

From the President's Notebook

By Joseph Mirrione



Ring in the New Year — 2008

*How are we doing
so far?*

The arrival of a new year represents a time for review, renewal and re-commitment. Let's start this New Year assessing where we have been, where we hope to go and how we will get there. A brief recap of our 2007 goals and progress:

1. Legislative Agenda for 2008. The following resulted from listening to you at ten regional meet-

ings conducted around the state and a Board of Governors' full day legislative retreat held in December:

- Workers' Compensation, permitting 308a discretionary benefits, scarring and disfigurement benefits and use of claimant's own doctor. Also, propose legislation clarifying the applicability of the final judgment rule to workers' compensation cases.
- Expand insurance protection by requiring conversion coverage, absent an informed consent waiver.
- Ensure that "pre-settlement funding" is accomplished with full disclosure and non-usurious interest rates.
- Pursue tolling the statute of limitation and notice periods while waiting for police reports; increasing juror compensation; and eliminating hold harmless clauses in releases.
- Stay current and active to prevent anti-plaintiff legislation.

2. Membership Drive. We have had a great response to our membership drive. We need sixty new members to meet our five-year high and goal of fifteen hundred. With your help we will continue to serve the needs of the Connecticut plaintiff's bar and encourage membership in CTLA.

3. Awards Recognition Program. At this year's annual meeting we will institute an awards recognition program to recog-

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CTLA Forum now available online

This past year, CTLA's website has been going through some major changes. One of the most significant changes you will see in the coming weeks is the presence of the *CTLA Forum* online. In just a few clicks of the mouse, you will be able to access current and past issues going back over six years.

In addition, we will be placing our Verdicts & Settlements reports in an online searchable database. You will be able to search by attorney, city, case type, or verdict amount. You will also be able to easily submit your own verdicts and settlements in our easily accessible online form.

We hope that you take advantage of these recent updates, and as always, let us know of other suggestions that you might have.

nize members who have contributed to the profession, their communities or the Association.

4. Public Service Ads. We have created and designed a series of public service ads that our members can place in their local hometown newspapers.

5. Continuing Legal Education. We continue to educate new and veteran lawyers. Our CLE programs have been well received and CTLA continues to be the foremost provider of CLE programming in Connecticut. Our CTLA/UConn Trial Advocacy Team is preparing for the March AAJ regional competition.

David Cooney returns for his eighth year and Rosemarie Paine is a welcome addition to the teaching team. We are grateful for their time-consuming dedication to helping train our next generation of trial lawyers.

6. Strategic Plan and Budget. We are working toward developing a three-year strategic plan, and have improved our budget format.

7. Communication. We created a Board of Governors listserve for rapid and more informed decision-making and improved communications. We are now publishing verdicts and settlements online. Notably,

two editions of the *Forum* have already been published and the third is planned for release in May.

It's been a busy and hopefully productive first half of our year together, and we have much more work to do. Thank you for committing your time, energy and ideas to the work of CTLA as we begin 2008 and continue to make progress toward our goals.

A late-night stroll down the Washington Monument Mall

It was in the fall when our CEO, Neil Ferstand, and Adam Nicholson, Director

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of Grassroots and Field Organizing, and I traveled to Washington on behalf of the American Association for Justice. At AAJ's expense, 26 state presidents gathered for a three-day effort to enlist support for two bills pending in Congress. Linda Lipsen, Chief AAJ lobbyist, and her staff spent half a day briefing us on two bills: curtailing *mandatory arbitration in consumer contracts* and a tax bill allowing attorneys to deduct *client expenses* in the year incurred.

The following day we engaged in a well-orchestrated support effort. We visited each of our state's five representatives and two senators. It was daunting because the meetings required multiple trips to the opposite ends of the capital. We were deep in the trenches, traveling through the capital's underground subway and connecting pedestrian tunnels. This complicated maze of offices and chambers led me to wonder how anything gets done. But our veteran staff prepared well and moved us gracefully through nine hours of meetings

After dinner, at about 10 p.m., we walked the Washington Monument Mall enjoying the crisp night air and colorful trees. It had been a while since I made this walk. In fact, it was 1972, during the May Day antiwar demonstrations.

It was late, but the Mall was alive. As we walked, Adam, who had spent time in Washington, was our guide with commentary about each of the monuments. We worked our way down to the World War II memorial, finished four years ago. It sits between the Washington Monument and the Lincoln Memorial, adjacent to the Jefferson Memorial. You come to it gradually, a circle within a circle, and at either end are large pillars commemorating major battles. Along its walls are quotations and large bronze plaques honoring the branches of our armed forces at various points during the war.

I was the pure tourist, taken in by the sheer beauty — the lighted water fountain and the "star" water pool — everything so majestic and perfect. What stopped me in my tracks was the plaque depicting the LST naval vessel landing on the beach at Normandy with men and equipment *rushing forward* into battle from its opened bow ramp. Their fierce determination and courage were apparent. Lost in the moment, I realized this was more than a reminder of a defining moment during the war, but also a testament to my father and all who served so bravely. (He served as a



gunner on an LST, first on the beaches of Normandy, then in the invasion of southern France, and finally the assault on Okinawa.) I saw below a fresh bouquet below with a handwritten note: "*we shall never forget you. . .*"

Surrounded by the granite-carved words "courage," "justice," "freedom," "we came not to conquer but to free," I felt I was in the epicenter of democracy. I realized that I did not possess the courage of my father. I have never made his sacrifices. I wondered if he felt that his sacrifices were worthwhile and if he was proud of them. (I certainly was.)

As trial lawyers, we fight a different battle, one of words and ideals to achieve fairness and justice. Our lives are not at risk so our

sacrifices do not compare to those who have fought for us. But in fighting for those we represent, those who entrust their well-being and futures to us, we do give up a part of ourselves with each trial.

