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In This Issue

But, I Don't Sell Securities...

Collateral-Participant Liability Under Oregon Securities Law

By Scott G. Seidman and Steven D. Olson of Tonkon Torp LLP

Scott G. Seidman

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Over the past many months, we have devoured news and information relating to the fall of Enron Corp. and the various securities and other lawsuits surrounding that fall. Questions have arisen as to who outside of Enron may be accused and asked to pay, such as analysts, banks, investment bankers, accountants, and lawyers. Business professionals have already been sued, and others, possibly including lawyers, will come under scrutiny.

While news of the events surrounding Enron's demise has captured our attention, it is important to appreciate that investors lose money in securities transactions every day. On occasion, losses are the result of securities fraud. More often, however, losses are caused by a variety of other factors. Undeniably, securities transactions involve risk of loss. While securities investors usually appreciate this risk when they enter into securities transactions, it is commonly ignored when deals go bad. Even sophisticated investors will attempt to hold others responsible for their misfortune, for their poor judgment, or for genuine instances of deception. Often, fingers are pointed at collateral participants such as lawyers and other business professionals who are believed to have deep pockets and an ability to compensate disappointed investors for their losses. To protect our clients and us, no matter which side of the dispute we may find ourselves on, it is important that all lawyers obtain a basic familiarity with securities fraud, and in particular, an awareness of Oregon's unique treatment of collateral-participant liability.

I. What is securities fraud?

Generally, securities fraud involves the use of untrue statements of material fact that are made directly or indirectly in connection with the purchase or sale of securities. Under Oregon's general provision for securities fraud liability, ORS 59.115(1),[1] it is unlawful for a person to sell

> "a security by means of an untrue statement of material fact or an omission to state a material fact necessary in order to make the statements made,

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Comments From the Editor

ORS 45.250(1)(b) ... Use your imagination!

Dennis P. Rawlinson
Miller Nash LLP

Senior U.S. District Court Judge Owen M. Panner has often remarked that lawyers have one of the most difficult jobs on earth. Clients bring us their thorniest problems: the "bet the company" and "bet the career" cases. We are a special breed to make our living by handling problems of this magnitude.

Most of us take these challenges and burdens seriously. As a result, we are also a profession with a high percentage of "burnout."

Dennis Rawlinson

Over the course of my career I have noticed that some of the best in our profession are those who take their cases seriously but not themselves. They allow a little bit of humor to revitalize their days and restore their energy.

With this background and realizing the gravity of the events over the past several months, I offer the following to revitalize and restore us all.

As you know, ORS 45.250(1)(b) provides:

> "The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party, may be used by an adverse party for any purpose."

Taking advantage of language in a comparable statute in Birmingham, an Alabama lawyer engaged in the rather imaginative use of the statute set forth below.

The Alabama trial transcript reads as follows:

THE COURT: "Next witness."

PLAINTIFF'S COUNSEL: "Your Honor, at this time I would like to swat defendant's counsel on the side of his head with his client's deposition."

THE COURT: "You mean read it?"

PLAINTIFF'S COUNSEL: "No, Your Honor, I mean swat him on the side of the head with it. Pursuant to state rule 32 I am entitled to use the deposition transcript of an adverse witness 'for any purpose.' In view of defense counsel's last argument, this is the purpose for which I want to use defense counsel's client's deposition transcript."

THE COURT: "Well, it does say that."

(PAUSE)

THE COURT: "There being no objection, you may proceed."

PLAINTIFF'S COUNSEL: "Thank you, Your Honor."

(Whereupon plaintiff's counsel swatted defense counsel on the side of the head with the deposition transcript of defense counsel's client.)

DEFENSE COUNSEL: "But judge...."

THE COURT: "Next witness."

DEFENSE COUNSEL: "I object."

THE COURT: "Sustained."

Is Proof of Damages Essential to Establish a Triable Issue of Contract Breach? No!

By Charlie Adams

As recently as December 2001, the Oregon Court of Appeals declared "that proof of damages is an essential element of a breach of contract action." *Rizo v. U-Lane-O Credit Union,* 178 Or App 498, 501, 37 P2d 220 (2001). This declaration is incorrect. As set forth below, no fewer than three Oregon Supreme Court cases hold to the contrary. Additionally, under well-established principles of contract law generally, it is settled that proof of damages is not an essential element of an action for breach.

Charlie Adams

The Oregon Court of Appeals' present-day position derives from that court's 1988 decision in *Moini v. Hewes,* 93 Or App 598, 602-03, 763 P2d 414, *rev den* 307 Or 245 (1988). Before addressing *Moini,* it will be useful first to address three prior Oregon Supreme Court decisions that *Moini* fails to address. This in turn requires understanding what elements are essential to a breach-of-contract claim.

In *Hollin v. Libby, McNeill & Libby,* 253 Or 8, 13, 452 P2d 555 (1969), the Oregon Supreme Court explained, "*[a]s soon as a party* to a contract *breaks any promise* he has made, he is liable to an action." (Emphasis added; citation and internal quotation marks omitted.) The court also made clear that an action for breach exists even "'[i]f that breach is a trifling one [for which] damages cannot well be more than the direct injury caused by that trifling breach.'" *Id.* (citation omitted).

A corollary to this is that a plaintiff who has provided evidence sufficient to show a breach of contract is entitled to have its case submitted to a jury, even without evidence of actual damages. In *Western Feed Co. v. Heidloff,* 230 Or 324, 334, 370 P2d 612 (1962), the court held:

> "The remaining ground of the motion for a directed verdict is that the defendant failed to produce 'satisfactory evidence of any damage for any breach of warranty.' Since the defendant proved a breach of warranty, the jury could have found that he was entitled to at least nominal damages and the motion was therefore properly overruled. *Cf. Sunny Side Land & Imp. Co. v. Willamette Bridge Ry. Co.,* 20 Or 544, 26 P 835 (1891); *Nicholson v. Jones,* 194 Or 406, 242 P2d 582 (1952)."

...under well-established principles of contract law generally, it is settled that proof of damages is not an essential element of an action for breach.

Additionally, the court explained in *Smith v. Abel,* 211 Or 571, 589, 316 P2d 793 (1957):

> "As to the motions for nonsuit and directed verdict, it is sufficient to say that there was evidence from which the jury could have found a breach of contract, at least when defendants finally stopped delivery on June 8 or 9, if not before. Such a finding would warrant a verdict *for at least* nominal damages, and the motions [for nonsuit and directed verdict] were properly denied." (Emphasis added.)

Finally, in *Schafer v. Fraser,* 206 Or 446, 486-87, 290 P2d 190, 294 P2d 609 (1955), the court explained:

> "No out-of-pocket loss is necessary to sustain the action even though such a loss might, in a proper case, be recovered if it has been incurred. For, generally, in contract actions actual damages are *not an element of the cause of action* because nominal, rather than compensatory, damages can be recovered for a breach. 1 Sedgwick on Damages, pp 167, 179. An action for breach of warranty of authority is an action on the contract. *Cochran v. Baker,* 34 Or 555, 52 P 520, 56 P 641, declares:
>
> "'* * * The question is a new one in this state, but we are impressed with the view that under the facts of the case at bar the plaintiffs have an action against the defendant upon his implied warranty touching his agency, and that it is one in contract, rather than in tort.'
>
> "Therefore, where a claimant is entitled to nominal dam-

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PROOF OF DAMAGES

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> ages, the adverse party's motion for a nonsuit must be denied * * *." (Emphasis added.)

