KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin,* L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal,* C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Hall v. Cole,* 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.,* 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson,* 620 F.2d 339 (2d Cir.1980).

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11,* 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby,* 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The references in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.,* 73 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, supra. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.,* New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. *See Manual for Complex Litigation, Second,* § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See *Willy v. Coastal Corp.,* 503 U.S. 131 (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.,* 498 U.S. 533 (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, *i.e.,* not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. *See Chambers v. NASCO,* 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

2007 Amendment

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

FEDERAL RULES DECISIONS COMMENTARIES

Collision course in federal civil discovery. Carl Tobias, 145 F.R.D. 139 (1993).

Notes of Decisions (3002)

Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., FRCP Rule 11
Including Amendments Received Through 12-1-16

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1927

§ 1927. Counsel's liability for excessive costs

Currentness

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 957; Sept. 12, 1980, Pub.L. 96-349, § 3, 94 Stat. 1156.)

Notes of Decisions (1095)

28 U.S.C.A. § 1927, 28 USCA § 1927
Current through P.L. 114-254. Also includes P.L. 114-256 to 114-288, 114-290 to 114-316, 114-318 to 114-321, 114-324 to 114-326. Title 26 current through 114-329.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Recognized as Unconstitutional by State ex rel. Howard v. Lucas Cty. Court of Common Pleas, Ohio App. 6 Dist., May 10, 2001

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas (Refs & Annos)
Chapter 2323. Judgment
Miscellaneous Provisions

R.C. § 2323.52

2323.52 Vexatious litigators

Effective: September 28, 2016
Currentness

(A) As used in this section:

(1) "Conduct" has the same meaning as in section 2323.51 of the Revised Code.

(2) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following:

(a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.

(b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

(c) The conduct is imposed solely for delay.

(3) "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. "Vexatious litigator" does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions. For the purposes of division (A)(3) of this section, "civil action" includes a proceeding under section 2743.75 of the Revised Code.

(B) A person, the office of the attorney general, or a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator. The person, office of the attorney general, prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

may commence this civil action while the civil action or actions in which the habitual and persistent vexatious conduct occurred are still pending or within one year after the termination of the civil action or actions in which the habitual and persistent vexatious conduct occurred.

(C) A civil action to have a person declared a vexatious litigator shall proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action.

(D)(1) If the person alleged to be a vexatious litigator is found to be a vexatious litigator, subject to division (D)(2) of this section, the court of common pleas may enter an order prohibiting the vexatious litigator from doing one or more of the following without first obtaining the leave of that court to proceed:

(a) Instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court;

(b) Continuing any legal proceedings that the vexatious litigator had instituted in any of the courts specified in division (D)(1)(a) of this section prior to the entry of the order;

(c) Making any application, other than an application for leave to proceed under division (F)(1) of this section, in any legal proceedings instituted by the vexatious litigator or another person in any of the courts specified in division (D)(1)(a) of this section.

(2) If the court of common pleas finds a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio to be a vexatious litigator and enters an order described in division (D)(1) of this section in connection with that finding, the order shall apply to the person only insofar as the person would seek to institute proceedings described in division (D)(1)(a) of this section on a pro se basis, continue proceedings described in division (D)(1)(b) of this section on a pro se basis, or make an application described in division (D)(1)(c) of this section on a pro se basis. The order shall not apply to the person insofar as the person represents one or more other persons in the person's capacity as a licensed and registered attorney in a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims. Division (D)(2) of this section does not affect any remedy that is available to a court or an adversely affected party under section 2323.51 or another section of the Revised Code, under Civil Rule 11 or another provision of the Ohio Rules of Civil Procedure, or under the common law of this state as a result of frivolous conduct or other inappropriate conduct by an attorney who represents one or more clients in connection with a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims.

(3) A person who is subject to an order entered pursuant to division (D)(1) of this section may not institute legal proceedings in a court of appeals, continue any legal proceedings that the vexatious litigator had instituted in a court of appeals prior to entry of the order, or make any application, other than the application for leave to proceed allowed by division (F)(2) of this section, in any legal proceedings instituted by the vexatious litigator or another person in a court of appeals without first obtaining leave of the court of appeals to proceed pursuant to division (F)(2) of this section.

(E) An order that is entered under division (D)(1) of this section shall remain in force indefinitely unless the order provides for its expiration after a specified period of time.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

(F)(1) A court of common pleas that entered an order under division (D)(1) of this section shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court unless the court of common pleas that entered that order is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application. If a person who has been found to be a vexatious litigator under this section requests the court of common pleas that entered an order under division (D)(1) of this section to grant the person leave to proceed as described in division (F)(1) of this section, the period of time commencing with the filing with that court of an application for the issuance of an order granting leave to proceed and ending with the issuance of an order of that nature shall not be computed as a part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

(2) A person who is subject to an order entered pursuant to division (D)(1) of this section and who seeks to institute or continue any legal proceedings in a court of appeals or to make an application, other than an application for leave to proceed under division (F)(2) of this section, in any legal proceedings in a court of appeals shall file an application for leave to proceed in the court of appeals in which the legal proceedings would be instituted or are pending. The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application. If a person who has been found to be a vexatious litigator under this section requests the court of appeals to grant the person leave to proceed as described in division (F)(2) of this section, the period of time commencing with the filing with the court of an application for the issuance of an order granting leave to proceed and ending with the issuance of an order of that nature shall not be computed as a part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

(G) During the period of time that the order entered under division (D)(1) of this section is in force, no appeal by the person who is the subject of that order shall lie from a decision of the court of common pleas or court of appeals under division (F) of this section that denies that person leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court.

(H) The clerk of the court of common pleas that enters an order under division (D)(1) of this section shall send a certified copy of the order to the supreme court for publication in a manner that the supreme court determines is appropriate and that will facilitate the clerk of the court of claims and a clerk of a court of appeals, court of common pleas, municipal court, or county court in refusing to accept pleadings or other papers submitted for filing by persons who have been found to be a vexatious litigator under this section and who have failed to obtain leave to proceed under this section.

(I) Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas or court of appeals to do so under division (F) of this section, the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator.

CREDIT(S)

(2016 S 321, eff. 9-28-16; 2002 S 168, eff. 6-28-02; 1996 H 570, eff. 3-18-97)

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Notes of Decisions (87)

R.C. § 2323.52, OH ST § 2323.52
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Baldwin's Kentucky Revised Statutes Annotated
Rules of the Supreme Court
III Practice of Law (Refs & Annos)
Kentucky Rules of Professional Conduct
Advocate

Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(3.1)

SCR 3.130(3.1) Meritorious claims and contentions

Currentness

A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Credits
HISTORY: Amended by Order 2009-05, eff. 7-15-09; adopted by Order 89-1, eff. 1-1-90

Note: Former Rules of Appellate Procedure (RAP) were amended and redesignated as Rules of the Supreme Court (SCR) by Order of the Supreme Court effective January 1, 1978. Prior Rules of the Court of Appeals (RCA) had been redesignated as Rules of Appellate Procedure effective March 12, 1976.

Editors' Notes

SUPREME COURT COMMENTARY
2009:

(1) The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

(2) The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves sufficiently about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

(3) The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Notes of Decisions (16)

Sup. Ct. Rules, Rule 3.130, Rules of Prof. Conduct, Rule 3.130(3.1), KY ST S CT RULE 3.130, RPC Rule 3.130(3.1)
Current with amendments received through September 1, 2016

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Friendly societies. In English law, associations supported by subscription, for the relief and maintenance of the members, or their wives, children, relatives, and nominees, in sickness, infancy, advanced age, widowhood, etc. The statutes regulating these societies were consolidated and amended by St. 38 & 39 Vict., c. 60.

Friendly suit. A suit brought by a creditor against an executor or administrator, being really a suit by the executor or administrator, in the name of a creditor, against himself, in order to compel the creditors to take an equal distribution of the assets. Also any suit instituted by agreement between the parties to obtain the opinion of the court upon some doubtful question in which they are interested. See also **Amicable action.**

Friend of the court. See **Amicus curiæ.**

Frilingi /frəlínjay/. Persons of free descent, or freemen born; the middle class of persons among the Saxons. See **Freeling.**

Fringe benefits. Side benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, profit-sharing plans, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts. See also **Cafeteria plan; Perquisites.**

Frisk. A pat-down search of a suspect by police, designed to discover weapons, not to recover contraband. The scope of a frisk has been limited by the courts to be less than a full-scale search. In determining whether a police officer had a basis for initiating a frisk, there are two matters to be considered. One concerns whether the officer had a sufficient degree of suspicion that the party frisked was armed and dangerous, and the other whether the officer was rightfully in the presence of the party frisked so as to be endangered if that person was armed. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. The running of hands rapidly over another's person, as distinguished from "search," which is to strip and examine contents more particularly. Kalwin Business Men's Ass'n v. McLaughlin, 126 Misc. 698, 214 N.Y.S. 99, 102. See also **Stop.**

Frith. Sax. Peace, security, or protection. This word occurs in many compound terms used in Anglo-Saxon law.

Frithborg /fríθbòrg/. Frank-pledge.

Frithbote /fríθbòwt/. A satisfaction or fine, for a breach of the peace.

Frithbreach /fríθbrìych/. The breaking of the peace.

Frithgar /fríθyàr/. The year of jubilee, or of meeting for peace and friendship.

Frithgilda /fríθgildə/. Guildhall; a company or fraternity for the maintenance of peace and security; also a fine for breach of the peace.

Frithman /fríθmǽn/. A member of a company or fraternity.

Frithsocne /fríθsòwkən/. Surety of defense. Jurisdiction of the peace. The franchise of preserving the peace. Also spelled *"frithsoken."*

Frithsplot /fríθsplòt/. A spot or plot of land, encircling some stone, tree, or well, considered sacred, and therefore affording sanctuary to criminals.

Frithstool /fríθstùwl/. The stool of peace. A stool or chair placed in a church or cathedral, and which was the symbol and place of sanctuary to those who fled to it and reached it.

Frivolous. Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. Frivolous pleadings may be amended to proper form, or ordered stricken, under federal and state Rules of Civil Procedure.

Frivolous appeal. One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed. Brooks v. General Motors Assembly Division, Mo.App., 527 S.W.2d 50, 53.

From. As used as a function word, implies a starting point, whether it be of time, place, or condition; and meaning having a starting point of motion, noting the point of departure, origin, withdrawal, etc., as he traveled "from" New York to Chicago. Silva v. MacAuley, 135 Cal.App. 249, 26 P.2d 887. One meaning of "from" is "out of". Word "from" or "after" an event or day does not have an absolute and invariable meaning, but each should receive an inclusion or exclusion construction according to intention with which such word is used. Acme Life Ins. Co. v. White, Tex.Civ.App., 99 S.W.2d 1059, 1060. Words "from" and "to," used in contract, may be given meaning to which reason and sense entitles them, under circumstances of case. Woodruff v. Adams, 134 Cal.App. 490, 25 P.2d 529.

From one place to another. From premises owned by one person to premises owned by another person in some legal subdivision or from one legal subdivision to another.

From person. Includes taking from presence of person assaulted as well as taking of property in actual contact with person of one robbed.

From, through, or under. The term refers to origin or devolution of property, and unless some title to or interest therein has been derived by assignment or otherwise from party adverse to decedent's estate, statute barring testimony is inapplicable.

From time to time. Occasionally, at intervals, now and then. See **From.**

Front. Forepart, as opposed to the back or rear. Any side or face of a building is a front, although the word is more commonly used to denote the entrance side. In re McInerney, 47 Wyo. 258, 34 P.2d 35, 43. As applied to a bare lot, it is that side of lot towards which, in ordinary circumstances, house, when built, will most likely face, and very general usage of build-

BUSALD FUNK ZEVELY, P.S.C.

E. ANDRE* BUSALD*
WILBUR M. ZEVELY*
WILLIAM J. KATHMAN, JR.*
BURR J. TRAVIS
GREGORY N. SCHABELL
MICHAEL J. McMAIN*
GAIL M. LANGENDORF*
STEFANIE DURSTOCK
JAY R. VAUGHN*

ATTORNEYS AND COUNSELORS AT LAW
226 MAIN STREET
P.O. BOX 6910
FLORENCE, KENTUCKY 41022-6910
859/371-3600 · 859/371-2300
TELECOPIER 859/525-1040
www.bfzlaw.com

C. WILLIAM FUNK
1928-1989

*ADMITTED IN OHIO AND KENTUCKY

December 28, 2004

The Cincinnati Enquirer
ATTN: Letters to the Editor
312 Elm Street
Cincinnati, Ohio 45202

The Kentucky Enquirer
ATTN: Letters to the Editor
226 Grandview Drive
Ft. Mitchell, Kentucky 41017

The Kentucky Post
ATTN: Letters to the Editor
421 Madison Ave
Covington, Kentucky 41011

The Sunday Challenger
ATTN: Letters to the Editor
100 E. RiverCenter Blvd. Suite 1100
Covington, Kentucky 41011
VIA E-Mail: letters@ChallengerNKY.com

RE: LETTER TO EDITOR REGARDING TORT REFORM

Dear Editor:

The Kentucky Legislature is about to reconvene in early January and assuming it can agree on a budget there is a possibility that it will be considering some special interest legislation generically categorized as "tort reform" with so much being written and discussed about the subject and the average citizen having so little knowledge about the concepts and their implications I thought that a GLOSSARY OF TERMS might be helpful:

GLOSSARY OF TERMS

Tort:
A civil wrong (act of carelessness) causing injury to an individual

Crime:
A criminal act (usually involving intent or reckless disregard for the consequences of one's actions) against an individual or society in general

Lawsuit:
An orderly, *civil* way to resolve a dispute, seek redress for losses and require another to assume responsibility for their careless acts. Prior to this method of dispute resolution people dueled or fought with the winner being the survivor or the one with the least amount of physical injury.

Crisis:
Hot button word used to justify "reform". Usually unsupported by fact; but designed to apply to emotion and influence ill conceived actions.

Reform:
Legislative reaction to perceived "crisis". Usually unnecessary; but generally to the benefit of Corporate America, always to the benefit of the insurance industry and rarely to the benefit of the average citizen.