A few days later as I was entering a courthouse, gum stuck to my shoe. There were long lines through security and long waits at the elevators. As I began to question a potential juror and sat down, the chair broke. None of this lessened the passion I brought home with me. I realized that this is our imperfect battlefield; this is our fight, to do our very best for those we serve. It is our humble way of honoring all of those brave men and women, by carrying on the fight for justice, for freedom, for truth, for honor. "*Rush forward,*" friends!

MESSAGE FROM THE EDITOR

By David Rosen

I just finished a three-month trial. I was reminded, as I always am, that what we do is really hard. We are producers, writers, directors, stage managers, and actors in an elaborate improvisational performance before an audience that is primed to be critical — and there's someone else on stage next to us who's getting paid to mess up the show. And not only do we have to be able to turn on a dime as circumstances change, but when we do we're in danger of being stopped because we didn't anticipate the new twist in time to tell our adversary about it months or years before the trial. And it goes on day after day while we get more and more exhausted until the end, when we have to be at our best. Oh,

and how we do determines someone else's fate.

Who wants to do something like that! The answer is, not many people; and most of them belong to this organization.

Cynics say we're ego-tripping or money-hungry; we like to think we're tribunes of the people, preserving justice and democracy. One thing's for sure — our jobs are stressful. You're probably feeling pretty frazzled. So put your feet up on the desk, take a break, and enjoy this issue.



**2007 Update on Evidence
(and sundry cases of interest to the trial bar)**

By Bob Adelman and Neil W. Sutton, *Adelman Hirsch & Newman, Bridgeport*

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INTRODUCTION

This Update on Evidence covers civil cases (insofar as the rules therein are useful in civil cases) and criminal cases published from August 29, 2006 through August 28, 2007.

It also discusses five amendments to the *Connecticut Code of Evidence* (“C.C.E.”) that will take effect on January 1, 2008.

The Table of Contents and section headings follow the format of the C.C.E. Because the C.C.E. does not cover every evidentiary issue (see commentary to C.C.E. §1-2(b)), this Update includes additional headings.

Article IV — Relevancy

§ 4-1 BUILDING CODE AND CONSUMER PRODUCT SAFETY COMMISSION REGULATIONS, THOUGH NOT DIRECTLY APPLICABLE, ADMISSIBLE AS EVIDENCE OF STANDARD OF CARE — *CONSIDINE V. WATERBURY*, 279 Conn. 830 (2006); Vertefeuille, J.; Trial Judge — Moraghan, J.

RULE: The state building code and

Consumer Product Safety Commission regulations are admissible as evidence of the standard of care, even though, because they were enacted after the fact, their violation did not constitute negligence per se.

FACTS: Plaintiff was at a restaurant in the clubhouse of a municipal golf course. On the way out, while one of his friends stopped to use the restroom, the plaintiff stood by the exit door to wait for him.

Next to the exit door was a floor to ceiling window panel, sometimes called a sidelite. Plaintiff’s leg gave out, and he fell through the sidelite. Because it was not made of safety glass, he received lacerations.

The clubhouse building had been constructed in 1962. In 1970, a state building code was enacted, requiring safety glass in sidelites. The code specifically exempted owners of buildings already constructed from having to install new sidelites. In 1980, the Consumer Product Safety Commission (“CPSC”) promulgated regulations to similar effect.

Plaintiff sought to introduce the building code and CPSC regulations as evidence of the standard of care for safe sidelites. Plaintiff’s expert testified that, although the regulations did not require the building owner to replace the sidelites, they reflected the judgment of the state building inspector and the CPSC that sidelites, because they are next to a door, are in a hazardous location that requires special precautions.

The trial court admitted the regulations and the expert’s testimony regarding those regulations. The Supreme Court affirmed.

REASONING: The Supreme Court distinguished between the admissibility of a regulation which is enforceable and the admissibility of a regulation which is not. The violation of an applicable building code regulation is negligence per se. The fact that a building is not up to the standard of an inapplicable regulation can be considered by the jury in deciding whether or not, under common law principles, the owner conducted himself as a reasonably prudent person.

“We therefore conclude that the trial court properly considered the building code and the federal regulations as *some*

evidence of the standard of care because they reflected the collective experience and expertise of both the office of the state building inspector and the federal Consumer Product Safety Commission and what they believe to be the safe use of glass in entryways.”

279 Conn. at 867-68 (footnote omitted.)

The defense argued that the likelihood that the jury would misuse the regulations and apply them as negligence per se standards was too great to allow their admission. Justice Zarella, in dissent, agreed.

§ 4-1 DEFENDANT DOCTOR’S EXPERIENCE NOT RELEVANT REGARDING INFORMED CONSENT — *DUFFY V. FLAGG*, 279 Conn. 682 (2006); Vertefeuille, J.; Trial Judge — Lager, J.

RULE: Defendant doctor’s incomplete answer to patient’s inquiry regarding the doctor’s prior experience — which was not claimed to affect the patient’s risk — is not relevant on the issue of informed consent.

FACTS: Plaintiff consulted with the defendant obstetrician regarding having a vaginal birth after cesarean section (“VBAC”) with her second child. In explaining the VBAC procedure, the defendant said the risks included uterine rupture which could result in the death of mother or child.

The plaintiff asked the doctor about the doctor’s personal experience with VBAC and whether the doctor had had any negative outcomes. The doctor stated that one of her previous patients had suffered a uterine rupture; she did not tell the patient that the infant had died and that she had been sued.

Plaintiff elected to attempt the VBAC. Her uterus ruptured, and her baby died.

Defendant filed a motion in limine to prohibit the plaintiff from introducing any evidence regarding the earlier case where the infant died and the doctor was sued. The trial court granted the motion, ruling that unless there was evidence that the defendant doctor’s experience of having had one prior death created a statistically more significant risk for the patient, it was not relevant.