Without citing any of these Oregon Supreme Court cases, the Oregon Court of Appeals incorrectly held in *Moini*, 93 Or App at 602-03, that "[d]amage is an essential element of any breach of contract * * *. Accordingly, judgment *n.o.v.* was proper as to that finding of breach." (Citation omitted.) *Moini* was incorrectly decided when measured against *Western Feed, Smith,* and *Schafer,* none of which *Moini* cites. *Moini* also materially misreads the only case it does cite, *Wm. Brown & Co. v. Duda,* 91 Or 402, 406, 179 P 253 (1919). In *William Brown,* the plaintiff alleged that a contract made on its face between the defendant and a third person was actually a contract between the plaintiff and the defendant. Under this contract, the defendant agreed to sell a quantity of hops to the third person at 10-1/2 cents per pound. The plaintiff alleged that he, in turn, had a contract to resell those same hops to yet another party for 11 cents per pound, that defendant knew of this resale contract, and that when the defendant failed to deliver the hops, the plaintiff lost the profit he would have made on the resale. The plaintiff sought these lost profits as damages against the defendant. At trial, however, the plaintiff did not introduce any evidence as to the market value of these hops at the time and place of the transaction. The jury thereafter found in favor of the defendant after having been instructed as follows:

> "'(C) Involved in *the measure of damages* is also the question of necessity for reliance by the plaintiff on the contract alleged to have been entered into between the plaintiff and defendant. It is alleged in the complaint that the plaintiff was unable to meet this alleged contract for eleven cents by reason of the alleged breach. If the market conditions were such that the plaintiff could by utilizing the market—going into the market and procuring the commodity at the time—the plaintiff could have avoided this alleged loss, then it would have been the duty of the plaintiff to have done so. Whether the evidence discloses such a state of facts is to be determined by the jury in this case.'" Id. at 405 (emphasis added) (quoting jury instructions).

In contrast, *Western Feed, Smith,* and *Schafer* are clear, holding that a right of action accrues immediately upon breach and in the absence of any actual damages.

Against this background, the court then held:

> "Instruction 'C' has to do with *the measure of damages.* Without some evidence tending to show that the plaintiff was damaged by reason of the failure of the defendant to carry out the alleged contract, the plaintiff would not be entitled to recover, and it appears from the record that there was no such evidence.
>
> "The judgment is affirmed." *Id.* at 406-07 (emphasis added).

There was no analysis in *William Brown* of a plaintiff's right to an award of nominal damages upon proving breach. The court's evaluation that "plaintiff would not be entitled to recover" consequently refers to recovery of the *lost profits.* Those profits could not be recovered in *William Brown,* because the plaintiff failed to show that it could not have performed its contract for resale at 11 cents by procuring hops from someone else.

William Brown consequently is not authority for the proposition that a plaintiff must provide proof of actual damages before a jury can decide whether a breach of contract has occurred. In contrast, *Western Feed, Smith,* and *Schafer* are clear, holding that a right of action accrues immediately upon breach and in the absence of any actual damages. These holdings match the state of the law throughout the country:

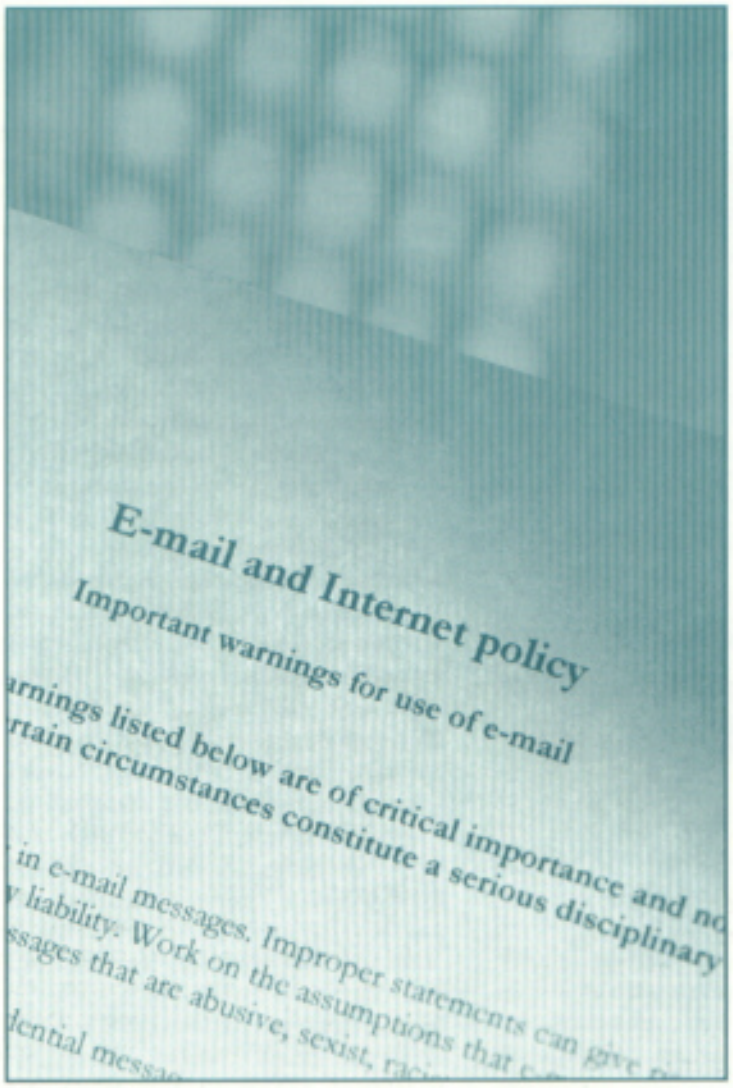
> "Although a breach of contract by a party against whom it is enforceable *always* gives rise to a claim for damages, there are instances in which the breach causes no loss. * * * In *all* these instances the injured party will nevertheless get judgment for nominal damages, a small sum usually fixed by judicial practice * * *." Restatement (Second) of Contracts § 346 cmt b (1981) (emphasis added).

This general declaration matches the holdings of *Western Feed, Smith,* and *Schafer.*

Even if *William Brown* had held (and it did not) that proof of actual damages is an essential element of every contract case, *William Brown* was superseded by the later Oregon Supreme Court holdings in *Western Feed, Smith,* and *Schafer. See, e.g., Fuller v. Safeway Stores,* 258 Or 131, 133-34, 481 P2d 616 (1971) (acknowledges implied overruling of older supreme court case by two subsequent decisions from that court which conflicted with, but did not cite, older case). By contrast, it is irrelevant to the continuing vitality of *Western Feed, Smith,* and *Schafer,* that the Oregon Court of Appeals' conflicting decision in *Moini* is more recent. *Jones v. General Motors Corp.,* 325 Or 404, 416, 939 P2d 608 (1997) (subsequent court of appeals decision contradicting earlier supreme court ruling on same issue does not change Oregon law).

CONCLUSION

Proof of actual damages is not an essential element of an action for breach of contract. ❐



I Spy...

Monitoring Employee E-Mail and Internet Use

By Kurt Nath Tandan of adidas America

I. Introduction

Many employers are monitoring, or considering monitoring, employee e-mail and Internet use. The primary motivation for monitoring is to protect employer interests. Both e-mail and the Internet can be excellent business tools or excellent ways for employees to waste time (think on-line shopping or day-trading). In addition, the employer may be held financially liable for employee misuse of these tools. For example, it can expect to be the target defendant in any hostile work environment claim involving sexually harassing e-mail or sexually explicit items downloaded from the Internet at work.

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Many employers feel that if they will ultimately bear the negative consequences of Internet and e-mail misuse and abuse, they need to monitor. If an employer decides to monitor, it must take care to comply with state and federal privacy and wiretap laws. Disregarding these laws will place employers' interests in further jeopardy.

