FALL 2007

Litigation Journal

PUBLISHED BY THE LITIGATION SECTION

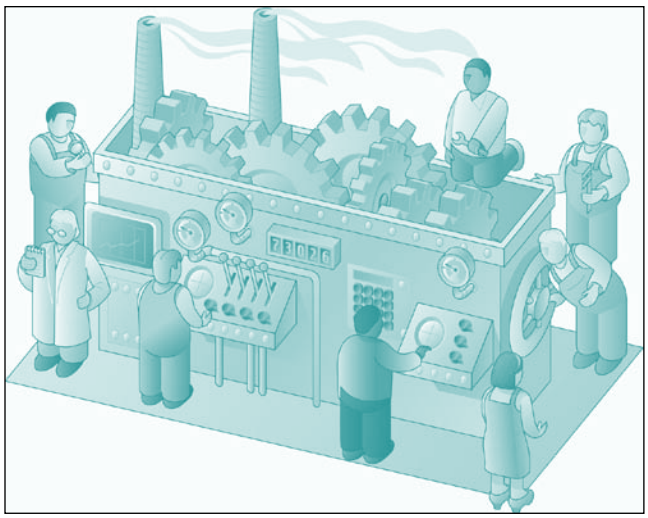
VOLUME 26 • NUMBER 3

In This Issue...

OREGON STATE BAR 1935

Advertising Agencies as Co-Defendants in Product Liability Actions

By David Rocker & Michael Stephenson
Davis Wright Tremaine LLP



I. Advertising Agencies WILL Be Held Liable in Products Liability

Justice Traynor once wrote, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." He also stated that individuals who suffer injury from defective products "are unprepared to meet its consequences," and therefore the risk of injury should be on those who profit from the sale of the products and who can distribute that risk "among the public as a cost of doing business."

The law of products liability reflects these policy concerns by holding manufacturers and sellers of defective products liable for the damages those products cause. However, conspicuously absent from the current state of products liability law is the regular imposition of liability on the advertising agencies who participate in the marketing of defective products. In his concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno,* 150 P.2d 436, 441 (Cal. 1944), Traynor also wrote "It is to the public interest to discourage the marketing of products having defects that are a menace to the public."

David Rocker

Michael Stephenson

The authors anticipate that as time goes

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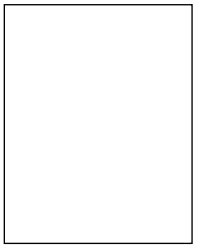
FROM THE EDITOR

PRACTICE BEING PERSUASIVE EVERY CHANCE YOU GET

BY
DENNIS RAWLINSON
MILLER NASH LLP

These days we all recognize that there are fewer and fewer opportunities to try cases. As a result, some law firms are encouraging their young litigation lawyers to become involved in public-prosecution and public-defense programs to gain trial experience. Other law firms are encouraging their young lawyers to attend trial-techniques seminars, such as those put on by the National Institute for Trial Advocacy, where each attendee is given extensive practice in the art of trying a case. Still other lawyers (realizing the value of trial experience) design their careers so that they will work in the office of a public prosecutor or public defender for a number of years to gain the necessary trial experience.



Dennis Rawlinson

What most of us overlook, however, is that we have the opportunity every day to develop our skills of persuasion, which are ultimately the most important skills in persuading the fact-finder (more important, for example, than technical legal objections).

1. Seek everyday opportunities to practice persuasion.

We all have many opportunities every day to practice persuasion.

Persuasion techniques such as brevity, clarity, choosing an effective theme, telling a story, personalizing a client, painting a word picture, using analogies, and appealing to emotions can be used in a number of everyday settings.

(a) Seek public-speaking opportunities.

Many organizations, including a substantial number of nonprofit organizations, offer frequent opportunities for lawyers to speak publicly. Those of us who wish to hone our skills of persuasion should take advantage of these opportunities to develop our skills.

(b) Employ persuasion skills in everyday discussions.

Stop and think of some everyday discussions in which you can practice persuasion techniques. The next time you discuss with one of your children why he should not have his body tattooed or why she should dress appropriately for a particular event, don't just issue an order—practice your skills of persuasion.

The next time you are mistreated by a sales clerk or service provider, think about using your skills of persuasion to obtain the outcome you want. Think about whom you need to persuade, what you want him or her to do, and what will be the best approach to get him or her to do that. Consider and use every persuasive skill and technique available to you.

(c) Create opportunities for persuasion.

Each of us can create additional opportunities to use our skills of persuasion every day. We can test our case themes, arguments, and approaches.

The next time you take a cab, ask the cab driver's opinion of one of your legal themes or legal theories. Think about it in advance. Develop persuasive arguments on both sides of the issue and listen to the feedback.

The next time you are at the gas station, get out of the car and test your case theme, theory, or argument on the gas station attendant. You will be surprised by what you learn.

Develop friendships with people who have different backgrounds from yours but seem to have insight and wisdom. Hairdressers or barbers are often excellent targets on which you can try your skills of persuasion.

2. Conclusion.

Yes, there are fewer opportunities to try cases these days. But each day that the sun rises, there are innumerable opportunities to persuade. Don't miss the opportunities you do have to develop your skills.

Class Arbitration:

Permissible? Preventable? Who Gets to Decide?

A Review of *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or App 521 (2007)

By Keith S. Dubanevich
of Garvey Schubert Barer

The Oregon Court of Appeals recently addressed the question of whether the court or an arbitrator decides whether a claim is subject to arbitration. Consistent with the Federal Arbitration Act[1] and Oregon law, when a party challenges the enforcement of an arbitration clause the issue is generally to be decided by the court and not an arbitrator.[2] That much of the Court's opinion in *Sprague* is not new. What is new in *Sprague* was the allegation of unconscionability that the Court had to consider when it decided whether to enforce the arbitration clause.

Sprague was an employee who claimed that the defendants violated Oregon wage and hour laws by failing to timely provide her with final paychecks. The actual amount of damages at stake for Ms. Sprague was less than $300.00 plus fees and possible penalties. The big issue in the case was whether the arbitration clause was unconscionable because it was silent as to whether Sprague could pursue claims in arbitration on behalf of a class.

