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# DIRECT EXAMINATION: *OLD Dogs and NEW Tricks*[1]

*Dennis P. Rawlinson*

*By Dennis P. Rawlinson*
*Miller Nash LLP*

An eerie silence fell over the courtroom. The air seemed suddenly heavy. Time stopped. For the first time all twelve jurors were on the edge of their seats. They were fully alert. They seemed to be straining their senses (like bird dogs after prey) to absorb the testimony that was about to come.

It had been quiet in the courtroom before. But nothing like this. It was as if those present in the courtroom were afraid to breathe, lest they distract attention from the questions about to be asked and the answers about to be given.

Some were reminded of old western movies when two cowboys riding through hostile Indian territory would rein their horses to a stop and one would whisper to the other:

"Slim, it's quiet . . . too quiet."

The memorandum in the hands of the witness was important. First, it was addressed not to just anyone but to the president of the tobacco company. But more importantly, the original had never been produced. In the hundreds of thousands of documents produced by the tobacco company, it was nowhere to be found. And yet, like a miracle, here was the file copy—carried to court by its author, revealing to all why the original had no doubt been destroyed.

Plaintiff's counsel, sensing the drama of the moment, waited for the lengthy and unnatural silence to draw the attention of all present in the courtroom to the witness stand. And that it did . . . just like moths in the darkness drawn to a lantern light.

In his opening, plaintiff's counsel described the witness in more glowing terms, but in simple cold English, he was "a turncoat former employee." All knew, without translation, that this meant a witness who was not "beholden to the company"—a witness whose job, reputation, and future income were not on the line. A witness whose testimony would not be tainted by his employment relationship with the defendant tobacco company.

Plaintiff's counsel cleared his throat as a precaution to ensure that the questions he was about to ask would be clear, crisp, and well enunciated.

[1] Reprinted from the Spring 2005 edition of *Litigation* magazine, a publication of the American Bar Association Section of Litigation.

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## Old Dogs and New Tricks

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**Q:** Did you read the third paragraph of the memorandum?
**A:** Yes.
**Q:** What was the subject of the third paragraph?
**A:** Nicotine.
**Q:** What about nicotine was discussed?
**A:** The nicotine levels in cigarettes.
**Q:** Did the paragraph suggest that the nicotine levels be increased or decreased?
**A:** Increased.
**Q:** If the nicotine levels were increased, would that have any effect on anything?
**A:** Yes.
**Q:** What?
**A:** The number of smokers.
**Q:** Would increasing nicotine mean more smokers or fewer smokers?
**A:** More smokers.
**Q:** More smokers than if the nicotine levels were not increased?
**A:** Yes.
**Q:** Would this mean more or fewer sales?
**A:** More.
**Q:** Would this mean more or less profit for the company?
**A:** More.
**Q:** Would the increased profits be substantial or insubstantial?
**A:** Very substantial.

The stake had been driven into the vampire's heart. No one in the courtroom missed the importance of these few questions and these few answers. In the minds of most of the jurors, the case was over.

But it was not just the information that was delivered by the above direct examination that had impact. It was the manner in which the direct examination was conducted. Plaintiff's counsel understood the difference between routine direct examination and powerful direct examination. Plaintiff's counsel understood the difference between traditional direct-examination techniques and traditional cross-examination techniques and consciously elected to apply the latter in this direct examination.

By adopting a traditional cross-examination style (in which the lawyer does the work and offers the witness only alternatives and no more than a word or two in the witness's answer), plaintiff's counsel had argued the important points of this testimony to the jury "through the window of the direct-examination witness," just as a cross-examiner argues a case to the jury "through the window of a cross-examination witness."

One of the advantages of arguing the case through a witness on direct examination, just as most lawyers argue their cases through witnesses on cross-examination, is that the answers to the lawyer's questions are answered by the fact-finder before the witness answers. As a result, if the answer is compelled by common sense, regardless of the witness's answer, each member of the jury arrives at his or her own answer . . . first. Such an answer is not subject to impeachment by any adversary.

The technique discussed above is not novel. Two of the proponents of this alternative approach to direct examination are trial-technique instructors, Judge Herbert Stern and Judge Ralph Adam Fine. Judge Fine uses an example substantially identical to the one set forth above to show the effectiveness of this technique by borrowing from the novel *Runaway Jury* by John Grisham.

In stark contrast to the foregoing, the traditional method of direct examination would have the witness do the work. Plaintiff's counsel would simply ask the witness what the memorandum disclosed, and the witness would be likely to "dump" all the incendiary, high-impact information into a single answer, which could be easily missed by a nonattentive or daydreaming juror.

**Q:** What was in the third paragraph of the memorandum?
**A:** I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The difference in the effectiveness of the two techniques is obvious.

Although arguably the information provided under both of the direct-examination techniques outlined above is substantially similar, this second example is not as powerful as it could be if the lawyer, not the witness, were doing the work. With a single question and answer, there is always the risk that the jury will be distracted for a moment and miss or misunderstand the answer.

Under the first example, with a lawyer doing the work, it would be hard for a member of the jury to miss the answer or miss the point. The questions and answers are "drawn out," repetitive, and much more dramatic. Moreover, under the first example as discussed above, the jury knows the answer to the question before it is even answered. Why? Because the answer is

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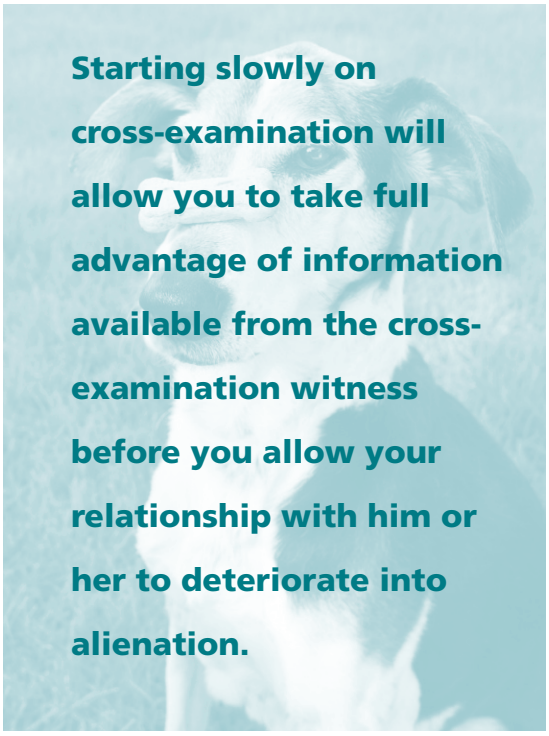
compelled by common sense.

Today, many established trial techniques and tactics that have been largely unchallenged are being reevaluated by commentators and practitioners to determine whether the assumptions on which they are based are truly sound. One of the areas that is being challenged is the traditional approach to direct examination. As disclosed by the contrast of the two techniques disclosed above, sometimes applying a traditional cross-examination technique to a direct examination can be more effective than employing traditional direct-examination techniques.

Discussed below is a comparison of the traditional rules of direct examination and cross-examination. By understanding how direct examinations are traditionally conducted and understanding how cross-examinations are traditionally conducted, we can then consciously decide whether in a given circumstance (such as the disclosure of the contents of the third paragraph of the memorandum that the tobacco company had destroyed in the above example) abandoning direct-examination techniques and embracing cross-examination techniques for a brief interlude or even for an entire direct examination might make your direct examination more powerful and persuasive.

A comparison of the traditional general rules for conducting direct examination and cross-examination exposes a common theme. Whatever rule applies to direct examination, usually the directly opposite rule applies to cross-examination.

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.




A review of six general rules of cross-examination and comparing those rules with comparable rules for direct examination will demonstrate the contrast.

A traditional cross-examination ends strongly but starts slowly. In contrast, a good direct examination, redirect examination, or recross examination should start and end strongly (take advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly, ending with the traditional "zinger," a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination the same kind of impact can be made with a zinger in the opening line of questions.

Cross-examination, however, should usually not begin with a zinger. Why? Because employing an initial zinger will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a zinger).

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

Traditional cross-examination employs indirection. In contrast, during the direct examination, in the interest of assisting your witness and drawing

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a clear, easy-to-follow picture for the fact-finder, the examiner works hard to make it clear where he or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve the same goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness's extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness's understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

1. You have more than 30 years of experience negotiating contracts, don't you?
2. You've been highly successful in negotiating successful contracts over your career?
3. You regularly hire lawyers to assist you in reviewing important documents?
4. To the extent that you don't review important documents, you have someone on whom you can rely review them?
5. You insist that important and crucial points that are discovered in documents be brought to your attention?
6. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Having established a general practice of careful reading of documents, while at the same time flattering the witness's achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

In traditional cross-examination, details are given first. In contrast, often in direct examination the most effective procedure is to cover details only after the witness has described the "action" of his or her recollections. Put differently, it is generally prudent not to interrupt the action of the witness's story on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact-finder's attention.

In cross-examination, the details must be elicited initially so that you can use them to "herd" and "corral" the witness to provide you with the admissions you need. Until the factual background has been laid by the adverse witness that limits the routes of escape and explanation, cross-examination is often ineffective.

Traditional cross-examination scatters circumstantial evidence. In contrast, in argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If the contention of the proponent is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.

In cross-examination, assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus, the circumstantial evidence points should be separated and scattered so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention is not obvious.

Traditional cross-examination employs short questions and short answers. In contrast, during direct examination the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact-finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

Allowing an adverse witness to launch into long answers and explanations will doom any cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness's response. By inching along and adding

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# Oregon Condemnation Procedure Revisited *(Again)*

*By Mark J. Fucile*
*Fucile & Reising LLP*

*Mark J. Fucile*

Condemnation procedure in Oregon varies significantly in key respects from other civil actions.[1] At the same time, for many years following the adoption of the General Condemnation Procedure Act in 1971[2] condemnation procedure was static. The past decade, however, has seen major changes in several central elements of condemnation procedure. This article outlines the unique facets of condemnation cases from the prefiling stage through trial and highlights the recent changes for the general practitioner who handles an occasional condemnation case.

There are two principal statutory sources of condemnation procedure applicable to public agencies[3] in Oregon.

The first is ORS Chapter 35, which creates the basic procedural framework governing condemnation cases. It is important to note at the outset that ORS Chapter 35 governs *direct* condemnation actions—where the government acts affirmatively under the power of eminent domain to acquire property. *Inverse* condemnation, by contrast, occurs when the government has taken property without invoking the power of eminent domain and the property owner affected brings an action against the government to recover compensation. Inverse condemnation actions in state court are governed solely by the Oregon Rules of Civil Procedure rather than the specialized procedures applicable to direct condemnations. *See generally Suess Builders v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982) (discussing inverse condemnation procedure); *accord Butchart v. Baker County*, 214 Or App 61, 76, 166 P3d 537 (2007) ("Such claims are actions at law that fall within the general jurisdiction of the circuit court[.]").

The second is the portion of the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act dealing with land acquisition, which is found at 42 USC §§ 4651-52[4] and which has been adopted as "guidance" for Oregon public agencies in their property acquisitions by ORS 35.510(3).[5] Neither the federal nor the state land acquisition policy provisions, however, create rights enforceable against a public agency in a condemnation action. See State Dept. of Trans. v. Hewett Professional Group, 321 Or 118, 129, 895 P2d 755 (1995).

## Prefiling Procedure

When it becomes apparent during the planning of a public project that an agency will need to acquire property for the project, the public agency involved will typically commission a survey to create a specific legal description, possibly an environmental assessment and a title search to identify the owner and other interest holders.

The Legislature in 2003 adopted a significant clarification to a public agency's ability to temporarily enter property during the prefiling phase to perform both surveys and environmental testing. Although some agencies had at least survey rights before the change, the ability to conduct invasive environmental testing under the prior survey and inspection provisions was less clear. Because a property's environmental condition is relevant to compensation under Oregon substantive valuation law (*see ODOT v. Hughes*, 162 Or App 414, 419-20, 986 P2d 700 (1999)) and might affect an agency's

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decision even to proceed with an acquisition, the Legislature created an expedited procedure, codified at ORS 35.220, for agencies to conduct testing with a property owner's consent or over the property owner's objection with a court order.[6] ORS 35.220 also creates a compensation mechanism to reimburse an owner for physical damage to the property caused by the testing or other substantial interference with the owner's use of the property. Compensable damage under ORS 35.220(3)(a) includes "any damage attributable to the diffusion of hazardous substances found on the property[.]"

After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequisites before it can file a condemnation complaint.

*First*, under ORS 35.235(1)-(2) and *Highway Com. v. Hurliman*, 230 Or 98, 113, 368 P2d 724 (1962), the public agency's governing body must adopt a resolution or ordinance authorizing the acquisition of the property concerned before moving forward with a condemnation action. The resolution must declare generally that there is a need to acquire the property involved for a public project that the public agency is authorized to carry out. The public agency's resolution is "presumptive evidence of the public necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." ORS 35.235(2). The public agency need not, however, have obtained all of the necessary land use permits required for the project before adopting its resolution or moving forward with condemnation. *See ODOT v. Schrock Farms*, 140 Or App 140, 144-46, 914 P2d 1116, *rev den*, 324 Or 176 (1996); *Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App 327, 332, 932 P2d 101 (1997).

*Second*, under ORS 35.346(2), the public agency must appraise the property it plans to acquire before beginning negotiations with the owner. Under ORS 35.346(3), the public agency's appraiser must generally inspect the property and must provide the owner with at least 15 days' advance written notice of the inspection and the opportunity to accompany the appraiser on the inspection.

*Third*, under ORS 35.235(1), the public agency must attempt to acquire the property through negotiations before pursuing litigation. *See generally State Hwy. Comm. v. Freeman*, 11 Or App 513, 519-20, 504 P2d 133 (1972). ORS 35.346(2), in turn, generally prevents an agency from offering the property owner anything less than the agency's appraised value.