II. Why monitor employee e-mail and Internet use?

The potential harm to an employer because of misuse of e-mail and the Internet is great. E-mail messages and company-provided Internet bulletin boards provide the means for employees to harass and defame their colleagues. The Internet provides a seemingly limitless supply of pornography that can be used to create a sexually hostile work environment. E-mail allows the quick transmission of confidential company or client information to competitors and unintended recipients. Finally, the wealth of information on the Internet enables employees to spend countless hours amusing themselves during work hours, rather than working.

To date, the primary area of litigation concerning the misuse and abuse of e-mail has been in the area of harassment and defamation. In 1996, Morgan-Stanley was sued in federal court in New York for $60,000,000 by two employees who alleged that they faced retaliation and discrimination after they complained about an e-mail message containing racist remarks disseminated through the firm's computer system. *Owens v. Morgan-Stanley & Co.*, No. 96-9747 (SDNY 1996). After more than a year of litigation, Morgan-Stanley settled the case for an undisclosed amount.

Blakely v. Continental Airlines, Inc., 164 NJ 38, 751 A2d 538 (2000), involved harassment that allegedly occurred on a company electronic bulletin board. The bulletin board could be accessed only by Continental pilots and crew member personnel, and allowed employees with access to post messages for one another. *Id.* at 48, 50. The plaintiff sued her coworkers for publishing allegedly defamatory statements about her on that electronic bulletin board and sued Continental under the New Jersey Law Against Discrimination on the theory that it was liable for a hostile work environment created by the statements on the electronic bulletin board. *Id.* at 54. With respect to the hostile work environment claim, the court held that an electronic bulletin board could be so "sufficiently integrated with the workplace" that it should be considered part of it. *Id.* at 60-61. The court remanded the case because the record was not sufficient to determine whether the electronic bulletin board in that case was part of the workplace. *Id.* at 46.

A survey released in April 2001 by the American Management Association disclosed that 46.5% of employers store and review employee e-mail messages, up from 38.1% in 2000 and 14.9% in 1997. The same survey showed that 62.8% of employers monitor employee Internet use.

As a result of the potential exposure from misuse and abuse, an increasing number of employers are monitoring employee e-mail and Internet use. A survey released in April 2001 by the American Management Association disclosed that 46.5% of employers store and review employee e-mail messages, up from 38.1% in 2000 and 14.9% in 1997. BNA DLR, April 19, 2001. The same survey showed that 62.8% of employers monitor employee Internet use. *Id.*

A key issue for employers that monitor is knowing the applicable laws and complying with those laws.

II. Laws that may limit an employer's ability to monitor employee e-mail and Internet use.

A. State common law right to privacy.

Oregon recognizes four causes of action for invasion of an individual's right to privacy: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) placing a person in a false light; and (4) appropriation of name or likeness. The most likely privacy claims in an e-mail/Internet monitoring case are intrusion upon seclusion and public disclosure of private facts. To maintain these causes of action, an employee must show an intrusion upon or disclosure of private concerns; in other words: that a right to privacy was violated. *Legget v. First Interstate Bank of Oregon, N.A.*, 86 Or App 523, 527, 739 P2d 1083 (1987) (the three elements of intrusion upon seclusion are: (1) intentional intrusion; (2) upon plaintiff's *private concerns or affairs*; and that (3) the intrusion is offensive to the reasonable person); *Tollefson v. Price*, 247 Or 398, 401-02, 430 P2d 990 (1967) (the three elements of public disclosure of private facts are: (1) facts disclosed are *private facts*; (2) defendant disclosed them to the public generally or to a large number of persons; and (3) the disclosure was in a form of publicity of a highly objectionable kind).

B. The Electronic Communications Privacy Act.

The federal Electronic Communications Privacy Act of 1986 ("ECPA") regulates the monitoring of communications

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by employers. The ECPA is divided into two parts, commonly referred to as the Federal Wiretap Act and the Stored Communications Act. The ECPA has been described as being "famous (if not infamous) for its lack of clarity." *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F3d 457, 462 (5th Cir 1994). That lack of clarity may account for the vastly different ways courts are interpreting the ECPA.

1. The Wiretap Act.

The Wiretap Act prohibits the interception of electronic communications and the use or disclosure of electronic communications knowing or having reason to know that it was obtained through interception. 18 USC § 2511. Courts are taking varying positions on when an electronic communication is intercepted.

The Fifth Circuit and a number of federal district courts have held that the Wiretap Act only applies to electronic communications when they are in transit. *Steve Jackson Games, Inc.*, 36 F3d at 461-62; *Wesley College v. Pitts*, 974 F Supp 375, 387 (D Del 1997) *aff'd*, 172 F3d 861 (3rd Cir 1998); *Bohach v. City of Reno*, 932 F Supp 1232, 1236 (D Nev 1996). Under this view of the Wiretap Act, in order to be an "interception," the acquisition must be contemporaneous with the transmission. Thus, an employer would violate the Act if it, for example, diverted every e-mail to or from an employee to its corporate counsel for review, even if the review were not contemporaneous with transmission.

Recently, a federal district court in Pennsylvania also held that the Wiretap Act only applies to interception during the course of transmission but defined the course of transmission broadly as any time from the time the electronic communication is sent to the recipient until the recipient reads it. *Fraser v. Nationwide Mutual Insurance Co.*, — F Supp 2d —, 2001 WL 290656, *8, *9 (ED Pa 2001). Under this interpretation, an employer would violate the Wiretap Act by monitoring e-mail after it had been sent but before it was read by the recipient. It would not violate the Act by accessing the e-mail after it had been read and placed in post-transmission storage. In the context of an Internet transmission, interception would occur at any time before the recipient downloaded the information from the web server. *Id.* at *10.

The Wiretap Act prohibits the interception of electronic communications and the use or disclosure of electronic communications knowing or having reason to know that it was obtained through interception. ...Courts are taking varying positions on when an electronic communication is intercepted.

Finally, in another recent case, the Ninth Circuit took the most expansive reading of the Wiretap Act. It held that the Act was violated any time an electronic communication was acquired, regardless of when it was acquired, because an electronic communication "cannot successfully be completed without being stored." *Konop v. Hawaiian Airlines, Inc.*, 236 F3d 1035, 1045 (9th Cir 2000). Under this reading of the Wiretap Act, an employer would violate the Wiretap Act any time it reviewed an employee e-mail or Internet transmission, unless it fell into one of the exceptions discussed below.

2. The Stored Communications Act.

The Stored Communications Act protects against the unauthorized access of stored electronic communications, 18 USC § 2701, and knowingly divulging the contents of electronic communications in electronic storage, 18 USC § 2702. The Act does not protect all stored electronic communications, just communications in "temporary, intermediate storage" incidental to the electronic transmission, and communications in storage by an "electronic communication service for purposes of backup protection of such communication." 18 USC § 2510(17).

In two recent cases, courts have taken radically different views of the extent of the protection provided by the Stored Communications Act.

The District Court for the Eastern District of Pennsylvania found that "temporary, intermediate storage" only protected communications in storage during the time after the transmission was sent but before it was read. *Fraser v. Nationwide Mut. Ins. Co.*, 2001 WL 29065, *10. It found that "back-up storage" referred only to the separate storage into which a communication is sent for back-up protection in the event that the system crashes before the communication is completed. *Id.* at *7, *10. The court held that the Act did not protect messages in post-transmission storage, the storage that exists after the recipient reads the message. *Id.* at *10. In *Fraser*, it was undisputed that the employer retrieved the e-mail message after it had been received; in other words, after it had become an electronic communication in post-transmission storage. Accordingly, the court held that the Stored Communications Act did not apply to the retrieval. *Id.* at *10.

In *Konop v. Hawaiian Airlines, Inc.*, 236 F3d 1035, the Ninth Circuit held that "access" under the Stored Communications Act merely required being in a position to acquire the contents of an electronic communication. *Id.* at 1044. Under that very broad interpretation, an employer would appear to violate the Stored Communications Act merely by installing software that enabled it to monitor em-

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ployee e-mail and Internet transmissions, regardless of whether the employer actually monitored such use.