The trial court found the agreement to be unconscionable and denied the defendant's motion to compel arbitration. On appeal the court acknowledged that the agreement was a "classic contract of adhesion" but that alone was not a sufficient basis to find unconscionability. Sprague also claimed that the agreement was unconscionable because it imposed a shorter limitations period than was imposed by Oregon law. The Court of Appeals spent little time on this issue before concluding that such shorter time periods did not make the arbitration clause unconscionable.

Addressing the class action issue, the trial court in *Sprague* acknowledged that under *Green Tree Financial Corp. v. Bazzel,*[3] the decision of whether the arbitration clause allowed class arbitration was for the arbitrator to decide. Since the *Bazzel* decision the number of class arbitrations has significantly increased and some arbitration provider groups have propounded rules for class arbitrations.[4]

In response to the *Bazzel* decision and the perceived proliferation of class arbitrations, some businesses incorporated into their arbitration clauses provisions that prohibit class arbitrations. These provisions are often found in consumer and employment contracts. The provisions that ban or prohibit class arbitration have formed the basis of numerous court decisions.[5]

Complicating matters in *Sprague,* the arbitration clause did not mention

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Class Arbitration

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class arbitration and thus, the trial court had to speculate what might happen if the case proceeded in arbitration. The trial court found that if the plaintiff could not pursue class arbitration plaintiffs would be unlikely to pursue such small dollar claims.[6] The trial court then decided that the possibility that the arbitrator could determine that the arbitration clause forbade class arbitrations caused the clause to be unconscionable and unenforceable. Thus, the trial court concluded that since it was obligated under controlling precedent to determine unconscionability and in its view the clause would be unconscionable if the arbitrator decided that the clause forbade class actions, the court denied the motion to compel arbitration.

The Court of Appeals apparently agreed with the trial court that the arbitration clause would be unconscionable if it forbade class arbitration. But the Court never expressed that opinion. Rather, it initially focused on the question of whether a court should even address the issue raised by the plaintiff as the Court acknowledged that it is generally a question for the arbitrators, and not for the court, whether an arbitration clause allows class arbitration. However, the Court of Appeals decided that the question of "whether an arbitration agreement permits class action is one aspect of the larger question whether the arbitration agreement is unconscionable, [and] both questions are for the court."[7] In the Court of Appeals' view, so long as the question could be framed as a part of unconscionability, it was for the courts to decide and not the arbitrators.

Of more consequence to the parties in *Sprague,* however, is the Court of Appeals' final conclusion that because the clause was silent with respect to class claims, "the arbitrator would have decided that class claims were permitted. That being the case, the arbitration agreement itself permitted class claims."[8] So instead of addressing the question of unconscionability, the Court of Appeals simply concluded that the clause did not prohibit class arbitration and was therefore not unconscionable.

Regardless of the approach taken, it would appear that the decisions of both the trial court and Court of Appeals' may be in conflict with *Pacificare Health Systems, Inc. v. Book*[9] in which the U.S. Supreme Court decided that because it could not predict how an arbitrator would rule on the question of whether the arbitration clause before it prohibited an award of treble damages and might make the parties' agreement unenforceable, the proper course was to compel arbitration.[10]

Sprague is not like the cases in which courts have addressed express provisions that prohibited class arbitration.[11] As such, it would seem that the Court of Appeals did not need to reach its final conclusion that the arbitration clause before it allowed class arbitration.[12]

In reaching its conclusion that the silent arbitration clause allowed class arbitration the Court of Appeals did not conduct a typical "text and context" analysis of the agreement to determine the intent of the parties. In addition, the Court of Appeals did not address the fact that the applicable rules of the American Arbitration Association ("AAA") provide for a two step analysis in determining whether an arbitration agreement permits class arbitrations.[13] Indeed, the Court of Appeals cited to the AAA Policy on Class Actions in support of its conclusion but did not note AAA Supplementary Rule 3 which provides that in reaching the decision of whether the arbitration clause allows class arbitration,

> the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

Moreover, the Court of Appeals in *Sprague* did not assess whether the clause was ambiguous nor was there any discussion of whether extrinsic evidence supported the conclusion that the arbitration clause allowed class arbitration. In sum, the record was inadequate to allow the court to conclude that the clause either did or did not allow class arbitration and the decision could have been left for the arbitrator.[14]

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Class Arbitration

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So does this mean that the question of whether an arbitration agreement permits a class action is no longer a decision for the arbitrator? Maybe, maybe not. Certainly, if a claimant asserts that the arbitration clause is unconscionable because it does not address whether the claimant can pursue class claims, the question is for the court. But it would appear that in all other contexts, an arbitrator is still the proper decision maker regarding whether an arbitration agreement allows class actions.

In conclusion, it appears that *Sprague* may proceed as a class in arbitration, but it would seem that the Court's finding that the arbitration clause there allowed class arbitration even though it was silent on the issue is only dicta and should not be binding in future cases. Moreover, a court's finding that an arbitration clause is not unconscionable should not foreclose an arbitrator later deciding that the clause does not allow class arbitration. ❐

Endnotes

1 9 USC sections 1-16.

2 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440 (2006); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 563, 152 P3d 940 (2007).

3 539 US 444, 451-52 (2003).

4 See AAA Supplementary Rules for Class Arbitrations.

5 See Sternlight & Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?,* 67 SPG Law & Contemp. Probs. 75, 85-86 (2004) and cases collected in *Kristian v. Comcast Corp.*, 446 F3d 25, 55-57, 60-61 (1st Cir 2006).

6 213 Or App at 527.

7 *Id.* at 528.

8 *Id.* at 529.

9 538 US 401 (2003).

10 *Id.* at 407.

11 *See, e.g., Kristian v. Comcast,* 446 F3d 25.