*Fourth*, ORS 35.346(1) requires the public agency to make a written offer to the property owner at least 40 days before filing a condemnation complaint. *See also Urban Renewal Agency v. Caughell*, 35 Or App 145, 148, 581 P2d 98 (1978) (noting that the offer under ORS 35.346(1) is a condition precedent to filing a condemnation complaint); *accord Dept. of Trans. v. Pilothouse 60 LLC*, 220 Or App 203, 213, 185 P3d 487 (2008).[7] Under ORS 35.346(2), the public agency's initial written offer must be "accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered" if the amount involved is $20,000 or more. If it is less, then the agency is simply required to provide the owner with a written explanation of how it arrived at the compensation offered. In either event, the public agency must leave the initial written offer open for at least 40 days under ORS 35.346(4).[8]

### Initial Pleadings and Early Possession

Under ORS 35.245(1), all condemnation actions—regardless of the amount involved—are generally handled in circuit court. If the amount involved is $20,000 or less, however, the owner may elect to have the compensation determined by court-sponsored binding arbitration under ORS 35.346(6)(a)-(b). If the amount at issue is between $20,000 and $50,000, then the owner may elect court-sponsored nonbinding arbitration under ORS 35.346(6)(c).

Venue under ORS 35.245(1) lies in the county where the property—or the greatest portion of it—is located.

ORS 35.245 and ORS 35.255 outline the elements the public agency must include in its complaint. The express statutory requirements include only a description of the property, a statement of ownership, the amount alleged to be the value of the property taken and any associated severance damages to the defendant's remaining property from the taking. *See generally Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App at 330-32. In practice, however,

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public agencies usually also include a general description of the project for which the property is being acquired, the statutory authority for the taking, a reference to the condemnation resolution and an allegation that the agency has attempted to negotiate with the owner before filing the complaint. ORS 35.245(2) permits the public agency to join any person claiming an interest in the property as a defendant.

Of special note, in 1997 the Legislature amended ORS 35.346 to make it very difficult to reduce the agency's allegation of the compensation by later amendment of the complaint.[9] Under ORS 35.346(2), any such amendment must be by court order entered not later than 60 days before trial. Further, the court must find by clear and convincing evidence that the appraisal upon which the agency's original offer was based "was the result of a mistake of material fact that was not known and could not reasonably have been known at the time of the original appraisal or was based on a mistake of law." *Id*.

ORS 35.295 governs the matters that must be included in a defendant's response. If a defendant has a legal defense to the taking, it must be raised by either a motion to dismiss or an affirmative defense. Defenses to the taking, which in practice are rare, usually focus on defects in the public agency's prefiling procedures or the public agency's need for the property. On this last point, a property owner challenging a public agency's need for the property must show that the agency abused its discretion. *See generally Wiard Memorial Park Dist. v. Wiard Community Pool*, 183 Or App 448, 452-58, 52 P3d 1080, *rev den*, 335 Or 114 (2002) (discussing the abuse of discretion standard in condemnation); *accord Emerald PUD v. PacifiCorp*, 100 Or App 79, 83-87, 784 P2d 1112, *on reh'g*, 101 Or App 48, 788 P2d 1034, *rev den*, 310 Or 121 (1990). Measure 39, adopted by the voters in 2006 and codified as to condemnation authority at 35.015, also imposes substantive limitations on the acquisition of some forms of property for subsequent conveyance to other private parties. The defendant's answer must also allege the value of the property being taken and any associated damages to the defendant's remaining property as a result of the taking.

If applicable, a property owner may also bring related counterclaims against the public agency within the context of the condemnation case. *See State ex rel Nagel v. Crookham*, 297 Or 20, 22-24, 680 P2d 652 (1984). In *Nagel*, for example, the property owners asserted by way of a counterclaim that the value of their property had been diminished—or "blighted"—by the eight-year delay between the time that the public agency had initially announced its project and the point the agency actually filed its condemnation action.

In many instances, a public agency may wish to obtain possession of the property before the eventual trial on valuation so that its project can go forward in the interim. If so, it must deposit the alleged value of the property into the court under ORS 35.265. In 2005, the Legislature adopted a significant clarification on the method for acquiring early or "immediate" possession. ORS 35.265 is silent on whether simply depositing the alleged value of the property was, in and of itself, sufficient to entitle the public agency to possession without a court order, and practices varied among agencies in this regard.[10] Under the change enacted in 2005 and codified at ORS 35.352,[11] a public agency is now permitted to simply serve a notice on the defendants of its intent to take immediate possession (subject to the deposit requirement). At that point, the defendants have 10 days to file a written objection. The grounds for objection, however, are narrow: (1) whether the condemnation is "legal"; and (2) whether the agency has "acted in bad faith, engaged in fraud or engaged in an abuse of discretion under a delegation of authority." If no objection is made, the public agency can simply apply for an order granting possession. If an objection is made, the court is to consider it "expeditiously." In either event, a defendant is not

**After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequistes before it can file a condemnation complaint.**

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precluded from asserting legal defenses to the taking in its answer for separate resolution by the court under ORS 35.295. If early possession is sought and allowed, the property owner may withdraw the public agency's deposit under ORS 35.285 without prejudice to any later argument the owner may make on value.

### Discovery

Discovery in condemnation cases is, at one and the same time, more confined than a typical commercial case and more expansive.

It is more confined in the sense that the focus of most condemnation cases (absent a challenge to the taking itself) is solely on valuation. Discovery, therefore, typically involves an investigation of the possible uses of the property, the owner's plans for the property, any environmental or other permitting issues affecting the property and past sales or efforts to sell the property. Under a limited exception to OEC 701, a noncorporate owner of property can generally offer an opinion on the property's value. *Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962); *Dept. of Transportation v. El Dorado Properties*, 157 Or App 624, 636-38, 971 P2d 481 (1998); *see also Northwest Natural Gas Co. v. Shirazi*, 214 Or App 113, 120, 162 P3d 367, *rev den*, 343 Or 223 (2007) (allowing an owner of a nearby parcel to testify about the value of his property). Public agencies, therefore, often take property owners' depositions on this point.

Discovery is more expansive than in a typical commercial case because the parties are now required to exchange appraisal reports before trial. Until 1997, there was generally no expert discovery in Oregon condemnation cases—just as in other civil cases. *See Brink v. Multnomah County*, 224 Or 507, 516-18, 356 P2d 536 (1960) (cloaking appraisal reports within the attorney-client privilege); *City of Portland v. Nudelman*, 45 Or App 425, 432-34, 608 P2d 1190, *rev den*, 289 Or 275 (1980) (noting that the work product rule would protect appraisal reports prepared in anticipation of litigation). Because expert appraisal testimony is usually *the* key element of a condemnation trial, the limitation on expert discovery gave the phrase "trial by ambush" real meaning in a condemnation case.

In 1997, however, the Legislature brought expert discovery to Oregon condemnation cases.[12] Under revisions to ORS 35.346, the parties to a condemnation case are now required to disclose appraisal reports at three distinct points:

- As noted earlier, the public agency's prelitigation offer in acquisitions valued at $20,000 or more must be accompanied under ORS 35.346(2) by the appraisal report upon which the agency based its offer.
- If the property owner rejects the agency's offer and the acquisition moves into litigation, the property owner must provide the agency with its appraisal report at least 60 days before trial or arbitration under ORS 35.346(4).
- If a case proceeds to trial, ORS 35.346(5)(b) requires each side to provide the other with all other appraisal reports obtained "as part of the condemnation action"—whether they will be used at trial or not. If the parties cannot agree on a date for further exchange, the trial court has the inherent power to set one under ORCP 1D. *See Marineau v. A.P. Green Refractories Co.*, 201 Or App 590, 597, 120 P3d 916 (2005) (noting that trial courts under ORCP 1D have authority to enter case management orders consistent with the procedural rules and statutes).

The penalty under ORS 35.346(5)(a) for the failure to follow these exchange requirements is that the appraisal involved cannot be used at trial. In *Dept. of Trans. v. Stallcup*, 341 Or 93, 138 P3d 9 (2006), the Supreme Court held that the appraisal exchange requirement only applies to completed reports, not drafts. However, under ORS 35.346(8), if an appraisal "relies on a written report, opinion or estimate of a person who is not an appraiser, a copy of the written report, opinion or estimate must be provided with the appraisal" and if an appraisal "relies on an unwritten report, opinion or estimate of a person who is not an appraiser, the party providing the appraisal must also provide the name and address of the person who provided the unwritten report, opinion or estimate."

### Trial

Several facets of condemnation procedure vary significantly from other civil cases at trial.

*First*, ORS 35.235 and the Court of Appeals' decision in *Emerald PUD v. PacifiCorp*, 100 Or App 79, in effect bifurcate the trial if the defendant challenges the public agency's right to take the property concerned. In that event, the trial court determines

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the issue of the right to take in a preliminary evidentiary proceeding. As noted earlier, under ORS 35.352(6) this preliminary hearing may—but not necessarily—coincide with any hearing on early possession. If the public agency prevails on the right to take, then the question of value is reserved for the jury under ORS 35.305(1).

*Second*, under ORS 35.305(2), neither party bears the burden of proof on the issue of value. *See Unified Sewerage Agency v. Duyck*, 33 Or App 375, 378, 576 P2d 816 (1978).

*Third*, because neither party bears the burden of proof on value, the defendant can elect under ORS 35.305(1) to proceed first with the presentation of evidence during the valuation phase and can present both opening statement and closing argument first as well. This election, however, must be made at least seven days prior to trial.

*Fourth*, ORS 35.315 permits either side to request a jury view of the property involved. If requested, the view is mandatory. The jury view typically follows opening statements.

*Fifth*, recovery of both attorney and expert witness fees (including appraisal costs) is available to a property owner in several circumstances under ORS 35.346 and ORS 35.300. Fee recovery in condemnation was long static but has changed dramatically twice within the past five years. Beginning in 1973[13], the yardstick for gauging cost recovery was whether the jury awarded the property owner more than the public agency's highest written offer made at least 30 days before trial. *See generally State ex rel. Dept. of Trans. v. Kesterson*, 182 Or App 105, 47 P3d 546 (2002) (discussing "30-day" offers). In 2006, however, Measure 39, adopted by the voters and later codified as to fee awards at ORS 35.346(7)(a)[14], moved the measuring point to the very beginning of the case by awarding fees if the jury's verdict exceeded the condemner's initial written offer served before the case was even filed. *See generally Portland General Elec. Co. v. Mead*, 235 Or App 673, 234 P3d 1048 (2010) (describing the changes enacted by Measure 39). In 2009, the pendulum swung back to the end of a case when the Legislature enacted ORS 35.300.[15] Under this new provision, a condemner may serve an offer of compromise up to 10 days before trial. The offer may include separate amounts for compensation and fees or it may simply address compensation. If the offer did not include a separate amount for fees, the owner can accept the offer and the court will then determine reasonable fees incurred before the condemner served its offer. If the offer does include a separate amount for fees, the owner can either accept the entire offer or just the portion for the property concerned. If the latter, the court will determine reasonable fees incurred before the condemner served its offer. If the owner rejects an offer outright and the jury awards more at trial, the owner is generally entitled to recover all fees through trial—with one exception. In situations where the offer included separate amounts for the property and fees, the owner is only entitled to all fees if the combined total of the jury's verdict and the amount in fees the owner incurred prior to the offer exceeds the total offered by the condemner. If the owner rejects an offer and the jury awards less at trial, the owner is still permitted to recover reasonable fees incurred before the offer. In the event that a condemner makes no further settlement offer after filing a case, then under ORS 35.346(7)(a) the owner is entitled to fees if the jury's award exceeds the highest written offer before the case was filed. Under both ORS 35.300 and ORS 35.346(7)(a), fee recovery (for both attorneys and experts) is not reciprocal; rather, it only runs in favor of a prevailing property owner.[16] Fees on appeal are governed by ORS 35.355. Like its trial-level counterpart, ORS 35.355 is not reciprocal; again, it runs only in favor of a prevailing property owner.


*Finally*, once the jury has determined the overall compensation the public agency must pay as a result of the taking, any disputes among the defendants concerning their respective shares of the overall award are determined by the court

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*Miller Nash LLP*
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## Oregon Condemnation Procedure

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in a supplemental proceeding under ORS 35.285(1). *See Dept. of Transportation v. Weston Investment Co.*, 134 Or App 467, 473-75, 896 P2d 3 (1995).

*The author thanks Greg Mowe for reviewing a draft of this article.*

### Endnotes

[1] Federal condemnation procedure is regulated by Federal Rule of Civil Procedure 71.1.

[2] Or Laws 1971, ch 741.

[3] Some private corporations, such as utilities and railroads, have also been given condemnation authority by statute. The procedures applicable to private condemners are generally similar to, but not precisely the same as, those governing public condemners. *See, e.g.*, ORS 35.235(3) (effect of condemnation resolutions) and ORS 35.275 (early possession requirements). Except as noted, this article focuses on procedures applicable to public condemners.

[4] The federal statutes are supplemented by corresponding regulations at 49 CFR § 24.1, *et seq*.

[5] ORS 35.510(3) was formerly found at ORS 281.060(3). The Legislature in 2003 incorporated several sections of ORS Chapter 281, which dealt with other facets of governmental property acquisition, into ORS Chapter 35. *See* Or Laws 2003, ch 534, § 1.

[6] Or Laws 2003, ch 477, § 2.

[7] Owners and others having possessory interests in the property involved may also be eligible for relocation benefits and other related assistance under 42 USC § 4601, *et seq.*, and ORS 35.500, et seq.

[8] ORS Chapter 35 formerly contained a "20-day" pre-filing offer requirement. *See* Or Laws 2003, ch 476, § 1. The Court of Appeals held in *Urban Renewal Agency of Salem v. Caughell*, 35 Or App at 148 that the "20-day offer" requirement was waived if the property owner did not object in the initial response. Since *Caughhell*, however, the Legislature also added a requirement that a public agency generally provide an appraisal along with its initial written offer. *See* Or Laws 1997, ch 797, § 1, codified at ORS 35.346(2). *Caughell's* conclusion that the prefiling offer requirement is waived if not raised in the initial response has not been revisited since the Legislature revised both the timing and content of the initial offer. *Pilothouse 60* does not address this issue as the property owners raised the lack of an offer in their answer, which led to the dismissal of the state's action.