In other words, unless the plaintiff proved that the prior uterine rupture and infant death *increased the risk* of the procedure for the plaintiff, it was not one of the four areas doctors must discuss when obtaining informed consent.

In the decision being appealed, *Duffy v. Flagg*, 88 Conn. App. 484 (2005), the Appellate Court had held:

“[W]e do not believe that a plaintiff must first demonstrate a nexus between a physician’s prior experience with an anticipated procedure and the statistical risks of the procedure before evidence of a physician’s misleading and incomplete answer to a question related to that procedure can be presented to a jury. . . . [W]e believe that the court’s narrow construction of the doctrine of informed consent is at odds with our Supreme Court’s determination in *Logan* that jurors should have the opportunity to determine the scope and amount of information required to support a claim based on a lack of informed consent. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 293-94.”

88 Conn. App. at 492.

The Supreme Court reversed the Appellate Court.

The defendants argued that the Appellate Court failed to confine the doctor’s duty to inform to the four factors recognized in prior case law: (1) the nature of the procedure; (2) the risks and hazards of the procedure; (3) the alternatives to the procedure; and (4) the anticipated benefits of the procedure. They contended that the court below had added a fifth element, “an obligation on the part of a physician to disclose details of his or her professional experience even if this experience did not increase the risk to the patient.” 279 Conn. at 688.

The Supreme Court agreed, rejecting the idea of a flexible standard:

“First, the [plaintiff’s] claim runs afoul of our adoption and consistent application of an *objective* standard of disclosure. We do not require a physician to disclose information that a particular patient might deem material to his or her decision, but, rather, limit the information to be disclosed to that which a reasonable patient would find material. Second, the information that the plaintiff sought to admit into evidence did not relate to any of the four

specific factors encompassed by informed consent as we have defined it. Before granting the defendants’ motion in limine the trial court in the present case carefully ascertained that the plaintiff did not claim, and was not offering any evidence that, Flagg’s prior experience with vaginal birth after cesarean section increased the risks or hazards of that procedure for the plaintiff. The evidence therefore had no relevance to any of the four established elements of informed consent in this state.”

Id. at 693.

COMMENT: The court was careful to point out that if the physician’s prior experience increased the risk to the patient, that information must be disclosed under the second factor.

Furthermore, the decision does not limit a patient’s right to recover for a doctor’s misrepresentation.

§ 4-1 FACT THAT MOST DRIVERS ON A GIVEN ROAD EXCEED THE SPEED LIMIT NOT ADMISSIBLE AS CUSTOM — *DEEGAN V. SIMMONS*, 100 Conn. App. 524, cert. denied, 282 Conn. 923 (2007); Bishop, J.; Trial Judge — Arnold, J.

RULE: Testimony as to the average or “normal” speed of drivers on a particular road is not admissible as custom and practice, the reasonableness of speed being within the common knowledge and experience of the jury.

FACTS: Intersection collision case in which the plaintiff pulled out from a stop sign and attempted to make a left turn onto Research Parkway in Meriden and was hit by a truck.

Plaintiff alleged speeding and traveling unreasonably fast. The speed limit on Research Parkway was 40 m.p.h. The plaintiff’s accident reconstructionist opined that the truck driver was traveling 49 to 51 m.p.h. The defendant’s accident reconstructionist opined that the truck driver was traveling at 39.03 m.p.h.

Over objection, defense counsel was allowed to elicit from the police officer that the average speed of traffic on Research Parkway was between 40 and 50 miles an hour, and even higher later at night. Also over objection, defense counsel elicited testimony from a lay eyewitness, who regularly drove on Research Parkway, that the “normal speed” of the flow of traf-

fic on Research Parkway was 45 to 50 m.p.h.

The Appellate Court reversed.

REASONING:

“The general rule unquestionably is that a party charged with negligent conduct will not be allowed to show that such conduct was common or customary among those . . . placed under like circumstances and owing the same duties.” 100 Conn. App. at 531.

“Where the evidence in a case is such that the trier, applying to the facts found proven the common knowledge and experience of men in general has an adequate basis for determining whether the conduct in question is that of an ordinarily prudent person, the practice of other persons would serve no sufficient purpose to justify its admission, especially in a jury trial where it might create confusion as to the ultimate test to be applied. . . . When the question is, did a person use ordinary care in a particular case, the test is the amount of care ordinarily used by men in general, in similar circumstances. If it be matter of common knowledge, such amount of care needs no proof — the jury take notice of it.”

Id. at 532 (citations omitted; internal quotation marks omitted).

§ 4-1 PRIOR DWI CONVICTIONS ADMISSIBLE ON ISSUE OF PUNITIVE DAMAGES — *YEAKLEY V. DOSS*, Supreme Court of Arkansas, No. 06-851, WestLaw 1560550 (May 31, 2007); Corbin, J.

RULE: Even when a defendant driver admits negligence and intoxication, defendant’s earlier drunken driving convictions are relevant to punitive damages claim.

FACTS: Claim arising from motor vehicle accident. Defendant had pled guilty to DWI on the day in question. Plaintiff sought to introduce evidence that defendant had pled guilty to drunken driving twice before. Defendant moved in limine to exclude the prior convictions.

The trial court excluded the prior convictions as irrelevant. The jury did not award punitive damages. The Supreme Court of Arkansas reversed.

REASONING: The standard for awarding punitive damages includes an assessment of whether the defendant acted reck-

lessly, i.e., “with the knowledge that his conduct of driving while intoxicated could result in injury and that he continued that conduct in reckless disregard of the consequence from which malice could be inferred.” *Yeakley* at 8.