12 At least four U.S. Circuit Courts of Appeal have enforced consumer arbitration clauses barring the use of class mechanisms. See *Johnson v. West Suburban Bank,* 225 F3d 366, 374 (3rd Cir 2000); *Snowden v. Checkpoint Check Cashing,* 290 F3d 631, 638 (4th Cir 2002); *Livingston v. Associates Fin., Inc.,* 339 F3d 553, 559 (7th Cir 2003); *Randolph v. Green Tree Fin. Corp.-Alabama,* 244 F3d 814, 819 (11th Cir 2001). On the other hand, the Ninth Circuit, the California Supreme Court and the Washington Supreme Court have all found that class action bans in arbitration agreements are unconscionable. *Ting v AT&T,* 319 F3d 1126, 1130 (9th Cir 2003); *Discovery Bank v Superior Court,* 36 Cal 4th 148, 161, 30 Cal Rptr 3d 76, 113 P3d 1100 (Cal 2005); *Scott v Cingular Wireless,* 161 P3d 1000 (Wash July 12, 2007).

13 See AAA Supplementary Rules for Class Arbitrations Rules 3 – 7. AAA Rule 3 provides: "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award")," available at http://www.adr.org/sp.asp?id=21936.

14 This ruling suggests how the Court of Appeals might rule if presented with the question of whether an arbitration clause that prohibited class arbitration was enforceable.

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

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The Opening Statement:
A Process and a Result

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

Introduction

I discuss our firm's use of the opening statement as a trial preparation and organizing tool.[1] While we do Plaintiff's personal injury work, this model is generic and has value for all parties involved in jury trials. It's both a process and a result involving many drafts and authors. You will need a video-camera with a tripod and zoom lens. The opening statement is the framework or lens through which jurors evaluate the evidence. If you are the plaintiff's lawyer, you go first, and this gives you the power to make the case about what you want the case to be about. As a defense attorney, the opening is your opportunity to redirect the jury's attention to your interpretation of the facts. We use the opening to outline the critical case issues for our trial presentation and to integrate our responses to the defendant's strengths. The repetitive process of melding and refining your opening statement ensures you are well organized and prepared. It is thought and labor intensive but generates a superior work product.

Our office has a sequence we employ to create our opening statement. There are nine interrelated steps that are repeated until the final product is done to our satisfaction. These steps are:

1. Selecting your working committee which, in most cases, consists of one person, meaning you;

2. Roughing out the first draft of your opening;

3. Generating a flip-chart road map (this can also be done in PowerPoint or some other visual system for creating a skeletal outline);

4. Delivering and recording the opening;

5. Mailing or electronically sending the video of the opening to your jury consultant;

6. The jury consultant reviews and critiques the opening;

7. The consultant then telephones you, or your committee, and the consultant's ideas are thoroughly aired;

8. You, or your committee, incorporate the consultant's agreed upon ideas into your next draft; and,

9. Repeat steps 4 through 8 until satisfied.

Start this process about two months before trial or when your discovery is basically completed. It is critical when you embark on this process that you know what your key evidence and themes are and, just as important, what your opponent's probable

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main points are. The process is repeated (usually about four to seven times) until you are satisfied.

A fine primer on opening statements is David Ball's *Story and Structure for Plaintiffs.*[2] It's an easy read and offers Ball's view of seven distinct and modular steps of an opening along with the order therein. As will be seen, each step can be encapsulated and independently videotaped. Perhaps of even greater value are his thoughts on storytelling. He focuses on the virtues of simplicity; of one fact per sentence; use of the present tense; how a story is a sequence of events, not facts or explanations; and the importance of where you start the story.

Jury Consultants: Concept and Structured Focus Groups

Before discussing our opening process in detail, I want to talk about jury consultants. Using jury consultants isn't news, but how our office uses them is. Integral to the success of our opening model are the contributions of a good jury consultant. Will our process improve your trial performance without an effective jury consultant? Yes. Will it generate excellent results? Probably not. While most anything gets better with practice, after the first few drafts, there really isn't much more you or your committee members can do to improve your own thinking. It's difficult for any of us to self-correct. We need help. That's where the consultant's trained perspective and "outside" voice come to the rescue.

Now, will any jury consultant help? Probably yes. However, a jury consultant's contributions are directly proportionate to his or her experience and insight, which vary widely. By my observation, the consultant's value doesn't appear to have much to do with the length of his or her resume. The keys are how savvy the consultant is, and how much experience he or she has conducting focus groups, mock trials, and post-trial juror interviews.[3] Not only do you want to hear the consultant's reactions, you must hear his or her recommendations based on what the consultant has observed in jurors' reactions to cases similar to yours. The intangible of how well you and the consultant work together is answered after receiving the consultant's reaction to your first draft. It doesn't take long.

If you take your case to a jury consultant, he or she will usually present you one of several forms of pre-trial research—testing out case themes, arguments, getting juror reactions to your key witnesses, and assessing ways to best leverage your case strengths and rebut your weaknesses. There are two main types of pre-trial focus group research: structured and concept focus groups. Let's briefly discuss each.

In a structured focus group, lawyers for each side make a 15-25 minute presentation of key evidence and instructions to the jurors. It usually includes brief portions of videotaped testimony of the most important witnesses. The jurors then retire with the jury consultant facilitating the deliberations. This often occurs in a facility where the lawyers can watch the deliberations through one-way mirrors. This structured approach to collecting information is considered deductive and reactive.

In a concept focus group, the consultant starts by providing the jurors enough information to know what the case is about, and then begins a gradual process of releasing selected bits of information. The consultant inquires about the importance of each piece of released information by asking the jurors "Why this is, or isn't important?" and given this new information, "What more the jurors would like to know?" and "Why?" This is an effective approach to divining what your trial story might be, and why. Using a concept focus group is considered generative and inductive. When conducted by a skilled facilitator, a wealth of information can be extracted from a concept focus group that helps shape your trial story.

Both types of focus groups are helpful in assessing fault and comparative fault, but neither is very good at gauging damages. A concept focus group is usually conducted first, and the trial story generated with the information provided is then tested before a structured focus group. You will always end up with a better product for having done either, or both.