[9] *See* Or Laws 1997, ch 797 § 1.

[10] In *Harder v. Dept. of Fin. and Admin.*, 1 Or App 26, 27-29, 458 P2d 947 (1969), the Court of Appeals noted that due process requires a hearing and judicial approval of early possession at least in those cases where the party in possession of the property refuses to vacate.

[11] *See* Or Laws 2005, ch 565.

[12] *See* Or Laws 1997, ch 797, § 1.

[13] *See* Or Laws 1973, ch 617, § 2.

[14] *See* Or Laws 2007, ch 1, § 4.

[15] *See* Or Laws 2009, ch 530, § 5.

[16] Under ORS 35.346(7)(b), a property owner is entitled to fees regardless of the outcome at trial if the court finds that a condemner's first written offer was not made in good faith. A property owner is also entitled to fees under ORS 35.335 if the condemner abandons the acquisition. ❐

*Please continue on next page*

# Simplifying A Complex ERISA Case

*By William T. Patton and Robert E. Maloney, Jr.*
*Lane Powell PC*

Cases under the Employee Retirement Income Security Act ("ERISA") often present unique and difficult challenges for counsel. A case we recently handled, *Daul v. PPM Energy, Inc.*, highlights some of these challenges and how to address them. First, the *Daul* case illustrates the importance of considering early on whether a dispute involves an ERISA-governed benefit plan. Employees and employers alike benefit from knowing before a lawsuit is filed whether the claim is preempted by ERISA because significant consequences flow from that: federal court jurisdiction, no right to a jury trial, and, in many cases, limited or no discovery. In addition, the *Daul* case is also a good example of how a seemingly complex fact-intensive case can be won on summary judgment by focusing on a single provision in the ERISA plan.

*William T. Patton*

## 1. Factual Background

### a. The Special Severance Protections Plan.

Our client, Iberdrola Renewables, Inc., formerly known as PPM Energy, Inc. ("PPM"), is in the renewable energy business. Plaintiffs were two high-level executives in PPM's wind energy group. In April 2007, Iberdrola S.A. purchased Scottish Power ("Scottish Power"), the parent corporation of PPM. PPM wanted to retain plaintiffs' services for at least a year after this change in control. To achieve that objective and to "eliminate concerns" they may have had about any negative financial impact due to an adverse change in their role or compensation structure for one year following the change in control, PPM offered plaintiffs and two other individuals the opportunity to participate in the Special Severance Protections Plan (the "SSPP"). On April 16, 2007, plaintiffs voluntarily accepted the SSPP.

The SSPP provided for severance benefits if a "Qualifying Employee-Initiated Resignation" occurred "no later than the 13th month following the Change in Control." A "Qualifying Employee-Initiated Resignation" occurred when a participant resigned due to a "Constructive Dismissal" or "Material Alteration in Compensation." A "Constructive Dismissal" occurred when "considering the employee's job responsibilities and scope of authority in the aggregate, the employee's role has unilaterally changed and has been materially diminished in a manner which effectively removes the employee from a position substantially comparable to the one the employee held immediately prior [to] the Change in Control." A "Material Alteration in Compensation" occurred when

> (1) The Participant's base pay is reduced by any amount, * * *
> (2) The Participant's earnings opportunity is adversely impacted by a change in the annual incentive structure, practices, or administrative guidelines, * * * that results in:
> (a) a limit or cap on Participant's bonus opportunity
> (b) a reduction in the Participant's opportunity to earn bonuses consistent with the Annual Incentive Plan dated FY 2006-2007 ("Annual Incentive Plan")
> * * *
> (3) The Participant's earnings opportunity is adversely impacted by a material change in the scope of the Participant's responsibilities which limits the employee's contributions to key measures linked to reward opportunity in the Annual Incentive Plan.
> (4) Participant's earnings opportunity is adversely impacted by a change in the long term incentive structure * * * described in the Value Appreciation Rights (VAR) Plan that results in * * * the elimination of the Participant's opportunity to earn comparable value appreciation for growth of PPM * * *.

*Robert E. Maloney, Jr.*

The SSPP also provided that a "Material Alteration in Compensation" would *not* include a "restructuring of Participant's pay components so that the Participant's total direct compensation (base salary, bonus, and long-term incentive) is comparable." Finally, under the SSPP, if a Participant experienced a "Qualifying Employee-Initiated Resignation," he would

*Please continue on next page*

immediately be entitled to severance benefits worth several millions of dollars.

### b. The VAR Plan and the Replacement VAR Plan.

As just noted, a Material Alteration in Compensation could be triggered by a change in the structure of something known as the "Value Appreciation Rights Plan." PPM had provided a "VAR Plan" of one sort or another since 2001. Each plan had a duration of a single year. Under the VAR Plan, PPM had discretion to grant VARs which were like company stock options.

VARs vested annually in one-third increments starting on the one-year anniversary of the grant: thus, one-third of the VARs granted an employee as of October 1, 2004 would vest on October 1, 2005, another third on October 1, 2006, and the final third on October 1, 2007. An employee could exercise VARs either when they vested or thereafter.

In September 2007, PPM advised VAR Plan participants of the opportunity to participate in the Replacement VAR ("RVAR") Plan. One of the significant features of the RVAR Plan was its revaluation of existing VARs. Under the VAR Plan, as of October 1, 2007, VARs were valued at $30.80 per share. Under the RVAR Plan, that value increased by $18.20—nearly 60%—to $49. In addition to greatly enhancing the current value of VARs, the RVAR Plan provided that VARs would be revalued each year thereafter through October 1, 2011, based on a guaranteed 20% compounded annual growth rate ("CAGR"), and with the potential for 10% growth on top of that (also compounded annually), depending on Iberdrola's stock performance. This meant that VARs would increase from the already enhanced $49 value to at least $101 by October 1, 2011. Under the VAR Plan, shares were not guaranteed any increase and, in fact, could decrease in value.

The RVAR Plan thus presented all VAR participants, including plaintiffs, with a significant upside. Not surprisingly, then, all 463 VAR Plan participants, including plaintiffs, elected to participate in the RVAR Plan and, thus, to eliminate the VAR Plan. In September 2007, each plaintiff signed his "Election to Participate" form and expressly agreed that the RVAR Plan would be "a replacement for my prior rights under all of the VAR Plans."

### c. The Annual Incentive Plan.

Plaintiffs also participated in PPM's Annual Incentive Plan ("AIP"). The AIP was funded by approximately 15% of PPM's Earnings Before Interest and Taxes ("EBIT"). Awards were made to participants on a discretionary basis, based upon various factors including a participant's eligible earnings, business unit performance, Net Present Value ("NPV") generation, and individual/team performance against goals. NPV awards were generally spread out over a three-year period, with the first payment typically made in June.

### d. Plaintiffs Quit, Claiming They Experienced a Qualifying Employee-Initiated Resignation.

Plaintiffs advised PPM of their intent to invoke Qualified Employee-Initiated Resignations on November 15, 2007. Plaintiffs told PPM that they felt the changes to the VAR Plan and AIP adversely impacted their earning and bonus opportunities, and therefore, qualified as a Material Alteration in Compensation under the terms of the SSPP. Plaintiffs also claimed they had experienced a Constructive Dismissal under the SSPP because their job responsibilities and scope of work were substantially changed as a result of organizational restructuring, impacting their ability to contribute to key measures linked to reward opportunity under the AIP. PPM rejected plaintiffs' claims and they then sued.

## 2. The Litigation.

Plaintiffs filed their complaint in state court, alleging breach of contract against PPM. PPM removed the case to federal court solely on the grounds of ERISA preemption. Plaintiffs moved to remand the case to state court, claiming that the SSPP was an individually negotiated contract, not an ERISA plan. The SSPP was only three pages long, contained no mention of ERISA, and had none of the features one would expect to see in an ERISA plan, such as a claims procedure, statement of ERISA rights, or identification of the plan administrator. Also, unlike most ERISA plans, the SSPP covered a very small group of people—plaintiffs and two other key executives. On its face, the SSPP appeared to be an individually negotiated agreement that no one intended to be an ERISA plan.

Nonetheless, the district court found that the SSPP was an ERISA plan. The court based its decision on a series of Ninth Circuit cases which hold that an employee benefit program is governed by ERISA if it requires that the employer engage in an "ongoing, particularized, administrative, discretionary analysis" to make benefit determinations.[1] The SSPP required an analysis of whether plaintiffs suffered a "Material Alteration in Compensation" which was based

*Please continue on next page*

## Simplifying a Complex ERISA Case

*continued from page 12*

on a consideration of whether an employee's "earnings opportunity is adversely impacted" by a number of factors, including, but not limited to "a material change from the historical levels of Participant awards considering comparable business value and profit contributions," "a material reduction in the proportion of profit and value sharing allocable to incentive funding," or "a material change in the scope of the Participant's responsibilities which limits the employee's contributions to key measures linked to reward opportunity in the Annual Incentive Plan." Thus, as the district court found, because the SSPP "creates an ongoing administrative scheme which obligates the Company to consider the unique circumstances of each of the covered employees and determine whether they are entitled to severance pay and benefits under the terms of the Agreement," it was an ERISA plan.[2]

So the SSPP is an ERISA plan and the case stays in federal court. Now what? As in many ERISA benefits cases, the battle shifted to the standard of review. Under ERISA law, there are two possible standards of review the district court can apply when reviewing an administrator's decision to deny benefits: an abuse of discretion standard, which is highly deferential to the administrator's decision, or de novo, which affords no deference to the administrator's decision. Abuse of discretion can only apply if the plan document expressly unambiguously vests the administrator with discretionary authority to make benefit determinations and interpret plan terms.[3]

Here, the district court found that de novo review was the standard of review for two independent reasons. First, the court found that the SSPP did not contain adequate language conferring discretion on the administrator to make benefit determinations and interpret plan terms. The court disagreed with PPM that the SSPP was an amendment to the existing severance plan that covered most PPM employees and which did contain adequate discretionary language. Second, even if the SSPP had discretionary language, the court found that de novo review was applicable because ERISA's procedural rules were not followed when PPM made its benefit determination (i.e., the SSPP did not provide for an administrative appeal, as required under the applicable Department of Labor regulations[4]). The court based this decision on *Abatie* in which the Ninth Circuit found that, in some cases, discretionary review will be lost if ERISA's claims handling procedures are not followed.[5]

With the jurisdictional and standard of review issues behind us, our case finally moved to the merits of plaintiffs' claim. As noted, plaintiffs claimed that the elimination of the VAR plan and certain alleged changes to the AIP after Iberdrola's purchase of Scottish Power adversely impacted their earning and bonus opportunities and, therefore, qualified as a Material Alteration in Compensation under the SSPP. One of the changes that plaintiffs complained about was PPM's alleged decision to eliminate the "build-to-sell" opportunity for them and other wind farm developers.[6] Plaintiffs also complained that after the change in control, PPM switched its focus to installing as many megawatts as possible rather than generating the most EBIT or profit per megawatt. According to plaintiffs, these and other changes adversely impacted earning opportunities and thus constituted a Material Alteration in Compensation under the SSPP.

Addressing the merits of these claims would have been a significant and time-consuming undertaking. Plaintiffs' claims could have potentially involved a large amount of discovery and analysis regarding the numerous wind projects they were involved in, the status of those projects before and after the change in control, and the impact of those projects on PPM's bottom line (which, in turn, impacts VAR value and the AIP bonus pool). Their claims also would have required a detailed and complex financial analysis of PPM's EBIT, the bonus calculation under the AIP (based on EBIT), and the calculation of VAR value under the old VAR Plan.

Rather than go down that path, PPM filed a motion for summary judgment based on the SSPP's provision that a "Material Alteration in Compensation" does not include a "restructuring of Participant's pay components so that the Participant's total direct compensation (base salary, bonus, and long-term incentive) is comparable." It was undisputed that both plaintiffs' total direct compensation (salary, AIP bonus, and VAR value) actually increased in the year following the change in control. From April 2006 to April 2007 (the year before the change in control) one plaintiff's total direct compensation was $1,845,249. If he had not resigned from PPM, his total direct compensation in the year after the change in control would have been $2,471,231. The other plaintiff's total direct compensation in the year before the change in control

*Please continue on next page*

was $1,234,740. If he had not resigned, it would have been $1,845,377 in the year after April 2007. Thus, as PPM argued, the alleged restructuring of the VAR Plan and the AIP did not cause plaintiffs to experience a Material Alteration in Compensation under the SSPP.

## 3. Results and a Few Lessons.

The district court granted PPM's motion for summary judgment and dismissed their VAR plan and AIP claims.[7] The district court found that plaintiffs had not experienced a Material Alteration in Compensation given that their total direct compensation actually increased after the change in control.[8] Plaintiffs moved for reconsideration under Fed. R. Civ. P. 60(b) and the court denied that motion. Plantiffs then appealed to the Ninth Circuit. On July 19, 2011, the Ninth Circuit affirmed the district court's decision granting PPM's motions for summary judgment.

A few lessons emerge from this case. First, in any dispute involving any type of employee benefit program, counsel for the employee and the employer should, at the outset, consider whether the program is an ERISA plan. As this case illustrates, the answer to this question is not always clear. But, if the program is an ERISA plan, the consequences can be significant. ERISA provides for jurisdiction in federal courts and every circuit has held that there is no right to a jury trial in ERISA cases.[9] In addition, in many ERISA cases, discovery is limited or sometimes not allowed because benefits cases are supposed to be a review of an existing administrative record.[10] Thus, an employee who thought she had a state court breach of contract action that would be tried to a jury may find herself in federal court with no jury trial and limited discovery.

Employers also benefit from knowing early on if a dispute involves an ERISA plan. ERISA imposes detailed claims handling procedures that must be followed in benefits cases. If these procedures are not followed, that may result in the district court applying a de novo standard of review rather than the more deferential abuse of discretion standard (assuming the plan has adequate discretionary language in the first place).