These different views may have little practical impact on employers' ability to comply with the Stored Communications Act. One exception to the Stored Communications Act is that "providers" may access the stored electronic communications on their system. 18 USC § 2701(c)(1); *Bohach v. City of Reno*, 932 F Supp at 1236. In most cases, the employer will meet this exception because it is the entity providing employees with the system that enables them to send or receive e-mail and Internet transmissions.

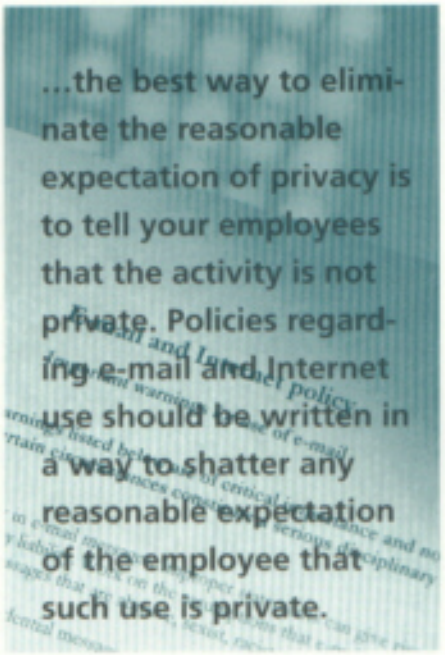
3. Damages.

The ECPA provides for the recovery of: (1) statutory damages (for a violation of the Stored Communications Act) and either statutory or actual damages plus the amount of the profits made by the violator because of the violation (for a violation of the Wiretap Act); (2) punitive damages; and (3) reasonable attorney fees and litigation costs. 18 USC § 2520; 18 USC § 2707. Criminal penalties also may be imposed. 18 USC § 2511(4); 18 USC § 2701(b).

C. Oregon law on Interception of Communications.

Oregon's Interception of Communications laws, ORS 133.721, et seq., contain prohibitions on the disclosure and interception of electronic communications. ORS 133.721(3). Although no Oregon court has addressed the issue, these laws should apply to e-mail and Internet transmissions. These statutes provide a private right of action for:

> "Any person whose wire, *electronic* or oral communication was intercepted, disclosed or used in violation * * *" of the statute "* * * against any person who willfully intercepts, discloses or uses, or procures any other person to intercept, disclose or use such communications * * *." ORS 133.739.



An employer risks violating these laws either by disclosing the contents of or by intercepting e-mail or Internet transmissions. "Intercept" is defined to mean "the acquisition, by listening or recording, of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device." ORS 133.721(5). There are no reported cases defining the term "intercept" as applied to e-mail or Internet transmissions. If the Oregon courts look to the federal courts' interpretations of that term under the ECPA, they have three very different options from which to choose.

For a violation of these laws, an employer is liable for actual damages suffered by the employee, but no less than damages of $100 a day for each day of the violation or $1000, whichever is greater, punitive damages, and reasonable attorney fees and litigation costs. ORS 133.739.

III. Complying with the laws.

A. Privacy laws.

The most effective barrier to a common law privacy claim is to eliminate any reasonable expectation of privacy. In Oregon, in order to maintain a privacy claim, an employee must have a reasonable expectation of privacy in the information discovered or disclosed. That means that the employee must subjectively believe that the information is private and be reasonable about the subjective belief.

With respect to the element of reasonable expectation of privacy, Pennsylvania privacy law is similar to Oregon law. A federal court applying Pennsylvania law found that an employee had no reasonable expectation of privacy in e-mail communications sent over the company e-mail system despite the fact that the employer made assurances that such communications would remain confidential and privileged, and would not be intercepted by the employer. *Smythe v. The Pillsbury Company*, 914 F Supp 97, 100 (ED Pa 1996).

Because Oregon courts are unlikely to reach the same, surprising conclusion as in *Smythe*, the best way to eliminate the reasonable expectation of privacy is to tell your employees that the activity is not private. Policies regarding e-mail and Internet use should be written in a way to shatter any reasonable expectation of the employee that such use is private.

The policy should tell employees the proper use of these business tools. It should explain that, while at work, e-mail and the Internet is to be used for business reasons, in accordance with business decorum and is not personal or private. If the policy allows for non-business use, make sure that it addresses what non-business use is proper, when non-business use may occur, and that even for non-business use, use of the e-mail and Internet is not personal and private. The policy should set forth that all e-mail and records of Internet use are company

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records, employees should expect that e-mail sent or received through its e-mail systems may be monitored, reviewed, used, and disclosed by the company, and that by using company equipment, they are consenting to having their e-mail and Internet use monitored by the company at its discretion.

This type of policy has been used effectively to defeat privacy claims by employees. For example, in *Bourke v. Nissan Motors*, YC 003979 (Sup Ct Cal 1991), *aff'd* No. BO68705 (Cal Ct App July 26, 1993), former employees of Nissan fired because their e-mail messages contained inappropriate jokes or inappropriate language filed an invasion of privacy claim against Nissan. In an unpublished decision affirmed by the California Court of Appeals, Second Appellate District, a California Superior Court dismissed the employees' claim based on Nissan's argument that the employees had no reasonable expectation of privacy in their e-mail messages because they had signed a computer use registration form which set forth that it was company policy that employees restrict their use of company owned hardware and software to company business.

It is just as important for employers to follow their e-mail/Internet use policy consistently. Selective application of the policy increases the risk of a claim that monitoring was done for a discriminatory or retaliatory purpose.

B. Statutory claims.

Unfortunately, shattering the reasonable expectation of privacy by telling your employees that their e-mail use is not private will not protect an employer from a claim under the ECPA or Oregon's Interception of Communications laws. Instead, to monitor legally, the employer must get prior consent or take steps necessary to fit into the system provider exemption (not available under Oregon law). 18 USC § 2511(2)(d), 18 USC § 2702(b)(3); 18 USC § 2511(2)(a)(i).

It is just as important for employers to follow their e-mail/Internet use policy consistently. Selective application of the policy increases the risk of a claim that monitoring was done for a discriminatory or retaliatory purpose.

1. Prior consent to monitor.

An employer should consider "consent to monitor" under the ECPA and Oregon law as more strict than other types of consent, such as the type of consent to the issuance of an employee manual. Because these are statutes, an employer needs to take care that it has met its exceptions. Courts are reluctant to imply consent under the Wiretap Act. *See, e.g., Konop v. Hawaiian Airlines, Inc.*, ("consent should not be casually inferred"); *Watkins v. L.M. Berry & Co.*, 704 F2d 577 (11th Cir 1983) (telemarketing employee's knowledge of her employer's capability to monitor her private telephone calls could not be considered implied consent to such monitoring). There is no reason to believe that they will be less exacting in their standards under the Stored Communications Act, or under Oregon's Interception of Communications law.

The best practice is to obtain consent through some affirmative expression of assent. The employer can, for example, obtain an employee's signature consenting to the e-mail/Internet use policy. Another excellent way to show assent is to condition giving a password to access the system on the employee's signing a consent form agreeing to the e-mail and Internet use policy.

To show consent to monitor, it would be helpful if the employer gave notice to its employees stating explicitly that it intends to monitor e-mail and Internet use, the purpose of the monitoring (e.g., to ensure it is being used in accordance with company rules, policies or practices), the type of monitoring (random, across the board, or for cause), and that employees should not assume that e-mail communication and Internet use is private. Employers would be wise to reference their anti-harassment policies specifically, so that employees are aware that harassment conducted by e-mail and Internet use is strictly prohibited.