Maybe because I live in Newport and am geographically isolated, it's never convenient to travel to the venue where the case will be tried to conduct focus groups. I like the ease, efficiency, and cost effectiveness of our process because the work can be done in the convenience of our office. Modern technology and overnight mail allow you to hire any jury consultant in the country. You get great service, without all the costs, logistics, and inconvenience of travel by you or the consultant. The quality of strong jury consultants' insights and contributions are so great that I believe I am provided with much of what a focus group yields. You benefit from not only the consultant's training and expertise, but also from his or her prior experience with jurors in similar cases. If you have confidence in your consultant, and he or she recommends a focus group of some kind then, by all means, do so.

STEPS IN THE OPENING PROCESS

Now, back to discussing the steps of my opening process in more detail.

1. Selecting the working committee.

Begin the process by involving the individuals who will actually be trying the case with you. If you're trying the case alone, then you are probably going to be a committee of one.

I want to spend some time here discussing how we use a group approach in our office, and some of the benefits should you choose to imitate us by inviting a few carefully selected individuals to assist you in drafting your openings. I want to introduce you to the advantages of a chorus, rather than going it solo. In our office the committee operates almost as a de facto concept focus group.

Kevin Strever, Fadra Day, and I try all our cases together. There are some advantages to doing this opening process

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alone, yet multiple contributors, and thus perspectives, provide real benefits. I suggest four people are the outer limits of an effective committee. Members might include your spouse, law partner, paralegal or any other member of your office staff. Remember that the committee's product can be no better than the individuals on the committee. Whoever is the lead counsel must moderate all discussions and have the final word. Too much democracy makes your committee unwieldy and creates a camel, rather than a horse. The challenge is to encourage everyone's enthusiastic contribution which ultimately blends into one coherent and clear voice. This can be difficult, exasperating, and exhausting. The idea is that with multiple contributors, it's more likely the final product will reflect the composite views of any prospective jury.

In our work sessions, everyone is expected to vigorously express and defend his or her views. Discussions get heated. Emotions simmer, our voices grow louder and louder, and soon we are all talking (some might say shouting!) over one another. Frequent breaks are necessary. Everyone is quite sure that he or she personifies common sense, and naturally, we all identify with our own ideas.

Key ingredients in the contributors' multiple perspectives are gender, age and the views of nonlegal laypersons. My now-retired investigator, Greg Estep (who we all suspect, as an ex-cop and detective, didn't much care for most lawyers), continually disagreed with Kevin and me, arguing our views reflected lawyers' perspectives and not those of ordinary folks. He was right. Gender is another aspect. A woman or mother's perspective should be represented. Obstetrical negligence birth trauma cases are a good example of when these views are a must. This is another reason why we believe woman jury consultants are uniquely qualified to assist us in this generative and dynamic process.

If you want to try our procedure without a jury consultant, you could always have a committee involved in reviewing your successive drafts of opening. Here your committee would have many similarities to a structured focus group.

2. Roughing out an opening.

Don't worry when the first few drafts are very, very rough. It's to be expected, and is why you repeat it so many times. The hardest part is getting started. Skip damages during the first few drafts. Damages are at the end, and are easy to later graft on.

In the process of building your opening, ask: Would visual aids help? Consider having exhibits, perhaps demonstrative, that visually present the key aspects of your case. While you may not be able to show each of these exhibits to the jury in the opening in state court (because they wouldn't have been admitted into evidence yet), you can still describe what is important about them.[4]

Decide exactly what you want each exhibit to show, and then make sure it does precisely that. We often go through many drafts of each exhibit, such as medical illustrations, until we get the drawing to tell only the story we want. How about a chronology or timeline? Carefully consider what goes on it, in how much detail, and perhaps most important: Where should it start and end? This, in turn, is driven by your trial story and theme.

The twin keys are always motive and identifying the moral imperative which creates a sense of urgency that there is a wrong that must be corrected. You want to tell your story. Do any technical terms or ideas need explaining? Have you anticipated and preempted the opponent's strengths? How about an exhibit book for the jury?

3. Generating your flip-chart road map.

In our office, this is done with a large (30" x 42") paper flip chart. Technologically inclined offices do the same thing with computers. When I use the word "flip-chart," substitute "computer presentation" if that's your preference. This approach ensures I won't forget anything during my opening and chimes with the teaching mantra, "Tell them what you are going to tell them (the opening), tell them (the evidence), and then tell them what you told them (the closing)." The effectiveness of this format is grounded not only by principles of primacy and recency, but also of repetition. This opening road map foreshadows both the evidence and your closing argument.

Using the flip chart is a good way to introduce damages. Write out in cryptic language the key terms of the instructions. You can even reuse this same sheet during your closing. Then verbally introduce and discuss in a topical fashion the nature of the injuries, but not too much too soon. You should save something for the proof and closing argument. David Ball and I say damages should consume about one third of your opening. I don't like to get into damages much until I feel I've accrued enough credibility. Any differences we have are driven by my view that trials are really about the generation, consolidation and utilization of the intangible of credibility. I see the trial as a crescendo which climaxes with the application of the plaintiff lawyer's credibility when arguing for serious money.

4. Delivering and recording the opening.

Once you have roughed out your first draft (I did say roughed out), then try an "in-house" dry run. Tinker with it. Do you like the terms and language you are using? Remember the value of plain English and incorporating key phrases from the court's instructions. Next, present the opening on your feet, and record it with a video camera. Make sure the camera operator zooms in on any important details of the exhibits so the jury consultant, who later watches and critiques the video in his or her office next week, will be able to clearly read them. Why present the opening out loud rather than write it out and edit the draft outline or manuscript? Because how we write something is never the same as how we say it. Words and

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sentences can look good on paper, but sound tortured when spoken. And with the limited trial experience of many attorneys today, there is no substitute for on-your-feet practice.

5. Mailing the video.

Electronically send or mail the video by one day delivery to the jury consultant, along with 8 x 11 ½" paper copies of any exhibits you used in the opening. This allows the consultant to write suggested changes on the copies, which they can, in turn, fax or mail back to you.