Finally, this case is also a good reminder of how a seemingly complex case can be won by focusing on a single important provision in the plan document. As explained above, plaintiffs' claims that certain changes to the VAR plan and the AIP caused a Material Alteration in Compensation potentially raised a host of complex issues concerning PPM's finances and its renewable energy business in general. Tackling those issues (which were probably not amenable to summary judgment) would have been costly and time-consuming. PPM avoided that thicket by focusing instead on the "total direct compensation" carve-out in the SSPP and the undisputed fact that plaintiffs' compensation actually increased after the change in control. Thus, as we argued, plaintiffs had not experienced a Material Alteration in Compensation under the SSPP. This district court and the Ninth Circuit agreed.

## Endnotes

1 *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1317 (9th Cir. 1997); *Delaye v. Agripac, Inc.*, 39 F.3d 235, 237 (9th Cir. 1994); *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1322 (9th Cir. 1992).

2 *Daul v. PPM Energy*, 2008 WL 4283262 at *10 (D. Or. Sept. 17, 2008).

3 *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en banc).

4 29 C.F.R. § 2560.503-1.

5 *Abatie*, 458 F.3d at 959.

6 "Build-to-sell" refers to building a wind farm and then selling it to a utility or other investor (as opposed to keeping the wind farm and selling the electricity generated by it).

7 *Daul v. PPM Energy, Inc.*, 267 F.R.D. 641, 643-44 (D. Or. 2010). After this ruling, plaintiffs voluntarily dismissed their Constructive Dismissal claim.

8 Additionally, the court found that plaintiffs' VAR plan claim was barred based on waiver and estoppel because plaintiffs voluntarily eliminated their rights under the VAR plan and replaced them with the RVAR plan.

9 *Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employees of Transferred GE Operations*, 244 F.3d 1109, 1114 (9th Cir. 2001); *see also McKnight v. Brentwood Dental Group, Inc.*, 2005 WL 2290326 at *3 (D. Neb. Sept. 20, 2005) (collecting cases).

10 *See Opeta v. Northwest Airlines Pension Plan for Contract Employees*, 484 F.3d 1211 (9th Cir. 2007) (holding that in most ERISA cases "only the evidence that was before the plan administrator at the time of determination should be considered."); *Waggener v. Unum Life Ins. Co. of Am.*, 38 F.Supp.2d 1179, 1183 (S.D. Cal. 2002) ("Because of the interest in both maintaining costs at a reasonable level and allowing for the prompt and fair resolution of claims, discovery [in an ERISA case] simply cannot be as broad and overreaching as in other types of cases."). ❐

# Surviving *Winter*: The Ninth Circuit Reaffirms the "Serious Questions" Test for Injunctive Relief

*By Paul W. Conable and Frank J. Weiss*
*Tonkon Torp LLP*

In a recent opinion authored by Judge William A. Fletcher, *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit held that one aspect of its "sliding scale" test for preliminary injunctive relief, the "serious questions" approach, remains good law.[1] The viability of any part of the sliding scale test was an open question following the Supreme Court's opinion in *Winter v. NRDC*.[2] In concluding that the "serious questions" test remains valid following *Winter*, the Ninth Circuit in *Cottrell* joined an existing split among the Circuit Courts that have considered the question. According to one District Court, the *Cottrell* Court may also have created a split on this issue within the Ninth Circuit.

*Paul W. Conable*

**In *Winter*, the Supreme Court rejected part of the Ninth Circuit's alternative test.**

## *Winter* Changes the Landscape

Before the Supreme Court's decision in *Winter*, cases in the Ninth Circuit articulated two standards for granting preliminary injunctions, described by the Ninth Circuit as "traditional" and "alternative."[3] Under the alternative standard, a party seeking a preliminary injunction was able to meet its burden by demonstrating "either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) serious questions going to the merits and a balance of hardships strongly favoring [the moving party]."[4] At a minimum, the party seeking the injunction was required to demonstrate a fair chance of success on the merits, or questions serious enough to require litigation.[5]

In *Winter*, the Supreme Court rejected part of the Ninth Circuit's alternative test. The Ninth Circuit had affirmed the District Court's issuance of an injunction based on a finding of a strong likelihood of success on the merits coupled with the "possibility" of irreparable harm.[6] The Supreme Court reversed, holding that "the Ninth Circuit's 'possibility' standard is too lenient."[7] In so holding, the Court articulated a standard for preliminary injunctive relief consistent with the Ninth Circuit's "traditional" test: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest."[8]

*Frank J. Weiss*

Following *Winter*, the Ninth Circuit has acknowledged that one formulation of its alternative test—likelihood of success plus possibility of irreparable harm—is no longer viable.[9] The question remained, however, whether the other alternative test—"serious questions" going to the merits plus a balance of hardships strongly favoring the moving party—survived. In her dissent in *Winter*, Justice Ginsburg pointed out that the Court had not rejected every version of a "sliding scale" for injunctive relief, only the particular sliding scale at issue in the case before it.[10]

Following *Winter*, three other Circuit Courts addressed the question whether some version of a "sliding scale" for injunctive relief survived the Supreme Court's opinion. The Fourth Circuit said no.[11] The Second and Seventh Circuits said yes.[12] District courts within the Ninth Circuit also wrestled with the question.[13]

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## The Ninth Circuit Reaffirms the "Serious Questions" Test

In *Cottrell*, the Ninth Circuit addressed for the first time in a published opinion the question whether any formulation of the sliding scale approach survived *Winter*.[14] The plaintiffs were environmental advocacy groups who moved for a preliminary injunction blocking certain logging projects. In denying the injunction, the District Court quoted *Winter* and ruled: "Plaintiffs do not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction. This determination prevents the issuance of a preliminary injunction..."[15]

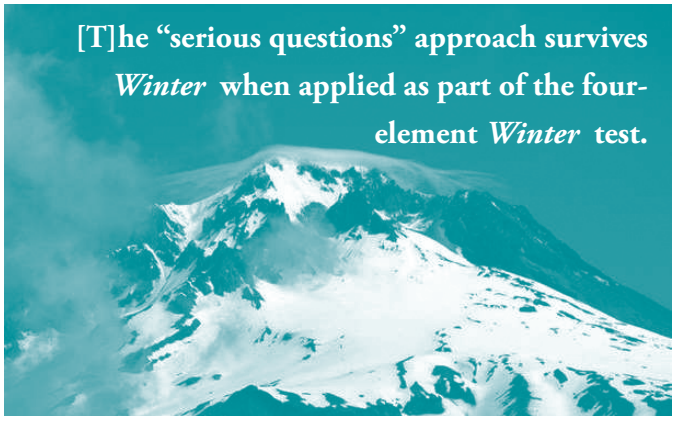
The Ninth Circuit reversed and ordered the District Court to enter the requested injunction. Citing *Winter*, the *Cottrell* court first acknowledged that the mere possibility of irreparable harm was no longer enough to support the issuance of an injunction. However, the court concluded that the District Court had abused its discretion in finding on the record before it that there was no likelihood of irreparable harm from the challenged logging projects. Because irreparable harm was in fact likely, the Ninth Circuit ruled, the first element of the test for an injunction was met.[16]

The Court then turned to the question whether the "serious questions" version of the sliding scale test remained viable. Agreeing with the Second and Seventh Circuits, the court concluded that this formulation of the test for injunctive relief survives *Winter*. As noted, the *Cottrell* District Court had confined its analysis to the test articulated in *Winter*, namely whether the moving parties had established that they were "likely to succeed on the merits." The Ninth Circuit held that this was insufficient: The District Court was also required to address the question whether the case presented "serious questions" on the merits. "Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction sought by [the plaintiffs]."[17] Rather than remanding to allow the district court to apply the "serious questions" test, the Court simply found that the case presented serious questions on the merits and ordered that the injunction be entered.[18]

After *Cottrell*, the "serious questions" test is not only viable as an "alternative" formulation. The Ninth Circuit has now made clear that it is a mandatory part of the inquiry when a party seeks a preliminary injunction. Even where a district court finds no likelihood of success, it is legal error for the court not to also consider whether the case presents "serious question" on the merits.[19]

Thus, in the Ninth Circuit, a preliminary injunction must issue where the plaintiff demonstrates "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," provided the other elements of the test for injunctive relief are met.[20] The *Cottrell* Court was careful to explain that the "serious questions" test is not complete in itself. It is not enough to show the existence of serious questions going to the merits and that the balance of hardships tips decidedly in the plaintiff's favor; the remaining elements set forth in *Winter* must also be established. In other words, the moving party must also show that there is a likelihood of irreparable injury and that the injunction is in the public interest. The Ninth Circuit summarized the post-*Winter* rule as follows:

[T]he "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* test. That is, "serious questions going to the merits" and a balance of hardships that tips sharply toward the plaintiff can support a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.[21]




## Judge Mosman Concurs, Citing the Need for Flexibility

Oregon District Judge Michael W. Mosman sat on the *Cottrell* panel by designation and authored a concurring opinion that provided a trial judge's perspective on the practical application of the "serious questions" test. Judge Mosman lauded the majority opinion for maintaining the flexibility necessary for trial judges to appropriately handle requests for preliminary injunctions.

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## Surviving *Winter*

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Prior to the decision in *Cottrell*, district court judges openly worried about whether *Winter* had eliminated all discretion, requiring trial courts to adhere to a rigid standard when evaluating requests for preliminary relief, in the absence of a complete record and despite the traditional latitude that is granted to judges in dealing with matters of equity. The majority opinion in *Cottrell* also echoed this concern, quoting District Judge Alsup's opinion in Save Strawberry Canyon: "Can it possibly be that the Supreme Court and Ninth Circuit have taken away the ability of district judges to preserve the status quo pending at least some discovery and further hearing on the merits in such cases?"[22]

**Thus although *Cottrell* resolves an open question for the time being, it is possible that further guidance from the Supreme Court will be forthcoming on the issue.**

The standard adopted by the Ninth Circuit in *Cottrell* addresses this concern by permitting a district judge to preserve the status quo until the merits can be properly analyzed by issuing an injunction in instances in which clear irreparable injury would otherwise result and there are, at least, serious questions going to the merits. As Judge Mosman noted in his concurrence, this approach is consistent with the practical reality that, when acting with a limited record on an expedited basis, judges often are not in a position to accurately predict which party will ultimately prevail. Accordingly, in many cases it is only really possible to evaluate whether the case presents serious questions on the merits. On the other hand, as Judge Mosman noted, the courts are often in a better position to predict the likelihood of harm. Accordingly, he argues, the approach adopted in *Cottrell* strikes the appropriate balance—requiring the courts to make a determination about the probability of irreparable harm, which they are well equipped to do, but only requiring them to find serious questions on the merits, so that they are not forced to make predictions about the eventual outcome based upon a limited record.

### Judge Navarro Attempts to Harmonize Cases

At least one district court within this Circuit has questioned whether *Cottrell* is consistent with *Winter* and prior Ninth Circuit law applying *Winter.* In *Quiroga v. Chen*,[23] District Judge Gloria M. Navarro denied motions for a temporary restraining order and preliminary injunction. In denying the requested injunction, Judge Navarro first noted that *Cottrell* was not the first published Ninth Circuit opinion interpreting *Winter*. Quoting the Ninth Circuit's 2009 opinion in *Stormans, Inc. v. Selecky*,[24] the court stated:

> The Ninth Circuit has explicitly recognized that its "possibility" test was "definitely refuted" by *Winter*, and that "[t]he proper legal standard for preliminary injunctive relief requires a party to demonstrate 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'"[25]

The court then discussed *Cottrell* and the serious questions test.[26] Noting that both the Supreme Court in *Winter* and the Ninth Circuit in Selecky had stated that a party must show likelihood of success to obtain an injunction, Judge Navarro sought to harmonize the "likelihood of success" and "serious questions" standards:

> To satisfy *Winter*, the movant must show that he is "likely" to succeed on the merits. To the extent the *Cottrell* court meant to imply that its "serious questions" standard was a lesser standard than "likely," it is inconsistent with *Winter* and *Selecky*. The Court must reconcile the cases by interpreting the *Cottrell* "serious questions" requirement to be in harmony with the *Winter/Selecky* "likelihood" standard, not as being in competition with it. The movant must therefore show that there are serious questions as to the merits of the case such that success on the merits is likely. A claim can be weaker on the merits if it raises "serious questions" and the amount of harm the injunction will prevent is very great, but the chance of success on the merits cannot be weaker than "likely."[27]

Whether the *Cottrell* Court would agree with this attempted

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reconciliation is far from certain. Although *Cottrell* never explicitly says that "serious questions" can exist even absent a likelihood of success, that is the implication of the court's holding. The *Cottrell* court ordered that an injunction was mandated notwithstanding the District Court's conclusion—which was not disturbed on appeal—that the moving parties "do not show a likelihood of success on the merits."[28] It follows, then, that a "serious question" sufficient to justify (or, in *Cottrell*, require) issuance of an injunction can exist even where a district court does not find it "likely" that the moving party will prevail on the merits. Otherwise, the *Cottrell* District Court's conclusion that the moving parties had not shown likelihood of success would have been dispositive. Accordingly, Judge Navarro's attempt to equate "serious questions" with "likely success" may not square with the holding in *Cottrell*.

## Conclusion

In *Cottrell*, the Ninth Circuit resolved an open question regarding the viability of the "serious questions" test for injunctive relief following the Supreme Court's ruling in *Winter*. In so doing, the Court joined an existing Circuit Court split on the question and, in the eyes of at least one district judge, may have also created a split of authority within the Ninth Circuit itself. Thus although *Cottrell* resolves an open question for the time being, it is possible that further guidance from the Supreme Court will be forthcomng on this issue.

## Endnotes

[1] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

[2] 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008).

[3] *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (quoting American *Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983)).

[4] *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007).

[5] *Hunt v. National Broadcasting Co.*, 872 F.2d 289, 293 (9th Cir. 1989). *See also Johnson v. California State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (quoting *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984)). The traditional and alternative tests were sometimes characterized as one test, "a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *Rohman v. City of Portland*, 909 F. Supp. 767, 771 (D. Or. 1995) (quoting *San Diego Committee against Registration & Draft (CARD) v. Governing Bd. of Grossmont Union High School Dist.*, 790 F.2d 1471, 1473 n3 (9th Cir. 1986)).