2. System provider exception.

An employer also may comply with the Wiretap Act claim by meeting the system provider exception. The system provider exception under the Wiretap Act is more limited than the system provider exception provided by the Stored Communications Act, discussed above. The exception is limited to those who "intercept, disclose, or use that communication in the normal course of * * * [business] while engaged in any activity which is a necessary incident to * * * the protection of rights or property of the provider * * *." 18 USC § 2511(2)(a)(i). The employer could argue that, as provider of the service, it was monitoring e-mail to ensure that it was being used only for business purposes. Because "normal course" of business is a vague standard and the employer likely will have to bear the burden of proving that the monitoring was done for its protection, an employer is probably better protected by obtaining consent from its employees. Consent is also the better option because the Oregon laws on Interception of Communications do not contain a system provider exception.

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In either case, if monitoring uncovers personal communications, the employer should not probe too deeply into the contents or disseminate the information any more than necessary to accomplish its needs – which should be limited to the protection of legitimate business interests. Limiting dissemination will protect the employer by ensuring that it steers clear of violating the "disclosure" prong of the ECPA and Oregon wiretap laws and by providing the additional defense to a public disclosure of private facts claim that the disclosure was not made to the public at large or to a large number of persons.

IV. Recent Developments

Regulation of employers' ability to monitor employee computer usage continues to be a hot topic nationally. In 2000, the federal Notice of Electronic Monitoring Act (HR 4908) was proposed. The bill would have amended the ECPA by requiring employers to notify employees of any electronic monitoring of communications or computer usage, including: (1) the form of communication that will be monitored; (2) the means of monitoring, (3) the kinds of information being obtained; (4) the frequency of the monitoring; and (5) how information will be stored, used or disclosed. Although the bill ultimately died before reaching the House floor, it is expected to be resurrected again in 2001.

V. Conclusion

Monitoring employee e-mail and Internet use may provide employers with an excellent tool to better protect their business interests. If monitoring is done, it must be done in compliance with applicable laws; otherwise, the employer will expose itself to other claims, placing its interests at additional risk. ❐

Article written by Kurt Nath Tandan of adidas America

Taking a Byte Out of Electronic Discovery

Tips for the cyber litigator

By Amy J. Longo, Litigation News Associate Editor

It is a rare discovery request today that does not call for the production of some form of electronic information. "Over the last ten years, electronic discovery has gone from a novelty to a staple of modern day litigation. It is unusual for a case of any complexity not to require the production of electronically stored materials," says Dale M. Cendali, New York, Co-Director of Division VII, Task Forces and Special Projects.

Rule 34 of the Federal Rules of Civil Procedure explicitly addresses electronic discovery. It states that parties may request discovery of "any designated documents," including "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."

Requesting and Producing Electronic Discovery

"Electronic evidence is a major factor in every case," according to Gregory P. Joseph, New York City, Section's Liaison to the American College of Trial Lawyers and past Chair of the Section of Litigation. "While litigants routinely seek to discover printouts of their opponents' e-mails, they should also request access to the hard drives themselves, which often contain information not captured in hard copy, such as when a document was created and who had access to it."

Beyond discovery of printed e-mails and parties' hard drives, other sources of electronic materials are often overlooked. "People tend to neglect or come haphazardly upon sources such as home computers, laptops, and personal digital assistants," notes Cendali. "If you ask the right questions you are likely to find responsive material in these locations, particularly as witnesses tend to work more frequently from locations outside the office."

"Just as has been done for years with other forms of calendars, personal electronic devices can be redacted to protect individuals' interests so that only responsive information is produced."

"In every case, lawyers should check with their clients whether or not there are potentially responsive items on home computers and the like," advises Joseph, who believes that concerns about individuals' privacy interests in such materials can be addressed in the same fashion as with traditional personal calendars. "Just as has been done for years with other forms of calendars, personal electronic devices can be redacted to protect individuals' interests so that only responsive information is produced."

Allocating the Burden

Cost is a hot-button topic in electronic discovery. In conventional discovery, circumstances rarely justify shifting the cost of production from the requesting to the producing party, except to the extent that parties agree to bear their own costs. But the costs of collecting and retrieving electronic discovery can be much greater and more varied.

Rule 26(b)(2) provides that the court may limit or reallocate the expense of discovery by taking into account, among other factors, whether the "burden or expense of the proposed discovery outweighs its likely benefit." But as Joseph points out, "even with electronic discovery, it is the exception, rather than the rule, for courts to intervene and require burden-shifting."

Section 29(b) of the Section of Litigation's Civil Discovery Standards, adopted by the ABA House of Delegates in 1999, provides that the requesting party "generally should bear any special expenses" incurred for the production of electronic materials. Where parties cannot agree upon allocating these costs, the Standards recommend that courts consider the cost of the production in proportion to its expected benefit, the relative expenses and benefits to each party, and whether the producing party has "any special or customized system for storing or retrieving the information."

"The Standards are intended to promote efficiency and cost reduction in the discovery arena," says Dennis P. Rawlinson, Portland, OR, Co-Chair of the Section's Commercial and Business Litigation Committee and former Co-Chair of the Section's Civil Discovery Standards Task Force. "Appropriate situations to shift costs might be where the requesting party seeks to receive materials in a way that unduly increases the expense of the production, or where the producing party stores electronic materials in a way that is designed to unreasonably thwart access."

Please continue on next page

Electronic Discovery
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To date, there is little case law on shifting the cost of producing electronic discovery. "The touchstone seems to be foreseeability: If a party chooses to store electronic materials in a way that is prohibitively complex and expensive for other parties to use, then courts are generally less sympathetic to the idea that it is unfair to require that party to bear some of the burden," notes Cendali. "On the other hand, parties seeking extensive restoration of electronic materials need to demonstrate how and why the materials are critical to the case, and that the burden pales in comparison to what is at stake in the action."

Given the ever-expanding reach of electronic discovery, clients are advised to adopt formal policies concerning the retention of electronic information. They should revisit existing policies to make certain the policies apply to the electronic realm.

Preserving Electronic Materials

Given the ever-expanding reach of electronic discovery, clients are advised to adopt formal policies concerning the retention of electronic information. They should revisit existing policies to make certain the policies apply to the electronic realm.

"One of the biggest problems parties face in this arena is that information technology professionals tend to purge documents in the normal course, unless otherwise instructed by counsel," warns Joseph. "As soon as a case begins, clients should be advised to retain relevant electronic records, lest a routine destruction inadvertently give rise to a spoliation claim."

"Clients should consider tailoring retention policies to the industry's particular need to retain different categories of documents," adds Cendali. "For example, in retail, consumer complaints might be important to retain longer than travel receipts. Retention policies are easier to rely on where they bear a demonstrated relationship to the needs of the business."

Public Perceptions of Electronic Discovery

Practitioners agree that the advent of electronic discovery has the potential to significantly affect parties' and the public's view of civil litigation. "Electronic discovery further complicates complex litigation, which is already perceived as costly and time-consuming," admits Cendali. As Joseph points out, however, "In many cases the costs are outweighed by the beneficial evidence that can be obtained. In today's world, no litigant can afford not to pursue this avenue of discovery."

Lawyers can also use electronic discovery to improve efficiencies. Production of information in electronic form may minimize expenses by reducing copying charges and making the information immediately searchable. In Rawlinson's view, "Electronic discovery challenges us to be more imaginative in coming up with solutions that actually reduce costs. With the courts' help, parties can use the technological advances associated with electronic information to achieve greater flexibility and effectiveness in civil discovery."

For a more extended look at electronic discovery, see the cogent article by James P. Flynn and Sheldon M. Finkelstein, "A Primer on 'E-*vide*-n.c.e.'," in the Winter 2002 issue of *Litigation*, the ABA Section of Litigation quarterly magazine. ❐

Citations:

Federal Rules of Civil Procedure Rules 26(b)(2) and 34.