6. The jury consultant reviews and critiques the opening.

7. The consultant then telephones you.

We use the speakerphone which thus gets all of us involved on our end. Here is where the merits of everyone's suggestions and reactions are thoroughly aired. This dialogue is the spawning ground for the next draft of the opening. This give and take is necessary because the consultant won't know all the details. The merits of his or her suggestions can only be assessed in the context of all the facts. These telephone conversations often take one to two hours. I suggest you tape record this conversation, and replay it when preparing your next draft to make sure you have included all the consultant's agreed upon suggestions.

8. The consultant's ideas are incorporated into the next draft.

Talk plainly with the jury consultant. Ask questions, such as "What do you think about reorganizing the various sections?" or "How do you think jurors will react to testimony that . . ." Good consultants work with you, not just "talk at you." Some jury consultants err on the opposite end. They are simply facilitators and fail to offer concrete recommendations and suggestions. Again, make sure the "fit" is right for you and your office.

9. Repeat.

This process of preparation, videotaped presentation, critique and suggestion is then repeated as often as necessary.

Criticisms of our opening process are that it is too labor intensive and expensive, and therefore isn't viable for smaller cases, or maybe most cases. I concede this point when the case's upside is so small there isn't a sufficient return on the money and effort invested.

First let's discuss the cost. Most consultants charge $250 to $300 per hour. For a one hour videotaped opening statement draft, plan on the consultant spending two hours to review the tape and make notes and recommendations, then an additional one to two hours on the telephone call with you and your committee. An average consultant's bill for our office, without focus groups, is about $3,000 to $4,000.

As to the labor, the work involved in this process isn't much more than you should be doing in all serious claims anyway. I concede most lawyers don't work this hard to prepare their cases. If you have any doubts, go to a courthouse, and watch a few cases being tried.

Regarding profitability, when you are paid on a contingency fee, it's expected that the better your product, the bigger the verdict, and thus the more money you will make. To me it's obvious. You distinguish yourself in this business when you break the probability curve on verdict sizes. Until then, by definition, you are average. My point here is to do even the smaller cases extremely well. It is an investment in your reputation which positively colors every future case you accept. Lift your vision of profitability beyond the specifics of this one case. Think of it as an investment not only in one case, but even more, in you—your professional growth and future reputation.

Most cases settle, so why put so much work into any one case? One answer is to schedule your settlement conferences far enough out that you settle the cases that are going to settle earlier, and that is most of them.

The big challenge is to try your good cases and settle your bad cases. The opposite is what happens. As to your bigger, more serious cases, if they don't settle, then start preparing for trial. After working so hard, you are prepared, confident, and truly eager to try the case. It's when the case doesn't settle and the opponent "calls your hand" that you prove your analysis was correct. By the way, this attitude is also the best way to settle the next case. Your income and reputation are driven not only by the quality of your cases, but also by your reputation for a willingness, I would say an eagerness, to go to court; and that when you do, you always try an excellent case. ❐

Endnotes

1 I want to express my gratitude for his contributions in the preparation of this paper to my law school classmate Jeff Batchelor of the Portland firm Markowitz, Herbold, Glade & Mehlhaf. Most of the ideas herein are mine; the good grammar is his. Jeff handles all my appeals. Our symbiotic relationship began in September 1969, when he started giving me his notes for all the property classes I missed. Nothing has changed in the last three decades.

2 By David Ball, Ph.D., JuryWatch, Inc., PMB 401, 1720 Guess Road, Durham, NC. Portions of this paper were initially published in *TrialBriefs,* February 2000.

3 I note in Oregon neither lawyers nor consultants can approach jurors to discuss their deliberations. See, UTCR 3.120 and OR USDCT CIV LR 48.3.

4 It is helpful if the judge rules on exhibits prior to trial, as in federal court, or as an increasing number of state trial judges are doing. This of course permits knowing what will be admitted in evidence before the first witness is called, and thus allows greater latitude for the use of actual exhibits in the opening. This is also true for your jury notebook.

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Advertising Agencies
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on, advertising agencies that aid in the marketing of defective products will increasingly be sued and held jointly liable for the harm those defects cause. This article proposes that liability should only attach to the ad firms in cases where they created or aided in the transmission of false or misleading advertising material. In addition, an ad firm should only be held liable where it intended, knew, or disregarded a high degree of risk that the advertising material it was creating or transmitting was false or misleading. Finally, this article suggests ways in which advertising agencies can limit their exposure.

A. Where the Law Stands Now

Surprisingly, courts and litigants have historically given little attention to the idea that advertising agencies should be brought in as co-defendants in product liability actions. However, a few product liability claims have been brought in which an ad agency has sat as co-defendant alongside the manufacturers and sellers, and at least one court has stated that, in a proper case, it may be appropriate to hold the advertiser of a product liable for injury caused as a result of the product's defect:

> The cause of action against the defendant Grey Advertising, Inc., rests solely upon the content of advertising designed to induce the public to patronize the through buses of the defendant Greyhound Lines. The court recognizes that the rapid development and expansion of products liability law for the protection of the consumer can be expected to impose liability upon advertising agencies who mislead the public. In a proper case the court will give close attention to such argument.

Paine-Henderson v. Eastern Greyhound Lines, Inc., 320 F.Supp. 1138, 1140 (D.C. S.C. 1970) (citations omitted).

What an advertisement says, or fails to say, about a product is becoming more and more important. Today, consumers look to a product's advertisement to learn what the product can and cannot do and how it should and should not be used. In many cases, the advertisement convinces the consumer to purchase the product. Traynor considered this phenomenon in his *Escola* concurrence:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark. (Traynor, *Escola.*)

B. Public Policy Considerations

Products liability law should help decrease the number of accidents in society. It is desirable for manufacturers to adequately test their products prior to distribution to prevent injuries to consumers and property. Likewise, imposing liability on ad agencies will encourage them to gather all the necessary information from the manufacturers and sellers, in order to ensure that the advertisements are not false or misleading.

Imposing liability on ad agencies can spread financial losses resulting in less hardship to any one party. Ad agencies,

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Advertising Agencies

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like manufacturers and sellers, are usually in a better position than consumers to absorb financial costs and can, like manufacturers, easily offset litigation costs as a cost of doing business.