[6] *NRDC v. Winter*, 518 F.3d 658, 696-97 (9th Cir. 2008).

[7] *Winter v. NRDC*, 555 U.S. at 21, 129 S. Ct. at 375.

[8] *Winter v. NRDC*, 555 U.S. at 20, 129 S. Ct. at 374.

[9] *American Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

[10] *Winter v. NRDC*, 129 S. Ct. at 392 (Ginsburg, J. dissenting).

[11] *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds* __U.S.__, 130 S. Ct. 2371, 176 L. Ed. 2d 764 (2010).

[12] *Citigroup Global Mkts., Inc. v VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); *Hoosier Energy Rural Elec. Co-Op, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

[13] *See Save Strawberry Canyon v. Dep't of Energy*, 2009 WL 1098888 (N.D. Cal. 2009) (listing cases).

[14] But *see Greater Yellowstone Coalition v. Timchak*, 2009 WL 971474 (9th Cir. 2009) (unpublished disposition).

[15] *Cottrell*, 632 F.3d at 1130.

[16] *Id.* at 1135.

[17] *Id.*

[18] *Id.*

[19] Indeed, as a practical matter, it could be argued that courts should simply skip the "likelihood of success" inquiry and proceed directly to the "serious questions" test, since any case in which there is a likelihood of success on the merits will necessarily also present serious questions on the merits.

[20] *Id.* at 1134-1135, *citing Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008).

[21] *Cottrell*, at 1135.

[22] *Cottrell*, 632 F.3d at 1134 (*quoting Save Strawberry Canyon*, 2009 WL 1098888 at *3.)

[23] 735 F. Supp. 2d 1226 (D. Nev. 2010).

[24] 586 F.3d 1109, 1127 (9th Cir. 2009).

[25] Quiroga, 735 F. Supp. 2d at 1228.

[26] There are actually three *Cottrell* opinions at the Ninth Circuit. The Quiroga court was discussing the second. *Alliance for the Wild Rockies v. Cottrell* ("*Cottrell II*"), 622 F.3d 1045 (2010). *Cottrell II* was withdrawn and amended on denial of rehearing, see *Cottrell*, 632 F.3d at 1127. Thus, the current version of *Cottrell* is the third, and the Quiroga court was addressing *Cottrell II*. However, the second and third *Cottrell* opinions are not materially different on the issues discussed in *Quiroga*.

[27] *Quiroga*, 735 F. Supp. 2d at 1229.

[28] 632 F.3d at 1130. ❐

## Old Dogs and New Tricks

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only one fact at a time, the examiner can control the adverse witness and give the adverse witness little room for argument and evasion.

Traditional cross-examination draws attention to the cross-examiner. In contrast, during classic direct examination the examiner attempts to place the attention of the fact-finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

Having refreshed ourselves of the contrast between the traditional rules of cross-examination and direct examination, let's now consider (as one of the "new tricks" being urged by commentators and forward-thinking practitioners) abandoning the traditional direct-examination approach on direct examination for a cross-examination approach.

Under such an approach, the direct examination should be tightly controlled by the examiner, the direct-examination witness should be given little or no leeway, and the attention of the fact-finder during examination should be on the examiner, not the witness. Thus, like cross-examination, direct examination becomes an opportunity for the examiner to argue his or her case through the window of a witness.

Under this approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of "each bite" of information that is given to the fact-finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

A number of advantages can be realized by using cross-examination techniques to conduct a direct examination and thereby argue your case through the window of a witness.

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, "What happened?" The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to "be sure to cover this, be sure to cover that, and don't forget to say this . . . and by the way, you cannot use any notes."

Is it really fair to lay all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn't a lawyer be doing the "rowing" (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition on the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact-finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information the fact-finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the window of the direct-examination witness.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact-finders are suspicious of fact or expert witnesses who appear to be "salespersons."

In contrast, the fact-finder expects the lawyer examiner to be a salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness's credibility is not undercut or tainted by the witness's active effort to sell the point.

Having discussed the contrast between traditional techniques of direct examination and cross-examination and having discussed how applying cross-examination techniques to direct examination can sometimes be effective, let's take a look at a second example of employing cross-examination techniques in direct examination.

This can be demonstrated by a simple intersection collision case,

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## Old Dogs and New Tricks

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assuming that there is no dispute as to fault. You have the good fortune of learning that the defendant had three beers before the accident.

You call an eyewitness who was present when the defendant had the three beers at a local tavern. Your direct examination, instead of simply setting the scene and asking the witness what he or she saw and again running the risk that in long narrative answers the point and impact of the testimony might be lost, can be transformed by having the lawyer do the work.

Set forth below is another sample of direct examination in which the examiner does the work, limits the answers of the witness, and emphasizes through repetition the point that the defendant had been drinking at the time of the accident through the window of the direct-examination witness.

*Q:* Did the defendant have a beer?
*A:* Yes.
*Q:* Did the defendant have a second beer?
*A:* Yes.
*Q:* Did the defendant have a third beer?
*A:* Yes.
*Q:* So the defendant had a total of three beers?
*A:* Yes.
*Q:* The three beers that the defendant drank—were they imported or domestic beers?
*A:* Imported.
*Q:* The three beers that the defendant drank—were they light beers or dark beers?
*A:* Light.
*Q:* The three beers that the defendant drank—were they bottled beers or from the tap?
*A:* Bottled.
*Q:* The three beers that the defendant drank—did he drink them out of the bottle or with a glass?
*A:* Out of the bottle.
*Q:* The three beers that the defendant drank—did he drink them slowly or fast?
*A:* He drank the first two fast and the last one slowly.

**In contrast, often in direct examination the most effective procedure is to cover details only after the witness has described the "action" of his or her recollections.**

Under that example, with the lawyer doing the work, it would be hard for the fact-finder to miss the fact that the defendant had three beers. In fact, whether the beers were imported or domestic, bottled or from the tap, light or dark, drunk with a glass or from the bottle, or drunk slowly or fast is irrelevant. The point is, the defendant drank three beers, and that point is being driven home so that the fact-finder will not miss it.

The advantage of arguing the case through a witness on direct examination is that it is powerful and undeniable, and it allows you to repeat and emphasize important points.

A good solid understanding of the differences between traditional direct examination and cross-examination should not be the end of your analysis. Consider using cross-examination techniques during all or portions of your direct examinations. Doing so will give you yet another opportunity to argue your case through the window of the witness on the stand.

When you stop and think about it, the potential advantage is obvious. It seems undeniable that in a trial, if one of the lawyers spends 80 or 100 percent of his or her cross- and direct-examination time arguing his or her case through the window of the witnesses on the stand and the opposing attorney using traditional methods gives up the opportunity to argue the case during direct examination (and as a result is able to argue his or her case through the window of the witnesses on the stand only 50 percent or less of the time), the first lawyer will have the advantage.

We all work hard to master the traditional methods of direct and cross-examination. Having mastered those techniques, the battle is not over. One of the keys to continuing to improve our skills is to continue to consider alternative and improved approaches to the persuasive techniques we have mastered. One of the alternatives that may offer the greatest promise is substituting cross-examination techniques in our direct examinations. ❐

# Security Interests in Collateral – How Secure is Your Interest?

*By David A. Bledsoe and Nicholle Y. Winters of Perkins Coie LLP*


## PART II

Last quarter we discussed whether a security interest in collateral is truly secure and how the buyer in the ordinary course (BIOC) exception under UCC 9-320 (ORS 79.0320) can terminate a security interest. This installment discusses how the "Authorization" exception may also terminate a security interest in collateral.

*David A. Bledsoe*

*Nicholle Y. Winters*

This exception arises under UCC 9-315(a), codified at ORS 79.0315(a), which states that "A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof *unless the Secured Party authorized the disposition free of the security interest or agricultural lien.*" (emphasis added).

Authorization under UCC 9-315(a) most often occurs in the case of inventory financing, because the Secured Party realizes that it cannot be paid until the inventory is sold, and selling the items with the security interest attached would discourage sales, slow the process, and reduce the pool of buyers. This exception has been robustly applied by courts in the context of farm goods, because buyers of those goods are expressly precluded from the BIOC exception.

Authorization may be express or implied through conduct, course of dealing, or custom in the trade. The courts are divided as to whether the authorization and resulting waiver of security interest can depend on a condition that is outside of the buyer's control (such as payment by the Seller to its Secured Party), and are also divided as to whether implied consent can override an express prohibition.

Most of the case law regarding implied authorization interprets the former version of the applicable provision, UCC 9-306, so there is some uncertainty as to the impact the change in language of UCC 9-315 has on the parameters of implied authorization. Although the state of the law regarding the Authorization exception is somewhat in flux, it remains a viable defense to allegations relating to the disposition of collateral.

### A. The potential pitfalls of an express authorization

Many security agreements provide express authorization for transactions free and clear of the security

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agreement, although most of them establish that such sales must be to buyers in the ordinary course, essentially merging express authorization and the BIOC exception. If the language references buyer in the ordinary course, courts usually find that the full BIOC definition and restrictions are incorporated. However, if the language is not that specific, there may be transactions that would not qualify for the BIOC exception that would qualify under the Authorization exception, such as agricultural transactions or affiliated sales if such transactions are routine in the industry or that particular business.

Without the buyer in the ordinary course limitation in an agreement, even a lack of good faith, which would disqualify the buyer from BIOC protection, may not prevent a finding of express authorization. *See, e.g., Home Savings Assoc v. General Elec. Credit Corp.*, 708 P.2d 280, 287-88 (Nev 1985); *Univeral C.I.T. Credit Corp v. Middlesboro Motor Sales, Inc.*, 424 SW 2d 409, 413 (Kent App 1968). To ensure that any express authorization within the security agreement is not broader than the BIOC statutory exception, such agreements should be drafted with language that mirrors the BIOC requirements.

### B. How conduct can give rise to an implied authorization

Even without an express authorization in a security agreement, the language of the UCC and most of the case law support the proposition that Authorization of disposition of collateral free and clear of liens can be implied through conduct. The UCC establishes that conduct can be used to evaluate the parties' agreement, ORS 71.2010(2)(c), and that course of performance is relevant to show a waiver or modification of any term inconsistent with that course of performance. ORS 71.3030(6). "Whether particular words, acts, or conduct on the part of the Secured Party will give rise to a waiver by implied consent to a sale of the collateral depends on the circumstances of the parties, the nature of the collateral, the usage of trade, the course of dealing of the parties, and their subsequent course of performance."[1]

The most common conduct resulting in a finding of Authorization is when the Secured Party had knowledge of earlier, similar dispositions by the debtor and did not prevent or otherwise object to the disposition. Accepting proceeds from the previous sales has also been considered relevant to show knowledge and to show Authorization. *See, e.g., Neu Cheese Co. v. FDIC*, 825 F2d 1270, 1272-73 (8th Cir 1987); *Mercantile Bank of Springfield v. Joplin Reg'l Stockyards*, 870 F Supp 278, 283 (WD Mo 1994).

The analysis of waiver of a security interest through an implied authorization looks to the conduct between the Secured Party and the Seller. The conduct of the Purchaser is not at issue, except where a known condition is put on the transaction, as discussed below. Implied authorization has been found both when the Purchaser knew of the security interest and when the Purchaser did not bother to check for a security interest. Implied authorization has also been found when the Purchaser acted in bad faith. Unlike BIOC, which evaluates the Purchaser, the authorization analysis centers around the conduct of the Seller and the Secured Party, mostly the Secured Party.

There is a split in authority regarding whether an implied authorization can control over an express term. Much of the case law holds that an implied authorization through conduct can control over an express term in the security agreement relating to sales of inventory, which comports with the current language of the UCC establishing that course of dealing can waive or modify terms.[2] *C&H Farm Service Co. of Iowa v. Farmers Savings Bank*, 449 NW 2d 866, 871 (Iowa 1990); *Whirlpool Finan Corp v. Mercantile Bus Credit*, 892 F Supp 1256, 1262 (ED Mo 1995); *Mercantile Bank*, 870 F Supp at 282-83. Most of the cases finding to the contrary relied on the earlier language of the UCC that specified that course of dealing cannot control over express terms.

### C. Did the change in language in UCC 9-315 affect the body of law on implied authorization?

The original Authorization exception was codified in UCC 9-306 (former ORS 79.3060), establishing that security interests stayed with collateral after disposition unless the "disposition was authorized by the Secured Party in the security agreement or otherwise." Numerous cases interpreted the "or otherwise" language to allow for implied authorization through conduct.

In 2001, UCC 9-306 was revised and placed in the current 9-315 (ORS 79.0315); the Authorization language was changed to "unless the Secured Party authorized the disposition free of the security interest or agricultural lien." This new language mirrored the language in Comment 3 to the old version of the statute, which clarified that the collateral was obtained free and clear "only if the disposition of the collateral by the debtor was authorized by the Secured Party free and clear of the Secured Party's security interest. If the disposition was not authorized by

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## How Secure is Your Interest?

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the Secured Party, or was authorized by the Secured Party subject to the Secured Party's security interest, the transferee will not acquire the collateral free and clear of the security interest."

Several cases after the 2001 changes relied on pre-2001 cases interpreting the earlier version of the statute. The Ohio Court of Appeals stated that the two sections were "sufficiently similar so that case law construing former [UCC 9-306] is applicable to our analysis under [UCC 9-315]." *RFC Capital Corp v. Earthlink, Inc.*, 2004 WL 2980402 at * 10 (Ohio App 2004).

Conversely, the Third Circuit Court of Appeals in *In re Jersey Tractor Trailer Training, Inc.*, 580 F3d 147 (3d Cir 2009), found UCC 9-315 to be materially different from UCC 9-306 because UCC 9-315 states that a creditor must authorize the disposition free of the security interest, whereas UCC 9-306 merely states that a creditor must authorize the disposition. Neither Oregon nor the Ninth Circuit has indicated whether it will follow the logic of *RFC Capital* or *Jersey Tractor Trailer*.

