufacturer test remains viable."[5] The court therefore concluded that the legislature had abrogated the reasonable manufacturer test and consequently, Oregon trial courts may no longer instruct juries on that test.

MCCATHERN AT TRIAL: Toyota 4Runner Rollover

In *McCathern*, one Linda McCathern was severely injured when the 1994 Toyota 4Runner in which she was a passenger rolled over. The roll-over resulted from the driver's attempts to avoid a head-on collision on a two-lane paved highway and involved a series of sharp turns and evasive maneuvers.

McCathern brought a product liability action against Toyota Motor Corporation and others, alleging, *inter alia*, that the vehicle was "dangerously defective and unreasonably dangerous in that it was unstable and prone to rollover" as designed and sold. A jury found for McCathern, awarding her $5,400,000 in economic damages and $2,250,000 in noneconomic damages. Toyota appealed.

MCCATHERN AT THE OREGON COURT OF APPEALS

The Oregon Court of Appeals affirmed.[6] In its affirmance, the court of appeals recognized two distinct approaches to establishing liability in a product liability action: 1) the "representational" approach and 2) the "consumer risk-utility" approach, holding that a plaintiff "with sufficient proof" could proceed under either approach, or both.

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Under the representational approach, a plaintiff must prove that the product did not perform according to specific representations made by the manufacturer to the consuming public and that, as a result, plaintiff was injured. The court opined that, based upon common law principles of warranty, the representational approach "endeavors to protect consumer expectations reasonably flowing from the manufacturer's representations";[7] "[c]onsiderations of cost and utility are *immaterial* to the representational approach."[8]

Under the consumer risk-utility approach, a plaintiff must prove that the manufacturer could have "feasibly and practicably" designed a safer alternative design, which, in effect, establishes that the existing product has failed to meet the consumer's reasonable expectations. Thus, in contrast to the representational approach, the consumer risk-utility approach is grounded on considerations of product cost and benefit, as determined from the perspective of the reasonable consumer. The premise underlying this approach is that "ordinary consumers reasonably expect products to be designed in the safest feasible and practicable manner."[9]

Causation is more difficult to prove under the consumer risk-utility approach than under the representational approach because the former requires a comparison between the existing product and the alleged safer, practicable alternative. As explained by the court:

> . . . [W]as the difference in design between the actual product and the alleged alternative a material cause of the plaintiff's injuries – or, conversely (from the defense perspective), would the plaintiff have been injured even if she had been using the alleged "safer" alternative?[10]

However, "particular evidence" is not required to prove causation. An inference from other probative evidence is sufficient.

The court found that McCathern had met her burden of proof under both approaches. With respect to the representational approach, McCathern had submitted examples of Toyota's print and television advertising for the 1994 4Runner. In that advertising, Toyota had specifically promoted the vehicle as maintaining good control in various driving environments, including during "sharp steering maneuvers."[11] The court held that, given Toyota's representations, a jury could conclude that "an ordinary consumer would reasonably expect a 1994 4Runner traveling at legal speed *not* to roll over following foreseeable evasive maneuvers, such as three sharp turns on a flat, dry, paved highway."[12] The court further held that McCathern had established causation under the representational approach by merely showing that she was injured because the vehicle did not perform as represented.

...the consumer risk-utility approach is grounded on considerations of product cost and benefit, as determined from the perspective of the reasonable consumer.

With respect to the consumer risk-utility approach, McCathern presented evidence and expert testimony regarding the likelihood of rollover of a 1994 4Runner as compared to a 1996 4Runner. The court concluded the jury could properly infer that, had plaintiff been a passenger in a vehicle with the design of the 1996 4Runner, "the increased stability of the 1996 design would have either prevented or 'greatly reduced the likelihood' . . . of a rollover."[13]

Toyota filed a petition for review with the Oregon Supreme Court.

MCCATHERN AT THE OREGON SUPREME COURT: Consumer Expectations v. Reasonable Manufacturer tests

ORS 30.900 defines a "product liability civil action" as a

> civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of:
>
> (1) Any design, inspection, testing, manufacturing or other defect in a product;
>
> (2) Any failure to warn regarding a product; or
>
> (3) Any failure to properly instruct in the use of a product.

Of the three types of product liability civil actions permitted by ORS 30.900, *McCathern* involved only ORS 30.900(1) – defective design. ORS 30.920(1) sets out the statutory requirements for a defective design claim:

> One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> (a) The seller or lessor is engaged in the business of selling or leasing such a product; and
>
> (b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.[14]

Thus, to establish a defective design under ORS 30.920(1), a plaintiff must prove:

> (1) the sale or leasing of a product by one engaged in the business of selling or leasing such products;

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> (2) a product that was expected to, and did, reach the user or consumer without substantial change in condition;
>
> (3) a product that, when sold, was in a defective condition unreasonably dangerous to the user or consumer;
>
> (4) injury to the user or consumer, or damage to his or her property;
>
> (5) that was caused by the product's defective condition.[15]

At issue before the Oregon Supreme Court was whether McCathern had introduced sufficient evidence to establish element (3), that the 1994 Toyota 4Runner, when sold, "was in a defective condition unreasonably dangerous" to McCathern, and (5), that the defective condition caused McCathern's injuries.