Frivolous lawsuit:
One brought by anyone other than you. Does not apply to corporations suing other corporations or corporations suing individuals. Generally limited to claims by person's injured by defective products, careless doctors or negligent operators of vehicles.

Lawsuit crisis:
Similar to UFOs or Weapons of Mass Destruction. Reported or believed by many, yet to be verified by anyone; but necessitating immediate remedial legislative action (a.k.a. "reform").

Insurance crisis:
What occurs when one of the two least regulated industries (Insurance and Major League Baseball) unjustifiably, unethically and immorally (but not illegally) raise the cost of insurance (usually for doctors malpractice, employers workers compensation, group health and auto) in an attempt to influence legislative "reform" resulting in significant reduction of remedies for injured individuals. Almost always the direct result of bad real estate investments (late '80s, early '90s); bad stock market investments (like Enron) and periodic natural disasters like tornados and hurricanes.

Tort Reform:
Special legislation (often times of questionable constitutionality) to protect corporations, the insurance industry and; sadly the medical industry from responsibility for the consequences of their careless acts. Always to the benefit of the insurance industry, never to the benefit of the average citizen.

We've almost come full circle from a Government of the people, by the people and for the people to a Government of the corporations, by the corporations and for the corporations.

Rest Assured "Tort Reform" will be the last brick in the wall. There is only one thing standing in the way; YOU, the people. Wake up America before it is too late!

Very truly yours,

E. ANDRE BUSALD
Covington, Kentucky

EAB/dsl

KeyCite Yellow Flag - Negative Treatment
Distinguished by Miller v. Donald, 11th Cir.(Ga.), August 29, 2008

111 S.Ct. 596
Supreme Court of the United States

In re Michael SINDRAM.

No. 90–6051.
|
Jan. 7, 1991.
|
Rehearing Denied Feb. 19, 1991.
|
See 498 U.S. 1116, 111 S.Ct. 1029.

Petitioner sought extraordinary writ and requested permission to proceed in forma pauperis. The Supreme Court held that petitioner's request that Court consider same claims that petitioner had presented in over a dozen prior petitions was frivolous and abusive.

Motion for leave to proceed in forma pauperis denied.

Justice Marshall filed dissenting opinion in which Justices Blackmun and Stevens joined.

Justice Blackmun filed dissenting opinion in which Justice Marshall joined.

West Headnotes (2)

[1] Federal Courts
Supervisory jurisdiction;writs in aid of jurisdiction

Granting of extraordinary writ is, in itself, extraordinary.

13 Cases that cite this headnote

[2] Federal Courts
Supervisory jurisdiction;writs in aid of jurisdiction

Petitioner who sought writ compelling state appellate court to expedite consideration of his appeal so that speeding ticket could be expunged from his driving record was not entitled to in forma pauperis status; petitioner's request that Supreme Court consider same claims that he had presented in over a dozen prior petitions was frivolous and abusive. 28 U.S.C.A. § 1651; U.S.Sup.Ct.Rule 39, 28 U.S.C.A.

182 Cases that cite this headnote

Opinion

****596** PER CURIAM.

Pro se petitioner Michael Sindram seeks an extraordinary writ pursuant to 28 U.S.C. § 1651 and requests permission to proceed *in forma pauperis* under this Court's Rule 39. This is petitioner's 25th filing before this Court in the October 1990 Term alone. Pursuant to our decision in *In re McDonald,* 489 U.S. 180, 109 S.Ct. 993, 103 L.Ed.2d 158 (1989), we deny the motion for leave to proceed *in forma pauperis.*

Petitioner is no stranger to this Court. In the last three years, he has filed 43 separate petitions and motions, including ***178** 21 petitions for certiorari, 16 petitions for rehearing, and 2 petitions for extraordinary writs.[1] Without recorded dissent, the Court has denied ****597** all of his appeals, petitions, and motions.[2] Petitioner has nonetheless persisted in raising essentially the same arguments in an unending series of filings. Like the majority of petitioner's previous submissions to this Court, the instant petition relates to a speeding ticket that ***179** petitioner received on May 17, 1987, in Dorchester County, Maryland. Having already challenged his conviction for speeding in five different state and federal courts on 27 prior occasions, petitioner now requests that the Court issue a writ compelling the Maryland Court of Appeals to expedite consideration of his appeal in order that the speeding ticket may be expunged from his driving record. The petition for mandamus was filed less than three months after he filed his appeal with the Maryland court.

The mandamus petition alleges only that petitioner's "appeal in the lower court remains pending and unacted upon," and that "[a]s a direct and proximate cause of this dilatory action, Petitioner is unable to have his driving

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

record expunged." Pet. for Mandamus 2. The legal bases offered by petitioner for relief were presented in eight prior certiorari petitions and are identical to the claims unsuccessfully presented in at least 13 of petitioner's rehearing petitions.

[1] **[2]** As we made clear in *McDonald,* the granting of an extraordinary writ is, in itself, extraordinary. 489 U.S., at 184–185, 109 S.Ct., at 996; see *Kerr v. United States District Court for Northern District of California,* 426 U.S. 394, 402–403, 96 S.Ct. 2119, 2123–2124, 48 L.Ed.2d 725 (1976). On its face, this petition does not even remotely satisfy the requirements for issuance of an extraordinary writ. Petitioner has made no showing that "adequate relief cannot be had in any other form or from any other court" as required by this Court's Rule 20.1. He identifies no "drastic" circumstance to justify extraordinary relief (see *Ex parte Fahey,* 332 U.S. 258, 259, 67 S.Ct. 1558, 1559, 91 L.Ed. 2041 (1947)). Instead, he merely recites the same claims that he has presented to this Court in over a dozen prior petitions. Petitioner's request that we consider these claims yet again is both frivolous and abusive.

In *McDonald, supra,* we denied *in forma pauperis* status to a petitioner who filed a similarly nugatory petition for extraordinary writ. As we explained, the Court waives filing fees and costs for indigent individuals in order to promote the interests of justice. The goal of fairly dispensing justice, however, is compromised when the Court is forced to devote ***180** its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. *Id.,* at 184, 109 S.Ct., at 996. The risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation. In order to prevent frivolous petitions for extraordinary relief from unsettling the fair administration of justice, the Court has a duty to deny *in forma pauperis* status to those individuals who have abused the system. Under the circumstances ****598** of this case, we find it appropriate to deny *in forma pauperis* status to petitioner in this and all future petitions for extraordinary relief.

Accordingly, if petitioner wishes to have his petition considered on its merits, he must pay the docketing fee required by this Court's Rule 38(a) and submit a petition in compliance with Rule 33 before January 28, 1991. The Clerk is directed not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee required by Rule 38(a) and submits his petition in compliance with Rule 33. Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 39 and does not similarly abuse that privilege.

It is so ordered.

Justice MARSHALL, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

To rid itself of the minor inconvenience caused by Michael Sindram, an *in forma pauperis* litigant, the Court closes its doors to future *in forma pauperis* filings by Sindram for extraordinary writs and hints that restrictions on other filings ***181** might be forthcoming. Because I continue to believe that departures of this sort from our generous tradition of welcoming claims from indigent litigants is neither wise nor warranted by statute or our rules, see *In re McDonald,* 489 U.S. 180, 185, 109 S.Ct. 993, 996, 103 L.Ed.2d 158 (1989) (Brennan, J., dissenting, joined by MARSHALL, BLACKMUN, and STEVENS, JJ.), I dissent.

As the Court documents, Sindram's filings have been numerous, and many have been frivolous. In my view, however, the Court's worries about the threats that hyperactive *in forma pauperis* litigants like Sindram pose to our ability to manage our docket are greatly exaggerated and do not support the penalty that the Court imposes upon him. We receive countless frivolous *in forma pauperis* filings each year, and, as a practical matter, we identify and dispense with them with ease. Moreover, indigent litigants hardly corner the market on frivolous filings. We receive a fair share of frivolous filings from paying litigants. Indeed, I suspect that because clever attorneys manage to package these filings so their lack of merit is not immediately apparent, we expend more time wading through frivolous paid filings than through frivolous *in forma pauperis* filings. To single out Sindram

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

in response to a problem that cuts across all classes of litigants strikes me as unfair, discriminatory, and petty.

The Court's crackdown on Sindram's future filings for extraordinary writs is additionally disconcerting when one considers the total absence of any authority for the penalty the Court administers. As Justice Brennan keenly pointed out in *In re McDonald,* see *id.,* at 185–186, 109 S.Ct., at 996–997, the *in forma pauperis* statute permits courts only to dismiss an action that is in fact frivolous. See 28 U.S.C. § 1915(d). That statute, however, does not authorize us prospectively to bar an *in forma pauperis* filing on the ground that the litigant's earlier filings in unrelated actions were frivolous. This Court's Rules are equally silent on the matter. Rule 39, which governs *in forma pauperis* proceedings, includes no provision allowing prospective denial of *in forma pauperis* status. While Rule ***182** 42.2 permits assessing costs and damages for frivolous filings, it says nothing about saddling an indiscriminate litigant with what amounts to an injunction on future filings.

Some of our *in forma pauperis* filings are made by destitute or emotionally troubled individuals. As we struggle to resolve vexing legal issues of our day, it is tempting to feel put upon by prolific litigants who temporarily divert our attention from these issues. In ****599** my view, however, the minimal annoyance these litigants might cause is well worth the cost. Our longstanding tradition of leaving our door open to all classes of litigants is a proud and decent one worth maintaining. See *Talamini v. Allstate Ins. Co.,* 470 U.S. 1067, 1070, 105 S.Ct. 1824, 1825, 85 L.Ed.2d 125 (1985) (STEVENS, J., concurring).

Moreover, we should not presume in advance that prolific indigent litigants will never bring a meritorious claim. Nor should we lose sight of the important role *in forma pauperis* claims have played in shaping constitutional doctrine. See, *e.g., Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). As Justice Brennan warned, "if ... we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim." *In re McDonald, supra,* 489 U.S., at 187, 109 S.Ct., at 998. By closing our door today to a litigant like Michael Sindram, we run the unacceptable risk of impeding a future Clarence Earl Gideon. This risk becomes all the more unacceptable when it is generated by an ineffectual gesture that serves no realistic purpose other than conveying an unseemly message of hostility to indigent litigants.

I dissent.

Justice BLACKMUN, with whom Justice MARSHALL joins, dissenting.

I join Justice MARSHALL's dissent. I write separately simply to emphasize what seems to me to be the inappropriateness of the Court's action in this particular case. Even if one believes, as I do not, that this Court has the authority prospectively to deny leave for a litigant to proceed *in forma pauperis,* and in some instances may be justified in doing so, ***183** I cannot conclude that such action is warranted in this case. Jessie McDonald, the first *pro se* litigant to whom this Court has barred its doors prospectively, had filed 19 petitions for extraordinary relief when the Court concluded that he had abused the privilege of filing *in forma pauperis.* See *In re McDonald,* 489 U.S. 180, 181, and n. 3, 109 S.Ct. 993, 994, and n. 3, 103 L.Ed.2d 158 (1989). See also *Wrenn v. Benson,* 490 U.S. 89, 109 S.Ct. 1629, 104 L.Ed.2d 80 (1989). As the Court today acknowledges, however, Michael Sindram has filed only two petitions for extraordinary relief since 1987: a petition for writ of habeas corpus filed in 1988 and the pending petition for mandamus. *Ante,* at 596, and n. 1.

While it may well be true that each of Sindram's petitions for extraordinary relief lacked merit, it cannot be, as the Court asserts, that these two petitions have "compromise[d]" the "goal of fairly dispensing justice," or "disrupt[ed] the fair allocation of judicial resources." *Ante,* at 597. Rather, the Court's order in this case appears to be nothing more than an alternative for punishing Sindram for the frequency with which he has filed petitions for certiorari and petitions for rehearing. *Ante,* at 596. Accordingly, I dissent.