### D. Placing a condition on the authorization

There is a split in authority as to whether an Authorization (implied or expressed) can be conditioned upon an act, such as payment of proceeds. Many courts find that placing a condition that is outside the control of the Purchaser, such as the Seller using the proceeds to pay the Secured Party, does not serve to invalidate an implied authorization.[3]

A condition within the control of the Purchaser, however, may serve to invalidate an implied authorization. There have been a few Oregon cases in which an implied authorization was invalidated because there was a condition that the Purchaser (or Purchaser's agent or bank) was aware of and did not fulfill.[4] Some of the language used in these cases relating to a condition is broad, and does not expressly state that the Purchaser must be aware of the condition, although the facts of the cases involved Purchasers who were aware.

There is one Oregon case, *Matteson v. Harper*, 297 Or 113 (1984), that involved a condition unknown to the buyer. In this case, an item was for sale at auction, and the Secured Party informed the auctioneer that a sale was not authorized unless a minimum price was reached. The auctioneer sold the item below the minimum price, the Secured Party sued the ultimate Purchaser for conversion, and the Court found the transaction was not authorized. The court did not discuss the fact that the Purchaser in *Matteson*, unlike the Purchasers in the earlier Oregon cases, did not know about the condition and that the condition was outside of the Purchaser's control. The court also did not discuss the authority in other jurisdictions that distinguish conditions that are known or in the control of the Purchaser from conditions that are not in determining whether a security interest continues when conditions have not been met. These courts note that holding Purchasers responsible for conditions between the Secured Party and Seller would make the Purchaser an insurer of acts beyond its control. However, *Matteson* is still good law; parties asserting Authorization as a defense in circumstances where a condition was placed on the transaction will need to distinguish *Matteson* until it is clarified or overruled.

Notably, the Oregon cases finding an enforceable condition have involved express conditions, and have not involved a general requirement to be paid. Without something more, it is unlikely that a general requirement to pay the Secured Party will be found to be a condition that would invalidate an Authorization.

Finally, the status of the Purchaser as a "good guy" or "bad guy" does seem to come into play in the evaluation of a conditional Authorization. In reviewing the case law, where the Purchaser has paid in full and the Seller is the "bad guy," courts are more likely to find that even with a failure to meet the condition, the security interest in the collateral is terminated. *See, e.g., Peoples Nat'l Bank and Trust v. Excel Corp.*, 695 P2d 444, 449 (Kan.1985); *Iowa Beef*, 626b F2d at 768. Conversely, cases in which the Purchaser is the "bad guy" and has not paid the Seller for the collateral are more likely to find that the condition should be enforced, the transaction is not Authorized, and the security interest remains. *See, e.g., Ellsworth v. Tri-State Livestock Credit Corp*, 722 F2d 1448 (9th Cir 1984); *Southwest Washington Prod Credit Assoc v. Seattle-First Nat'l Bank*, 593 P2d 167 (Wash 1979).

### E. Burden of proof for authorization

Oregon courts have not expressly addressed who has the burden of proof on whether a transaction was Authorized. Courts in other jurisdictions are split on the issue. Some hold that because the party asserting conversion has the burden of proving all the elements, which includes proving that the party is entitled to possession of the property, the Secured Party asserting its rights in the collateral has the burden to prove that it did not authorize the sale

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# Oregon's Anti-SLAPP Statute:
## AN ADDENDUM

*Charles F. Hinkle*
*Retired Partner, Stoel Rives LLP*

In its Spring 2011 issue, the Litigation Journal published a helpful article regarding Special Motions to Strike under Oregon's anti-SLAPP statute, ORS 31.150 to 31.155.[1] The article pointed out that the statute is a useful tool in putting a quick end to meritless litigation that attempts to impose liability for damages on defendants who have engaged in expressive activity on issues of public interest.


*Charles F. Hinkle*

The article was mistaken, however, in stating that "[u]nlike the California anti-SLAPP statute, Cal. Code Civ. Pro. § 425.16(i), the Oregon statute does not contain an automatic right of appeal."[2] The Oregon legislature amended the statute in 2009 expressly for the purpose of establishing that automatic right of appeal.

The legislature acted in response to the Ninth Circuit's decision in *Englert v. MacDonell*.[3] The defendants in that libel case had filed anti-SLAPP motions, which were granted in part and denied in part by Judge Aiken.[4] The defendants appealed from the partial denial of their motions, relying on *Batzel v. Smith*,[5] in which the Ninth Circuit had held that an immediate appeal could be taken from the denial of a motion under the California anti-SLAPP statute. Oregon's statute was modeled on the California statute, and the *Englert* appellants argued that the same rule of immediate appeal should apply to cases involving the Oregon statute.

The Ninth Circuit disagreed, and dismissed the *Englert* appeal for lack of jurisdiction. The court distinguished *Batzel* on the ground that the California statute specifically provided for immediate appeal from the denial of an anti-SLAPP motion, while the Oregon statute was silent on the point. The Ninth Circuit deduced from that difference that although the California statute was intended "'to protect speakers from the trial itself,'"[6] the Oregon statute, in contrast, "was not intended to provide a right not to be tried."[7] The court concluded, therefore, that interlocutory appeal from the denial of an anti-SLAPP motion under the Oregon statute was not available.

I represented some of the defendants in *Englert*, and I thought the Ninth Circuit decision was contrary to the intent of the Oregon legislature in adopting the statute.[8] The legislature was about to convene for its 2009 session (a week after the Ninth Circuit issued the *Englert* opinion), and I decided to ask the legislature to amend the statute to make it clear that the denial of an anti-SLAPP motion can be appealed.

I hoped the legislature would address another issue as well—one that also had come up in the *Englert* case. In denying part of the anti-SLAPP motion, Judge Aiken noted that "California's Anti-SLAPP statute expressly calls for broad construction; Oregon's does not,"[9] and that difference appeared to have some influence on her decision. A few weeks later, Judge Kantor also appeared to be influenced by that difference, when he quoted Judge Aiken's statement in an opinion explaining his denial of an anti-SLAPP motion in a libel case based on the defendant's "statements made on a consumer-oriented web site."[10]

So I drafted an amendment to the statute to address both the "no appeal" issue and the "broad construction" issue, by proposing two new subsections to ORS 31.152:

> (4) The Purpose of the procedure established by ORS 31.150 through 31.155 is to provide a right not to proceed to trial in cases in which the plaintiff does not meet the burden specified in ORS 31.150(3). ORS 31.150 through 31.155 are to be

**The Oregon legislature amended the statute in 2009 expressly for the purpose of establishing that automatic right of appeal.**

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## Oregon's Anti-SLAPP Statute

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liberally construed in favor of the exercise of the rights of expression described in ORS 31.150(2).

(5)(a) An appeal may be taken from an order denying a motion made under ORS 31.150.(b) An appeal under this section must be taken as provided in ORS chapter 19.

Members of the Senate Judiciary Committee were interested in the proposal, and my draft was submitted to the office of Legislative Counsel. That office objected to the wording of the proposed Subsection (5). I had copied the wording of Subsection (5) from ORS 36.730(1)(a) and (2), which provide for interlocutory appeals from orders denying petitions to compel arbitration, but Legislative Counsel took the position (as it later explained in a memorandum to the Senate Judiciary Committee) that one purpose of the extensive revision of the ORS chapter on judgments in the 2003 legislature[11] had been "to try to get rid of most appeals of orders." Legislative Counsel thought it would be "cleaner" to amend the anti-SLAPP statute to provide instead for the entry of a "limited judgment," which would allow for a "direct appeal."[12] As a result, SB 543, as introduced in the Senate on February 16, 2009, proposed to amend ORS 31.150(1) by adding this sentence: "If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion."

That wording was acceptable to me, since every limited judgment is appealable under ORS 19.205. Requiring the denial of an anti-SLAPP motion to be set out in a limited judgment would mean that every such denial would be immediately appealable.

Legislative Counsel also opposed my suggestion for a new subsection (4) to ORS 31.152. First, it expressed doubt that "we would need a sentence related to the purpose of the special motion to strike."[13] But there was good reason to add a statement of purpose to the statute: namely, to respond to the Ninth Circuit's statement, quoted above, that the Oregon statute "was not intended to provide a right not to be tried."[14] That statement overlooked the fact (as the Ninth Circuit had itself previously stated) that the very purpose of an anti–SLAPP statute is "to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation."[15] Perhaps it should have gone without saying that the purpose of the statute was to provide a right not to go to trial, but after the Ninth Circuit held to the contrary, it seemed necessary to state that purpose explicitly.

Second, Legislative Counsel objected to the "liberally construed" directive on the ground that the courts would "struggle" with the meaning of that term.[16] Again, however, there was reason for the addition of that term: namely, to negate the inference that Judges Aiken and Kantor seemed to have drawn that the absence of such a directive meant that the Oregon statute was to be applied more narrowly in protecting speech than the California statute.[17]

As introduced, SB 543 reflected Legislative Counsel's preferences: it added the reference to a "limited judgment," and it omitted the Subsection (4) that I had proposed in my draft. During work sessions in April, however, the Senate Judiciary Committee amended the bill to add that subsection. The bill, as amended, was approved by the Senate on April 29, 2009, and by the House on May 29, 2009, with no negative votes in either chamber. The "limited judgment" provision now appears as the last sentence in ORS 31.150(1), and the statement of purpose and the "liberally construed" directive appear in ORS 31.152(4).

It thus took the Oregon legislature less than five months to respond to the Ninth Circuit's decision in *Englert*, as well as to the earlier decisions by Judge Aiken and Judge Kantor, to make it clear that (a) Oregon, like California, allows for an immediate appeal from the denial of an anti-SLAPP motion, (b) the purpose of the statute is to create a right "to not proceed to trial" (which includes the right not to be required to respond to discovery requests after an anti-SLAPP motion is filed,[18] as well as during the pendency of any appeal from the denial of such a motion[19]), and (c) courts are to "liberally construe" the anti-SLAPP statute in favor of the rights of expression described in the statute.

### Endnotes

1 Anna Sortun, "An Underused Defense Tool? Special Motions to Strike," *OSB Litigation Journal*, Vol. 30, No. 1, at 2 (Spring 2001).

2 *Id.* at 8 n. 29.

3 551 F3d 1099 (9th Cir 2009).

4 *Englert v. MacDonell*, 2006 U.S. Dist. LEXIS 29361, 2006 WL 1310498 (D Or 2006).

5 333 F3d 1018 (9th Cir 2003).

6 *Englert*, 551 F3d at 1106 (*quoting Batzel*, 333 F3d at 1025)).

7 *Englert*, 551 F3d at 1105.

8 Three months after the Ninth Circuit

## Oregon's Anti-SLAPP Statute

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decided *Englert*, the Fifth Circuit also concluded that the Ninth Circuit was wrong. In *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F3d 164 (5th Cir 2009), that court allowed an immediate appeal from the denial of an anti-SLAPP motion under the Louisiana anti-SLAPP statute. The Louisiana statute was in all material respects identical to the Oregon statute, and neither of them contained an express provision for interlocutory appeal from the denial of an anti-SLAPP motion. The Fifth Circuit nevertheless held that the Louisiana statute "creates a right not to stand trial," *id.* at 178 n. 1, and that the denial of an anti-SLAPP motion was therefore immediately appealable.

[9] *Englert*, 2006 WL 1310498 at *7.

[10] *Standard Appliance, Inc. v. Macneil*, 2006 WL 4041463 (Multnomah County Circuit Court No. 0511-11375) (July 21, 2006).

[11] Or Laws 2003, ch 576.

[12] Memorandum, David Heynderickx, Special Counsel to the Legislative Counsel, to Bill Taylor, Counsel to Senate Judiciary Committee, March 18, 2009.

[13] *Id.*

[14] *Englert*, 551 F3d at 1105.

[15] *Metabolife Intern., Inc. v. Wornick*, 264 F3d 832, 839 (9th Cir 2001). *See also Britts v. Superior Court*, 52 Cal Rptr 3d 185, 193 (Cal App 2006) (purpose of statute is "to nip SLAPP suits in the bud, with minimal costs to the target defendant.").

[16] Memorandum, *supra* n. 12.

[17] The term "liberally construed" was used rather than "broadly construed," as in the California statute, simply as a matter of Oregon legislative style: as of 2009, there were at least 49 Oregon statutes that contained a "liberally construed" directive, while the term "broadly construed" did not appear in any Oregon statute.

[18] ORS 31.152(2).

[19] If an anti-SLAPP motion is denied and an appeal is taken, the stay of discovery mandated by ORS 31.152(2) continues in place because of the rule that when a notice of appeal is filed, "jurisdiction of the cause" is transferred to the appellate court, ORS 19.270(1), and the trial court is "divested *** of jurisdiction" to proceed with the case, *Assisted Living Concepts, Inc. v. Fellows*, 244 Or App 475, 483, __ P3d __ (2011), except for certain specific matters listed in ORS 19.270(1)(a), (4), and (5). *See State v. Branstetter*, 332 Or 389, 403, 29 P3d 1121 (2001) (when notice of appeal is filed, appellate court has "'jurisdiction of the issue or subject matter of the appeal to the exclusion of the lower court except as provided in the statute'" (citation omitted)). Of course, if the complaint contains claims that were not subject to the anti-SLAPP motion, the trial court can proceed with those other claims during the pendency of the appeal from the claims targeted by the motion. ORS 19.270(7). ❐

**The "limited judgment" provision now appears as the last sentence in ORS 31.150(1), and the statement of purpose and the "liberally construed" directive appear in ORS 31.152(4).**

## How Secure is Your Interest?

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of collateral free of its security interest.[5] Other courts hold that the Purchaser of collateral has the burden to show that the transaction was authorized.[6]

### F. Conclusion

Authorization is an important consideration in determining whether a security interest remains in collateral that has been sold or otherwise disposed of. Attorneys should carefully review the particular facts involved in the case when evaluating the strength of a claim by a Secured Party or the affirmative defense of a Purchaser of such collateral.