"Defective Condition Unreasonably Dangerous to the User or Consumer"

To establish a "defective condition unreasonably dangerous to the user or consumer" under ORS 30.920(1), a plaintiff must prove that the product at issue is 1) defective and 2) unreasonably dangerous to the user or consumer. Under the consumer expectations test — and, as discussed above, that is the only theory of liability available under ORS 30.920 — a plaintiff must prove that:

> (1) "at the time it leaves the seller's hands, [the product is] in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him"; and
>
> (2) "[the product is] dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[16]

The supreme court opined that whether a product is dangerous to an extent beyond that contemplated by the ordinary consumer is a factual question for the jury. However, the court pointed out that the trial court must ensure that there is sufficient evidence for the jury to make "an informed decision about what ordinary consumers expect."[17]

What does a jury know about an ordinary consumer's expectations? It depends. In some design defect cases, "consumer expectations about how a product should perform will be within the realm of the jurors' common experience."[18] However, there are other design defect cases in which product performance is outside the personal experience of the average juror. In those cases, additional evidence about the expectations of an ordinary consumer is needed.[19]

Risk-Utility Analysis

Such additional evidence may involve establishing that the risk posed by the product outweighs its utility. Evidence related to a balancing of risk and utility "may" be necessary to show that "a product failed to perform as safely as an ordinary consumer would have expected," which is often demonstrated "by proving that a safer design alternative was both practical and feasible."[20]

The court agreed with McCathern that evidence related to risk-utility balancing and design alternatives "will not *always* be necessary" to prove that a product failed to meet the expectations of an ordinary consumer.[21] The supreme court therefore rejected the Oregon Court of Appeals' holding that a plaintiff *must* introduce risk-utility evidence, such as proof of a safer practicable alternative, under what the court of appeals called the consumer risk-utility approach.[22]

The supreme court also agreed with McCathern's assertion that the Oregon Court of Appeals "erroneously converted categories of evidence relevant to consumer expectations into separate theories of liability,"[23] rejecting the court of appeals' conclusion that a product design defect may be proved under a consumer risk-utility approach or a representational approach as "two separate and distinct 'theories' of liability."[24]

With respect to the risk-utility approach, the high court opined:

> We emphasize that, whether or not evidence related to risk-utility balancing is necessary to satisfy a plaintiff's burden of proof, a plaintiff's *theory* of liability under ORS 30.920 remains the same: That the product was dangerously defective and unreasonably dangerous because it failed to perform as the ordinary consumer expects. In other words, contrary to the Court of Appeals' opinion, "consumer risk-utility" is not a separate "theory of liability" under the statutorily mandated consumer expectations test.[25]

With respect to the "representational" approach, the high court stated:

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> The Court of Appeals' "representational" approach also is not a separate "theory of liability" under the consumer expectations test. Although advertising and promotional materials may be sufficient to demonstrate what the ordinary consumer expects from a product in some cases, such evidence by itself rarely will demonstrate that a product is defective.[26]

... the court concluded that, under ORS 30.920(1), the controlling test for a design defect in Oregon is the consumer expectations test.

Based upon its extensive analysis, the court concluded that, under ORS 30.920(1), the controlling test for a design defect in Oregon is the consumer expectations test. The question then became whether McCathern had established that, when the product left Toyota's hands, it was defective and dangerous to an extent beyond the expectations of the ordinary consumer.

The Evidence – Alternative Design

As discussed above, McCathern was a passenger in a Toyota 1994 4Runner that overturned. She offered the 1996 4Runner as a proposed alternative design. Toyota contended that McCathern had failed to produce sufficient evidence that the 1996 4Runner was practicable. The court disagreed with Toyota.

Toyota had argued at trial that risk-utility evidence was required in this case. McCathern did not dispute Toyota's contention, and she submitted evidence that "the 1994 4Runner had a high risk of rolling over and that the 1996 4Runner was safer and as practicable as the 1994 model without any detriment to other safety or utility features."[27] McCathern's expert testified that the 1996 4Runner was more stable than the 1994 model. Toyota made the 1996 4Runner more stable by lowering the floor and widening the track width. Toyota conceded that what it had done in 1996 would have been feasible in 1994. Based upon such evidence, the court concluded that McCathern had presented sufficient evidence from which a jury could have found that "the 1996 4Runner design was a safer design that was feasible and practicable when Toyota manufactured the 1994 4Runner."[28]

The Evidence - Causation

Toyota also argued that McCathern had not provided any direct evidence that the 1996 4Runner would not have rolled over under the particular circumstances at issue. The court again disagreed. The court noted evidence, including Toyota's own testing for resistance to rollovers, from which the jury could have found that, under the circumstances of the case and in contrast to the 1994 4Runner, a 1996 4Runner would have skidded to a stop, rather than rolling over. The court therefore concluded that McCathern's evidence was sufficient to establish that the 1994 4Runner's design caused her injuries.