The court held that the earlier convictions were relevant to this determination:

“Specifically, the evidence of his convictions is relevant to the question of whether he knowingly drove in an intoxicated state in conscious disregard to the fact that his actions could result in injury, an element that Yeakley was required to prove for an award of punitive damages.

. . .

Evidence that Doss was intoxicated in this one instance versus evidence that this was in fact his third conviction for DWI could certainly impact a jury’s ability to award punitive damages.”

Id. at 9-10.

COMMENT: The standard in Connecticut for awarding common law punitive damages or double/treble damages under *C.G.S.* §14-295 is similar to the Arkansas standard.

§ 4-3 EVIDENCE RE: INFORMED CONSENT NOT ADMISSIBLE IN SURGICAL ERROR CASE — HAYES V. CAMEL, 283 Conn. 475 (2007); Norcott, J.; Trial Judge — Radcliffe, J.

RULE: Where there is no informed consent claim, evidence that the surgeon told the patient that the consequence the patient ultimately suffered was a risk of the procedure is inadmissible because its probative value is outweighed by the danger of confusion of the issues.

FACTS: Medical malpractice case claiming surgical error. Plaintiff had an L4 herniated disc for which Dr. Camel performed surgery. During the procedure, Camel pierced the dura, causing a leak of cerebral spinal fluid and damage to the plaintiff’s sacral nerves.

Plaintiff did not claim lack of informed consent, but that defendant negligently pierced the dura.

Dr. Camel had informed the plaintiff before surgery that nerve damage was a risk. Plaintiff filed a motion in limine to prohibit the defendant from offering evidence that Camel informed plaintiff of

this risk on the grounds (a) that it was not relevant in the absence of an informed consent claim and (b) that it would mislead the jury into thinking that, when he agreed to the surgery, the plaintiff assumed the risk of nerve damage.

The trial court ruled that the fact that nerve damage is a risk of the procedure is relevant because it demonstrates that resulting nerve damage does not itself establish negligence. (Contrast this with a case in which the complication is not a risk of the procedure, so that the fact that the complication occurred may establish negligence.)

The trial court also recognized that, as there was no informed consent claim, there was danger of the jury being misled, and gave a charge designed to avoid the misuse of this evidence:

“[S]imply because a particular injury is considered to be a risk of the procedure does not mean that a physician is relieved of the duty of adhering to the appropriate standard of care and does not mean that because the injury was a risk of the procedure injury did not result from a failure to conform to the standard of care.”

283 Conn. at 492 n.20.

The Supreme Court held that the admission of the evidence was error that, in view of this charge, was harmless.

REASONING: The court agreed with the trial judge that the fact that nerve damage is a risk of the procedure is relevant, but held that the fact that that risk was communicated to the patient is *not* relevant.

“[A]dmission of testimony about what the plaintiff specifically had been told raised the potential that the jury might inappropriately consider a side issue that is not part of the case, namely, the adequacy of the consent. . . . Thus, although evidence of the risks of a surgical procedure is relevant in the determination of whether the standard of care was breached, it was unduly prejudicial to admit such evidence in the context of whether and how they were communicated to the plaintiff. Rather, such evidence is properly admitted, without this risk of confusion and inappropriate prejudice, in the form of, for example, testimony by the defendants or nonparty expert witnesses about the risks of the relevant surgical procedures generally.”

Id. at 487-88.

Article VII — Opinions and Expert Testimony.

§ 7-1 SPOUSE NOT PERMITTED TO GIVE OPINION ON VALUE OF REAL PROPERTY — *PORTER V. THRANE*, 98 Conn. App. 336 (2006); McLachlan, J.; Trial Judge — Winslow, J.

RULE: Although a property owner is permitted to give an opinion regarding the value of real property, the owner’s spouse is not.

FACTS: In this divorce case, the principle issue was the value of the marital residence. The husband had sole ownership of the property since 1988. The parties were married in 1991. The wife had moved out when the parties separated in 2001.

The trial court permitted the wife to testify as to the value of the property, reasoning that “the owner of the property has intimate knowledge of the characteristics of the property, the finances associated with the property, the condition of the property and so forth. This witness would appear to be in a similar situation.” 98 Conn. App. at 341.

The Appellate Court reversed.

REASONING:

“[A] party, although having no qualification other than his ownership, is competent to testify as to the value of his real property. . . . Commentary to § 7-1 of the Connecticut Code of Evidence acknowledges this narrow exception to the general rule that lay witnesses may not give expert opinions. Absent a proper foundation and the establishment of reasonable qualifications, a witness who is not the owner of property is not competent to testify as to its value.”

Id. (citations omitted).

“Although we recognize that in some situations a non-owner may be competent to testify about the value of property, none of those circumstances is present here, and we decline the defendant’s urging that we extend this exception further to permit a non-owner, nonresident spouse to testify as to the value of real property. At the date of dissolution, the defendant had not

lived at the property for almost three years.

Id. at 341-42 (footnote omitted).

§ 7-2 PORTER ANALYSIS REQUIRED FOR OPINION THAT WIND COULD NOT KNOCK OVER LADDER — *PRENTICE V. DALCO ELECTRIC, INC.* — 280 Conn. 336 (2006); Borden, J.; Trial Judge — Frazzini, J.

RULE: Testimony regarding the amount of force required to move a particular object is within the realm of physics and beyond the understanding of the average juror; therefore, it is the type of evidence requiring a validity assessment under *Porter*.

FACTS: Defendant hired the plaintiff to install a sign on the front of its building in Meriden. When plaintiff and a co-worker arrived and inspected the site, they informed the defendant that they would be unable to complete the work because the ladders they had brought were too short. The defendant offered the plaintiff the use of an extension ladder. Plaintiff said they could not complete the installation because they needed two extension ladders, but accepted the loan of the one extension ladder in order to take measurements. The owner then offered a second extension ladder, which they did not accept.