### Endnotes

[i] 29 Am Jur Proof of Facts 2d 711 § 4 (2009).

[ii] This language was added in 2009.

[iii] *See Peoples Nat'l Bank and Trust v. Excel Corp.*, 695 P2d 444, 448-49 (Kan.1985) (citing cases); *see also Parkersburg State Bank v. Swift Indep. Packing Co.*, 764 F2d 512 (8th Cir 1985); *First Nat'l Bank v. Iowa Beef Processors*, 626 F2d 764 (10th Cir 1980); *C&H Farm Service Co. of Iowa v. Farmers Savings Bank*, 449 NW 2d 866, 871-72 (Iowa 1990).

[iv] *See In re Sunriver Farms, Inc.*, 27 BR 655, 665 (Bankr D Or 1982) *aff'd in part, rev'd in part, sub. Nom. Klein v. First Interstate Bank of Oregon*, 718 F2d 1110 (9th Cir 1983); *Baker Prod Credit Assoc v. Long Creek Meat Co*, 266 Or 643, (1973).

[v] *See, e.g., Fin-Ag, Inc. v. Pipestone Livestock Auction Market, Inc.*, 754 NW 2d 29, 45 (S.D. 2008); *Whirlpool Finan Corp v. Mercantile Bus Credit, Inc.*, 892 F Supp 1256, 1264 (ED Mo. 1995); *Farmers & Merchants Bank of St. Clair v. Borg-Warner Acceptance Corp*, 636, 640 (Mo App 1983).

[vi] *See, e.g., Northern Commercial Co. v. Cobb*, 778 P2d 205, 208 (Ala 1989); *Rushmore State Bank v. Kurylas, Inc.*, 424 NW 2d 649, 656 (S.D. 1988). ❐


# Being Social in Practice: *Incorporating Social Media into Litigation Strategy*

*Jenna Mooney*
*Davis Wright Tremaine LLP*[1]

[1] *Davis Wright Tremaine LLP Summer clerk, Doug Posey, assisted with the preparation of this article.*

## INTRODUCTION TO SOCIAL MEDIA

Social media websites allow registered users to upload profiles, post comments, join "networks," and add "friends." They give registered users the opportunity to form "links" between each other, based on friendships, hobbies, personal interests, and business sector or academic affiliations.

Businesses use social media sites such as MySpace, Facebook, Twitter and LinkedIn to market themselves to specialized user groups. Social media are used in some form by the majority of new businesses today. Even the largest (and often most conservative) companies in the country have embraced social media as a business necessity. A study conducted by the University of Massachusetts (headed up by Nora Ganim Barnes, Ph.D) reported that 60% of Fortune 500 companies have a Twitter account, and 56% have a Facebook presence. Individual use has grown exponentially and has become a ubiquitous form of social interaction.

For litigators, this means a vast new world of concerns in serving clients' litigation needs. In 2006, Congress mandated changes to the Federal Rules of Civil Procedure expanding the acceptance of electronically stored information, or ESI, as evidence. While users may assume their communications and postings are private, federal and state discovery rules do not recognize any "privacy" exception (much less a "social networking privacy" exception). Potentially discoverable information that is generated and stored in social media sites should be considered as part of a litigation strategy.

## PRIVACY SETTINGS ARE NOT A BAR TO DISCOVERY

In the few years since the introduction of social media, they have already dramatically changed the social fabric of our lives, and therefore the scope of discovery. A decade ago we warned clients that email is permanent and must be used thoughtfully and carefully. Now, the same warnings apply to social media. The speed at which information is exchanged, shared and forwarded is astounding. Many of our clients or adversaries in litigation are posting comments to blogs, tweeting and providing status updates without thinking twice. The fact that accounts are marked "private" is often irrelevant. Courts have not recognized a right to privacy based on "locked" or "private" information on social media sites, so comments, tweets and updates are often discoverable.


*Jenna Mooney*

For example, in *Equal Employment Opportunity Commission v. Simply Storage Management, LLC*, a sexual harassment case, the defendant sought former employees' MySpace and Facebook profile information, as well as communications (including photos and videos), from their accounts. The court determined that defendant was entitled to discover some of the information despite being protected by privacy settings on the social media sites. The Court ruled that content on social networking sites is not shielded from discovery simply because the content is blocked from public view. 270 FRD 430, 434 (2010) and found that content from social media sites must be produced when it is relevant to a claim or defense in the case regardless of user privacy settings. *Id*. The defendant was entitled to profiles, postings, and messages (including status updates, wall

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comments, causes or groups joined, activity streams, and blog entries). *Id*. at 436.

In a personal injury case in New York, the defendant sought access to the plaintiff's current and historical Facebook and MySpace accounts, including deleted information, on the grounds that certain information posted on those sites contradicted the plaintiff's claims in the suit. *Romano v. Steelcase, Inc.*, 907 NYS 2d 650 (2010). The judge ruled that plaintiffs who seek damages for loss of enjoyment of life should not be permitted to "hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives." *Id*. at 655. As to plaintiff's right to privacy, the judge held that because "neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy." *Id*. at 656.

Judges have even taken it upon themselves to find social media evidence to support their opinions. In *Purvis v. Commissioner of Social Security*, an asthmatic woman appealed a Commission of Social Security decision denying her benefits. A New Jersey District judge looked to the plaintiff's Facebook page when gathering evidence. The judge noted that "although the Court remands the ALJ's decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile on what is believed to be Plaintiff's Facebook page where she appears to be smoking …If accurately depicted, Plaintiff's credibility is justifiably suspect." 2011 WL 741234 (2011).

As the above cases demonstrate, courts are reluctant to find a blanket "privacy" exception in discovery of social media and therefore it is fair game. Of course traditional standards of discoverability still apply. Interrogatories, document requests, and other requests for information should be crafted with social media in mind, and should be specific. Litigators should specifically identify which websites evidence is viewable on, and include screen names and URLs where possible. As with paper discovery, relevance and burden are factors to be considered when seeking social media, and when responding to requests. Litigators should be specific in social media discovery requests, and should have responses prepared for hearsay and authentication objections. In terms of authentication, the threshold for admissibility of social media evidence is low. In *Jarritos, Inc. v. Los Jarritos*, the court found that an attorney who went to a website, recognized that it belonged to the opponent, and printed what she saw on the screen, and testified to that effect, met the threshold to authenticate website printouts. 2007 WL 1302506 (2007).

## ACCESSING SOCIAL MEDIA IS BEST ACCOMPLISHED DIRECTLY FROM THE USER

Requests for production for social media content should be directed to social network users, not social network service providers because the providers are limited in how they may produce subscriber information and in some cases barred entirely from producing subscribers' communications. Courts have also found that deleted accounts are still discoverable from the original subscriber. In *Bass v. Miss Porter's School*, 2009 WL 3724968 (2009), Facebook provided plaintiff with 750 pages of wall postings, messages and pictures from her former account, which she was then compelled to produce to the defendant. By requesting the discovery from the plaintiff, the defendant avoided issues associated with requesting user data from social networking sites directly.

Requests for production from social networking sites may cause opponents and site operators to claim protection under the Stored Communications Act (SCA) (the sites may refuse to disclose information, as it undermines their ability to ensure privacy for their users). The SCA prevents certain private electronic communications from being disclosed without consent from the originator of the communication. 18 U.S.C. §2702(b)(3). Litigants may also object to disclosure of information from their social networking websites on the grounds that it is protected by the SCA. Some courts have found these objections meritless as the litigant can simply provide their consent to release the information. In *O'Grady v. Superior Court*, 139 Cal App 4th 1423, 1446 (2006), the court noted that "[w]here a party to the communication is also a

**Judges have even taken it upon themselves to find social media evidence to support their opinions.**

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party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions."

Courts struggle with the SCA in the context of social media discovery though. The court in *Crispin v. Christian Audigier Inc.*, quashed subpoenas to MySpace and Facebook, finding that at least some of the content on those sites is protected by the SCA. 2010 US Dist Lexis 52832 (2010). In *Crispin*, the court determined that e-mail messages sent through MySpace and Facebook were private messages and were therefore protected under the SCA.

But, the court failed to address whether messages that are posted to a wall or community group on a social networking site are also protected by the SCA. Presumably, messages posted to a wall or community forum would be subject to subpoena directly to the social media site, because the SCA does not apply to communications that are readily available to the general public. 18 U.S.C. §2511(2)(g).

In other cases, courts have found that a civil subpoena was enforceable without addressing the SCA at all. A District Court in Colorado found information subpoenaed from Facebook and MySpace reasonably calculated to lead to discovery of admissible evidence and that it was relevant to issues in the case. *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (2009). Facebook's own privacy policy states that it "may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law." Facebook Privacy Policy, http://www.facebook.com/policy.php (February 7, 2011).

**Attorney-client privilege and work product protections can be inadvertently waived by clients through normal use of social media.**

Litigators can avoid uncertainty over court interpretation of the SCA by operating under the assumption that requests for production must be made to the opposing party, not to social media sites. To discover relevant social media data, litigators need only show that the opponent can produce the data or that the opponent can give the website consent to produce it. There is no need to determine whether the site is subject to subpoena for the opponent's data.

## THE NEW AGE OF VOIR DIRE

Discovery is not the only concern for litigators dealing with the complexities of social media. The latest way social media is changing the U.S. court system has to do with jury selection. Attorneys and jury consultants are utilizing the personal information that jurors provide on social media sites.

According to Ana Campoy and Ashby Jones' article, Searching for Details Online, Lawyers Facebook the Jury, "Prosecution and defense lawyers are scouring [Facebook] for personal details about members of the jury pool that could signal which side they might sympathize with during a trial." Courts have found that using social media sites in this way does not violate any notions of fairness in the jury selection process.

In 2010, a New Jersey court ruled in *Carino v. Muenzen* that the lower-court erred by prohibiting a plaintiff's attorney from using the Internet to investigate potential jurors in the courtroom during voir dire. The court wrote, "That [plaintiff's counsel] had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.'" 2010 NJ Super Unpub LEXIS 2154 (2010).

## PROTECTING YOUR COMMUNICATIONS WITH CLIENTS IS NOW MORE COMPLICATED

Finally, litigators should beware that clients' use of social media can have an impact on litigation strategy. Attorney-client privilege and work product protections can be inadvertently waived by clients through normal use of social media.

A California court recently faced such a case. In *Lenz v. Universal Music Corp*, 2010 WL 4789099 (2010), an employee, via e-mails, a blog, and Internet chat sessions, disclosed information about her attorneys' litigation strategy. Her posts included a statement that her attorneys were "pretty well salivating over getting their teeth into UMG [the employer] again." *Id.* at 2. The court found that this statement waived privilege with respect to why the employee brought the lawsuit. The employee said over

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## Being Social in Practice

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Gmail chat that her attorneys hoped that the judge's opinion in the case would clarify a "cloudy" decision. This statement waived privilege with respect to the attorneys' specific legal strategies.

In *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503 (S.D. Cal. 2003), the plaintiff alleged copyright infringement and misappropriation of trade secrets. The plaintiff then discussed the alleged misappropriation of trade secrets on its company website and noted that it had obtained signed affidavits under penalty of perjury from the defendant's employees. During discovery, the plaintiff objected to production of the affidavits under the work-product doctrine, but based on the disclosures of the affidavits on the plaintiff's website, the court rejected the objections and ordered that the plaintiff produce the witness statements contained in the affidavits.

### SOCIAL MEDIA PRACTICE TIPS

- Include social media considerations in overall litigation strategy
- Be specific in discovery requests for social media, include website names and screen names whenever possible
- Prepare for authentication of social media during collection
- Be specific about the means of capturing social media, include specific times or intervals in discovery requests
- Analyze publicly available social media for information about opponents or potential jurors
- Monitor attorney and client use of social media for potential waiver issues ❐

Oregon State Bar

# Fall Calendar

## CLE Seminars

**October 6**
*The Best Technology to Get the Most Out of Your Practice*
9 a.m. to 4:30 p.m.
Oregon State Bar Center, Tigard, Oregon
6.5 General CLE or Practical Skills credits

**October 7**
*Elder Law: After the Diagnosis...*
9 a.m. to 4:00 p.m.
Oregon Convention Center, Portland, Oregon
4.5 General CLE and 1 Ethics credit

**October 13-14**
*Fundamentals of Oregon Civil Trial Procedure*
Oregon State Bar Center, Tigard, Oregon
12.75 General CLE or Practical Skills credits

**October 20**
*How to Try a Worker's Compensation Case*
9 a.m. to 4:15 p.m.
Oregon State Bar Center, Tigard, Oregon
6 General CLE or Practical Skills credits

**October 21**
*Broadbrush Taxation*
9 a.m. to 4:30 p.m.
Oregon State Bar Center, Tigard, Oregon
6.5 General CLE credits or 6 General CLE credits and .5 Access to Justice credit

**October 27-28**
The 13th Annual Oregon Trial Advocacy College
9 a.m. to 4:30 p.m.
Mark O. Hatfield United States Courthouse, Portland, Oregon
15 General CLE or Practical Skills credits

**November 3**
*Expanding Civil Rights Advocacy: Emerging Trends in Your Practice*
9 a.m. to 4:30 p.m.
Oregon State Bar Center, Tigard, Oregon
2.25 General CLE credits, 3.25 General CLE or Access to Justice credits, and 1 Ethics credit

**November 10**
*Powerful Motion Practice*
8:45 a.m. to 4:30 p.m.
Oregon State Bar Center, Tigard, Oregon
5.5 General CLE or Practical Skills credits and 1 Ethics credit

To register for or find out more information about these and other upcoming seminars offered by the Oregon State Bar, please visit the OSB's Web site at www.osbarcle.org, under Seminars, where you can view the online CLE seminars calendar, download a PDF of the current calendar, and register online for live seminars and video replays.