The Evidence – "Other Similar Incidents"

At trial, the court had admitted into evidence "other similar incidents" of rollovers presented by McCathern. In its petition for review, Toyota argued that the trial court had erred in admitting that evidence. The supreme court disagreed.

McCathern presented the expert testimony of a forensic engineer specializing in accident reconstruction. The expert reviewed approximately 35 rollover accidents involving pre-1996 Toyota 4Runners to determine whether those accidents were "'substantially similar'" to McCathern's accident. In his review, the expert looked at investigation reports, police reports and photographs, and witness depositions. For some of the cases, he visited the accident scene or examined the vehicle involved in the accident. After his analysis, the expert concluded that some 20 of the 35 accidents were "substantially similar" to McCathern's accident.

Toyota objected that the evidence was cumulative, and in the interests of time, the trial court restricted the expert's testimony to 15 incidents. The court, overruling Toyota's hearsay objections, permitted the expert to give a brief summary of each accident and to offer his opinion as to whether that particular accident was "substantially similar" to McCathern's accident. On cross-examination, Toyota sought to impeach the expert's testimony based upon several admitted police reports, which were part of the factual information upon which the expert had relied. McCathern contended that the admission of those reports was prejudicial to her because other information in the expert's file that the court had not admitted supported the expert's conclusions. Toyota eventually offered and stipulated to the admission of the expert's entire file.

On appeal to the Oregon Court of Appeals, Toyota argued that the trial court had erred when it overruled Toyota's hearsay objections and admitted the expert's testimony regarding the "substantially similar" incidents. The court of appeals declined to consider Toyota's arguments, concluding that Toyota had waived its hearsay objection to the expert's testimony when it offered and stipulated to the admission of the expert's file.

On review, the Oregon Supreme Court held that Toyota had not waived its objection by stipulating to the admission of the expert's file, but concluded that the disputed testimony was neither hearsay nor unfairly prejudicial.

Waiver. The court held that a party, after making the proper objections, "may counter its opponent's evidence, whether correctly admitted or not, without waiving its evidentiary objection on appeal."[29] Therefore, the court held that Toyota did not waive its hearsay objection.

Hearsay. The court held that the trial court correctly admitted McCathern's evi-

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dence of the details related to the 15 other rollover accidents over Toyota's hearsay objection because McCathern offered the evidence "only to provide the foundation necessary to explain [the expert's] opinion, not for its truth."[30] Because the trial court admitted the evidence "solely" for that purpose, the evidence by definition was not hearsay.[31]

Unfairly Prejudicial. Toyota argued that "other similar incidents" evidence was unfairly prejudicial under OEC 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

Toyota contended that the evidence was prejudicial because it "'powerfully suggested to the jury that it was the vehicle – not the driver, not the road, not the sudden, hard steering, not the speed, and not the other circumstances – that caused the rollover in this case.'"[32] Toyota also contended that the evidence was prejudicial because it included information about injuries or deaths that resulted from those other incidents.

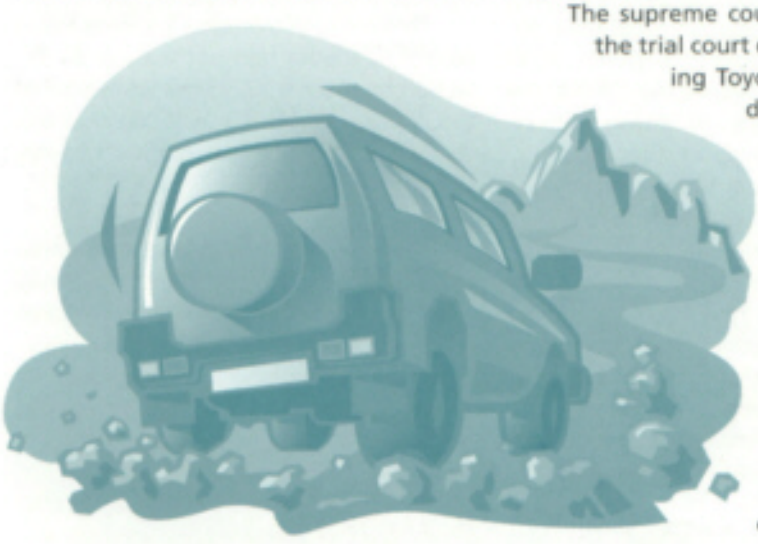
Finding the evidence was not unfairly prejudicial, the court opined that