All Citations

498 U.S. 177, 111 S.Ct. 596, 112 L.Ed.2d 599, 59 USLW 3458

Footnotes

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

1 See *Sindram v. Reading,* No. 87–5734, cert. denied, 484 U.S. 1013, 108 S.Ct. 716, 98 L.Ed.2d 666 (1988), motion to file late petition for rehearing denied 488 U.S. 935, 109 S.Ct. 331, 102 L.Ed.2d 348 (1988); *Sindram v. W & W Associates,* No. 87–6689, cert. denied, 486 U.S. 1024, 108 S.Ct. 1999, 100 L.Ed.2d 230 (1988); *Sindram v. Taylor,* No. 88–5386, cert. denied, 488 U.S. 911, 109 S.Ct. 266, 102 L.Ed.2d 254 (1988), rehearing denied, 488 U.S. 987, 109 S.Ct. 546, 102 L.Ed.2d 575 (1988); *Sindram v. Maryland,* No. 89–5039, cert. denied, 493 U.S. 857, 110 S.Ct. 165, 107 L.Ed.2d 122 (1989); *In re Sindram,* No. 88–6538, petition for writ of habeas corpus denied, 489 U.S. 1064, 109 S.Ct. 1358, 103 L.Ed.2d 826 (1989); *Sindram v. Ahalt,* No. 89–6755, cert. denied, 494 U.S. 1086, 110 S.Ct. 1824, 108 L.Ed.2d 953 (1990); *Sindram v. District of Columbia,* No. 89–7266, cert. denied, 496 U.S. 940, 110 S.Ct. 3222, 110 L.Ed.2d 669, rehearing denied, 497 U.S. 1047, 111 S.Ct. 9, 111 L.Ed.2d 824 (1990); *Sindram v. N. Richard Kimmel Prop.,* No. 89–7847, cert. denied, 498 U.S. 843, 111 S.Ct. 123, 112 L.Ed.2d 92 (1990), rehearing denied, 498 U.S. 973, 111 S.Ct. 446, 112 L.Ed.2d 428 (1990); *Sindram v. Washington Suburban Sanitary Comm'n,* No. 89–7848, cert. denied, 498 U.S. 843, 111 S.Ct. 124, 112 L.Ed.2d 92 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 446, 112 L.Ed.2d 428 (1990); *Sindram v. Garabedi,* No. 90–5335, cert. denied, 498 U.S. 872, 111 S.Ct. 194, 112 L.Ed.2d 156 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 448, 112 L.Ed.2d 430 (1990); *Sindram v. Steuben Cty.,* No. 90–5351, cert. denied, 498 U.S. 873, 111 S.Ct. 197, 112 L.Ed.2d 159 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 448, 112 L.Ed.2d 430 (1990); *Sindram v. Consumer Protection Comm'n of Prince George's County,* No. 90–5371, cert. denied, 498 U.S. 874, 111 S.Ct. 199, 112 L.Ed.2d 161, rehearing denied, 498 U.S. 974, 111 S.Ct. 448, 112 L.Ed.2d 430; *Sindram v. Abrams,* No. 90–5373, cert. denied, 498 U.S. 874, 111 S.Ct. 199, 112 L.Ed.2d 161 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 448, 112 L.Ed.2d 430 (1990); *Sindram v. Nissan Motor Corp.,* No. 90–5374, cert. denied, 498 U.S. 891, 111 S.Ct. 234, 112 L.Ed.2d 194 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 449, 112 L.Ed.2d 431 (1990); *Sindram v. Ryan,* No. 90–5410, cert. denied, 498 U.S. 901, 111 S.Ct. 261, 112 L.Ed.2d 218 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 449, 112 L.Ed.2d 431 (1990); *Sindram v. Sweeney,* No. 90–5456, cert. denied, 498 U.S. 903, 111 S.Ct. 264, 112 L.Ed.2d 221 (1990), rehearing denied, 498 U.S. 974, 111 S.Ct. 449, 112 L.Ed.2d 431 (1990); *Sindram v. Wallin,* No. 90–5577, cert. denied, 498 U.S. 974, 111 S.Ct. 356, 112 L.Ed.2d 320 (1990), rehearing denied, 498 U.S. 973, 111 S.Ct. 444, 112 L.Ed.2d 426 (1990); *Sindram v. McKenna,* No. 90–5578, cert. denied, 498 U.S. 944, 111 S.Ct. 356, 112 L.Ed.2d 320 (1990), rehearing denied, 498 U.S. 973, 111 S.Ct. 444, 112 L.Ed.2d 426 (1990); *Sindram v. Lustine Chevrolet, Inc.,* No. 90–5698, cert. denied, 498 U.S. 969, 111 S.Ct. 435, 112 L.Ed.2d 418 (1990); *Sindram v. Montgomery Cty.,* No. 90–5699, cert. denied, 498 U.S. 948, 111 S.Ct. 364, 112 L.Ed.2d 327 (1990), rehearing denied, 498 U.S. 973, 111 S.Ct. 444, 112 L.Ed.2d 427 (1990); and *Sindram v. Moran,* No. 90–5885, cert. denied, 498 U.S. 988, 111 S.Ct. 527, 112 L.Ed.2d 538 (1990), pet. for rehearing pending. A response in *Sindram v. Maryland,* No. 90–5352, was received on November 19, 1990, and the petition for certiorari is presently pending.

2 We have permitted petitioner to proceed *in forma pauperis* in each of these actions based upon his affidavit that he earns only $2,600 per year and has no assets of any value.

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

115 S.Ct. 1446
Supreme Court of the United States

Fred A. WHITAKER
v.
SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY (Merrill Reese, Inc., Real Party in Interest).

No. 94–7743.
|
April 17, 1995.

Pro se civil litigant petitioned for writ of certiorari and requested leave to proceed in forma pauperis (IFP). The Supreme Court held that: (1) litigant was not entitled to proceed in forma pauperis on frivolous petition, and (2) clerk of the court would be directed not to accept any further petitions for writs of certiorari in noncriminal matters unless litigant paid the required docketing fee and submitted his petition in compliance with rule governing printing requirements.

Stevens, Justice, dissented and filed opinion.

West Headnotes (3)

[1] Federal Courts
Proceedings in forma pauperis

Pro se civil litigant was not entitled to proceed in forma pauperis with regard to frivolous petition for writ of certiorari. U.S.Sup.Ct.Rules 39, 39.8, 28 U.S.C.A.

2 Cases that cite this headnote

[2] Injunction
Abusive, Vexatious, or Harassing Litigation

Clerk of court would be directed not to accept any further petitions for writs of certiorari submitted without required docketing fee by a pro se civil litigant who had, within the past eight years, filed 24 petitions for relief, all of which had been denied without recorded dissent; however, as litigant's abuse of petitions for certiorari had occurred only in noncriminal cases, sanction would be limited accordingly. U.S.Sup.Ct.Rules 33, 38, 39, 39.8, 28 U.S.C.A.

20 Cases that cite this headnote

[3] Federal Courts
Review of state courts

So called petition for writ of "certiorari" was more akin to petition for extraordinary writ, where petitioner sought review of state Supreme Court's denial of his petition for review of intermediate appellate court order denying petition for writ of mandate or prohibition in which he sought to compel state trial judge to make particular ruling in civil action which he had filed.

4 Cases that cite this headnote

Opinion

****1446 *208** PER CURIAM.

[1] [2] *Pro se* petitioner Fred Whitaker has filed a petition for writ of certiorari and requests leave to proceed *in forma pauperis* under Rule 39 of this Court. Pursuant to Rule 39.8, we deny petitioner's request to proceed *in forma pauperis.* * Petitioner is allowed until May 8, 1995, to pay the docketing fees required by Rule 38 and to submit his petition in compliance with this Court's Rule 33. For the reasons explained below, we also direct the Clerk of the Court not to ***209** accept any further petitions for certiorari from petitioner in noncriminal matters unless he pays the docketing fees required by Rule 38 and submits his petition in compliance with Rule 33.

Petitioner is a prolific filer in this Court. Since 1987, he has filed 24 petitions for relief, including 6 petitions for extraordinary relief and 18 petitions for certiorari. Fifteen of the twenty-four petitions have been filed in the last four Terms, and we have denied all 24 petitions without recorded dissent. We also have denied petitioner leave to proceed *in forma pauperis* pursuant to Rule 39.8 of this Court for the last three petitions in which

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

he has sought extraordinary relief. See *In re Whitaker,* 513 U.S. 1, 115 S.Ct. 2, 130 L.Ed.2d 1 (1994); *In re Whitaker,* 511 U.S. 1105, 114 S.Ct. 2098, 128 L.Ed.2d 661 (1994); *In re Whitaker,* 506 U.S. 983, 113 S.Ct. 489, 121 L.Ed.2d 428 (1992). And earlier this Term, we directed the Clerk of the Court "not to accept any further petitions for extraordinary writs from petitioner in noncriminal matters unless he pays the docketing fee required by Rule 38(a) and submits his petition ****1447** in compliance with Rule 33." 513 U.S., at 2, 115 S.Ct., at 3. Though we warned petitioner at that time about his "frequent filing patterns with respect to petitions for writ of certiorari," *ibid.,* we limited our sanction to petitions for extraordinary writs.

[3] We now find it necessary to extend that sanction to petitions for certiorari filed by petitioner. In what appears to be an attempt to circumvent this Court's prior order, petitioner has labeled his instant petition a "petition for writ of certiorari" even though it would seem to be more aptly termed a "petition for an extraordinary writ": He argues that the California Supreme Court erred in denying his petition for review of a California Court of Appeals order which denied his petition for writ of mandate/prohibition seeking to compel a California trial judge to make a particular ruling in a civil action filed by petitioner. And the legal arguments petitioner makes in his instant "petition for writ of certiorari" are, just as those made in his previous 18 petitions ***210** for certiorari, frivolous. As we told petitioner earlier this Term, "[t]he goal of fairly dispensing justice ... is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *Ibid.* (internal quotation marks and citation omitted).

Petitioner's abuse of petitions for certiorari has occurred only in noncriminal cases, and we limit our sanction accordingly. This order therefore will not prevent petitioner from filing a petition for certiorari to challenge criminal sanctions that might be imposed upon him. But like other similar orders we have issued, see *In re Sassower,* 510 U.S. 4, 114 S.Ct. 2, 126 L.Ed.2d 6 (1993); *Day v. Day,* 510 U.S. 1, 114 S.Ct. 4, 126 L.Ed.2d 1 (1993); *Demos v. Storrie,* 507 U.S. 290, 113 S.Ct. 1231, 122 L.Ed.2d 636 (1993); *Martin v. District of Columbia Court of Appeals,* 506 U.S. 1, 113 S.Ct. 397, 121 L.Ed.2d 305 (1992), this order will allow the Court to devote its limited resources to the claims of petitioners who have not abused our process.

It is so ordered.

Justice STEVENS, dissenting.
A simple denial would adequately serve the laudable goal of conserving the Court's "limited resources." *Ante,* at 1447. See generally *In re Whitaker,* 513 U.S. 1, 3, 115 S.Ct. 2, 3, 130 L.Ed.2d 1 (1994) (STEVENS, J., dissenting).

I respectfully dissent.

All Citations

514 U.S. 208, 115 S.Ct. 1446, 131 L.Ed.2d 324, 63 USLW 3752

Footnotes

* Rule 39.8 provides: "If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis* ."

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

ADMINISTRATIVE OFFICE OF THE COURTS
Circuit Court Caseload

CAMPBELL

Filings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	-	1	-	-	-	-	-	-	0.13
Adoption / Termination	-	1	-	-	-	-	1	1	0.38
Appeal Civil	4	-	6	5	5	7	4	2	4.13
Appeal Criminal	4	2	4	10	7	8	4	5	5.50
Circuit Criminal	738	671	679	711	968	1,072	1,103	1,050	874.00
Civil Suits	1,296	1,280	1,357	1,080	985	812	817	784	1,051.38
Domestic & Family	77	2	-	-	-	-	-	-	9.88
Other Civil	78	66	58	89	84	57	36	17	60.63
Total	**2,197**	**2,023**	**2,104**	**1,895**	**2,049**	**1,956**	**1,965**	**1,859**	

Closings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	-	-	1	-	-	-	-	-	0.13
Adoption / Termination	-	-	1	-	-	-	1	1	0.38
Appeal Civil	3	1	5	2	6	6	6	2	3.88
Appeal Criminal	1	5	3	4	11	4	6	3	4.63
Circuit Criminal	816	589	663	661	777	1,125	1,036	1,185	856.50
Civil Suits	1,356	1,109	1,334	1,228	1,021	842	862	720	1,059.00
Domestic & Family	32	183	23	2	-	-	-	-	30.00
Other Civil	109	64	60	82	75	70	58	24	67.75
Total	**2,317**	**1,951**	**2,090**	**1,979**	**1,890**	**2,047**	**1,969**	**1,935**	

Source: KyCourts Case Management System (courtnet database), Kentucky AOC, Research and Statistics Unit

ADMINISTRATIVE OFFICE OF THE COURTS
Circuit Court Caseload

BOONE

Filings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	-	-	-	-	-	-	-	2	0.25
Adoption / Termination	-	-	-	-	-	-	2	-	0.25
Appeal Civil	11	6	8	8	8	8	11	6	8.25
Appeal Criminal	3	4	7	4	4	3	4	5	4.25
Circuit Criminal	778	806	736	811	864	911	862	973	842.63
Civil Suits	2,158	2,205	2,276	1,760	1,541	1,212	964	902	1,627.25
Domestic & Family	9	2	-	-	-	-	-	2	1.63
Other Civil	45	64	60	67	96	143	133	106	89.25
Uresa/Uifsa	-	-	-	-	-	-	2	5	0.88
Total	**3,004**	**3,087**	**3,087**	**2,650**	**2,513**	**2,277**	**1,978**	**2,001**	

Closings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	1	1	-	-	-	-	-	1	0.38
Adoption / Termination	1	-	-	-	-	-	-	2	0.38
Appeal Civil	11	6	4	11	9	6	14	6	8.38
Appeal Criminal	5	5	7	5	2	5	3	6	4.75
Circuit Criminal	770	767	764	672	763	787	942	986	806.38
Civil Suits	2,110	2,052	2,147	2,041	1,748	1,415	1,191	944	1,706.00
Domestic & Family	5	5	3	-	-	-	-	-	1.63
Other Civil	67	68	53	60	68	97	121	114	81.00
Others	1	-	-	-	-	-	-	-	0.13
Uresa/Uifsa	-	-	-	-	-	-	-	5	0.63
Total	**2,971**	**2,904**	**2,978**	**2,789**	**2,590**	**2,310**	**2,271**	**2,064**	

Source: KyCourts Case Management System (courtnet database), Kentucky AOC, Research and Statistics Unit

ADMINISTRATIVE OFFICE OF THE COURTS
Circuit Court Caseload

KENTON

Filings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	-	-	-	-	2	1	1	1	0.63
Adoption / Termination	-	-	-	-	-	-	-	1	0.13
Appeal Civil	4	10	14	12	11	7	11	12	10.13
Appeal Criminal	6	9	11	2	6	15	6	4	7.38
Circuit Criminal	1,142	961	1,004	1,045	1,157	1,220	1,237	1,126	1,111.50
Civil Suits	2,916	2,723	2,867	2,169	2,148	1,661	1,369	1,377	2,153.75
Domestic & Family	-	1	-	-	-	-	-	-	0.13
Other Civil	60	152	99	51	53	92	162	77	93.25
Uresa/Ulfsa	-	1	-	-	-	-	-	1	0.25
Total	**4,128**	**3,857**	**3,995**	**3,279**	**3,377**	**2,996**	**2,786**	**2,599**	

Closings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	-	-	-	-	1	-	1	1	0.38
Appeal Civil	6	6	11	17	9	10	11	11	10.13
Appeal Criminal	12	6	10	4	5	15	8	4	8.00
Circuit Criminal	1,159	1,045	971	1,061	1,065	1,166	1,321	1,092	1,110.00
Civil Suits	2,866	2,814	2,709	2,594	2,310	1,812	1,748	1,241	2,261.75
Domestic & Family	1	4	-	-	-	-	-	-	0.63
Other Civil	129	137	122	99	54	60	114	102	102.13
Uresa/Ulfsa	5	2	-	-	-	-	-	1	1.00
Total	**4,178**	**4,014**	**3,823**	**3,775**	**3,444**	**3,063**	**3,203**	**2,452**	

Source: KyCourts Case Management System (courtnet database), Kentucky AOC, Research and Statistics Unit