ABA Section of Litigation Civil Discovery Standards (1999).

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It's About CHANGE...

Recent Amendments to the Federal Rules of Civil Procedure

Recent changes to the Federal Rules of Civil Procedure took effect on December 1, 2001. Three interrelated changes all have to do with service, especially service by electronic means. A fourth rule change affects copyright impound proceedings. The following summarizes the changes.

Rule 5 – Service of Process

The old version of Rule 5(b) seemed to say that service should always be made on the attorney of a party represented by an attorney unless service on the party was ordered by the court. New Rule 5(b)(1) clarifies that this rule only applies to service made under Rules 5(a) (service generally) and 77(d) (service of notice of court order or judgment). Rule 5(b) does not apply to service of a summons and complaint, service of process other than a summons, service of a subpoena, or service of notice of a condemnation action. Service of these types is governed by Rules 4, 4.1, 45(b), and 71(A)(d)(3) respectively.

New Rule 5(b)(2)(D) allows for electronic service under Rule 5(a), but only with the written consent of the person being served. Consent via electronic means, such as by an e-mail, should constitute consent in writing. Cf. 15 USC § 7001 *et seq*. Electronic service is complete upon transmission, i.e. when an e-mail is sent and not when it arrives, except that under new Rule 5(b)(3), service by electronic means is not complete if the party making service learns that the attempted service failed (e.g. a message is received indicating that the e-mail bounced). Lastly, courts may by local rule allow service through the court's "transmission facilities" (e.g. electronic filings with the court under Rule 5(e) automatically forwarded to opposing parties who have consented in writing).

The new rule also authorizes service by "any other means" with written consent. Here the intent is to permit service by carriers other than the U.S. Postal Service, and service is complete upon delivery to the designated agency.

Rule 6 – Time to Respond

New Rule 6(e) rewards a party that agrees to be served by electronic means in the same way as a party that agrees to be served by mail, with an additional three days to respond. The new rule also grants the three-day extension to a party of no known address who is served by leaving a copy with the clerk of the court under Rule 5(b)(2)(c).

Rule 65 – Injunctions in Copyright Impound Proceedings

New Rule 65(f) makes Rule 65 fully applicable to copyright impound proceedings. The Copyright Rules of Practice are abrogated and the Federal Rules of Civil Procedure are fully applicable to copyright proceedings. Rule 81(a)(1), on the application of the Federal Rules, has also been amended to reflect this change.

Rule 77 – Service of Court Orders and Judgments

New Rule 77(d) provides that the court clerk may serve notice of orders and judgments using any of the means authorized by Rule 5(b), including electronic service. The Rule 5(b) requirement of written consent for electronic service applies. ❐

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> in light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."

Federal securities law contains similar general liability provisions[2] that should be considered because, most often, both state and federal securities laws apply under circumstances in which securities fraud is alleged.[3]

II. What is collateral-participant liability?

Collateral-participant liability is a form of secondary liability in which nonsellers of securities are held liable for injuries caused by fraud perpetrated by sellers of securities. Collateral participants are individuals who do not actually sell securities, but who are nonetheless named as defendants in securities fraud lawsuits. Such individuals regularly include lawyers, accountants, investment advisors, consultants, investment bankers, corporate and celebrity spokespersons, and like individuals.

III. Federal law limits collateral-participant liability.

In order to appreciate the unique nature of Oregon's treatment of collateral-securities liability, it is helpful to first consider the comparable federal law. Under federal securities law, through express statutory provisions and through judicial mandate, strict limits regarding the circumstances in which collateral participants may be held liable for injuries caused by securities fraud have been established. For example, federal securities law precludes claims against collateral participants based on broad aider and abettor theories that would apply in common law tort cases, and narrowly defines the class of collateral participants who are subject to secondary liability.

a. Aider and abettor liability.

In its landmark decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 US 164 (1994), the United States Supreme Court definitively established that collateral-participant liability premised on aider and abettor theories is *not* available in actions brought under the federal securities law general liability provisions. Consequently, following *Central Bank*, collateral participants may be held liable under federal securities fraud claims only when all of the requirements of primary liability are proved against them.[4]

Collateral-participant liability is a form of secondary liability in which nonsellers of securities are held liable for injuries caused by fraud perpetrated by sellers of securities.

b. Controlling person liability.

Controlling person liability is liability for nonsellers of securities based on respondeat superior principles. Under the federal controlling person statutes, nonsellers may be liable for injuries caused by securities fraud only when nonsellers maintain control over sellers of securities.[5] A primary purpose of the controlling person provisions is to ensure that securities brokers act properly and supervise their employees. The statutes impose liability on supervisors who do not directly participate in bad acts, but nonetheless fail to prevent them. Other examples of nonsellers who might be liable as controlling persons include, without limitation, partners, officers, and directors of securities sellers.

For obvious reasons, many of the individuals identified above as collateral participants do not qualify as controlling persons under the federal statutes because they do not have the power to exert actual control over securities sellers. Therefore, in most instances, these individuals may not be held liable under the federal controlling person provisions.

IV. Collateral-participant liability under Oregon securities law.

Oregon securities law contains significant deviations from federal securities law. Notably, Oregon securities law does not contain the strict limitations on collateral-participant liability that are present in federal securities law, and which are discussed above. ORS 59.115(3), which creates collateral-participant liability under Oregon law, provides that

> "every person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based. Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with that person."

Unlike federal securities law, Oregon law does not limit collateral-participant liability to controlling persons and it expressly recognizes liability based on an aider and abettor theory. Accordingly, the number and categories of collateral participants subject to secondary liability under Oregon securities law are larger than under federal law.[6]

a. Interpreting ORS 59.115(3).

Presently, there are precious few published opinions interpreting ORS 59.115(3). As a result, there is considerable uncertainty regarding its application and its limitations. Presumably, this provision will receive closer and more frequent attention as the forum for adjudicating securities fraud claims moves from federal courts to state courts.[7]

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COLLATERAL-PARTICIPANT LIABILITY

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Also contributing to the uncertainty regarding the application and limitations of ORS 59.115(3) is its novelty. The Oregon legislature patterned ORS 59.115(3) after the 1956 Uniform Securities Act, § 410(a)(2)(b). However, it enacted different language regarding the scope of the individuals who may be subject to secondary liability. The Uniform Act provision provides that

> "[e]very person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable."

While the similarities in the provisions are many, two important differences exist. First, the Uniform Act provision provides an enumerated list of individuals who might be held secondarily liable for securities fraud, while the Oregon provision expands the possibility of liability to "every person." Second, the Uniform Act provision applies to persons who "materially aid" securities transactions, while the Oregon provision applies to those who either "materially aid" or "participate in" a securities transaction. These modifications distinguish Oregon's law from that of other states enacting the Uniform Act such that Oregon courts and practitioners cannot look to other jurisdictions for guidance. In addition, these modifications appear to expand the potential for liability by collateral participants in Oregon beyond that afforded by the Uniform Act.

Collateral participants may be held jointly and severally liable for injuries flowing from unlawful securities sales only if they either participate or materially aid in the sale of securities.

b. The primary-liability requirement.

It is important to appreciate that secondary liability, even in Oregon, cannot stand alone. While collateral-participant liability under ORS 59.115(3) is *not* contingent on any violation of law by nonsellers, it must be predicated on a seller's violation of securities law.[8] Consequently, nonsellers may be held liable under ORS 59.115(3) *only if* a plaintiff secures a finding of liability against a primary violator.[9] In other words, if a plaintiff fails to secure a judgment of liability against a primary violator, all collateral-liability claims must be dismissed.

c. The "material aid" and "participate" elements.