# Recent Significant Oregon Cases

**Hon. Stephen K. Bushong**
**Multnomah County**
**Circuit Court Judge**

## *Claims and Defenses*

***Strawn v. Farmers Ins. Co.*, 350 Or 336, adh'd to on recons, 350 Or 521 (2011)**

The plaintiff in *Strawn* alleged in this class action that the defendant insurers (collectively, "Farmers") "breached its contractual obligations and committed fraud by instituting a claims handling process that arbitrarily reduced payments for reasonable medical benefits owed under its automobile insurance policies." 350 Or at 339. The jury returned a verdict in favor of the plaintiff class, and after a post-verdict class claims process, the court entered judgment against Farmers for approximately $900,000 in compensatory damages and $8 million in punitive damages. On appeal, Farmers initially contended that classwide relief was inappropriate because "plaintiffs were required to present individualized proof as to the reasonableness of each class member's medical charges." *Id.* at 345. The Court of Appeals rejected that argument based on *Ivanov v. Farmers Ins. Co.*, 344 Or 421 (2008). In the Supreme Court, Farmers accepted that, under *Ivanov*, the burden shifted to Farmers to rebut the presumption that medical charges were reasonable. Instead, Farmers contended that the trial court erred by excluding its rebuttal evidence. The Supreme Court disagreed, concluding that "Farmers points to no place in the record where Farmers offered, and the trial court excluded," evidence to rebut the presumption. 350 Or at 350. Farmers also contended that it was entitled to a directed verdict on the fraud claim. The Supreme Court disagreed, concluding that "a jury could infer from evidence common to the class that the individual class members relied on Farmers' misrepresentation that it would pay its insureds' reasonable medical expenses arising out of their automobile accidents; individualized evidence of the class members' reliance was not necessary to create a jury question on that element of plaintiffs' fraud claim." *Id.* at 362.

*Judge Bushong*

The Supreme Court also reversed the Court of Appeals' ruling on punitive damages and reinstated the jury's award. The Court of Appeals had concluded that "the jury's award of $8 million in punitive damages was excessive, and that the highest amount that the jury could constitutionally award was four times the combined amount of plaintiff's compensatory damages and prejudgment interest." *Id.* at 362. The Supreme Court concluded that "the Court of Appeals erred in reaching Farmers' challenge to the punitive damages award as excessive." *Id.* at 369. The Supreme Court explained that the trial court had "articulated two alternative reasons for denying

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## Recent Significant Oregon Cases

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Farmers' motions [to reduce the punitive damage award] (waiver and other procedural defects, as well as a conclusion on the merits that the award did not exceed constitutional limits)." *Id.* But on appeal, Farmers "failed to preserve any challenge to the waiver and other procedural grounds on which the trial court's order was alternatively based. Any error by the trial court concerning the constitutionality of the punitive damages award therefore was necessarily harmless." *Id.* at 370. On reconsideration, the Supreme Court considered, but rejected, Farmers' arguments that the court's decision "violates federal due process because it alters state law to eliminate a class action plaintiff's burden to show classwide reliance, and because it erects a novel and inconsistently applied procedural bar to Farmers' federally based challenge to the amount of the jury's punitive damages award." 350 Or at 527-28.

### *Morehouse v. Haynes*, 350 Or 318 (2011)

The plaintiff in *Morehouse* was injured when defendant's car "crossed into the oncoming lane of traffic and struck plaintiff's car on a sharp curve." 350 Or at 320. Because plaintiff was driving without insurance at the time, ORS 31.715(1), (5)(c) barred him from recovering noneconomic damages unless he could prove that defendant's conduct met the statutory definition of reckless driving. Defendant acknowledged that he was negligent, but argued that his driving was not reckless because (1) he did not consciously disregard a substantial and unjustifiable risk; and (2) his conduct did not constitute a gross deviation from the standard of care that a reasonable person would observe in that situation. The trial court agreed and granted defendant's motion for partial summary judgment on the noneconomic damages claim. A divided Court of Appeals affirmed, but the Supreme Court reversed. The court acknowledged that, although "dividing negligence from recklessness can be difficult in particular cases, the line does exist, and it sometimes can be drawn on a summary judgment record." *Id.* at 332. In this case, the court concluded, the issue could not be resolved on summary judgment because "a reasonable juror could find each element of reckless driving in plaintiff's favor." *Id.* at 332.

### *Roberts v. Oregon Mutual Ins. Co.*, 242 Or App 474 (2011)
### *De Bay v. Wild Oats Market, Inc.*, 244 Or App 443 (2011)

The plaintiff in *Roberts* "complained to her supervisor about coworkers skipping meal and break periods, thereby permitting them to leave work earlier." 242 Or App at 476. The supervisor then changed plaintiff's work schedule, requiring her to work until 6:00 p.m. instead of 3:00 p.m. Plaintiff contacted the defendant employer's human resource manager and was informed that "the practice [of skipping breaks] was not legal and that defendant was required to enforce rest and meal break requirements." *Id.* Plaintiff also contacted defendant's chief executive officer, contending "that her supervisor had retaliated against her by changing her work schedule because she had contacted the human resources manager." *Id.* Eventually, defendant terminated plaintiff's employment, claiming that plaintiff had been "insubordinate to her supervisor." *Id.* at 477. Plaintiff sued for common-law wrongful discharge and unlawful employment discrimination under ORS 659A.230(1). The trial court granted defendant's motion for summary judgment; the Court of Appeals affirmed. The court explained that the wrongful discharge claim failed under *Lamson v. Crater Lake Motors, Inc.*, 346 Or 628 (2009) because there was "no infringement on a public duty or interest that is sufficiently important to warrant a departure from the ordinary rules of law respecting discharge from at-will employment." *Id.* at 481. The statutory claim failed because "[a] report to be protected by the statute must constitute a report of 'criminal activity'" which "necessarily implies that the person making the report believes that he or she is reporting criminal conduct at the time that the report is made." *Id.* at 484. In this case, plaintiff "desired the benefit of the employer's unlawful practices" and was "unaware that the practices that she complained about to her supervisor were in violation of Oregon labor law until after the manager informed her of that fact." *Id.*

The plaintiff in *De Bay* alleged that he was discharged in retaliation for "making complaints to his supervisors about wrongful corporate conduct and threatening to take his complaints to the board of directors[.]" 244 Or App at 445. The trial court dismissed his common-law wrongful discharge claim

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## Recent Significant Oregon Cases

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under *Lamson v. Crater Lake Motors*, Inc., 346 Or 628 (2009). The Court of Appeals reversed. The court concluded that plaintiff's complaint "sufficiently pleads factual allegations that bring him under the federal protective umbrella of the Sarbanes-Oxley Act [regarding fraud against shareholders of a publicly-traded company], at least for purposes of surviving an ORCP 21 A(8) motion to dismiss for failure to state a claim under the Oregon common-law tort of wrongful discharge." 244 Or App at 450. The court further held that the "federal statute is not 'adequate' under Oregon law to provide a complete remedy for the emotional consequences of a wrongful discharge, and therefore the Oregon common-law wrongful discharge tort remedies are not displaced or 'preempted' by the federal statute." *Id.* at 451-52.

### *Procedure and Jury Instructions*

#### *Burdette v. Miller*, 243 Or App 423 (2011)
#### *C-Lazy-K Ranch , Inc. v. Alexanderson*, 243 Or App 168 (2011)

In *Burdette*, the trial court struck defendant's defenses in a personal injury case as a sanction for his failure to appear at properly-noticed depositions. The Court of Appeals affirmed, concluding that the trial court did not abuse its discretion because defendant's "persistent frustration of plaintiff's efforts to secure his sworn testimony about what he remembered from the day of the accident subverted the fundamental purpose of pretrial discovery, putting plaintiff in the position of 'shadowboxing' with respect to defendants' defenses to liability." 243 Or App at 432. In *C-Lazy-K Ranch*, the trial court awarded plaintiff costs and attorney fees as a sanction under ORCP 17 based on false factual assertions and allegations in defendant's third amended answer. The Court of Appeals reversed, noting that "the third amended answer was superseded by the fourth amended answer prior to plaintiffs' motion for ORCP 17 sanctions." 243 Or App at 186. Sanctions were inappropriate, the court explained, because the "motion failed to identify any false certifications in the operative pleading at the time of the motions, and the court's order also failed to identify any false certifications in the fourth amended answer." *Id.*

#### *Matson v. Oregon Arena Corp.*, 242 Or App 520 (2011)

The plaintiff in *Matson* "was seriously injured when she fell approximately 40 feet from a railing enclosing the 300-level smokers' lounge during a Portland Trail Blazers basketball game at the Rose Garden." 242 Or App at 522. Plaintiff brought a negligence action against the developer and owner of the arena, Oregon Arena Corporation (OAC), and the company that provided security services at the basketball game, Coast to Coast Event Services, Inc. (Coast to Coast). A jury found OAC 50 percent at fault for plaintiff's injuries. OAC appealed, contending that the trial court erred in instructing the jury that "any negligence" of Coast to Coast is the negligence of OAC. OAC argued that (1) the jury should not have been allowed to consider Coast to Coast's negligence in the absence of allegations specifying the ways in which Coast to Coast was negligent; and (2) the phrase "any negligence" "allowed the jury to hold OAC responsible even for negligence by Coast to Coast that would otherwise be outside the scope of OAC's acknowledged vicarious liability as Coast to Coast's principal[.]" *Id.* at 526-27. The Court of Appeals affirmed, concluding that (1) "the complaint specifically alleged the ways in which agents, including Coast to Coast, failed to implement safety policies" (*Id.* at 527); and (2) in light of all the instructions, "the jury would have understood that 'any negligence' referred to negligence within the scope of the pleadings[.]" *Id.* at 528.

#### *Vandeveere-Pratt v. Portland Habilitation Center*, 242 Or App 554 (2011)

The plaintiff in *Vandeveere-Pratt* slipped and fell on a terrazzo floor in the food court area of Portland International Airport, resulting in a permanent loss of function in her ankle. Defendant's employee had mopped that area and placed warning markers at each end of the terrazzo area just before plaintiff's injury. The jury returned a defense verdict. Plaintiff appealed, contending that court erroneously instructed the jury in two respects. The Court of Appeals agreed and remanded for a new trial. First, the trial court erred by giving only the first paragraph of UCJI 46.09 (Possessor's Duty to Invitee). "By giving only the first paragraph of the instruction, the trial court permitted the jury to find for defendant based on its having provided

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a warning, without considering plaintiff's theory that defendant was required to do more to prevent injury because the floor's condition was unreasonably dangerous." 242 Or App at 561. Second, the trial court erred by giving UCJI 35.04 (Lookout) as requested by defendant. The court concluded that "the jury could have understood the lookout instruction as excusing defendant's breach of its duty rather than as explaining defendant's allegations that plaintiff was herself negligent." *Id.* at 564. Giving the "lookout" instruction was erroneous, the court explained, because (1) "the trial court separated the instruction from the other instructions on negligence and comparative fault" so the jury "could have believed that the instruction as a whole related to plaintiff's right to recovery rather than to an examination of plaintiff's comparative fault" (*Id.* at 564-65); and (2) the instruction "at least implies that, by proceeding into the concourse, plaintiff assumed the risk of whatever hazards existed there, and that the jury could use her alleged failure to maintain a proper lookout to find defendant had no duty towards her." *Id.* at 565.

### *Hammer v. Fred Meyer Stores, Inc.*, 242 Or App 185 (2011)

The plaintiff in *Hammer* was injured when she removed a lemonade carton from a display shelf at a Fred Meyer store. When plaintiff removed the carton, "the shelf flipped up from the back, ejecting additional cartons of lemonade from the shelf toward plaintiff." 242 Or App at 187-88. The jury returned a verdict for plaintiff. On appeal, defendant contended that the trial court should have granted its motion for directed verdict "because there was no evidence that defendant knew of a problem with the shelf or was aware of a danger before the accident occurred in this case." *Id.* at 189. According to defendant, the trial court "erroneously applied the doctrine of *res ipsa loquitur* to identify permissible inferences from which the jury could find that defendant was negligent." *Id.* at 190. The Court of Appeals disagreed. The court explained that *res ipsa loquitur* "is a rule of circumstantial evidence that permits a jury to infer both negligence and causation if the harm that occurs is of a kind that which more probably than not would not have occurred in the absence of negligence on the part of the defendant." *Id.* (internal quotes and citations omitted). In this case, the court explained, "the issue is whether plaintiff satisfied the third element [of *res ipsa loquitur*] by adducing sufficient evidence to create a reasonable inference that the negligence that caused the shelf to flip up was more probably than not attributable to defendant." *Id.* at 193. In resolving that issue, the court applied the "practical test" adopted in *Kaufman v. Fisher*, 230 Or 626, 636-40 (1962), and distinguished this case from "slip-and-fall cases…involving foreign substances on a floor." *Id.* at 193-96. The court concluded that "the jury was entitled to infer that the negligence that caused plaintiff's injuries was more probably than not defendant's, and the trial court did not err in denying defendant's motion for a directed verdict." *Id.* at 196. The court further concluded that defendant "failed to preserve either of its alternative objections on appeal to the challenged instruction [on *res ipsa loquitur*]." *Id.* at 200-01.

## *Miscellaneous*

### *Schmitz v. Sanseri*, 243 Or App 409 (2011)
### *Doe v. Lake Oswego School District*, 242 Or App 605 (2011)
### *State v. Lopez*, 241 Or App 670 (2011)

In *Schmitz*, the Court of Appeals held in a personal injury case that "the trial court did not abuse its discretion by, in effect, denying plaintiff's proposal to amend her complaint to seek recovery of only those medical expenses that were not paid by her PIP insurer." 242 Or App at 418. In *Doe*, an action based on alleged incidents of sex abuse by a teacher occurring between 1968 and 1984, the court held in affirming the dismissal of plaintiff's claims that "the statute of limitations contained in the Oregon Tort Claims Act does not violate Article I, section 20, of the Oregon Constitution or the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution[.]" 242 Or App at 624. In *Lopez*, the court held that the 15-year period in OEC 609(3)(a) for admission of evidence of a felony conviction to impeach a witness "begins to run when a witness is released from incarceration and ends when the witness testifies at trial." 241 Or App at 679. ❐

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