The plaintiff and his co-worker set up the first extension ladder to take the measurements. The owner got the second extension ladder and leaned it against the building, 8 to 10 feet from where the plaintiff and his co-worker had placed the first ladder. At that point the plaintiff informed the owner that they could not use the second ladder because it was missing braces required for stability.

While the plaintiff was on the first ladder taking measurements, the second ladder fell, striking the first and knocking the plaintiff to the ground. No one was touching the second ladder when it fell.

Plaintiff offered the expert testimony of Mervin Strauss, a forensic engineer and accident reconstructionist, who testified over objection that the wind conditions at the time and place of the accident would not have caused a properly set up ladder, free of defects, to fall.

Strauss contradicted his own testimony by conceding that he could not state with

reasonable engineering probability that the wind conditions were not the sole cause of the ladder becoming dislodged and colliding with the plaintiff.

He acknowledged that determining the amount of force required to move a particular object is an exercise within the realm of physics requiring certain factual data (the wind speed, the ladder's weight, and the coefficient of friction between the ladder and the edge of the roof) and the completion of calculations. Strauss conceded that he had not obtained any of the data or performed the calculations that would allow him to express his opinion to a reasonable probability.

The defendant filed a motion in limine seeking to preclude this testimony, and requested a *Porter* hearing. The trial court denied the request and admitted the testimony.

The Supreme Court reversed.

REASONING: "We conclude that Strauss' opinion was scientific evidence within the meaning of *Porter*, and that the trial court abused its discretion by permitting Strauss' expert opinion testimony without first assessing the validity of the methodology underlying his opinion as part of a *Porter* hearing." 280 Conn. at 347.

Next, the court rejected the argument that because the effect of wind on a ladder is a matter of common experience upon which the jury can exercise independent judgment, no *Porter* analysis was necessary. The court pointed out that the critical issue here was not the effect of wind in general, but whether the specific wind speed on the day in question could generate enough force to knock over the ladder.

The court then pointed out that "by Strauss' own admission, and despite his familiarity with the scientific calculations that would have allowed him to have tested his theory. . . he used no methodology to arrive at his conclusions." *Id.* at 351-52.

Finally, the court rejected the plaintiff's reliance on a line of cases holding that not all scientific evidence requires a *Porter* hearing. Those cases are confined to areas, such as hair analysis and footprint analysis, where the jury can exercise its own powers of observation to test the expert's opinion. The jury in this case had no such tools at its disposal.

§ 7-2 PORTER ANALYSIS NOT REQUIRED FOR TESTIMONY THAT IS NEITHER SCIENTIFICALLY OBSCURE

NOR INSTILLED WITH AN AURA OF MYSTIC INFALLIBILITY — *HENDERSON V. DEMATTEO MANAGEMENT, INC.*, Superior Court, New London (March 14, 2007); Docket Number CV-05-5000094; Leuba, J.

RULE: Testimony which is neither scientifically obscure nor instilled with an aura of mystic infallibility, and which merely places a jury in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment, does not require a *Porter* analysis.

FACTS: In this premises liability case, plaintiff had gone into a stall in a handicapped ladies' room and hung her eight-pound purse from the hinged grab bar. When she bent down to assist her child in using the toilet, the bar fell from its upright position and hit her on the head.

The grab bar was designed to rest vertically against the wall next to a toilet until needed by a disabled person, who moves it to a horizontal position for railing support. The bar pivots on a hinge with an adjustable clamping mechanism.

The evidence at issue in the case related to the amount of force needed to move the bar from upright to horizontal. The plaintiff sought to offer the testimony of an engineer that the more an adjustable clamp around the hinge is tightened, the slower the grab bar descends. Plaintiff sought to offer the engineer's opinion that in this case the clamp was adjusted too loose, allowing the bar to "free fall" rather than descend at a controlled pace.

Defendant filed a motion in limine to preclude this evidence. The trial court denied the motion.

REASONING: The trial court held that this testimony "does not involve the 'aura of mystic infallibility' nor is it 'scientifically obscure.' For this reason the court finds a *Porter* analysis inappropriate to the case." *Henderson* at 13.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO ESTABLISH THAT A PROFESSIONAL'S FAILURE TO FILE A REQUIRED NOTICE WAS NEGLIGENT — *VANLINER INSURANCE COMPANY V. FAY*, 98 Conn. App. 125

(2006); Gruendel, J.; Trial Judge — Stevens, J.

RULE: While a claim against an insurance adjuster sounds in professional negligence, expert testimony was not required to establish negligence where the adjuster's failure to file a required notice constituted a gross and obvious want of care and skill.

FACTS: The defendant insurance adjuster failed to file a notice to transfer a workers' compensation claim from the plaintiff to the Second Injury Fund on time.

Defendant claimed that expert testimony was needed to establish the standard of care for a workers' compensation adjuster in Connecticut. The trial court disagreed. The Appellate Court affirmed.

REASONING: Although expert testimony as to the standard of care is usually required in professional negligence cases, there is an exception for an obvious and gross mistake. "In this instance we are satisfied that the court was able to discern the various days on a calendar without the need for expert testimony." 98 Conn. App. 125 at 138.

§ 7-2 EXPERT TESTIMONY IS NOT REQUIRED TO APPLY BOATING REGULATIONS — *MICHALSKI V. HINZ*, 100 Conn. App. 389 (2007); Gruendel, J.; Trial Judge — Frankel, J.

RULE: Issues involving the applicability of, and compliance with, boating regulations are not beyond the ken of the average trier of facts.

FACTS: Boating collision in which one of the plaintiff's claims was that the defendant failed to sound his horn before the collision. The 2001 Connecticut Boaters' Guide was admitted as an exhibit. That Guide provides that two vessels on a collision course should exchange a one-blast signal.