Run Date: 6/2/2016

ADMINISTRATIVE OFFICE OF THE COURTS
Circuit Court Caseload

JEFFERSON

Filings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	2	3	4	3	7	3	3	5	3.75
Appeal Civil	42	80	73	66	132	74	57	74	74.75
Appeal Criminal	21	18	16	19	15	18	21	17	18.13
Circuit Criminal	4,486	4,473	4,782	4,676	4,798	4,243	4,209	4,101	4,471.00
Civil Suits	12,871	12,450	13,175	11,856	10,464	8,424	7,738	7,896	10,609.25
Domestic & Family	-	-	-	-	-	-	-	1	0.13
Other Civil	944	906	867	795	993	1,822	1,417	954	1,087.25
Total	**18,366**	**17,930**	**18,917**	**17,415**	**16,409**	**14,584**	**13,445**	**13,048**	

Closings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	3	1	5	3	4	5	1	4	3.25
Appeal Civil	41	65	68	79	79	115	62	57	70.75
Appeal Criminal	35	12	14	21	21	17	13	18	18.88
Circuit Criminal	4,826	4,317	4,342	4,627	4,468	4,551	4,298	4,340	4,471.13
Civil Suits	12,213	12,748	12,503	12,224	11,454	9,621	8,010	7,752	10,815.63
Domestic & Family	1	-	-	-	-	-	-	-	0.13
Other Civil	944	941	917	869	850	1,117	1,514	1,289	1,055.13
Total	**18,063**	**18,084**	**17,849**	**17,823**	**16,876**	**15,426**	**13,898**	**13,460**	

Source: KyCourts Case Management System (courtnet database), Kentucky AOC, Research and Statistics Unit

ADMINISTRATIVE OFFICE OF THE COURTS
Circuit Court Caseload

FAYETTE

Filings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	1	-	-	-	-	-	1	-	0.25
Appeal Civil	17	18	15	23	20	15	12	13	16.63
Appeal Criminal	34	34	51	31	25	18	16	10	27.38
Circuit Criminal	1,964	2,288	2,050	1,938	1,983	1,728	1,664	1,566	1,897.63
Civil Suits	4,387	4,810	5,070	4,023	3,202	2,780	2,472	2,312	3,632.00
Domestic & Family	8	-	-	-	-	-	-	-	1.00
Other Civil	203	193	246	375	348	303	360	375	300.38
Others	-	1	-	-	-	-	-	-	0.13
Uresa/Ulfsa	2	2	2	1	7	3	-	-	2.13
Total	**6,616**	**7,346**	**7,434**	**6,391**	**5,585**	**4,847**	**4,525**	**4,276**	

Closings

	CY 2008	CY 2009	CY 2010	CY 2011	CY 2012	CY 2013	CY 2014	CY 2015	Average
Adm Bd Appeals	1	-	-	-	-	-	1	-	0.25
Appeal Civil	18	20	18	23	14	18	15	13	17.38
Appeal Criminal	43	26	53	47	26	22	18	4	29.88
Circuit Criminal	1,860	2,110	2,089	1,883	2,079	1,624	1,758	1,643	1,880.75
Civil Suits	4,311	4,359	5,031	4,294	4,103	2,901	2,616	2,324	3,742.38
Domestic & Family	1	7	-	-	1	-	-	-	1.13
Other Civil	168	159	225	309	301	275	298	324	257.38
Others	-	-	1	-	-	-	-	-	0.13
Uresa/Ulfsa	2	2	2	-	6	2	2	1	2.13
Total	**6,404**	**6,683**	**7,419**	**6,556**	**6,530**	**4,842**	**4,708**	**4,309**	

Source: KyCourts Case Management System (courtnet database), Kentucky AOC, Research and Statistics Unit

Ohio

Supreme Court of Ohio, 2014 Ohio Courts Statistical Summary (2014). www.supremecourt.ohio.gov/Publication/annrep/14OCSR/summary/2014OCS.pdf

Courts of Common Pleas, General Division

Total incoming cases

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Administrative Appeals	1,214	1,298	1,344	1,748	1,531	1,537	1,488	1,404	1,116	1,181
Complex Litigation	97	88	84	106	94	76	59	67	102	149
Criminal	94,397	97,823	98,387	95,152	86,118	82,857	81,042	81,026	78,612	80,490
Foreclosures	74,472	92,077	91,574	94,295	99,208	97,412	85,629	84,196	63,940	51,699
Other Civil	56,811	56,832	69,444	75,471	74,813	68,907	61,647	56,510	50,392	49,251
Other Torts	27,033	24,098	21,960	20,498	20,666	19,280	18,303	17,981	17,669	17,240
Product Liability	1,375	394	378	328	263	257	203	234	254	184
Professional Tort	2,500	2,025	1,864	1,719	1,705	1,706	1,509	1,523	1,572	1,555
Workers' Compensation	9,951	9,048	9,437	8,297	8,698	8,176	7,759	7,296	7,164	6,935
Total	**267,850**	**283,683**	**294,472**	**297,614**	**293,096**	**280,208**	**257,639**	**250,237**	**220,821**	**208,684**

Courts of Common Pleas, Domestic Relations Division

Total incoming cases

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
All Others	12,562	12,456	13,967	15,993	16,271	14,457	14,029	13,582	12,948	12,686
Change of Custody	8,179	7,895	7,591	7,569	7,252	7,223	7,464	7,090	6,909	6,761
Domestic Violence	19,059	19,143	19,864	20,443	21,888	21,178	20,894	19,939	20,019	18,742
Marriage Dissolutions w/Children	8,373	8,346	8,092	8,033	8,031	8,621	8,455	8,028	7,667	7,398
Marriage Dissolutions w/o Children	11,044	11,006	10,420	10,206	10,463	10,732	10,550	10,167	10,316	10,087
Marriage Terminations w/Children	17,075	17,623	16,720	16,137	16,381	16,127	16,158	15,137	14,307	13,829
Marriage Terminations w/o Children	14,208	14,789	14,194	13,751	13,816	14,136	14,555	14,134	13,992	13,178
Parentage	1,656	1,590	1,859	2,181	2,271	2,261	2,133	1,987	1,704	1,577
Support - Enforce or Modify	40,711	37,461	36,854	37,863	37,703	34,751	31,866	31,018	29,975	28,982
U.I.F.S.A.	1,950	1,973	1,542	1,383	1,620	1,123	1,085	1,258	1,088	1,081
Visitation - Enforce or Modify	3,625	3,392	3,379	3,523	3,193	3,337	3,414	3,433	3,117	3,139
Total	**138,442**	**135,674**	**134,482**	**137,082**	**138,889**	**133,946**	**130,603**	**125,773**	**122,042**	**117,460**

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Civil Justice Survey of State Courts, 2005

Civil Bench and Jury Trials in State Courts, 2005

October 2008, NCJ 223851

This file is text only without graphics and many of the tables. A Zip archive of the tables in this report in spreadsheet format (.csv) and the full report including tables and graphics in .pdf format are available from: http://www.ojp.usdoj.gov/bjs/abstract/cbjtsc05.htm.

This report is an expansion of a series. See also Civil Trial Cases and Verdicts in Large Counties, 2001 at http://www.ojp.usdoj.gov/bjs/pubalp2.htm#civil.

By Lynn Langton, M.A. and Thomas H. Cohen, Ph.D.
BJS Statisticians

State courts of general jurisdiction disposed of approximately 26,950 general civil cases--tort, contract, and real property--through a jury or bench trial in 2005. These trials were a small percentage of the reported 7.4 million civil claims filed in all unified and general jurisdiction state courts nationwide. ***Approximately 7.4 million civil claims were filed in general jurisdiction and unified jurisdiction courts in 2005, with 4.5 million of those claims filed in courts of general jurisdiction and 2.9 million civil cases filed in states with a unified court structure. See LaFountain, R., Schauffler, R., Strickland, S., Raftery, W., & Bromage, C. Examining the Work of State Courts, 2006: A National Perspective from the Court Statistics Project (National Center for State Courts 2007).*** Among jurisdictions that provided totals for both trial and non-trial general civil dispositions in 2005, trials collectively accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts.

Civil bench and jury trials are rare but important events. Records from civil trials are the primary source of information on civil cases in general. The terms of settlement agreements and other key information for civil cases resolved prior to trial may not be reported to the court or may not be publicly available.

The Civil Justice Survey of State Courts (CJSSC) examines tort, contract, and real property trials disposed of in general jurisdiction courts. It provides information such as the types of litigants involved in trials, who wins in civil trials, compensatory award amounts, punitive damages, and case processing times. The 2005 CJSSC was the first time that the series examined general civil trials concluded in a national sample of urban, suburban, and rural jurisdictions. Prior iterations of the CJSSC focused on general civil trial

litigation in the nation's 75 most populous counties.
The 1992, 1996 and 2001 CJSSC reports are available at <http://www.ojp.usdoj.gov/bjs/civil.htm#publications> .
Major findings from the 2005 Civil Justice Survey of State Courts include--

*A jury decided almost 70% of the approximately 26,950 general civil trials disposed of in 2005.

*About 60% of the general civil trials included in the survey involved a tort claim and about a third involved contractual issues.

*Plaintiffs won in almost 60% of trials overall.

*The median damage award for plaintiffs who won monetary damages in general civil trials was $28,000 (figure 1).

*Punitive damages were awarded to 5% of plaintiff winners in general civil trials in 2005.

*In the nation's 75 most populous counties, the number of general civil cases disposed of by jury or bench trial declined by about 50% from 1992 to 2005.

Motor vehicle accident cases accounted for over a third of civil trials in 2005

The majority (61%) of the nation's civil cases disposed of by trial involved a tort claim, in which the plaintiff(s) alleged injury, loss, or damage from the negligent or intentional acts of the defendant(s) (table 1). Contract cases, concerning an alleged breach of a contractual agreement, accounted for 33% of all civil trials in state courts in 2005. Real property cases, involving disputes over land ownership, accounted for 6%.

The most common types of civil cases disposed of by trial were motor vehicle accident cases (35%), followed by seller plaintiff cases involving payments owed for the provision of goods or services (11%). Buyer plaintiff cases, in which the purchasers of goods or services sought the return of money, accounted for 10% of all civil cases disposed of by trial in 2005. Medical malpractice cases, involving the allegation of harm caused by a doctor, dentist, or other heath care provider, accounted for 9%, and premises liability cases, concerning an alleged harm from inadequately maintained or dangerous property, accounted for 7% of the civil trials. Employment discrimination and product liability cases each accounted for less than 2% of all civil trials in 2005.

Nine of every 10 tort trials resolved by juries in 2005

Civil trials involving tort claims of personal injury or damaged property were most often heard before a jury (90%), rather than a judge (10%). Medical malpractice (99%), alleged illness or harm due to asbestos (96%) or some other product (93%), premises liability (94%), and motor vehicle accident (92%) cases were among the most likely tort claims to be tried by a jury in 2005.

Judges decided a greater percentage of business-related civil trials--contract (64%) and real property (74%) cases--than juries. Litigants waived their rights to a jury trial and had their cases decided by a judge in more than 80% of contract

cases involving seller plaintiff, mortgage foreclosure, rental lease agreement, and subrogation issues. In the category employment discrimination, the majority (91%) of contract trials were decided by a jury.

Judges hear business litigation more often than juries

Civil cases tried before juries and judges in state courts differed in terms of the litigants, plaintiff win rates, damage awards, and case processing times (table 2). Bench trials (57%) had a higher percentage of business litigants than jury trials (39%) and were likely to be decided in less time than jury trials. Judges were more likely than juries to find for plaintiffs. Plaintiffs won in 68% of bench trials, compared to about 54% of jury trials.

The median damage awards in 2005 were statistically similar for both jury and bench trials overall. Contract cases tried before a jury ($74,000), however, had significantly higher median final awards than contract cases decided by a judge ($25,000).

Individuals accounted for the majority of plaintiffs in tort trials; businesses were more heavily represented as plaintiffs in contract disputes

In 2005, individuals accounted for the largest percentage of plaintiffs (81%) and defendants (50%) in civil trials (table 3). This held true in both tort and real property trials. For contract trials, the majority of defendants were businesses (58%). Also in contract trials, a larger percentage of plaintiffs were businesses (43%) than in tort (4%) or real property (9%) cases.

Real property cases involved the highest percentage of government plaintiffs (26%) and defendants (11%). A hospital or medical company was the plaintiff in less than 1% and the defendant in less than 6% of all civil bench and jury trials in 2005.

Seventy percent of civil trials involved individuals suing other individuals or businesses; 40% of trials involved one plaintiff and one defendant

The most common civil trials involved an individual suing either another individual (42%) or a business (28%) (table 4). Businesses sued other businesses in about 10% of all civil trials. In 2% of all civil trials, a government entity initiated the lawsuit.

Excluding class action lawsuits, almost 86,000 litigants were involved in general civil trials in 2005. Forty percent (10,800) of all civil trials disposed of in state courts in 2005 involved one plaintiff and one defendant. Almost half (47%) of all civil bench and jury trials in 2005 had multiple defendants, and more than a quarter (29%) had multiple plaintiffs (not shown in a table).

Plaintiffs won in the majority of tort and contract trials

Plaintiffs won in more than half (56%) of all general civil trials concluded in state courts (table 5). In 2005, a higher percentage of plaintiffs won in contract (66%) than in tort (52%) cases.

Among tort trials, plaintiffs were most likely to win in cases involving an animal attack (75%), followed by motor vehicle accident (64%), asbestos (55%), and intentional tort (52%) cases. Plaintiffs had the lowest percentage of wins in medical malpractice trials (23%), product liability trials that did not involve asbestos (20%), and false arrest or imprisonment trials (16%), compared to plaintiffs in other tort cases.

In contract cases, plaintiffs won in the majority of trials for all case types except subrogation (28%), which involves an insurance company seeking to recover the amount paid on behalf of a client. Mortgage foreclosure cases, in which the plaintiff was either a mortgage company or other financial lending institution, had the highest percentage of plaintiff winners (89%) of all tort and contract cases in 2005.

Over 60% of plaintiff winners were granted final awards of $50,000 or less

Plaintiff winners in civil bench and jury trials were awarded an estimated sum of $6 billion in compensatory and punitive damages in 2005 (not shown in a table). Among the 14,000 plaintiffs awarded monetary damages, the median final award amount was $28,000 (table 6). Contract cases in general had higher median awards ($35,000) than tort cases ($24,000).