> Toyota's assertion that the evidence powerfully suggested that the design of the 1994 4Runner caused the rollover in this case is no more than an assertion that plaintiff's evidence supported her theory of the case. As this court has recognized, relevant evidence often has the effect of proving one party's position while harming the other's.[33]

The court also pointed out that the trial court had complied with OEC 403 by balancing the prejudice of the evidence against its benefits. The trial court had limited the number of incidents that the expert could discuss as well as the number of videotaped depositions that McCathern could present. In addition, the trial court did not allow McCathern to present detailed evidence of the injuries sustained in the other accidents. The court concluded that the trial court did not abuse its discretion in determining that the probative value of the "other similar incidents" evidence was not substantially outweighed by the danger of unfair prejudice.

The Holding

The supreme court concluded that the trial court did not err in denying Toyota's motions for a directed verdict and JNOV. The court reasoned that McCathern had submitted evidence from which a jury could conclude that the 1994 4Runner failed to meet the expectations of the ordinary consumer and was consequently "in a defective condition unreasonably dangerous to the user or consumer" for purposes of liability under ORS 30.920(1). The court therefore affirmed the decisions of the trial court and the court of appeals in favor of Linda McCathern.



CONCLUSION

Like it or not, the *McCathern* court goes the way of a minority of state courts in making it clear: ORS 30.920 "endorse[s] only one perspective – that of the consumer."[34] Thus, in a design defect case under ORS 30.920, the only applicable test is the consumer expectations test, and under that test, the plaintiff consumer has the burden of establishing that a product left the seller in a condition not contemplated by the plaintiff and that the product was dangerous to an extent beyond that contemplated by the ordinary consumer. ❐

ENDNOTES

1 *See Heaton v. Ford Motor Co.*, 248 Or. 467, 470, 435 P.2d 806 (1967). As its name implies, the consumer expectations test focuses on the expectations of the "ordinary" consumer with regard to product safety.

2 *See Phillips v. Kimwood Machine Co.*, 269 Or. 485, 492, 525 P.2d 1033 (1974). The reasonable manufacturer test is whether "the seller would be negligent if he sold the article *knowing of the risk involved*"). *Id.* (emphasis in original).

3 ORS 30.920(3).

4 *McCathern v. Toyota Motor Corp.*, ____P.3d____, 2001 WL 492464 (Or. May 10, 2001).

5 *McCathern*, 2001 WL 492464, at *9.

6 *McCathern v. Toyota Motor Corp.*, 160 Or.App. 201, 985 P.2d 804 (1999).

7 *Id.* at 209.

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8 *Id.* at 210 (emphasis added).

9 *Id.* The court of appeals used the term "practicable" to mean both "practicable" and "feasible." *See id.* at 220 n.15.

10 *Id.* at 211.

11 *Id.* at 225.

12 *Id.* at 227 (court's emphasis).

13 *Id.* at 231 (quoting and finding controlling *Austria v. Bike Athletic Co.*, 107 Or.App. 57, 61, 810 P.2d 1312 (1991)).

14 ORS 30.920(1). ORS 30.920 provides in full:

> (1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> (a) The seller or lessor is engaged in the business of selling or leasing such a product; and
> (b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.
>
> (2) The rule stated in subsection (1) of this section shall apply, even though:
>
> (a) The seller or lessor has exercised all possible care in the preparation and sale or lease of the product; and
> (b) The user, consumer or injured party has not purchased or leased the product from or entered into any contractual relations with the seller or lessor.
>
> (3) It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965). All references in these comments to sale, sell, selling or seller shall be construed to include lease, leases, leasing and lessor.
>
> (4) Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence or under ORS 72.1010 to 72.7250.
>
> ORS 30.920.

15 *McCathern*, 2001 WL 492464, at *10, n.15.

16 *Id.* (quoting Restatement (Second) of Torts, §402A, Comment g (so defining "defective") and Restatement (Second) of Torts, §402A, Comment i (so defining "unreasonably dangerous").

17 *Id.* (citing *Heaton v. Ford Motor Co.*, 248 Or. 467, 472-73, 435 P.2d 806 (1967)).

18 *Id.* (citing *Heaton*, 248 Or. at 472).

19 *See id.* ("When a jury is 'unequipped, either by general background or by facts supplied in the record, to decide whether [a product] failed to perform as safely as an ordinary consumer would have expected,' this court has recognized that additional evidence about the ordinary consumer's expectations is necessary.") (quoting *Heaton*, 248 Or. at 473-74).

20 *McCathern*, 2001 WL 492464, at *10, *11 (citation omitted).