Defendant claimed that plaintiff could not establish a prima facie case of negligence without the aid of expert testimony. The trial court disagreed. The Supreme Court affirmed.

REASONING:

"The issues before the court involved boating regulations and the defendant's compliance therewith. . . . [O]ur boating regulations require the sounding of a horn when two vessels are approaching in a head-on situation. Whether the

defendant in fact complied with that precautionary requirement is a relatively straightforward inquiry that is not manifestly beyond the ken of the average trier of fact."

100 Conn. App. at 404-05.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO ADMIT PHOTOS OF VEHICLE DAMAGE — *BRENMAN V. DEMELLO*, 191 N.J. 18, 921 A.2d 1110 (2007); Rivera-Soto, J.

RULE: Expert testimony is not required for the admission of photographs of vehicle damage offered to show the cause or extent of a plaintiff's injury.

FACTS: Plaintiff alleged that, as a result of a rear-end collision, she required a three-level cervical fusion. Defendant offered photographs of plaintiff's car, showing minimal bumper damage.

Plaintiff filed a motion in limine to exclude the photographs absent expert biomechanical testimony connecting the extent of the car damage to the force of the impact. Defendant argued that the photographs were admissible to prove the extent of the impact, the damage to plaintiff's vehicle, and, by inference, the force involved and the extent to which plaintiff's injuries were caused by the impact.

The trial court admitted the photographs. The jury found that the defendant did not cause the plaintiff's injuries. The Supreme Court of New Jersey affirmed.

REASONING:

"We reject a per se rule that requires expert testimony as a foundation for the admissibility of a photograph of vehicle damage when the photograph is used to show a correlation between the damage to the vehicle and the cause or extent of injuries claimed by an occupant of the struck vehicle. Instead, we commend that judgment to the sound discretion of the trial court. Consistent there with, a party opposing the admission of photographs of damage to a car remains free to offer expert proofs for the purpose of showing that there is no relationship between the extent of the damage and the cause and severity of the resulting injuries. Conversely, a party proposing the use of photographs of impact may tender its own expert proofs to further support the proposition in its case-in-chief — either that

slight impact force results in no or slight injury, or that great impact force results in great injury — or to rebut its opponent's assertions. In the end, however, such expert proofs address the weight to be given to photographs of impact, not their admissibility."

191 N.J. at 21.

§ 7-2 EXPERT TESTIMONY IS REQUIRED TO PROVE THAT METHADONE IN BLOOD IMPACTED BEHAVIOR — *STATE V. LAWSON*, 99 Conn. App. 233, cert. denied, 282 Conn. 901 (2007); McDonald, J.; Trial Judge — Tobin, J.

RULE: The effect of a trace amount of methadone in a driver's blood is relevant only if it is shown to have affected the driver's ability to operate, a subject on which expert testimony is required.

FACTS: Prosecution for manslaughter with a motor vehicle, in which defendant, a drunk driver, turned left in front of a motorcycle, killing the motorcyclist. The defendant fled the scene.

On autopsy, a trace amount of methadone was found in the motorcyclist's blood. The State filed a motion in limine to preclude the defendant from offering this evidence. The trial court granted the motion, ruling that "the effects of a trace amount of methadone on motor skills or judgment must be shown by testimony from a qualified expert." 99 Conn. App. at 247.

The trial court gave the defendant the opportunity to produce such expert testimony, which the defendant did not do. The Appellate Court affirmed.

REASONING: In support of its claim that expert testimony is not required, the defendant pointed to *State v. Padua*, 273 Conn. 138 (2005) in which the Supreme Court held that expert testimony was not required to prove that eating marijuana is bad for children. The *Lawson* court distinguished *Padua* in that "unlike the effects of marijuana, the effects of a trace amount of methadone on driving impairment is not a matter of common knowledge, experience, and common sense; therefore expert evidence would be required." 99 Conn. App. at 250.

§ 7-2 EXPERT TESTIMONY IS REQUIRED TO LINK MARIJUANA IN BLOOD TO BEHAVIOR — *DEEGAN V. SIMMONS*, 100 Conn. App. 524, cert. denied, 282

Conn. 923 (2007); Bishop, J.; Trial Judge — Arnold, J.

RULE: A laboratory report showing that a driver’s blood tested positive for marijuana is inadmissible absent expert testimony linking the finding to behavior.

FACTS: When defendant truck driver Simmons was taken to the hospital, a test for a cannabinoid in his system resulted in a finding of “abnormal.” Plaintiff alleged that Simmons was operating under the influence of marijuana. Defendant filed a motion in limine to exclude the laboratory report. The trial court granted the motion. The Appellate Court affirmed.

REASONING: On appeal, plaintiff relied on *State v. Clark*, 260 Conn. 813 (2002), which held that expert testimony was not required to demonstrate the effect of marijuana on an eyewitness who testified to smoking five marijuana cigarettes shortly before witnessing the incident in question. The Supreme Court distinguished *Clark* on numerous points:

“In the case at hand, the court correctly noted that there was no evidence that marijuana had been used prior to the accident and no evidence that Simmons was impaired while driving his vehicle. Without corroborating evidence, the laboratory report itself would not explain: (1) how long a cannabinoid substance stays in a person’s system; (2) the amount of cannabinoid in Simmons’ system at the time of the accident; (3) the relationship between cannabinoid and marijuana; (4) what other products might cause a positive result for a cannabinoid substance; (5) whether urine tests could produce a false positive result and, if so, how often; (6) the possibility for contamination of the sample; and (7) the chain of custody of any sample. These are not subject areas within the common knowledge of the jury and yet each of these factors has evidentiary significance. Thus, the court correctly concluded that the laboratory report indicating an “abnormal result” for a cannabinoid screen was inadmissible absent explanatory expert opinion.”