Legislative schemes which currently reach ad firms do not yet allow for damages recovery by injured consumers of advertised products. Section 43(a) of the Lanham Act prohibits any use of a false or misleading description or representation in commercial advertising or promotion that "misrepresents the nature, characteristics, qualities, or geographic original of . . . goods, services, or commercial activities." However, the Lanham Act provides no cause of action to consumers, only to business competitors. *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1169-70 (3rd Cir. 1993).

Similarly, sections 5 and 12 of the Federal Trade Commission Act prohibit deceptive commercial practices such as false or misleading advertising. However, the typical remedy is an order for the advertiser to stop its illegal acts. The Act does not provide consumers with a private cause of action. As the trend towards advertising liability continues, it may be that such legislation will be amended and expanded.

C. Analogies Existing in the Law

Advertising agencies have been held liable for their actions on behalf of sellers and manufacturers in other areas of the law. In *Davis v. DuPont de Nemours & Co.*, 240 F. Supp. 612 (S.D. N.Y. 1965), a playwright brought a copyright infringement claim against an advertising agency for the alleged infringement of a copyrighted play script. The court held that the advertising agency, which had arranged the telecast of the infringing program (produced by others) under the

sponsorship of its client, could be held vicariously liable for the infringement. The court found that the advertiser had the requisite financial interest to support a finding of vicarious copyright infringement, even though it received no money from the airing of the television program. Significantly, the court emphasized that "[the advertising agency] had a financial interest in the increased sales of a client's products generated by an advertising package." 240 F.Supp. at 632.

II. What culpability level should apply?

The next question is what culpability level should be shown before liability can attach. While knowledge of the falsity or the intent to provide false or misleading information would certainly suffice, one must consider whether recklessness or even negligence would be enough. Should an advertising defendant's reckless and conscious disregard for a substantial risk of falsity be culpable? Should an ad agency be liable even in cases where it failed to perceive such a risk?

This article proposes that recklessness should be the minimum culpability level. Thus, an ad agency that actually knew of a serious risk that an advertisement was false or misleading could be held liable; an agency that was not aware of the risk would not. This would encourage ad agencies that are aware of a risk of falsity to conduct further investigation to determine whether an advertisement would be false or misleading. It would also not unduly punish ad agencies that failed to recognize a risk of falsity because of limited access to product information.

Setting recklessness as a minimum culpability level would also reinforce other common law and statutory schemes. For example, the common law tort of deceit may be proven if a false representation is made without any belief as to its truth, or with reckless disregard to its truth or falsity. *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or. 390, 406, 737 P.2d 595 (Or. 1987). A party who is liable for deceit is not merely negligent in deceiving the victim. Rather, that party must have intended to deceive the victim or acted in reckless disregard for the truth. *Riley* at 407.

III. TRENDS: INCREASED SCRUTINY OF PRODUCT ADVERTISEMENTS

A. Consumer Expectations Test

The content of advertisements plays an increasingly large role in products liability litigation. Many states have adopted the "consumer expectations test" for deciding whether a product is defective. In some cases, consumer expectations about how a product should perform under specific conditions will be within the realm of jurors' common experience. In others, additional evidence will be required. The Oregon Court of Appeals has stated that such relevant evidence "includes, for example, evi-

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dence of advertising and promotional materials demonstrating what the ordinary consumer was led to expect in regard to the product's performance." *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or.App. 444, 461, 61 P.3d 257 (2002), rev. denied 335 Or. 479, 72 P.3d 76 (2003).

The Supreme Court of Oregon adopted the consumer expectations test in *McCathern v. Toyota*, a case in which a plaintiff sued for injuries sustained when the 1994 4Runner vehicle in which she was riding as a passenger rolled over. 332 Or. 59, 23 P.3d 320 (2001).

At trial, Toyota's national merchandising manager for the United States, Don Cecconi, testified that Toyota was aware that many consumers thought that the 4Runner's height was a safety feature because it allowed better visibility. Cecconi also admitted, however, that Toyota's advertising did not attempt to communicate to consumers the rollover risk attendant with the vehicle's height. When asked about a television commercial depicting the 4Runner performing evasive maneuvers similar to those that occurred in the plaintiff's accident, Cecconi admitted that the maneuvers depicted in the commercial might cause the vehicle to roll over. Cecconi also testified that he was "not really sure" whether the 1994 4Runner could safely perform the evasive maneuvers depicted in certain advertising brochures. *Id.* at 65.

The Supreme Court of Oregon did not disturb the appellate court's holding that evidence of the 4Runner's advertising was relevant to establish what reasonable consumers would expect of the vehicle. The Court further held that the plaintiff had produced sufficient evidence for a finding that the 4Runner had failed the consumer expectations test and was therefore defective.

- **McDonald's Advertisement Litigation**

A recent case that focuses extensively on the content of product advertisements is *Pelman v. McDonald's Corp.*, 2006 WL 2663214 (S.D. N.Y. Sept. 16, 2006). In *Pelman*, the plaintiffs alleged that McDonald's advertisements created the false impression that its food was nutritious. *Id.* at *2. Plaintiffs cited statements such as "McChicken Everyday!" and "Big N'Tasty Everyday!" and printed language that reads "McDonalds can be part of any balanced diet and lifestyle" as examples of deceptive advertisements. *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512, 527-528 (S.D. N.Y. Jan 22, 2003). The case is still continuing and the plaintiffs have partially survived several motions to dismiss.

- **Tobacco Litigation**

Tobacco plaintiffs have also brought successful claims based on deceptive advertising. In *Price v. Philip Morris, Inc.,* 2003 WL 22597608 (Ill. Cir., March 21, 2003), plaintiffs alleged that Philip Morris had misrepresented its "light" cigarettes as less harmful than other cigarettes. In March 2003, following a bench trial, an Illinois state judge entered a $10.1 billion verdict against Philip Morris.