21 *Id.* at *11 (court's emphasis). Because the necessity of risk-utility evidence was not disputed in the instant case, the court did not decide under what circumstances a plaintiff must support a design defect claim with risk-utility evidence. *Id.*

22 *See* 160 Or.App. at 211 (holding that proof of a safer practicable alternative design "is essential" to the consumer risk-utility approach); James A. Henderson, Jr., *Restatement Third, Torts: Product Liability: What Hath the ALI Wrought?* 64 Defense Counsel Journal 502 (1997) (The Restatement takes the position that consumer expectations do not, standing alone, determine defectiveness . . . the majority rule requires design defect cases to be governed by risk-utility balancing . . . A large body of scholarly commentators has stated that risk-utility is and should be the governing test.).

23 *McCathern*, 2001 WL 492464, at *10. Note that Toyota also complained that the court of appeals' decision, through its "representational" approach, created a "'new theory of product liability'" that conflicted with ORS 30.920 and the case law of the Oregon Supreme Court. *Id.*

24 *Id.*

25 *Id.* at *11 (court's emphasis).

26 *Id.*

27 *Id.* at *12.

28 *Id.*

29 *Id.* at *5 (citing *Wallace v. American Life Ins. Co.*, 111 Or. 510, 533-37, 225 P. 192, *on reh'g*, 111 Or. 510, 227 P. 465 (1924)).

30 *Id.* at *6.

31 *Id.* (citing OEC 801(3) ("'hearsay' is out-of-court statement offered to prove truth of the matter asserted") and *Oberg v. Honda Motor Co.*, 316 Or. 263, 269-70, 851 P.2d 1084 (1993), *rev'd on other grounds sub nom Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) ("excerpts of documents read to jury admitted for limited purpose that defendants had notice of defective design and not for truth were not hearsay").

32 *Id.* (quoting Toyota).

33 *Id.* (citing *Macy v. Blatchford*, 330 Or. 444, 455, 8 P.3d 204 (2000)).

34 *Id.* at *9.

ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS IN THE NINTH CIRCUIT

By Kimberley Hanks McGair & Karen Saul of Farleigh, Wada & Witt, P.C.

Many practitioners know that arbitration can be more cost-effective, efficient, and satisfying for the litigants than litigation in court. Many of us simply assume that arbitration provisions in employment contracts can be enforced in the same manner and to the same degree as arbitration provisions in commercial agreements. However, compelling arbitration of an employment agreement in the Ninth Circuit is often a difficult task. The United States Supreme Court's recent decision in *Circuit City Stores Inc. v. Adams*,[1] gave many people the impression that compelling arbitration of employment claims was now as sure as compelling arbitration of commercial disputes. However, a close review of the law in the Ninth Circuit demonstrates that *Circuit City Stores* did not completely clear the field of Ninth Circuit precedence adverse to the enforceability of arbitration clauses in employment agreements.

Kimberley Hanks McGair

Karen Saul

...the Ninth Circuit held that an employer may not require its employees to waive their Title VII right to a judicial forum for either Title VII or state civil rights claims, although it may require them to arbitrate state-law tort and contract claims.

I. Pre-Circuit City Stores Law in the Ninth Circuit.

Two issues should be considered in evaluating how *Circuit City Stores* affects law in the Ninth Circuit. The first issue concerns whether arbitration clauses in employment agreements are subject to the Federal Arbitration Act. The second is whether an employer may compel the employee to arbitrate statutory claims. The United States Supreme Court's decision addresses only the first of these two issues.

A. Applicability of the Federal Arbitration Act to Employment Contracts.

The Federal Arbitration Act (FAA)[2] provides that "a written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction... shall be valid, irrevocable and enforceable."[3] However, section 1 of the FAA exempts from its coverage any arbitration clauses in "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[4] The Ninth Circuit has held that section 1 of the FAA prevented an employer from compelling arbitration of any dispute that arose under an employment contract with workers engaged in interstate commerce.[5] The Ninth Circuit was alone in its ruling in this regard, with every other circuit to have addressed the issue holding that the exclusion only applied to workers in the transportation industry.[6] The split in the circuits eventually was addressed by the Supreme Court in *Circuit City Stores*, as explained below.

b. Requirements for an Arbitration Agreement to be Enforceable in the Ninth Circuit.

Aside from whether the FAA applies, the Ninth Circuit has also ruled that an arbitration clause in an employment agreement did not bar the plaintiff's right to litigate statutory claims in a judicial forum unless certain conditions had been met.[7] In *Duffield v. Robertson, Stephens & Co.*, the plaintiff asserted claims for sexual discrimination in violation of Title VII of the Civil Rights Act of 1964, as well as California's Fair Employment and Housing Act. The defendant employer, a securities firm, moved to compel the plaintiff to arbitrate her claims pursuant to the arbitration clause in the security industry's standardized Uniform Application for Security Industry Registration, known as a U-4. In the U-4, the plaintiff agreed "to arbitrate any dispute, claim or controversy that may arise between me and my firm." The Ninth Circuit reversed the district court's order compelling plaintiff to arbitrate her claims and rejected the employer's motion to compel arbitration. It found a congressional intent in the enactment of the Civil Rights Act of 1991 to preclude the compulsory arbitration of Title VII disputes. Consequently, the Ninth Circuit held that an employer may not require its employees to waive their Title VII right to a judicial forum for either Title VII or state civil rights claims, although it may require them to arbitrate state-law tort and contract claims.[8] In other words, arbitration of these claims must be a mu-

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tual choice and not a unilateral mandate.