Almost two-thirds (62%) of all plaintiff award winners were awarded $50,000 or less. A small percentage (about 4%) of all plaintiff award winners were awarded $1 million or more. Plaintiff winners in asbestos cases tended to win the highest award amounts. The median final award in asbestos cases was almost $700,000. More than three-quarters of all award amounts in asbestos cases were greater than $250,000.

Cases with median final awards over $150,000 included other product liability ($500,000), medical malpractice ($400,000), false arrest or imprisonment ($259,000), employment discrimination ($175,000), and tortious interference ($169,000).

Motor vehicle accident cases accounted for more than 40% of all plaintiff award winners in 2005. The median award in motor vehicle accident cases was $15,000. Forty percent of plaintiff winners in motor vehicle accident trials were awarded $10,000 or less.

Punitive damages were awarded to 5% of plaintiff winners in general civil trials in 2005

Punitive damages are awarded to punish and deter the defendant. Punitive damages were sought in 13% of the approximately 14,000 general civil trials with plaintiff winners in 2005 (table 7). Plaintiffs were awarded punitive damages in 700 of the 14,000 trials (5%).

The median overall punitive damage amount awarded to plaintiff winners was $64,000. About a quarter (27%) of the punitive damage awards in 2005 were over $250,000 and 13% were $1 million or more. Of the approximately 450 contract cases in which punitive damages were awarded, plaintiffs were awarded punitive amounts of $250,000 or more in 40% of the trials.

Tortious interference ($6,900,000) and medical malpractice ($2,800,000) cases had among the highest median punitive damage awards for specific contract and tort case types. During 2005, there were less than 20 of each case type in which punitive damages were awarded. Among the case types in which punitive damages were awarded most frequently--intentional torts, fraud, and buyer plaintiff cases--the median punitive damage awards were $100,000 or less.

Largest damage award was $172 million

Of the civil trials sampled in state courts nationwide in 2005, the largest damage award was granted to approximately 116,000 California employees who brought a class-action lawsuit against a large retail corporation.

The lawsuit was originally filed in 2001 by several former employees and was expanded to cover California employees working for the retailer between 2001 and 2005. The employees claimed that the retailer had violated a California state law requiring that employees working six hours or more be given a 30-minute, unpaid lunch break. Under the law, if an employee was not permitted the break, the company was required to pay a full hour's wages in compensation. The employees maintained that they were owed more than $66 million plus interest.

After four months of testimony and three days of deliberation, an Alameda County jury awarded the plaintiffs $57 million in general damages and $115 million in punitive damages.

Punitive damages exceeded compensatory awards in over half of the cases in which they were awarded

In a number of cases since 1996 the United States Supreme Court has examined the issue of what constitutes a grossly excessive***In BMW of North America, Inc. v. Gore, the U.S. Supreme Court ruled that the punitive damages of more than 500 times the amount of compensatory damages was grossly excessive and unconstitutional (517 U.S. 559, May 20, 1996).***ratio between plaintiff compensatory and punitive damage award amounts. In 2003, the Supreme Court opined that "few awards exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process. "***State Farm Automobile Insurance Company v. Campbell (123 S.Ct. 1513:1524, April 7, 2003).***

In 2005, punitive damages exceeded compensatory awards in 37% of tort and 62% of contract trials (table 8). Punitive awards were at least four times greater than compensatory awards in 26% of all applicable trials. In 17% of applicable trials, punitive awards exceeded compensatory awards by a ratio of 10 to 1 or greater (not shown in table).

Damage awards were adjusted in about 16% of all civil trials

The initial compensatory and punitive damage amounts awarded to plaintiff winners were adjusted prior to trial end in about 16% of all trials (not shown in a table). Of the approximately 2,300 adjusted awards, over half (56%) were reduced due to findings of contributory negligence on the part of the plaintiff. A small percentage (about 1%) were adjusted because of damage caps. Thirty percent of the adjustments were due to miscalculation of cost, payment of additional fees, set-off claims, collateral source

reductions, and other reasons.

Class action lawsuits

A case must meet the following criteria if it is to be class action certified:

*The case must involve plaintiffs so numerous that it would be impractical to bring them all before court;

*The case must have a named representative(s) who can fairly represent all members of the class;

*The case must have class members with a well defined common interest in the questions of law or fact to be resolved (Black's Law Dictionary).

Within the jurisdictions included in the 2005 Civil Justice Survey of State Courts, 14 trials were identified as being class action certified. Over half (8) of the trials occurred in Philadelphia County, Pennsylvania.

Class action cases are unique in that they tend to take longer to process than regular civil trials. In 2005, the 14 class action trials lasted 17 days on average. The total time from filing to disposition averaged 3.5 years.

Of the 14 class action certified trials in 2005, ten were heard before a jury. Nine of the 14 involved a product liability claim: three were asbestos cases, four involved a well-known prescription drug combination, one was a non-prescription drug case, and one involved a defective automobile part. Another tort case involved a class of neighbors alleging discomfort as a result of a nearby factory's release of a chemical into the air. There were also four contract cases that were class action certified.

The defendants in all 14 class action certified cases were businesses. The plaintiffs prevailed in ten of the 14 class action trials. The median final award in the ten trials was $1 million.

Jury trials lasted two days longer on average than bench trials

In 2005, jury trials for general civil cases lasted almost four days on average (table 9). Bench trials lasted almost two days. Thirteen percent of jury trials and 70% of bench trials were completed within one day (not shown in a table). Among bench and jury trials, contract cases lasted slightly longer on average than both tort and real property cases.

Asbestos jury trials tended to take the most time, averaging 13 days in trial. Although less than 10% of employment discrimination, medical malpractice, and other product liability cases were bench trials, these cases took the longest for judges to hear and dispose (about three days). The longest trial recorded in the 2005 CJSSC sample was a premises liability case, in which the trial lasted for 69 days (not shown in a table).

Majority of bench and jury trials were disposed within two years of filing

Cases heard before a jury took more time from filing of the

complaint to rendering of the verdict than those heard before a judge. On average, the processing of a case required an additional half year for a jury trial (26 months), compared to a bench trial (20 months). About three-quarters (76%) of bench trials and more than half (57%) ofjury trials were disposed of within two years of filing.

Overall, there was little difference in the average number of months needed for tort and contract case processing. Real property jury trials took about four months longer from filing to verdict than tort and contract jury trials. Real property bench trials took two months less time on average to process, compared to other general civil bench trials. Among jury trials, mortgage foreclosure (47 months), false arrest and imprisonment (40 months), and tortious interference (36 months) cases took the longest to process on average. Partnership dispute cases averaged the longest time from filing to bench trial judgment (43 months) (not shown in a table).

Litigants filed notices of appeal in nearly 1 in 5 civil trials

Litigants who seek to overturn or modify a verdict or judgment that they believe does not comply with state law have the option of filing a notice of appeal. Appeals were filed with the trial court in 17% of general civil trials concluded in 2005 (not shown in a table).

The rate of appeal for civil bench and jury trials varied depending on the case outcome. Plaintiffs filed appeals in 5% of general civil trials in which they prevailed, and in 15% of civil trials in which they did not win any monetary award (not shown in a table). Defendants gave trial court notice of appeal in 12% of civil trials with a plaintiff winner, and in 2% of trials in which the plaintiff did not receive an award.

In the nation's 75 most populous counties, the total number of civil trials declined by over 50% from 1992 to 2005

Prior to the 2005 CJSSC, BJS funded three surveys that examined general civil trial litigation. The surveys focused on general civil trials concluded in a sample of the nation's 75 most populous counties in 1992, 1996, and 2001. ***For a discussion of findings and methodologies for the earlier BJS studies on general civil trials, see Civil Jury Cases and Verdicts in Large Counties, 1992 (NCJ 154346), Civil Trial Cases and Verdicts in Large Counties, 1996 (NCJ 173426), and Civil Trial Cases and Verdicts in Large Counties, 2001 (NCJ 202803) at <http://www.ojp.usdoj.gov/bjs/civil.htm>.***

For the purpose of discussing trends in this report, this section focuses on civil trial litigation in the nation's 75 most populous counties rather than on the national sample examined in 2005. The trends analyses has been restricted to the nation's 75 most populous counties as data from previous BJS civil justice surveys cannot be used to generate national level estimates.

In the nation's 75 most populous counties, the number of civil trials decreased 52%, from 22,451 in 1992 to 10,813 in 2005 (table 10). Tort cases decreased the least (40%), while real property (77%) and contract (63%) cases registered the largest declines. Among tort cases, product and premises liability experienced the sharpest declines, while decreases

in medical malpractice cases were not statistically significant from 1992 to 2005. In terms of contract trial litigation, seller plaintiff cases saw the largest declines (73%) and the number of fraud and buyer plaintiff cases dropped by about 50%.

Data from the two most recent BJS civil trial surveys showed stabilization in the number of general civil trials. From 2001 to 2005, the number of general civil trials concluded in the nation's 75 most populous counties declined by 9%, a decrease that was not statistically significant.

Although the number of product liability trials declined from 1992 to 2005, a comparison of the two most recent surveys (2001 and 2005) showed a 42% increase in those trials.

In terms of incoming caseload filings, the Court Statistics Project of the National Center for State Courts (NCSC) reported that the number of civil cases filed in state courts increased by 5% in the unified/general jurisdiction courts of 43 states from 1996 to 2005. NCSC also reported a 21% decline in tort filings in 30 states and a 25% increase in contract filings in 13 states from 1996 to 2005. ***LaFountain, R., Schauffler, R., Strickland, S., Raftery, W., & Bromage, C. Examining the Work of State Courts, 2006: A National Perspective from the Court Statistics Project (National Center for State Courts 2007).***

Percentage of plaintiffs prevailing in general civil trials remained stable in the nation's 75 most populous counties

The percentage of plaintiff winners in general civil trials concluded in the nation's 75 most populous counties remained relatively stable between 1992 and 2005. On average, plaintiffs won in about 53% of trials concluded during this period (not shown in a table). Overall plaintiff win rates ranged from 52% in 1992 and 1996 to 55% in 2001. In 2005, plaintiffs prevailed in 53% of civil trials. Among tort cases, about half the plaintiffs prevailed at trial from 1992 (47%) through 2005 (48%). The percentage of plaintiff winners in contract trials varied from 57% in 1992 to 65% in 2001. The plaintiff win rate for contract trials concluded in 2005 was 63%.

Trials accounted for 3% of all general civil dispositions

Seventy-nine of the surveyed jurisdictions were able to provide counts of both trial and non-trial dispositions in 2005. Non-trial dispositions include cases dismissed for want of prosecution, granted default or summary judgments, settled or withdrawn prior to trial, settled though mediation or another method of alternative dispute resolution, or transferred to another court.

Among the 79 jurisdictions that could provide the total number of general civil dispositions, the rate of cases disposed through trial was just under 3%. Among the various case types, the highest percentage of cases disposed through trial were real property cases (5%), followed by tort (3%) and contract (2%) cases.

Since 1992, the overall median jury awards declined by 40%

When adjusted for inflation, the median damages awarded in general civil jury trials declined from $72,000 in 1992 to $43,000 in 2005, a decrease of 40% (table 11). For tort jury trials, the median damages declined by about 50% from $71,000 to $33,000 during the 1992 to 2005 period. The reduction in jury awards for tort trials can be attributed mostly to the decline in median damage awards in automobile accident trial litigation. From 1992 to 2005, the median awards in automobile accident trials declined by almost 60%, from $41,000 to $17,000. Since automobile accident cases accounted for approximately 64% of tort jury trials with plaintiff winners, these cases drove the overall tort award trend (not shown in a table).

In comparison to automobile accident cases, several tort case categories had marked increases in their median jury awards. This trend was apparent in product liability jury trials in which the median award amounts were about 5 times higher in 2005 ($749,000) than they were in 1992 ($154,000). For medical malpractice trials, the median damage awards were nearly 2.5 times higher in 2005 ($682,000) than they were in 1992 ($280,000).

The years 2001 and 2005 were marked by stability in the median damage awards for general civil jury trials. Overall, the median damage awards increased by almost 5% but this increase was not statistically significant. One exception to the stabilization trend was medical malpractice trials. For medical malpractice trials, the median damage awards increased by 44% during this period.

Punitive damages awarded infrequently in civil jury trials in the nation's 75 most populous counties

The percentage of jury trials in which the plaintiff winners received punitive damages remained stable, ranging from 4% in 1996 to 6% in 1992 and 2001 (not shown in a table). In 2005, plaintiff winners were awarded punitive damages in about 5% of general civil jury trials concluded in the nation's 75 most populous counties.

Methodology

Collection of data on civil bench and jury trials

The Civil Justice Survey of State Courts (CJSSC) examines tort, contract, and real property trials disposed of in general jurisdiction courts. The 2005 CJSSC contained two sampling frames. First, the sample was designed so that inferences could be made about general civil trials litigated in the nation's 75 most populous counties. The 75 most populous counties design was maintained in order to compute trends in civil trial litigation.

The sample design for the 75 most populous counties sample was the same as the ones used for the 2001, 1996, and 1992 BJS civil trial studies. The sample is a stratified sample with 46 of the 75 most populous counties selected.

In addition to sampling civil trial litigation in the nation's 75 most populous counties, a sample of non-metropolitan counties, from which to estimate the civil trial litigation in counties outside the 75 most populous,

was developed.

The sample of civil trial litigation outside the nation's 75 most populous counties was constructed by first forming 2,518 primary sampling units (PSUs) from 3,066 counties--3,141 U.S. counties total minus the 75 counties from the 2001 CJSSC.

The 2,518 PSUs were stratified into 50 strata according to census region, levels of urbanization, and population size which was based on the square root of the estimated 2004 population in each of these PSUs.

From the 50 strata, a total of 100 PSUs containing 110 counties were selected for the supplemental sample of counties outside the nation's 75 most populous. Hence, a total of 156 counties, 46 representing the nation's 75 most populous, and 110 representing the remainder of the nation were used for the sample.