100 Conn. App. at 538.

§ 7-3 NUMBER OF M.P.H. OVER SPEED LIMIT AT WHICH OFFICER ISSUES TICKETS INADMISSIBLE — *DEEGAN V. SIMMONS*, 100 Conn. App. 524, cert.

denied, 282 Conn. 923 (2007); Bishop, J.; Trial Judge — Arnold, J.

RULE: Police officer’s testimony that he does not ticket motorists unless they are traveling more than 15 m.p.h. over the speed limit is inadmissible opinion testimony on the ultimate issue of reasonable speed.

FACTS: See § 4-1 above. Over objection, the defendant offered the testimony of Officer Harris that he usually ticketed motorists only when they went more than 15 m.p.h. over the posted speed limit, because he felt it was reasonable.

The trial court allowed the testimony. The Appellate Court reversed.

REASONING:

“Here, it is undisputed, that an ultimate issue at hand was the reasonableness of the speed at which [defendant] Simmons was driving at the time of the accident. Thus the question is whether Harris’ testimony constituted an opinion on this ultimate issue. Although the defendants argue that Harris’ testimony was factual in nature and not opinion testimony, we conclude that his testimony taken as a whole and given its logical effect, was an opinion on the ultimate issue in the case. Thus, it should not have been admitted.” 100 Conn. App. at 535-36.

“Harris’ testimony regarding the speeds he considers to constitute a chargeable offense constituted no more than an indirect or disguised opinion of whether Simmons’ actions were unreasonable. In essence Harris was suggesting by implication that he does not ticket drivers for speeds up to fifteen miles per hour over the speed limit because he believes it is reasonable for motorists to drive at such speeds on Research Parkway. Thus, in the guise of a factual representation, Harris was permitted to suggest that Simmons was traveling at a reasonable speed. Indeed, when asked why he usually tickets someone driving more than fifteen miles per hour over the posted speed limit, Harris responded ‘[b]ecause I feel it’s reasonable.’ Accordingly, we conclude that under the facts of the present case, the court improperly admitted Harris’ testimony because it constituted improper opinion evidence.”

100 Conn. App. at 536.

Article VIII — Hearsay.

§ 8-4 POLICE DIAGRAM BASED ON WITNESS STATEMENTS INADMISSIBLE — *PIROLO V. DEJESUS*, 97 Conn. App. 583 (2006); Schaller, J.; Trial Judge — Zoarski, J.

RULE: A police diagram showing how vehicles collided based on what the drivers and witnesses said is hearsay and does not fall within the business record exception.

FACTS: In this rear-end collision case, plaintiff testified that, while stopped at a red light, she was hit from behind by the defendant. The defendant testified that plaintiff backed up into defendant after unsuccessfully attempting a right turn. The cars were not moved before the police officer arrived at the scene.

The police diagram showed the plaintiff’s vehicle turned slightly to the right at the corner of the intersection, but the arrows did not indicate that the plaintiff had backed up. The police officer testified the diagram was based upon the statements of the drivers and witnesses.

The trial court admitted the diagram. The Appellate Court found the admission to be error, but harmless.

REASONING: Police reports are subject to the business record analysis. Statements in a police report must be based upon the officer’s own observations or upon information provided by an observer with a business duty to transmit the information (e.g., another officer). Therefore, witness statements in police reports are inadmissible unless they fall within another hearsay exception, such as statements of opposing parties.

A police diagram showing how the vehicles collided is treated much like a statement. If it is based upon the accounts of the drivers and witnesses, it is inadmissible. If it is based upon the police officer’s own observation, his independent accident reconstruction, or the observations of other officers, it is admissible. (If the diagram is based on the statement of a party opponent, it is also admissible.)

Discovery

REFUSAL TO ENFORCE PARTIES’ DISCOVERY RIGHTS REVERSIBLE ERROR — *RAMIN V. RAMIN*, 281 Conn. 324, (Feb. 20, 2007); Borden, J.; Trial Judge — Shay, J.

RULE: Where motions to enforce discovery requests are properly presented to the court, the court has an obligation to consider these motions and if necessary to allow a party to properly prosecute her case, enter appropriate orders to enforce the parties' discovery rights.

FACTS: On August 2, 2000 the plaintiff filed her first discovery requests. The defendant failed to comply. Plaintiff filed a motion for contempt. In October 2000 the court ordered the defendant to comply.

The plaintiff filed her second motion for contempt in January 2001. Defendant provided an authorization allowing plaintiff to obtain information directly from his employer. Plaintiff was unsuccessful in obtaining the information from the employer.

In July 2001 the plaintiff filed her third motion for contempt, in response to which the court ordered the defendant to respond within 30 days and imposed a \$2500 sanction. In August, the defendant provided partial compliance. In October, the plaintiff provided the defendant with a detailed list of documents still missing, and requested the payment of the \$2,500.

In January 2002 the plaintiff filed her fourth motion for contempt, which led the court to impose attorney's fees and sanctions against the defendant. In February, the parties participated in a discovery mediation which resulted in a court order for the production of documents. Still, production was incomplete.

In August, the plaintiff filed her fifth motion for contempt. When the motion for contempt was presented for a hearing in September, the court pointed out that the case was the oldest case on the docket and set it down for trial. When the plaintiff attempted to bring to the court's attention the specific items needed for the trial, the court, evincing its frustration with the age of the case and the court's own case-load, refused to address the issues.

The Supreme Court reversed in a 4 to 3 decision.

REASONING:

"We have already squarely addressed this issue, concluding that, in the absence of 'an extreme, compelling situation,' a trial court that has jurisdiction over an action lacks authority to refuse to consider a litigant's motions."

281 Conn. at 336.

Discovery

SANCTION OF DEFAULT FOR DISCOVERY VIOLATION HELD REVERSIBLE ERROR — *SWEENEY V. CHOICE HOTELS INTERNATIONAL, INC.*, 97 Conn. App. 741 (2006); Flynn, J.; Trial Judge — Gordon, J.