In the Ninth Circuit, the court will enforce an agreement to arbitrate claims under Title VII or the Americans with Disabilities Act (ADA) only where it finds a "knowing waiver" by the employee of his or her right to a jury trial in the event of an employment dispute.[9] To constitute a "knowing waiver," the agreement must specifically put the employee on notice that he or she is bound to arbitrate the particular type of claim in question.[10] The court has said that, for a waiver to be knowing, "the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question."[11] This holding has been criticized by many other Circuit Courts of Appeal and is contrary to the rulings issued by those courts on the arbitrability of Title VII claims.[12]

However, even in the Ninth Circuit, an agreement to arbitrate claims under either the Age Discrimination in Employment Act (ADEA) or the Fair Labor Standards Act (FLSA) is enforceable, and the court does not apply the "knowing waiver" standard in those cases.[13] The Ninth Circuit and the Supreme Court have ruled that the restrictions on the waiver of a plaintiff's right to a judicial forum and to submission of claims to compulsory arbitration found in Title VII and the ADA are not present in Congress' enactment of the ADEA and FLSA. *Id.*

II. Circuit City's Limited Effect on Ninth Circuit Procedure.

In *Circuit City Stores,* the Supreme Court neither considered nor decided the issue of whether an employer may require an employee to arbitrate Title VII and state civil rights claims, nor did it consider whether the Ninth Circuit's knowing waiver requirement under these laws was a correct statement of the law. Instead, *Circuit City Stores* addressed only the Ninth Circuit's holding that all employment contracts are exempt from the FAA's coverage. Agreeing with all of the other Circuit courts, the Supreme Court ruled that only employment contracts for transportation workers are within the scope of the exemption contained in Section 1 of the FAA.

Advice-oriented employment lawyers should ensure that any agreement to arbitrate employment claims is "knowing" by presenting the arbitration as a choice, instead of a mandate.

Thus, *Circuit City* overturned the Ninth Circuit's recent line of cases holding that the FAA did not apply to any contract of employment involving interstate commerce. It did not overturn other law in the Ninth Circuit involving arbitration clauses in employment agreements and statutory causes of action. Accordingly, as it currently stands, the law in the Ninth Circuit regarding arbitration of employment claims is as follows:

1. If the claim involves either state civil rights claims, Title VII claims or claims under the ADA, an arbitration agreement will only be enforced if the employee "knowingly waived" his or her right to a judicial form;

2. If the claim involves state law contract or tort claims, or claims under the FLSA or ADEA, then an arbitration clause will be enforced regardless of whether there is evidence that the employee knowingly waived the right to a judicial forum.

III. Future Developments.

The Supreme Court has not had occasion to consider the Ninth Circuit's holding on the knowing waiver requirement. It denied certiorari in *Prudential Ins. Co. of America v. Lai*, which directly addresses this point of law.[14] Until the Supreme Court takes up the issue, however, practitioners should be aware of the limitations on compelling arbitration in the Ninth Circuit. Advice-oriented employment lawyers should ensure that any agreement to arbitrate employment claims is "knowing" by presenting the arbitration as a choice, instead of a mandate. All other criteria for an enforceable contract must be met, as well. In summary, only under the most ideal facts should an employer expect a favorable outcome when an employment related arbitration clause is challenged in this jurisdiction. ❐

1. No. 99-1379, 2001 WL 273205.
2. 9 USC § 1, *et seq.*
3. 9 USC § 1.
4. 9 USC § 1.
5. *Craft v. Campbell Soup Co.*, 177 F3d 1083 (9th Cir 1999).
6. *Circuit City Stores, Inc. v. Adams*, No. 99-1379, 2001 WL 273205 (2001) (collecting cases), *see e.g. McWilliams v. Logicon, Inc.*, 143 F3d 573, 575-76 (10th Cir 1998); *O'Neil v. Hilton Hospital*, 115 F3d 272, 274 (4th Cir 1997).
7. *Duffield v. Robertson, Stephens & Co.*, 144 F3d 1182 (9th Cir 1998).
8. *Id.* at 1202-03.
9. *Prudential Ins. Co. of America v. Lai*, 42 F3d 1299, 1305 (9th Cir 1994); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F3d 756, 762 (9th Cir 1997).
10. *Id.*
11. *Id.*
12. *See, e.g. Seus v. John Nuveen & Co., Inc.*, 146 F3d 175, 183-84 (3rd Cir 1998); *Haskins v. Prudential Ins. Co. of America*, 230 F3d 231 (2000).
13. *Kuehner v. Dickinson & Co.*, 84 F3d 316 (9th Cir 1996); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed 2d 26 (1991).
14. 516 US 812 (1995).