Collateral participants may be held jointly and severally liable for injuries flowing from unlawful securities sales only if they either participate or materially aid in the sale of securities.[10] Unfortunately, Oregon courts have encountered difficulty defining the type of conduct that satisfies these elements and, therefore, uncertainty exists.

In *Prince v. Brydon*, 307 Or 146 (1988), the Oregon Supreme Court attempted to explain the limits of the material aid and participate in elements. In *Prince*, the court held that lawyers who prepared documents necessary to a securities sale had materially aided and participated in securities sales. Arguably, *Prince* represents a shift from Oregon case law, which provided that the mere preparation and execution of documents by collateral participants does not constitute material aid or participation in a securities transaction.[11] Justifying its decision, the *Prince* court distinguished a lawyer's role in preparing securities transactions, which the court recognized requires certain knowledge and judgment, from "[t]yping, reproducing, and delivering sales documents", which the court admitted "may be necessary to the sale", but does not require certain knowledge and judgment, and can be performed by anyone.[12]

Following *Prince*, it appears that the analysis of the material aid and participation elements is centered on the significance of the collateral participant's conduct as it contributes to the securities transaction.[13] It is unclear, however, to what extent a collateral participant's conduct, including conduct requiring knowledge and judgment, must be necessary to securities transactions.[14] Prior to *Prince*, courts held that collateral participants materially aid or participate in securities sales when the "sale would and could not have been consummated" without the collateral participants' activities.[15]

With little effort, one can conjure up a variety of circumstances in which collateral participants contribute significant knowledge and judgment in a manner that is only tangentially related to securities sale, and not necessary to it. For example, securities transactions can be completed without the use of investment advisors and consultants. If such individuals are commissioned for a limited purpose, which is only remotely related to a securities transaction, does ORS 59.135 nonetheless implicate these individuals? The answer to this question, and many more like it, is unknown. Accordingly, it is prudent for all business professionals to proceed with deliberate caution whenever an engagement involves, or might involve, securities transactions.

d. The lack of knowledge defense.

A substantial limitation to collateral-participant liability in Oregon is the lack of knowledge defense. Pursuant to ORS 59.115(3), collateral participants who ei-

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COLLATERAL-PARTICIPANT LIABILITY

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ther participate or materially aid in unlawful securities transactions may avoid liability by proving that they "did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based."[16] Under this defense, the "relevant knowledge is of 'the existence of facts,' not of the unlawfulness of a sale." In other words, one may be held liable as a collateral participant based on knowledge of facts constituting a fraud, even though one does not know in fact that a fraud has occurred. In addition, because the lack of knowledge defense is an affirmative defense, and not an element of the plaintiff's prima facie case, the Oregon Supreme Court has acknowledged that it places "upon persons besides a seller's employees or agents who materially aid in an unlawful sale of securities a substantial burden to exonerate themselves from liability for a resulting loss, but this legislative choice was deliberate."[17]

Like the material aid and participate elements, considerable uncertainty surrounds the lack of knowledge defense. For example, it is unknown to what extent courts will be willing to infer knowledge of securities transactions by collateral participants based on argument that they should have known certain facts. Consider an investment banker who is engaged by a nonpublic corporation to value its assets in conjunction with certain bank loans. If the corporation later uses the valuation in connection with securities transactions, will courts deny the investment banker the protection of the lack of knowledge defense based on argument that the banker should have known about the securities transactions because asset valuations are frequently used in connection with them? Or, will the court find that the affirmative defense is satisfied because the investment banker could not have knowledge of the "facts on which the liability is based" because the securities transactions had not even been contemplated at the time that the asset valuation was performed? Again, answers to these questions are unknown. Lawyers and clients should proceed with caution when any business activity does, or might, involve the possibility of securities transactions.

...one may be held liable as a collateral participant based on knowledge of facts constituting a fraud, even though one does not know in fact that a fraud has occurred.

Conclusion

Recent events have prompted us to consider the reality of losses caused by investments in securities. Because such losses are common, and because the circumstances surrounding them often provide fertile ground for litigation by disappointed investors, it is important we are attentive to and understand the implications of both federal and state securities laws, and that we counsel our clients to do the same. In particular, we should be mindful of Oregon's collateral-participant liability statute, which is unique and riddled with uncertainty. With prudence and diligence, our clients and we can ensure that we steer clear from securities fraud liability. ❐

1 *See also* ORS 59.135 (providing general liability for securities fraud).

2 *See* Section 10(b) of the Securities Exchange Act 1934, 17 CFR § 240.10b-5 (1987), Rule 10b-5 promulgated order (providing definition for general securities fraud liability under federal securities law).

3 Generally, federal securities laws apply when fraud is perpetuated through use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange. *See e.g.* 17 CFR § 240.10b-5 (1987).

4 *Id.* at 191.

5 *See, e.g.*, 15 USCA § 77o; 15 USCA § 78t(a).

6 *See Anderson v. Carden*, 146 Or App 675, 683, 934 P2d 562 (1997) ("By its terms, [ORS 59.115(3)] expands the class of potentially liable persons from whom damages may be obtained for a seller's violation of securities laws").

7 The enactment of the Private Securities Reform Act of 1995, which imposes significant obstacles to plaintiffs seeking to bring securities fraud claims in federal courts, has caused a shift in securities actions to state courts.

8 *See Anderson v. Carden*, 146 Or App 675, 683, 934 P2d 562 (1977).

9 *See id.* ("ORS 59.115(3) itself does not establish a standard of conduct the violation of which may result in an action for damages").

10 *See* ORS 59.115(3).

11 *See Austin v. Baer, Marks & Upham*, 1986 WL 10098, *5 (D Or July 18, 1986) ("[i]n interpreting the 'participates or materially aids' language, the Oregon courts have required more than the mere preparation and execution of documents") (*citing Fakhrdai v. Mason*, 72 Or App 681, 696 P2d 1164 (1985)).

12 *Prince v. Brydon*, 307 Or at 149.

13 *See Ainslie v. First Interstate Bank of Oregon*, 148 Or App 162, 184, 939 P2d 125 (1997) (holding that "the cases have emphasized that liability as a participant or a provider of material aid depends on the extent and importance of the defendant's involvement").

14 The *Prince* court did not address the issue of necessity because the lawyer's conduct at issue, drafting transaction documents, was clearly necessary to the securities sale. *See Prince v. Brydon*, 307 Or at 150-51.

15 *See, e.g., Black & Co. v. Nova-Tech Inc.*, 333 F Supp 468 (D Or 1971) (lawyers who prepared legal papers did work required to consummate the securities sale); *see also Fakhardai*, 72 Or App at 686 (former owner of securities drafted sale contract that was necessary to securities sale).

16 *Prince v. Brydon*, 307 Or 146, 150, 764 P2d 1370 (1988); *see also Collins v. Fitzwater*, 277 Or 404, 406, 560 P2d 1074 (1977) (director who knew that securities were unregistered could be liable under ORS 59.115(3) even though he had no knowledge that registration was required).

17 *See id.* at 150.

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims for Relief

The elements of certain business torts were examined by the Court of Appeals in *Volt Services Group v. Adecco Employment Services*, 178 Or. App. 121 (2001). Plaintiff (Volt) and defendant (Adecco) were in the business of providing temporary employees to serve business customers. One large customer—Nike, Inc.—terminated its contract with Volt and hired Adecco to become its "master vendor" for temporary employee needs nationwide. Adecco then contacted certain Volt employees and encouraged them to apply for positions with Adecco so that they could continue working at Nike. About 150 employees did so. Volt sued, alleging (among other things) that Adecco had improperly interfered with the restrictive covenant in Volt's employment contract with its employees. The trial court granted summary judgment to Adecco. The Court of Appeals reversed on certain claims, holding that (1) the trial court erred in concluding that the restrictive covenant was unenforceable as a matter of law (178 Or. App. at 128-29); and (2) Volt sufficiently established the "improper means" element of its intentional interference claim by showing that Adecco's actions violated guidelines set forth in a "code of ethics" promulgated by a national industry organization (178 Or. App. at 129-31). The court also reversed a summary judgment for Adecco on Volt's unjust enrichment claim, and affirmed the summary judgment for Adecco on Volt's unfair competition claim. 178 Or. App. at 134-35.