The second stage of the sample design involved generating lists of cases that would be coded. Each participating jurisdiction was asked to identify a list of cases that had been disposed of by jury trial or bench trial between January 1, 2005, and December 31, 2005. Trial cases were to meet the definitional criteria for jury and bench trials developed by the National Center for State Courts. Civil trials that occurred in federal district courts and civil trials in state courts of limited jurisdiction were excluded from the sample.

For the sample of civil trials occurring in the nation's 75 most populous counties, data on 5,613 civil jury trials and 2,069 civil bench trials met the study criteria. When these trials are weighted to the nation's 75 most populous counties, they represent 10,813 general civil bench and jury trials.

For the sample of civil trials occurring outside the nation's 75 most populous counties, data on 814 civil jury trials and 376 civil bench trials met the study criteria. When these trials are weighted, they represent 16,135 general civil bench and jury trials disposed in counties outside the nation's 75 most populous counties.

Collection of counts of trial and non-trial dispositions

In conjunction with collecting detailed case level information on general civil trials, the counties participating in this survey were asked to complete a matrix that contained information on all general civil cases disposed in 2005. Frequency counts were obtained for trial and non-trial dispositions in these counties. The non-trial dispositions included cases dismissed for want of prosecution, granted default or summary judgments, settled or withdrawn prior to trial, settled through mediation or another method of alternative dispute resolution, or transferred to another court. This secondary data collection was used to gather disposition outcomes in trial and non-trial cases by plaintiff claim type.

Information on all civil dispositions was obtained from a variety of sources including state administrative court offices, annual reports, or the actual trial courts. Some trial courts were able to provide specific information on the exact types of non-trial dispositions including the number of cases concluded by summary judgment, dismissal, settlement,

McFacts, McMedia & McCoffee

by Gordon E. Tabor

It was bound to happen again. It was not the first time, and it will not be the last time. The McFacts of the now well-publicized hot coffee spill causing injury at McDonalds and the jury result have been spread along the disinformation highway by the McMedia.

The historical antecedent of this most recent volley in the disinformation campaign took place in the mid-1980s during the insurance "crisis." At that time, the insurance industry, along with its allies, bankrolled a multi-million public relations campaign geared toward convincing the public that there was a lawsuit crisis. In order to stay afloat, the tort-reformers noted, citizens' constitutional rights to redress in the courts had to be restricted.

The public relations gurus have had a ball with misinformation, distortions and half-truths about real horrors suffered by injured consumers in America. The McDonalds coffee spill case must not fall victim to the same propaganda machine. It is the purpose of this column to detail the facts behind the trail of corporate misconduct brought to light by this case.

McFacts

In 1992, Stella Liebeck, a 79-year-old woman, was a passenger in a car driven by her grandson in southeast Albuquerque. Ms. Liebeck and her grandson ordered, among other items, a small cup of coffee. After receiving the coffee at the drive-thru window, they pulled forward and stopped the car momentarily so that Ms. Liebeck could add cream and sugar to her coffee. During her attempt to remove the plastic lid from the styrofoam cup, she placed the cup between her knees. As she was removing the plastic lid, the cup spilled the entire contents into her lap.

Gordon E. Tabor

Ms. Liebeck was wearing sweatpants which absorbed the liquid and held it next to her skin. Her grandson, after helping her out of the car, drove her to a local hospital. She was admitted for eight days and was seen by a vascular surgeon specializing in treating burns. The doctor determined Ms. Liebeck suffered third degree burns over six percent of her body (including her inner thighs, perineum, buttocks, genital and groin area) which were treated with skin grafting. She also underwent whirlpool and debridement treatments. Due to the pain from the burn, Ms. Liebeck lost a substantial amount of mobility during recovery.

Ms. Liebeck tried to settle the case for $20,000 prior to retaining an attorney. McDonalds refused the offer, and Liebeck hired S. Reed Morgan, a board certified trial attorney in Houston, Texas, who had settled a similar case against McDonalds in the mid-1980s.

Discovery Sheds Light on History of Corporate Misconduct

During discovery, McDonalds *produced documents showing a history of more than 700 burn claims from 1982 to 1992*, some of which were similar to the third degree burns suffered by Ms. Liebeck. The documentation verified McDonalds' knowledge of the nature and extent of the burn hazards.

In the process of discovery, McDonalds said it kept its coffee between 180 and 190 degrees (compared to home-made coffee at 135-140 degrees) to maintain optimum taste based on advice of its coffee consultant, Kenneth Burgess, formerly of the National Coffee Institute. Burgess remarked that he had never spent any time evaluating the safety ramifications of spilled coffee at that temperature.

Christopher Appleton, quality assurance supervisor for McDonalds, admitted that he and McDonalds were aware of the 700 prior burn claims and that a burn hazard exists with any food substance served at 140 degrees or higher. Appleton said that *if one were to drink coffee at the temperature at which it was served, it was not fit for consumption because of potential mouth and throat burns*. He understood that burns would occur, and McDonalds had no intention of reducing the "holding temperature" of the coffee.

Dr. Kenneth Diller, chair of the department of mechanical engineering at the University of Texas and a scholar in thermo-dynamics

> *The public relations gurus have had a ball with misinformation, distortions and half-truths about real horrors suffered by injured consumers in America.*

skin burns, stated that at 180 degrees, liquids cause a full thickness burn to human skin in 2-7 seconds. He said that as the temperature decreases toward 155 degrees, the extent of the burn decreases exponentially.

McDonalds argued that consumers buy coffee from drive-thrus and carry it to the office or home, so it is hot when they arrive. Consumer research refuted this argument indicating that consumers indeed drink the coffee while driving soon after purchase.

McDonalds also argued that consumers know the egregious consequences of spilling hot coffee on themselves. In testimony, McDonalds admitted its consumers were unaware of the risk of full thickness burns requiring hospitalization, skin grafting, etc. Using the "warning defense," noting the "caution, contents hot" posted on the side of the coffee cup, Appleton admitted it was not a warning but a "reminder." The language on the side of the cup was the same size and color as the ornamental trim of the cup.

During the pretrial phase, the temperature of coffee served by various fast food restaurants in the Albuquerque area was tested, and it was found that non-franchise vendors were selling coffee substantially cooler than McDonalds. McDonalds, on the other hand, was serving coffee between 180 and 190 degrees.

McTrial

At trial, McDonalds asserted three defenses: 1) Attacking proximate cause, McDonalds argued that Ms. Liebeck would have sustained the same burns had the coffee temperature been substantially lower; 2) McDonalds showed many other sellers were marketing the coffee at the same temperature; 3) McDonalds showed life carries with it many hazards and being burned by coffee was not sufficiently dangerous to warrant special consideration.

In refuting these assertions, Mr. Morgan, the attorney representing the injured consumer, explained that the holding temperature of the coffee posed an unacceptable risk of harm of which McDonalds had been aware since 1978. He also showed that the temperature of McDonalds coffee was consistently higher than those of other chains. He also demonstrated that the temperature at which the coffee was served was unreasonably dangerous.

The jury agreed and awarded Ms. Liebeck $2.7 million in punitive damages equal to two days of coffee sales for McDonalds. She was also awarded $200,000 in compensatory damages reduced 20 percent by comparative negligence to $160,000.

Conclusion

Some members of the popular media viewed this case as another example of the jury system out of control. On the contrary, the tort system has served its dual purpose: it has compensated Ms. Liebeck for her severe injuries and deterred future misconduct by awarding her punitive damages. (Post verdict investigation found that McDonalds is now serving coffee in the Albuquerque area at a temperature of 158 degrees.)

Hopefully, the case will send a message to the fast food industry that safety is more important than profits. If not, perhaps we should all purchase quality coffee at our local grocery, grind it ourselves and drink it casually in the safe confines of our own home.

> *Hopefully, the case will send a message to the fast food industry that safety is more important than profits.*

Gordon Tabor is a member of the Indiana Chapter and the National Executive Committee of ABOTA. He is President of the Indiana Trial Lawyers Association and Vice President of the Indianapolis Bar Association.

This article is reprinted with permission from *The Indiana Lawyer*.

Subsequent to the writing of this article, the court granted remittitur on both the compensatory and punitive damages.

WINTER 1998 Vol. 1, Issue. 2

McFacts about the McDonald's Coffee Lawsuit

Everyone knows what you're talking about when you mention "the McDonald's lawsuit". Even though this case was decided in August of 1994, for many Americans it continues to represent the "problem" with our civil justice system.

The business community and insurance industry have done much to perpetuate this case. They don't want us to forget it. They know it helps them convince politicians that "tort reform" and other restrictions on juries is needed. And worse, they know it poisons the minds of citizens who sit on juries.

Unfortunately, not all of the facts have been communicated— facts that put the case and the monetary award to the 81-year old plaintiff in a significantly different light.

According to the *Wall Street Journal*, McDonald's callousness was the issue and even jurors who thought the case was just a tempest in a coffee pot were overwhelmed by the evidence against the Corporation.

The facts of the case, which caused a jury of six men and six women to find McDonald's coffee was unreasonably dangerous and had caused enough human misery and suffering that no one should be made to suffer exposure to such excessively hot coffee again, will shock and amaze you:

McFact No. 1: For years, McDonald's had known they had a problem with the way they make their coffee— that their coffee was served much hotter (at least 20 degrees more so) than at other restaurants.

McFact No. 2: McDonald's knew its coffee sometimes caused serious injuries— more than 700 incidents of scalding coffee burns in the past decade have been settled by the Corporation— and yet they never so much as consulted a burn expert regarding the issue.

McFact No. 3: The woman involved in this infamous case suffered very serious injuries— third-degree burns on her groin, thighs and buttocks that required skin grafts and a seven-day hospital stay.

McFact No. 4: The woman, an 81-year old former department store clerk who had never before filed suit against anyone, said she wouldn't have brought the lawsuit against McDonald's had the Corporation not dismissed her request for compensation for medical bills.

McFact No. 5: A McDonald's quality assurance manager testified in the case that the Corporation was aware of the risk of serving dangerously hot coffee and had no plans to either turn down the heat or to post warning about the possibility of severe burns, even though most customers wouldn't think it was possible.

McFact No. 6: After careful deliberation, the jury found McDonald's was liable because the facts were overwhelmingly against the company. When it came to the punitive damages, the jury found that McDonald's had engaged in willful, reckless, malicious or wanton conduct, and rendered a punitive damage award of 2.7 million dollars. (The equivalent of just two days of coffee sales. McDonald's Corporation generates revenues in excess of $1.3 million daily from the sale of its coffee, selling 1 billion cups each year.)

McFact No. 7: On appeal, a judge lowered the award to $480,000, a fact not widely publicized in the media.

McFact No. 8: A report in *Liability Week*, September 29, 1997 indicated that Kathleen Gilliam, 73, suffered first and second degree burns when a cup of coffee spilled onto her lap. Reports also indicate that McDonald's consistently keeps its coffee at 185 degrees, still approximately 20 degrees hotter than at other restaurants. Third degree burns occur at this temperature in just two to seven seconds, requiring skin grafting, debridement and whirlpool treatments that cost tens of thousands of dollars and result in permanent disfigurement, extreme pain and disability to the victims for many months, and in some cases, years.

The most important message this case has for you, the consumer, is to be aware of the potential danger posed by your early morning pick-me-up. Take extra care to make sure children do not come into contact with this scalding liquid, and always look to the facts before rendering your decision about any publicized case.

Hot coffee burns McDonald's

Company's actions confound observers

By Andrea Gerlin

©Copyright 1994, The Wall Street Journal

ALBUQUERQUE, N.M. — When a law firm here found itself defending McDonald's Corp. in a suit last year that claimed the company served dangerously hot coffee, it hired a law student to take temperatures at other local restaurants for comparison.

After dutifully slipping a thermometer into steaming cups and mugs all over the city, Danny Jarrett found none came closer than about 20 degrees to the temperature at which McDonald's coffee is poured — about 180 degrees.

It should have been a warning.

Yet McDonald's lawyers went on to dismiss several opportunities to settle out of court, apparently convinced no jury would punish a company for serving coffee the way customers like it.

After all, the coffee's temperature helps explain why McDonald's sells a billion cups a year.

But days after a jury here awarded $2.9 million to an 81-year-old woman scalded by McDonald's coffee, some observers say the defense was naive.

"I drink McDonald's coffee because it's hot, the hottest coffee around," says Robert Gregg, a Dallas defense attorney. "But I've predicted for years that someone's going to win a suit, because I've spilled it on myself."

McDonald's, known for its fastidious control over franchisees, requires that its coffee be prepared at very high temperatures, based on recommendations of coffee consultants and industry groups.

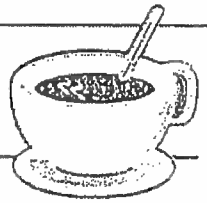
Before the trial, McDonald's gave the opposing lawyer its operations and training manual, which says its coffee must be brewed at 195 to 205 degrees and held at 180 to 190 degrees for optimal taste.

Since the verdict, McDonald's has declined to offer any comment, as have their attorneys. It is unclear if the company, whose coffee cups warn drinkers the contents are hot, plans to change its preparation procedures.

Coffee temperature is suddenly a hot topic in the industry. The Specialty Coffee Association of America has put coffee safety on the agenda of its quarterly board meeting this

Please see COFFEE, 3A

Hot coffee to go



Coffee temperatures at local restaurants, as tested by a Post employee.

Hathaway's Coffee Shop	176°
Graeter's	170°
Dunkin Donuts	169°
The Coffee Beanery	169°
Burger King	166°
White Castle	166°
Frisch's	165°
Stop N' Go	162°
UDF	159°
Awakenings	159°
Hardees	157°
McDonalds (UC)	156°
McDonald's (Calhoun St.)	155°
Busken Bakery	153°
McDonald's (Mitchell Ave.)	150°
Au Bon Pain	145°

Coffee

From Page 1A

month. And a spokesman for Dunkin' Donuts Inc., which sells about 500 million cups of coffee a year, says the company is looking at the verdict to see if it needs to make changes in the way it makes coffee.

Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans — including many who typically support the little guy — to be outraged at the verdict.

And radio talk-show hosts around the country have lambasted the plaintiff, her attorneys and the jurors on air. Declining to be interviewed for this story, one juror explained that he already had received angry calls from around the country.

It's a reaction many jurors could have understood before they heard the evidence. At the beginning of the trial, jury foreman Jerry Goens said he "wasn't convinced as to why I needed to be there to settle a coffee spill."