- **Alcohol Litigation**

Recently, a plaintiff claimed that several companies violated Washington D.C.'s consumer protection laws. *Ayman R. Hakki, et al. v. Zima Co., et al.*, 03-CV-2621-GK (Nov. 13, 2003). On behalf of two classes of plaintiffs, the plaintiff seeks to recover the profits gained by these companies from their "long-running, sophisticated and deceptive scheme . . . to market alcoholic beverages to children and other underage consumers." The lawsuit alleges that each company violated industry-enforced advertising codes by aiming website designs, magazine and radio ads, and television commercials at underage youth and children.

While courts and plaintiffs' lawyers are increasingly focusing their attention on the conduct of manufacturers in marketing their products, it becomes increasingly likely that advertising firms will begin to be named as co-defendants in product liability cases.

IV. RECOMMENDATIONS FOR AVOIDING LIABILITY

Advertising agencies should work hand-in-hand with clients to ensure that the content of their advertisements is not false or misleading. If there is a risk that an advertisement is deceptive, an agency should not ignore that risk. Instead, the agency should diligently acquire information from the client to ensure that the claims being made about the product can be substantiated. This article does not explore ethical codes and guidelines which may exist to guide advertisers in the development of their ad campaigns, but to the extent they exist they should certainly include prohibitions against the knowing misrepresentation of a product's traits, characteristics and safety risks.

V. CONCLUSION

Advertising agencies have the power to affect the choices consumers make. With that power comes responsibility. It should be part of good business practices for advertising agencies to ensure that the content of their advertisements are not false or misleading. With the trend towards increased liability for the content of product advertising on the horizon, there is even more motivation for agencies to ensure that they are not pushing the bounds of what can be considered truthful advertising, especially where the health and safety of the consuming public is concerned. ❐

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims and Defenses

MEC Leasing, LLC v. Jarrett, 214 Or App 294 (2007)

Boyer v. Salomon Smith Barney, 213 Or App 560 (2007)

The Court of Appeals addressed negligence claims in two recent cases. The plaintiff in *MEC Leasing* sued the manager of a golf course after four vehicles parked on property next to the course were damaged by errant golf balls. The trial court granted defendant's motion for summary judgment, finding that the damage was either caused by accident or by the negligence of an individual golfer that cannot be attributable to the golf course operator. 214 Or App at 300. The Court of Appeals reversed. The court explained the plaintiff was not seeking to hold defendant liable for the negligence of individual golfers; "rather, plaintiff asserts that defendant is liable in negligence for the activities that it conducts on the golf course property[.]" *Id.* at 301. And it is "axiomatic that an actor may be liable for his own negligence even though the injury caused was the result of the combined effects of the actor's negligence and the subsequent conduct of another person." *Id.* In this case, the evidence presented a jury question "as to whether it could be inferred...that the activities permitted by defendant, combined with the actions of the individual golfers who he invited onto the property, operated to create a reasonably foreseeable risk of harm to persons who were using the adjoining lands." *Id.* at 304.

Stephen K. Bushong

In *Boyer*, an equally divided Court of Appeals affirmed the dismissal of claims to recover economic damages allegedly caused by defendants' negligence in managing plaintiff's investments in various commodity contracts. Resolution of the claims turned on whether "there was a special relationship between the parties that imposed on defendants the obligation to pursue plaintiff's interests and not just their own." 213 Or App at 564 (Armstrong, J., concurring). Five judges joined in Judge Armstrong's concurrence; they concluded that "the control that the contract gave defendants over plaintiff's commodity futures trading account and trading activity was control to protect *their* economic interests, not *plaintiff's*." *Id.* at 568 (emphasis in original). In other words, Judge Armstrong explained, "the relationship that the contract created was *not* a relationship in which defendants assumed any responsibility to act *on plaintiff's behalf for plaintiff's benefit*." *Id.* Five judges joined in the dissenting opinion written by Judge Edmonds. The dissent concluded that it "can reasonably be inferred that the parties entered into a relationship whereby defendants would control plaintiff's account and would exercise their discretion to further plaintiff's financial interests." 213 Or App at 576 (Edmonds, J., dissenting). As a result, the dissent explained, "the defendants' assumption of control over the plaintiffs' investments created a special relationship that implied a duty on the part of the defendants to act in the best interests of the plaintiffs." *Id.*

Taylor v. Lane County, 213 Or App 633 (2007)

Union Bank of California v. Copeland Lumber Yards, 213 Or App 308 (2007)

Defenses to wrongful death claims were the subject of these recent decisions. In *Taylor*, the Court of Appeals addressed the applicability and validity of the immunity provided by the Oregon Tort Claims Act—ORS 30.265(3)(a)—for claims covered by workers' compensation. The decedent, a Douglas County Deputy Sheriff, was shot and killed by a felon who was under the supervision of Lane County employees at the time of the shooting. Douglas County determined that the deputy's death was compensable under the Oregon Workers' Compensation Law and awarded benefits to his wife under ORS 656.204. The wife then sued Lane County, asserting wrongful death and negligence claims. The trial court granted Lane County's motion for summary judgment on the grounds that it was immune from liability under ORS 30.265(3)(a). Plaintiff argued on appeal that (1) the statute "does not grant immunity to a public body [i.e., Lane County] that injures a person who is engaged in the course of his or her employment for *another* employer [i.e., Douglas County]" (213 Or App at 638); and (2) applying the immunity provision of the statute to plaintiff's wrongful death claim "violates the remedy clause of Article I, section 10, of the Oregon Constitution." *Id.* at 643. The Court of Appeals disagreed. It concluded that the statute "grants immunity to all public bodies, including third-party public bodies, in defending against a civil claim brought against them for the injury to or death of any person covered by any workers' compensation law." *Id.* at 642.

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Plaintiff's constitutional argument was precluded by *Juarez v. Windsor Rock Products, Inc.*, 341 Or 160 (2006), in which "the Supreme Court refused to overrule its prior cases rejecting a common-law wrongful death cause of action." *Id*. at 643.