An agent for Hemenway Realty learned the importance of being earnest after he was found liable for nearly $65,000 in damages and attorney fees for breaching his fiduciary duty of disclosure to his clients. *Rathgeber v. James Hemenway, Inc.*, 176 Or. App. 135 (2001). The agent may have bade a farewell to alms, but he discovered after the Court of Appeals reversed a portion of the award that the sun also rises. For the plaintiffs, it turned out to be a case of to have and have not when the Court of Appeals (1) reversed an award of emotional distress damages; (2) reversed the attorney fee award (which was based on a claimed violation of the Unfair Trade Practices Act); and (3) affirmed an award of $13,600 in economic damages. The court noted that Oregon courts "consistently have rejected claims for emotional distress damages stemming from relationships that are fundamentally economic" in nature. 176 Or. App. at 145. The relationship here was "fundamentally economic" because "defendant's sole undertaking was to aid plaintiff in the *purchase* of a residence." 176 Or. App. at 146.

A driver who avoided a fatal automobile accident may be liable in tort for acting "in concert" with another driver who was killed in the crash, the Court of Appeals held in *Slagle v. Hubbard*, 176 Or. App. 1 (2001). The plaintiff in that case was involved in a head-on collision with a pickup truck driven by Hubbard. Hubbard was killed in the wreck. Plaintiff sued a third driver (Painter) who avoided the accident, alleging that Painter and Hubbard acted "in concert" when they "agreed to race" from their homes in Astoria to Woodland, Washington. The Court of Appeals, reversing a judgment on the pleadings entered in favor of Painter, held that plaintiff's allegations were sufficient to establish a claim against Painter under section 876 of the *Restatement (Second) of Torts* (1979).

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SIGNIFICANT CASES

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A majority shareholder of a closely-held corporation breached his fiduciary duties to the minority shareholders in some respects, the Court of Appeals held in *Naito v. Naito*, 178 Or. App. 1 (2001). After noting that "the heart of a corporate fiduciary's duty is an attitude, not a rule" (178 Or. App at 21), the Court of Appeals concluded that Sam Naito failed to act with the required "fiduciary attitude" by "failing to provide for adequate dividends or other financial benefits [to the minority shareholders] on reasonable terms." 178 Or. App. at 24. The opinion includes an interesting discussion of the history of the Naito family and their development projects in the Portland area.

II. Jurisdiction

The Court of Appeals debated "the genealogy of modern doctrines of justiciability" in *Utsey v. Coos County*, 176 Or. App. 524, 529 (2001). In that case, a divided court, sitting *en banc*, affirmed the dismissal of a petition for judicial review of a decision of the Land Use Board of Appeals. Judge Landau, writing for the majority, examined the doctrine of justiciability—"along with its companion terms 'standing,' 'mootness' and 'ripeness'" as they evolved in Oregon. Judge Landau concluded that these concepts are "judicial constructs, developed first in reference to the 'judicial power' conferred in federal courts under Article III of the United States Constitution and later adopted by the Oregon courts in reference to the 'judicial power' conferred under Article VII (Amended) of the state constitution." 176 Or. App. at 529. Three judges—Deits, Armstrong, and Brewer—dissented. The *Utsey* opinions are required reading for Oregon practitioners interested in justiciability issues.

One of the justiciability doctrines analyzed in *Utsey*—mootness—was applied by the Court of Appeals in *Keeney v. University of Oregon*, 178 Or. App. 198 (2001). There, the court dismissed as moot a student's challenge to a university's disciplinary order. The claim became moot after the student graduated. Petitioner's claim to eliminate the "black mark" on his student record was found to be not justifiable because administrative rules required the university to destroy a student's disciplinary records upon graduation. 178 Or. App. at 208.

Petitioner's claim to eliminate the "black mark" on his student record was found to be not justifiable because administrative rules required the university to destroy a student's disciplinary records upon graduation.

III. Limitation of Actions

The three-year statute of limitations in ORS 30.075—not the two-year limitations period in ORS 12.110(4)—applied to a medical malpractice action brought by the personal representative of the decedent's estate against decedent's treating physicians, the Court of Appeals held in *Giulietti v. Oncology Associates of Oregon*, 178 Or. App. 260 (2001). In another medical malpractice case, *Walters v. Hobbs*, 176 Or. App. 194 (2001), the court held that new allegations did not "relate back" to the original complaint. Plaintiff sued to recover damages she suffered as a result of negligent treatment relating to the birth of her daughter. The Court of Appeals held that there were "material differences" between the allegations of the complaints as to (1) the nature of defendant's tortious conduct; (2) the source of causation of injury; and (3) the nature of plaintiff's injury and resultant damages. 176 Or. App. at 212. Because the new allegations were added after the statute of limitations expired, a jury award based on those allegations was reversed.

In *Barke v. Maeyens*, 176 Or. App. 471 (2001), the Court of Appeals held that the five-year statute of ultimate repose in ORS 12.110(4) does not violate Article I, sections 10 and 20 of the Oregon Constitution. The court explained that plaintiff's action, filed seven years after the alleged negligent acts, would have been barred under the law as it existed at the time of the enactment of the Oregon Constitution, in part because the "discovery rule," as applied to medical malpractice actions, "was primarily a judicial creation of the 1950s and 1960s." 176 Or. App. at 482.

IV. Miscellaneous

The 1999 amendments to the summary judgment standards in ORCP 47C do not apply to cases pending on appeal on the effective date of the amendment, the Oregon Supreme Court held in *Robinson v. Lamb's Wilsonville Thriftway*, 332 Or. 453 (2001). The Court explained that the 1999 amendments only applied to actions "pending on" the effective date of the Act; it was clear from the text and context of the Act that the legislature "intended that the amendments apply only to actions pending in trial courts." 332 Or. at 460.

The mere fact that a party voluntarily complied with a judgment does not preclude the party from bringing an appeal, the Court of Appeals held in *Ramax, Inc. v. Northwest Basic Industries*, 176 Or. App. 75, 84 (2001) (disavowing *City of Portland v. One 1973 Chevrolet Corvette,*

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113 Or. App. 469 (1992)). The rule prohibiting the use of verdict-urging instructions—also called "dynamite instructions because they are used to 'blast loose' a deadlocked jury"—applies in civil as well as criminal cases. *Schlimgen v. May Trucking Co.*, 178 Or. App. 397, 404 (2001).

And although the end does not justify the means, *Weaver v. Gunn*, 176 Or. 383 (2001), demonstrates that the means will sometimes determine the end. In that case, a man entered into an "artificial insemination surrogate contract" with a woman in order to provide a means for the man to father a child through artificial insemination. The woman agreed to relinquish custody of the child. She was to receive $12,000 for her services. After reaching an oral agreement, the parties then began to engage in consensual sexual intercourse. The woman became pregnant, accepted approximately $12,000 in payments, signed the written agreement, and allowed the man to take the baby home from the hospital. Three weeks later, she sought custody. The trial court awarded custody to the mother, holding that "the artificial insemination agreement did not apply because mother did not become pregnant by artificial insemination." 176 Or. App. at 386. The Court of Appeals affirmed. ❐