At that point, Goens and the other jurors knew only the basic facts: two years earlier, Stella Liebeck bought a 49-cent cup of coffee at the drive-in window of an Albuquerque McDonald's, and while removing the lid to add cream and sugar spilled it, causing third-degree burns of the groin, inner thighs and buttocks.

Her suit, filed in state court in Albuquerque, claimed the coffee was "defective" because it was so hot.

What the jury didn't realize initially was the severity of her burns. Told during the trial of Mrs. Liebeck's seven days in the hospital and of her skin grafts, and shown gruesome photographs, jurors began taking the matter more seriously.

Even more eye-opening was the revelation that McDonald's had seen such injuries many times before. Company documents showed that in the past decade McDonald's had received at least 700 reports of coffee burns ranging from mild to third-degree, and had settled claims arising from scalding injuries for more than $500,000.

Some observers wonder why McDonald's, after years of settling coffee-burn cases, chose to take this one to trial.

After all, the plaintiff was a sympathetic figure — an articulate, 81-year-old former department store clerk who said under oath she had never filed a lawsuit before.

In fact, Mrs. Liebeck said, she never would have filed this one if McDonald's hadn't dismissed her request for compensation for pain and medical bills with an offer of $800.

Then there was the matter of Mrs. Liebeck's attorney. While recuperating from her injuries in the Santa Fe home of her daughter, Mrs. Liebeck met a pair of Texas transplants familiar with a Houston attorney who had handled a 1986 hot-coffee lawsuit against McDonald's.

His name was Reed Morgan, and ever since the first case, he had deeply believed McDonald's coffee is too hot.

For the first case, involving a Houston woman with third-degree burns, Morgan deposed Christopher Appleton, a McDonald's quality assurance manager. According to Morgan, Appleton said "he was aware of this risk ... and had no plans to turn down the heat." McDonald's settled that case for $27,500.

As the trial date approached for Mrs. Liebeck, McDonald's declined to settle. At one point, Morgan said he offered to drop the case for $300,000, and was willing to accept half that amount. But McDonald's didn't bite.

Only days before the trial, Judge Robert Scott ordered both sides to attend a mediation session. The mediator, a retired judge, recommended that McDonald's settle for $225,000, saying a jury would be likely to award that amount. The company didn't follow his recommendation.

Instead, McDonald's continued denying any liability for Mrs. Liebeck's burns. The company suggested she may have contributed to her injuries by holding the cup between her legs and not removing her clothing immediately.

McDonald's also argued "Mrs. Liebeck's age may have caused her injuries to have been worse than they might have been in a younger individual," since older skin is thinner and more vulnerable to injury.

The trial lasted seven sometimes mind-numbing days. Experts dueled over the temperature at which coffee causes burns.

A scientist testifying for McDonald's argued that any coffee hotter than 130 degrees could produce third-degree burns, so it didn't matter whether McDonald's coffee was hotter.

But a doctor testifying on behalf of Mrs. Liebeck argued that lowering the serving temperature to about 160 degrees could make a big difference, because it takes less than three seconds to produce a third-degree burn at 190 degrees, about 12 to 15 seconds at 180 degrees and about 20 seconds at 160 degrees.

The testimony of Appleton, the McDonald's executive, didn't help the company, jurors said later. He testified McDonald's knew its coffee sometimes caused serious burns, but hadn't consulted burn experts about it.

He also testified that McDonald's had decided not to warn customers about the possibility of severe burns, even though most people wouldn't think it possible.

Finally, he testified McDonald's didn't intend to change any of its coffee policies or procedures, saying, "There are more serious dangers in restaurants."

Juror Jack Elliott said he then began to realize the case was about 'callous disregard for the safety of the people."

Next for the defense came P. Robert Knaff, a human-factors engineer who earned $15,000 in fees from the case and who, several jurors said later, didn't help McDonald's either. Knaff told the jury hot-coffee burns were statistically insignificant when compared to the billion cups of coffee McDonald's sells annually.

When the panel reached the jury room, it swiftly arrived at the conclusion McDonald's was liable.

The six men and six women decided on compensatory damages of $200,000, which they reduced to $160,000 after determining that 20 percent of the fault belonged with Mrs. Liebeck for spilling the coffee.

The jury then found McDonald's had engaged in willful, reckless, malicious or wanton conduct, the basis for punitive damages. Morgan suggested penalizing McDonald's the equivalent of one to two days of companywide coffee sales, which he estimated at $1.35 million a day.

During the four-hour deliberation, a few jurors unsuccessfully argued for as much as $9.6 million in punitive damages. But in the end, the jury settled on $2.7 million.

McDonald's has since asked the judge for a new trial.

Judge Scott has asked both sides to meet with a mediator to discuss settling the case before he rules on McDonald's request. The judge also has the authority to disregard the jury's finding or decrease the amount of damages.

Inside

Blume Goldfaden Berkowitz Donnelly Fried & Forte
Attorneys at Law

Summer 2003 **Published for Clients and Friends of the Firm**

CHATHAM (973) 635-5400 JERSEY CITY (201) 963-4711 NORTH BERGEN (201) 861-7757

Product Safety – Water Burns

BY KENNETH BERKOWITZ

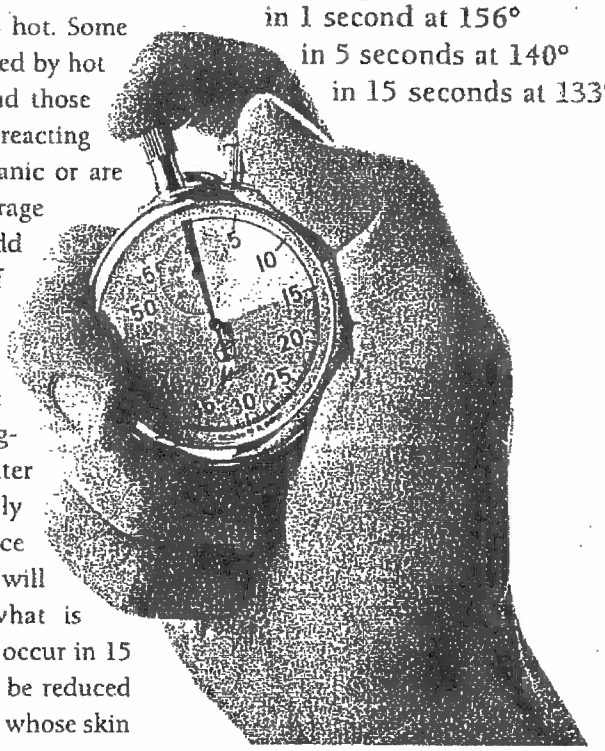
Each year, several thousand children and adults are burned by tap water because the water is too hot. Some people are more likely to be permanently injured by hot water than others; these include the elderly, children, the infirm, and those with disabilities. These groups of people are oftentimes incapable of reacting properly when exposed to scalding hot water, either because they panic or are simply physically incapable of responding appropriately. While the average adult may realize that he or she should simply turn off the water, or add some cold water, those with special needs are frequently incapable of doing so.

...experts recommend adjusting the thermostat setting on your water heater to 120 degrees F or less.

All too often, burn injuries result from the water to which the client was exposed having been negligently set at a temperature hotter than was necessary. This excessively hot temperature is the difference between what is acceptable—and will not cause burn injuries—and what is dangerously too hot. For example, at 133 degrees F, a serious burn can occur in 15 seconds. At 140 degrees, only five seconds are required. The time may be reduced by 50 percent or more for children under age 5 and some adults over 65, whose skin is thinner than the average adult's skin.

It is not uncommon for clients to be badly burned without their attorney knowing that there is a potential case. Blume Goldfaden has represented numerous clients who have been horribly burned when exposed to scalding hot water. More often than not, there is an unrealized theory of the case that, if properly pursued, will result in a substantial recovery for the client. →

Hot water causes third degree burns...
in 1 second at 156°
in 5 seconds at 140°
in 15 seconds at 133°



For more information on hot tap water and scald burns, please visit the following websites:

www.tmva.org.uk/scalding.htm
www.safekid.org/scald.htm
www.shrinershq.org/prevention/burntips/water.html

VICE PRESIDENT'S REPORT

Legislative Attack Based on False Assumptions

by Michael F. Colley, Vice President/Chair of Key Person Committee

The wholesale attack currently being waged upon America's product liability system is based on assumptions which are untrue and unsupported by the evidence. The proponents of "product liability reform" claim that there has been an explosion of product liability litigation. This is simply not true.

The Conference of Chief Justices recognized that in 1991, of the roughly 7 million civil filings in state courts, only ten percent were tort cases; four percent of those tort cases were product liability cases; only 3% of all civil cases decided by trial were product liability cases. Further, "[b]etween 1986 and 1992, new non-auto tort filings (e.g., product liability, medical malpractice, defamation) remained relatively constant, falling and rising only moderately over that period, and ending in 1992 at a level just slightly above the 1986 level."[1] Product liability cases (excluding asbestos cases) filed in the federal courts between 1985 and 1991 actually declined by approximately 36 percent (from 8,268 cases in 1985 to 5,263 cases in 1991).[2]

As Professor Marc Galanter, the Director of the University of Wisconsin Law School's Institute for Legal Studies, has reported:

> "The decrease in product liability filings was even more dramatic for the largest corporations. A study of the litigation of the nation's one thousand largest corporations, presently being conducted by the Business Disputing Group at the University of Wisconsin in conjunction with the Rand Corporation's Institute for Civil Justice, found that the number of non-asbestos product liability cases involving these corporations fell from 4,014 in 1985 to 1,437 in 1990—a decrease of 64%."[3]

Mike Colley, Vice President

The only true "litigation explosion" has not been an explosion of product liability cases, but rather an explosion in the number of lawsuits between corporations. As reported by columnist Colman McCarthy, in *The Washington Post*:

> "The Administrative Office of the U.S. Courts found that between March 1990 and March 1992, product liability cases declined from 18,639 to 10,919. A 1988 University of Wisconsin law review article stated that from 1971 to 1986, cases of corporations suing other corporations rose more than 1,100 percent."[4]

Milo Geyelin also reported in *The Wall Street Journal*:

> "Business may be their own worst enemies when it comes to the so-called litigation explosion. Preliminary data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court. Trailing behind are personal-injury suits and product-liability cases brought by individuals."[5]

Proponents of product liability legislation also argue that there has been an "explosion in the frequency, size, and availability of punitive damage awards" and that federal legislation is necessary to correct this "problem." This is simply not true. Punitive damages are very rarely awarded in product liability cases.[6] The number of known punitive damage awards in non-asbestos product liability cases from the early 1980s to 1990 actually decreased 34 percent.[7] In the infrequent case where punitive damages are awarded, they are typically modest or reduced by the trial judge.[8] The median punitive damage award between 1981 and 1986 in jurisdictions studied by the American Bar Foundation was only $30,000.[9] Despite the fact that consumer products (excluding cigarettes) are responsible for an estimated 29,000 deaths and 3 million injuries each year, punitive damages were awarded in only 353 product liability cases between 1965 and 1990, and 91 of these involved asbestos claims.[10] Approximately 25 percent of these awards were reversed or remanded upon appeal.[11] The overwhelming majority of plaintiffs who received punitive damages suffered catastrophic injury or death.[12] Three out of four product liability punitive damage awards involved the failure of a company to warn of well-known dangers, or the failure to remedy known and serious dangers after marketing or regulatory approval.[13] The circumstances under which punitive damages may be awarded are already highly

restricted by the states. According to the Conference of State Justices, "[t]hirty-nine states either do not permit punitive damage awards or have taken steps to reduce the frequency and size of the punitive awards through tort reform."[14]

Proponents of reform also suggest that the nationalization of product liability law is necessary to provide uniformity and predictability in product liability litigation. This is simply not true. Their argument completely ignores the fact that the same liability standard (i.e., "strict liability") under Section 402(a) of the Restatement (Second) of Torts is already in effect in almost every State.[15] And besides, this is not the real goal. What the proponents really want is to revert to a negligence standard which existed fifty years ago. The imposition of a new Congressionally-mandated product liability scheme upon the states would be improper and make the interaction between federal and state law in the tort area much more complex. The nationalization of product liability law is not necessary and would be destructive. To use the language of a spokesman for the Conference of Chief Justices:

> "Preempting each State's existing tort law in favor of broad Federal product liability law will create additional complexities and unpredictability for tort litigation in both State and Federal courts, while depriving victims of defective products of carefully reasoned principles and procedures already developed at the State level. The critical experience of State courts with the long process of interpretation and consistency on major points of product liability law tells us the Federal legislation is not the answer. Re-inventing tort law must occur by and through State courts and legislatures situated to determine and control the impact of reform within their own communities."[16]

Predictability will be reduced rather than increased. Each of the fifty states will have to decide the scope of the federal preemption of product liability law and how it interacts with that state's non-preempted tort law. Indeed, the interaction between federal and state law in the tort area will be made much more complex. The well-settled case law to which businesses can now look to predict how a particular case is likely to be resolved will become unsettled.

Proponents of federal product liability legislation argue that it would establish "uniform legal principles". This is simply not true. Federal product liability legislation would destroy the state- based product liability system and impose a new and untested system. It would effectively throw out the window years of well-settled case law interpreting current product liability laws. Rather than establishing uniform legal principles, the legislation would result in a complex legal mess, including constitutional litigation, which will take years for the courts to resolve.

As Professor Marshall S. Shapo noted in testimony on behalf of the American Bar Association concerning S.687, a product liability act which was rejected during the last session of Congress:

> "[A] proposal of this sort, besides seriously dampening the creativity of state courts, would actually complicate the law, viewed as a system, rather than simplify it. For many years, people have been complaining about the workload of the Supreme Court, and complaints about the burdens of the federal courts generally have escalated over the last decade or so. It would seem that legislation of this sort can only deposit more reams of litigation on the desks of federal, as well as state, judges. Why would this Committee want to involve our nation's courts in a new set of wrangles about the meaning, let alone the constitutionality, of a federal statute that attempts to change a quite serviceable body of state law."[17]

Some proponents suggest that the proposed product liability legislation is needed to make the system "fairer" by precluding liability on the part of product sellers. Continuing to impose strict liability upon sellers as well as the manufacturers of defective products is not only fair, but make sense. The important public policy rationale was set forth in the landmark case of *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171-172 (1964):

> "Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship."