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims for Relief.

A. Negligence.

To avoid liability for negligent failure to warn, the warning must be specific, the Court of Appeals held in *Nelsen v. Nelsen*, 174 Or. App. 252 (2001). There, the court reversed a summary judgment in favor of a man who was sued by his mother after she slipped on a wet plastic tarp and broke her hip. The son told his mother to "watch your step" just before she slipped on the tarp. The Court of Appeals held that a reasonable juror "could conclude that 'watch your step' is not an equivalent warning to 'watch out for the plastic, it's wet and slippery and you might fall' and that 'watch your step' was an inadequate warning in this instance." 174 Or. App. at 259.

Justifiable reliance is not required to hold a hospital liable for the negligent acts of radiologists under an "apparent agency" theory, the Court of Appeals held in *Jennison v. Providence St. Vincent Medical Center*, 174 Or. App. 219 (2001). There, the court rejected the "justifiable reliance" test of the *Restatement (2d) of Agency* § 267 (1958), holding that, in the hospital context, a patient can recover "if it is objectively reasonable for the patient to believe that the physician is an employee of the hospital" unless the patient has actual knowledge to the contrary. 174 Or. App. at 235.

An insurer's failure to conduct reasonable settlement negotiations with a third party after entry of a verdict against the insured in excess of the policy limits can constitute actionable negligence, the Court of Appeals held in *Goddard v. Farmers Ins. Co.*, 173 Or. App. 633 (2001). There, the Court of Appeals reversed the trial court's decision to strike the negligence allegations against the insurer. The court, deciding an issue of first impression in Oregon, concluded that after entry of a judgment in excess of policy limits, "an insurer must continue to give equal consideration to interests of its insured. The insurer must act as if it were liable for the amount of the entire judgment[.]" 173 Or. App. at 642.

The California "balancing" test for determining whether an attorney owes a duty to a nonclient does not apply in Oregon, the Court of Appeals held in *Lord v. Parisi*, 172 Or. App. 271 (2001). The court concluded that the Supreme Court's decision in *Hale v. Groce*, 304 Or. 281 (1987) "forecloses the possibility that Oregon will follow California in deciding when an attorney owes a duty to protect someone other than his or her client." 172 Or. App. at 280. The court explained that applying the six-factor California approach "would result in the court making a judgment about a defendant's duty (or lack of duty) based, in part, on its evaluation of the foreseeability of harm to the plaintiff." 172 Or. App. at 279-280. That would be contrary to *Hale* because that case required plaintiff to establish the existence of "a duty that arises apart from the foreseeability of the harm." 172 Or. App. at 279.

B. Other Claims.

An employee who was fired for refusing to sign a noncompetition agreement stated a claim for wrongful discharge, the Court of Appeals held in *Dymock v. Norwest Safety Protective Equipment*, 172 Or. App. 399 (2001). The court reasoned that a statute—ORS 653.295—effectively confers an employment-related right not to sign a noncompetition agreement that is not supported by adequate consideration. Being fired for exercising that right could support a wrongful discharge claim. 172 Or. App. at 405-06.

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The Court of Appeals rejected inverse condemnation claims in two recent cases, *Deupree v. ODOT*, 173 Or. App. 623 (2001), and *Hunter v. West Linn Wilsonville School Dist. 3JT*, 173 Or. App. 514 (2001). In *Deupree*, the court affirmed the dismissal of plaintiffs' inverse condemnation claim based on the alleged loss of highway access to their property, holding that the loss of direct highway access was not compensable as long as plaintiffs had another means to access their property. In *Hunter*, the court held that plaintiff's claim for compensation for loss of a contractual right to remove rocks and boulders from the subject property was properly rejected because (1) plaintiff's contract rights were extinguished in the school district's original condemnation of the subject property; and (2) subsequent actions taken by the school district could not have been a compensable taking because plaintiffs "had no property rights for the district to take." 173 Or. App. at 519.

The "consumer expectation" test is the controlling test for determining whether a manufacturer can be held liable for an alleged design defect, the Supreme Court held in *McCathern v. Toyota Motor Corp.*, 332 Or. 59 (2001). The court affirmed a verdict in plaintiff's favor after she was injured when the Toyota 4Runner vehicle in which she was riding rolled over. The court concluded that plaintiff submitted sufficient evidence from which the jury could have concluded that the 1994 4Runner "failed to meet ordinary consumer expectations and was, therefore, in a defective condition unreasonably dangerous to the user or consumer." 330 Or. at 82.