In *Union Bank*, the Court of Appeals held that a personal representative cannot bring a wrongful death action where the decedent previously recovered damages for personal injury based on the same act or omission. Decedent Morris Nagl worked as a floor installer for almost 40 years. During that time, he was exposed to building materials that contained asbestos. After he was diagnosed with an asbestos-related disease, Morris and his wife, Donna, brought a personal injury action against companies engaged in the manufacture, distribution, and sale of asbestos-containing building materials. Some claims were settled; claims against Dowman Products, Inc. (Dowman) went to trial. The Nagls ultimately obtained a verdict against Dowman for a total of $659,720.87. 213 Or App at 311. Morris died shortly thereafter; Donna and three surviving children then brought a wrongful death action against Dowman and others. The trial court granted Dowman's motion for summary judgment, holding that ORS 30.020 barred plaintiffs' wrongful death claim. The Court of Appeals affirmed, concluding that Morris Nagl's "successful prosecution of a personal injury claim for exposure to asbestos-containing products bars plaintiff from bringing another claim on behalf of Nagl's estate and children on the basis of the same exposure because plaintiffs cannot satisfy the requirement of the wrongful death statute that, Nagl, had he not died, might have brought the action." *Id*. at 320.

Budonov v. Kutsev, 214 Or App 356 (2007)

Knepper v. Brown, 213 Or App 598 (2007)

Claims for fraudulent misrepresentations were at the heart of these two recent decisions. The plaintiffs in *Budonov* purchased a farm, four mobile homes, and a migrant camp in Woodburn. They alleged that the defendant sellers misrepresented that the mobile homes and camp were "legal" and could be used to secure income from the property. Three years after the sale, plaintiffs learned from Marion County that occupancy of the mobile homes as rental dwellings and of the camp violated the applicable zoning ordinances. Plaintiffs prevailed at trial; defendants contended on appeal that (1) the claims were barred by the two-year statute of limitations in ORS 12.110(1); and (2) plaintiffs waived their right to sue when they sold the property before trial. The Court of Appeals rejected both arguments. Applying the "discovery" rule, the court held that, "in the absence of actual knowledge of the misrepresentation, the elements of a fraudulent misrepresentation claim cannot be said to be 'inherently discoverable' before the plaintiff knows of facts that would put her on notice of the need to make [further] inquiry." 214 Or App at 361. And plaintiffs did not waive their right to sue because a tort action related to the acquisition of real property is not "an interest that is conveyed or relinquished" by a warranty deed under ORS 93.850(2). *Id*. at 366.

The plaintiff in *Knepper* alleged that Dex Media, Inc. (Dex) published a Yellow Pages ad that misrepresented that a physician was "board certified." Plaintiff sought to recover damages after liposuction surgery performed by the physician left plaintiff "with what one expert witness described as an 'uncorrectable disaster.'" 213 Or App at 601. After a jury returned a verdict in plaintiff's favor, Dex appealed, arguing that there was no evidence that its misrepresentation caused plaintiff's injury. The Court of Appeals affirmed, finding that "the injury that occurred is within the foreseeable risk of harm that a reasonable person could expect to result from the type of misrepresentation made in this case." *Id.* at 607.

Oregon Southwest, LLC v. Kvaternik, 214 Or App 404 (2007)

View Point Terrace, LLC v. McElroy, 213 Or App 281 (2007)

In *Oregon Southwest*, the Court of Appeals held that specific performance of a land sale contract was inappropriate where "performance of the sale agreement was contingent on defendants' attorney's review and approval of the documents, [and] the approval did not occur[.]" 214 Or App at 406. In *View Point Terrace*, the trial court ruled in favor of defendant on a specific performance claim, finding that the seller could not deliver clear title on the closing date. The Court of Appeals reversed, holding that the evidence demonstrated that "the closing date for the purchase of defendant's property was extended by the parties' mutual conduct until such time as defendant could furnish clear title." 213 Or App at 288.

II. Procedure

Baker v. City of Lakeside, 343 Or 70 (2007)

Belinskey v. Clooten, 214 Or App 172 (2007)

Znaor v. Ford Motor Company, 213 Or App 191 (2007)

In *Baker*, the Supreme Court held that a complaint is commenced for purposes of the statute of limitations in the Oregon Tort Claims Act (OTCA) when it is filed, as long as service is effected within 60 days, as provided by ORS 12.020. The Court concluded that the "notwithstanding" clause of ORS 30.275(9)—"notwithstanding any other provision of ORS chapter 12"—"does not bar application of ORS 12.020 to OTCA claims." 343 Or at 83. In *Belinskey*, the Court of Appeals held that, where the trial court dismisses a complaint without prejudice as a sanction for violating a discovery order under ORCP 46 B(2)(c), "the trial court is not required to find

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willfulness, bad faith, or a similar degree of fault before imposing the sanction." 214 Or App at 182. In *Znaor*, the Court of Appeals reversed a judgment directing a verdict for defendants in a products liability action, concluding that, to prove a manufacturing defect, plaintiff was not required to "introduce evidence that the product failed to meet its design specifications or differed from other similar products by the same manufacturer." 213 Or App at 195.

III. Miscellaneous

Johnson v. SAIF, 343 Or 139 (2007)

NW Natural Gas Co. v. Shirazi, 214 Or App 113 (2007)

Fox v. Collins, 213 Or App 451 (2007)

In *Johnson*, the Supreme Court held that the State Accident Insurance Fund Corporation (SAIF) "does not share the state's immunity under the Eleventh Amendment and therefore is a 'person' for purposes of claims under 42 USC section 1983." 343 Or at 158. In *NW Natural*, the Court of Appeals reversed a jury's award in a condemnation case, holding that the trial court abused its discretion when it excluded the testimony of a neighboring landowner regarding the effect a buried natural gas pipeline had on the value of his property. The court explained that "if a landowner is competent to testify as to the diminished value of his or her own land when he or she is a party, we see no reason why that competence would not extend to cases in which he or she is not a party." 214 Or App at 120. And in *Fox*, the Court of Appeals held that a statute that "revived" untimely products liability claims—HB 2080 (2003), which amended ORS 30.905(2)—did not violate separation of powers under the Oregon Constitution. The court explained that the Supreme Court's prior resolution of the issue in *McFadden v. Dryvit Systems, Inc.*, 338 Or 528 (2005), "is not 'merely advisory,' but a binding pronouncement of state law." 213 Or App at 458. ❐