Imposition of strict liability upon the seller brings "further pressure on the manufacturer for safety in design and production; all to the protection of the public". *Mead v.*

(cont'd on page 29)

(Vice President's Report cont'd)

Warner Pruyn Division, 394 N.Y.S.2d 483 (1977).

Tell your United States Senators which you believe is right for the citizens in your state: the current product liability laws adopted by your state legislature and interpreted by your state courts or the House-passed product liability laws rushed to judgment in the first 100 days of the 104th Congress.

Write, fax or call your United States Senators today.

Endnotes

1. *Hearings on S. 687 Before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 7 (1993)(statement of the Conference of Chief Justices).

2. *Hearings on S. 640 Before the Senate Committee on the Judiciary*, 102d Cong., 2d Sess. 3 (1992)(testimony of Marc Gallanter).

3. *Id.*

4. Colman McCarthy, *The Washington Post*, February 16, 1993.

5. Milo Geyelin, *The Wall Street Journal*, December 3, 1993, at D21.

6. Thomas Koenig and Michael Rustad, Roscoe Pound Foundation, *Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of A Quarter Century of Verdicts* (1991).

7. *Hearings on S. 640 Before the Senate Committee on the Judiciary*, 102d Cong., 2d Sess. 3 (1992)(summary of testimony of Marc Gallanter).

8. *See infra* note 13.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Hearings on S. 687 Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. 6 (1994).

13. *Id.* at 7. *See generally*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992); Koenig and Rustad, supra note 8; S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1 (1990)(authors are researchers at American Bar Foundation); Peterson, Sharma & Stanley, Rand Institute for Civil Justice, *Punitive Damages: Empirical Findings* (Report R-3311-1CJ).

14. *Hearings on S. 687*, *supra* note 1 at 7 n. 6 (1993)(statement of the Conference of Chief Justices). *See also* Thomas Koenig and Michael Rustad, *The Quiet Revolution Revised: An Empirical Study of the Impact of State Tort Reform on Punitive Damages in Products Liability*, 16 Justice Sys. J. 23 n. 5.

15. As of 1988, 45 states had adopted the law of strict liability set forth in Section 402(A) of the Restatement (Second) of Torts, including Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania; Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. In addition, the "unreasonably dangerous" standard has been accepted in Alabama and Georgia. Specific proof that a product is unreasonably dangerous is not required in Alaska, California, Idaho, New York, Pennsylvania, Washington, and West Virginia. *See also*, L. Frumer and M. Friedman, *Products Liability* 3.03(3)(1987) (survey of state) and *American Law of Products Liability* 125-131 (3d ed. 1987).

16. *Hearings on S. 687*, supra note 1 (1993)(statement of Conference of Chief Justices).

17. *Hearings on Broad Federal Products Liability Legislation Before the Senate Committee on the Judiciary*, 100th Cong., 2d Sess. 5 (1990)(statement of Marshall S. Shapo, Professor, Northwestern University School of Law, on behalf of the American Bar Association).

It's Not Perfect, But It's Us

by Richard Allin

I HAVE just been released from jury duty after serving on two cases in circuit court, and I come away from the process well aware that the jury system is faulty. Bushels of facts, suppositions, opinions, guesses, and assertions both helpful and misleading are dumped into the laps of twelve randomly selected citizens who are then asked to come up with the truth.

The twelve go into a small room without training and little practical instruction on how to conduct themselves, and are told to stay there until they have reached a decision. A bailiff sits outside the door. He is their only contact with the real world.

The judge has instructed them in the law as it applies to the case. This comes at the end of hours of presentation of evidence from witnesses and exhibits, and the interpretation of that evidence by opposing lawyers.

My first feeling upon entering the jury room is inadequacy. We are a pretty inexpert bunch to be making such momentous decisions. Among those pulling out chairs around the table are a policeman's wife, a letter carrier, a grandmother of thirty, a businessman in sales, a former truck driver, a railroad engineer, a housewife with growing children, and a retired businessman. I have a feeling that they are no more or less competent than I am, and that gives me a depressed feeling in my insides.

Here are twelve random, unskilled citizens asked to find a kernel of truth in bushels of confusing data.

The first case involves a pretty young lady who works for a local investment firm. She has appealed a municipal court finding of driving while intoxicated. A young chap from the city attorney's office is prosecuting. He looks the model yuppie lawyer, fresh-faced and boyish. But the jury feels all along that he brings too little to the trial to convict an attractive ex-cheerleader from small town Arkansas. After all, her attorney argues, she drank only four or five beers before midnight, and the arrest didn't come until after 3 a.m. when she was driving home.

Could a person who had four or five beers before midnight be sufficiently impaired at 3:30 a.m. to be guilty of driving while intoxicated?

> *Here are twelve random, unskilled citizens asked to find a kernel of truth in bushels of confusing data.*

"I say the defendant had been drinking all night and didn't stop with four beers," exclaimed a young black woman in the jury room. She and another woman were holding out for conviction.

Jurors shake their heads. Both prosecution and defense agree that no more than four beers were drunk.

"People like that don't stop with just four beers," she insisted further.

Other jurors finally persuade her that evidence admits only five beers at the most.

This vote then is final. All twelve jurors must agree on the verdict in a criminal trial.

All twelve of us agree on a not guilty verdict, and sign the form.

There was a second charge that the young lady was guilty of breaking a law against refusing to take a breath test. But the jury decided that if she was not guilty of DWI, it would not shackle her with the second charge.

"I think we can temper justice with mercy," somebody said expansively.

Debate has been earnest and in goodwill. I sign the forms as "foreperson," and we file back into the courtroom where the judge reads the verdict aloud.

"Not guilty."

There are tears and hugs and smiles. The jury is released with thanks, and leaves the courtroom unnoticed by the relieved knot of people. The prosecuting lawyer looks glum.

IN THE CIVIL CASE, two companies are charged with negligence that resulted in an injury of a highway worker. The plaintiff's lawyer specializes in personal injury cases and is frequently before the courts representing individuals against large companies. Word is that he makes money if his client makes money.

The plaintiff is of oriental ancestry, but an American citizen by birth. Though not well educated, he is articulate. He is known as a dependable businessman, and as a hard worker.

A highway striper by profession, he claims that he was hurt on the job working as a subcontractor for a highway builder who was just completing a job for the Arkansas Highway and Transportation Department. The contractor, he complains, is negligent in that it does not properly mark the traffic lanes with warning barrels and signs, nor does it assign an adequate number of personnel to direct traffic.

> *When the jury gets the case, it is clear during early stages of discussion that a majority will rule in favor of the defendants. But there are holdouts.*

The second defendant is a moving company. The side of one of its trucks that was proceeding at about 7 miles per hour through a construction zone came into contact with the head of the plaintiff as he bent over to put a guide mark on the highway. Testimony shows that a deep brain concussion robs him of his ability to work, and will severely limit a normal existence for the rest of his life.

The trucking company is represented by a soft-spoken, no frills attorney with a respected law firm. His questions are phrased to elicit brief answers from witnesses, not requiring them to construct complex sentences. The method seems well suited for workmen who are unused to conveying thoughts constructing long sentences.

The subcontractor is represented by a nervous young lawyer who can't keep his legs still under the table, and seems to be in constant movement even while seated. Some jury members find the perpetual motion distracting and ask the bailiff to speak to him. His questions, though, reveal him to be bright and articulate, and he gives the jury good reason to rely on his ability despite his youth.

When the jury gets the case, it is clear during early stages of discussion that a majority will rule in favor of the defendants. But there are holdouts.

"I think he's lying to save his job," one juror said of a witness in the second suit.

How had the juror reached that conclusion? No substantial reasons are given.

"I just do. I know his type."

But the evidence says otherwise...

THE DISCUSSION grinds on. Several talk at once. The atmosphere in the jury room is friendly. There are laughter and joking. The bailiff brings hamburgers and Cokes as suppertime passes.

"Who is going to pay his hospital bills?" a lady asks. "We ought to give him something."

But why should a company pay if it is not negligent?

"Sentiment and compassion aren't at issue," someone declares. "If the company was negligent it should pay. If it wasn't then it shouldn't."

Heads shake.

"It don't seem right."

The choices are uncomfortable, but they have to be made.

"All of them was trying to protect their jobs. I still say he was lying."

NO MONEY is awarded. At the announcement the plaintiff's attorney lifts his hands a couple of inches from his lap in a gesture of frustrated resignation. There is almost no reaction from the defense attorneys.

The plaintiff does not change expression.

DID WE as a jury do well? Could another system have rendered better verdicts?

The answer, is probably not. Better a jury of one's equals making the decision instead of the king, or duke, or landowner, or sheriff, or judge, or policeman making it.

It's not perfect. But it's us.

> *DID WE as a jury do well? Could another system have rendered better verdicts? The answer is probably not.*

Richard Allin is a columnist with the Arkansas Democrat-Gazette in Little Rock.

THE CINCINNATI ENQUIRER

Jury awards don't tell the story

BY MAURA DOLAN
Los Angeles Times

The Karen Silkwood saga that inspired an Oscar-winning movie starring Meryl Streep didn't end with a $10.5 million jury award against Kerr-McGee Corp., which owned the Oklahoma nuclear plant where Ms. Silkwood was exposed to plutonium.

But Ms. Silkwood's children never collected the millions a jury felt was owed them in 1979, after the 28-year-old laboratory analyst died in a one-car accident on her way to meet a reporter and a union official.

After years of appeals and delay, the family and Kerr-McGee settled for $1.38 million. The three children, all teen-agers by then, shared $500,000. The rest went to legal and estate fees.

Verdict just beginning

It was an ending familiar to many plaintiffs who receive large jury awards. Mammoth awards that make headlines and spur calls for tort reform frequently are considerably reduced before they reach plaintiffs.

"There is a public perception that getting the verdict is getting the money," said Pennsylvania lawyer Joseph P. Lenahan. "But getting a verdict is nothing more than getting a door open to get a chance to get the money."

On the other side of the door are appeals that can overturn or slice big awards, defendants who don't have the money or insurance coverage to pay or who have sheltered their assets, and lawyers' fees. In many cases, the plaintiffs negotiate a lower settlement, hoping to enhance their chance of collecting some money.

Less than 20% of award

In a review of 25 of the United States' largest personal injury awards in 1993 — the year examined to allow for subsequent appeals — the *Los Angeles Times* found that plaintiffs in 18 cases received an average of less than 20 percent of what the jury ordered. In most cases, even that share was reduced by another third to half by legal and court costs.

One of the 25 cases is still on appeal, and the rest were settled for undisclosed amounts.

Awards ranged from $15 million to $163 million, handed down by juries as restitution for a multitude of horrors, from a needless amputation to a fatal plane crash to negligent transmission of AIDS. Injured litigants or their families collected as much as 60 percent of their original award — or as little as nothing.

Despite the discrepancy between awards and payment, huge jury awards, while rare, are often cited as justification for reining in the tort system, the legal arena that allows recovery for injuries. These highly publicized awards also may give plaintiffs unreasonable expectations about hitting the jackpot.

In fact, the larger the jury award, the smaller the percentage that will be collected. "The verdict is just the beginning of the story," said Suffolk University law school professor Michael Rustad, who has studied the difference between awards and payments.

The difference was staggering for Donald VanDyk, 38, of Jacksonville, Fla. He had been shot in the head in an unprovoked attack in a Florida bar in 1988; he filed a lawsuit against the gunman and the bar that served him.

The jury awarded Mr. VanDyk $25 million, potentially making him a wealthy man.

But Mr. VanDyk's victory was short-lived. All he could collect was about $100,000, the amount of insurance held by the tavern owner. He pocketed $50,000 after legal and medical bills.

Brain damaged and partially paralyzed from the shooting, Mr. VanDyk now makes his living photocopying documents at his lawyer's Jacksonville office. "No justice, man," he said. "No justice."

In the *Times'* survey, the cases that were settled for more than half of the original award involved only compensatory damages or victims who had high earning power before their accidents.

Other studies have found that the larger the award and the greater the punitive damages, the more vulnerable it is to reduction. A 1987 Rand Corp. study found 93 percent of jury awards of less than $100,000 were paid, but payment averaged only 57 percent for 10 cases studied with verdicts more than $10 million.

KY POST

Monday, January 24, 1994

You and the law

Report on litigation offers some insight into awards pattern

By G. Wayne Bridges

The National Center for State Courts studied the size of plaintiff's awards and their relation to the status of the litigants, the type of trial, area of tort law and length of time to disposition.

The study concluded that who prevails in a tort case may depend on whether the litigants were individuals or corporations.

For example, the success of individual plaintiffs over corporate entities or mixed corporate and individual entities varied somewhat. Against insurance companies, the plaintiffs succeeded in 63 percent of the trials and against corporations approximately 50 percent of the time. Individual plaintiffs prevailed in only 40 percent of the trials against government defendants.

Where the individuals sued other individuals, the plaintiffs succeeded 61 percent of the time.

The study also found that the plaintiff's success varied by the type of tort involved. Only 29 percent of the verdicts favored the plaintiffs in medical malpractice cases; 64 percent of the automobile verdicts favored the plaintiff.

Plaintiffs were successful in 74 percent of the cases tried before a judge and 62 percent of the cases tried by juries in automobile cases. In personal injury cases generally, plaintiffs were successful 69 percent of the time in cases tried by the judge and 54 percent of the cases before a jury.

According to litigant status and cause of action, the largest median award was for cases involving institutional plaintiffs and defendants, which was $72,466; awards for individuals who sued corporations were $66,474, and individuals suing the government collected a median award of $54,961.

The highest median award was $200,000 in medical malpractice cases and $48,300 in personal injury cases and $19,157 in automobile actions.

Punitive damages were rarely awarded; only 6 percent of the 426 verdicts studied where plaintiffs recovered included a punitive award. Most of these were from personal injury or automobile actions. In only a few cases did the punitive damages exceed the compensatory damages.

Overall, the median total award for compensatory and punitive damages was $25,154.

Wayne Bridges practices law in Covington and lectures at seminars and the Chase Law School. He was named the Kentucky Bar Association's "Outstanding Lawyer" in 1986.