II. Remedies.

The remedy provided by the workers' compensation law will no longer be the exclusive remedy for all work-related injuries following the Supreme Court's decision in *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83 (2001). There, the court held that the exclusive remedy provisions of ORS 656.018 violate the remedy clause set forth in Article I, section 10 of the Oregon Constitution. In a lengthy opinion that traced the history of the remedy principle back to the Magna Carta, the court concluded that plaintiff had a viable negligence claim to recover for injuries he suffered at work after his workers' compensation claim was denied. The court explained that "the remedy clause mandates that a remedy be available to all persons—including workers—for injuries to 'absolute' common law rights for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857." 332 Or. at 136.

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Two months before the *Smothers* decision, the Court of Appeals ruled that the immunity provided by ORS 30.265 to public bodies from claims that are covered by the workers' compensation statutes does not violate the remedy clause of Article I, section 10. *Gunn v. Lane County*, 173 Or. App. 97 (2001). Unlike the plaintiff in *Smothers*, the plaintiff in *Gunn* had received workers' compensation benefits. The Court of Appeals concluded in that instance that the immunity statute—ORS 30.265(3)(a)—"constitutionally shields public bodies from liability when the workers' compensation statutes provide the plaintiff with a substantial remedy." 173 Or. App. at 101.

III. Limitation of Actions.

In *Holdner v. Oregon Trout, Inc.*, 173 Or. App. 344 (2001), the Court of Appeals affirmed a summary judgment on a defamation claim, holding that the claim was barred by the one-year statute of limitations set forth in ORS 12.120(2). The court declined to decide whether the "discovery rule" applied to defamation claims in Oregon, because plaintiff's claim was barred as a matter of law even if the discovery rule applied. 173 Or. App. at 351-52.

In *Kambury v. Daimlerchrysler Corp.*, 173 Or. App. 372 (2001), the Court of Appeals held that the three-year statute of limitations for wrongful death actions, not the two-year statute of limitations for product liability actions, applied to a wrongful death case alleging claims for product liability, negligence and breach of warranty. The court held that the issue of which statute of limitations applied in those circumstances had been decided in an earlier case, *Korbut v. Eastern Kodak Co.*, 100 Or. App. 649 (1990), and the court could not conclude that its resolution of the issue in *Korbut* "is so plainly wrong that we should overrule that decision." 173 Or. App. at 383.

IV. Procedure.

Relief from a default judgment was improperly granted by the trial court in one case, and improperly denied in another case, according to the recent decisions in *Duvall v. McLeod*, 331 Or. 675 (2001), and *National Mortgage Co. v. Robert C. Wyatt, Inc.*, 173 Or. App. 16 (2001). In *Duvall*, the Supreme Court made it clear that a responsive pleading must be tendered simultaneously with a motion for relief from the default judg-

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ment. The court held that the trial court erred when it set aside a default judgment and accepted an answer filed ten days later. In *National Mortgage*, the Court of Appeals held that a defendant made a sufficient and timely showing of "excusable neglect" when it established that the person served with summons and complaint was incapacitated by mental illness. 173 Or. App. at 24.

An amended complaint does not "relate back" under ORCP 23C to the date of filing the original complaint, the Court of Appeals held in *Krauel v. Dykers Corp.*, 173 Or. App. 336 (2001), with respect to claims asserted against a new defendant first named in the amended complaint. And in a decision that was undoubtedly designed to put some teeth back into the law, the Court of Appeals recently held that the word "denture" "encompasses any removable prosthetic dental appliance that replaces all of the teeth in either the upper or lower jaw regardless of whether that appliance rests solely on soft tissue." *Oregon State Denturists Assn. v. Board of Dentistry*, 172 Or. App. 693, 702 (2001). ❐

Panner Professionalism Award Nominations

The Oregon State Bar Litigation Section Executive Committee has begun its annual screening and selection process for the Owen M. Panner Professionalism Award, which will be presented at the Litigation Section's Annual Institute and Retreat on March 8, 2002, at Skamania Lodge. Past recipients of the award are as follows:

1998 - Honorable Owen M. Panner

1999 - Don McEwen

2000 - Gene Hallman

2001 - Judy Snyder

The award recognizes a member of the bench or bar who exemplifies the highest professional standards. The Litigation Section Executive Committee welcomes nominees of diverse backgrounds, practice areas, gender, and geographic location. The deadline for nominations is September 1, 2001. Individuals nominated, but not selected to receive the award this year, will be considered in future years.

To nominate an individual, please send a short letter identifying the nomination to The Oregon State Bar Litigation Section Executive Committee, c/o Richard A. Lane, 1000 Jackson Tower, 806 SE Broadway, Portland, Oregon 97205-3307. You will be contacted for more information should the nominee become a finalist.

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