RULE: Before a trial court may impose sanctions for violation of a discovery order, the order must be reasonably clear, and the record must establish that the order was in fact violated. In addition, the sanction must be proportional to the violation.

FACTS: Slip-and-fall case in which the defendant failed to produce its franchise agreement. The trial court entered a default against the defendant and added as a further sanction that certain paragraphs of the plaintiff's complaint were deemed admitted. The Appellate Court reversed, finding an abuse of discretion.

REASONING: The Appellate Court relied on *Millbrook Owners Assn. Inc. v. Hamilton Standard*, 257 Conn. 1 (2001), which established the rule set forth above for the imposition of sanctions as a result of the violation of discovery orders. The court held that in this case the first prong (that the discovery order be reasonably clear and that the record establishes it was violated) was not met.

Expert Disclosure

PRECLUSION OF EXPERT REVERSED — *WEXLER V. DEMAIO*, 280 Conn. 168 (2006); Vertefeuille, J.; Trial Judge — Sheldon, J.

RULE: Trial court's order that party who had not timely complied with expert disclosure requirements file a detailed written expert report; and the subsequent orders precluding the expert and granting summary judgment, reversed.

FACTS: Medical malpractice action against four physicians. Three were in one practice and represented by the same attorney. The fourth, Davis, was from a different practice and represented by separate counsel.

In July 2002 the court issued a scheduling order requiring the plaintiffs to disclose their experts by November 2002. The plaintiffs did not comply.

In May 2003 defendant Davis filed a motion for summary judgment. Two

weeks later, the plaintiffs filed a motion seeking more time to disclose their expert witnesses. The court granted the plaintiffs' motion to extend time until June, but required that, in addition to fully complying with the Practice Book disclosure requirements, the disclosure include (a) the expert's c.v., (b) a list of all materials and information viewed or considered by the expert, (c) a copy of all such materials not yet disclosed, and (d) a list of all cases in which the expert had testified since January 1999.

The court also ordered the plaintiffs to make the expert available for a deposition on specific dates during the first two weeks of July, and to bear all costs associated with the deposition.

The plaintiffs filed their disclosure within the court's deadline, but did not include a list of the cases in which the expert had testified.

Defendant Davis filed a motion to preclude. The defendants chose not to depose the plaintiffs' expert.

A hearing was held on September 4, 2003 at which the court found that the plaintiffs' compliance was insufficient and ordered that a written report be supplied by the expert by September 10, 2003.

Fifteen days after this deadline, the plaintiffs filed an additional supplemental disclosure which provided more detail, but no written report, billing list, or transcripts of prior testimony.

The trial court then granted the defendant's motions to preclude and for summary judgment. The Appellate Court affirmed.

The Supreme Court unanimously reversed the Appellate Court.

REASONING: The Appellate Court had upheld the trial court's authority to require a written report under the circumstances of this case: "Given that the court could have precluded the plaintiffs' expert under § 13-4 (4) or its own inherent powers to compel observance of its rules; see *Millbrook Owners Assn., Inc. v. Hamilton Standard*, supra, 257 Conn. 12-13; the court was well within its discretion to issue a new, albeit stringent, discovery order." *Wexler v. Demaio*, 88 Conn. App. 818, 831-32 (2005).

Judge Lavery had dissented: "I believe that the expert disclosure provided by the plaintiffs . . . met the requirements of Practice Book § 13-4 (4). Accordingly, I would hold that the court order of September 4, 2003, which imposed addi-

tional stringent requirements that the plaintiffs were unable to meet and ultimately resulted in the dismissal of their case, was an abuse of discretion.” *Id.* at 834.

Judge Lavery continued:

“The plaintiffs argue persuasively that the court improperly imported into state court proceedings the more rigorous standard for expert disclosure in federal cases. The current federal rule, in contrast to § 13-4(4), explicitly contemplates disclosure similar to that ordered by the court, in particular, disclosure of a detailed “written report prepared and signed by the witness . . . contain[ing] a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Fed. R. Civ. P. 26 (a)(2)(B).

Id. at 837-38.

As this dissent points out, the federal rule was designed to eliminate or reduce the need for deposing experts. In contrast, Connecticut state courts, the disclosure is designed to give the opposing side a framework to be examined in detail at deposition.

In reversing the Appellate Court, the Supreme Court reiterated that the rule regarding the imposition of sanctions is set forth in *Millbrook Owners Assn., Inc. v. Hamilton Standard*, 257 Conn. 1 (2001).

The court then addressed whether or not the plaintiffs’ disclosure met the requirements of § 13-4(4), and held that it did. The court specifically rejected some of the conditions imposed by Judge Sheldon and approved by the Appellate Court. It held that the failure of the disclosure to distinguish specifically what opinions related to each defendant was not a violation of § 13-4(4), and rejected the assertion that the failure to link the documents relied on by the experts to specific opinions was a violation of § 13-4(4).

The Supreme Court noted that § 13-

4(4) is designed to “apprise the defendant of the basic details of the plaintiffs’ claims.” 280 Conn. at 187.

“Indeed, the text of § 13-4(4) was modeled on the interrogatory requirements of Practice Book § 13-4(1)(A), which was not intended to elicit “an overly detailed exposition of the expert’s opinion.” R. Ciulla & R. Allen, “Comments on New Practice Book Revisions,” 4 Conn. L. Trib., June 19, 1978, p. 3 (explaining amendments to rules of practice).

“In the present case, although the plaintiffs’ June disclosure was not as precise and detailed as it could have been, we nevertheless conclude that it complied with the minimal requirements of § 13-4(4) because it adequately disclosed the name of the plaintiffs’ expert witness, the subject matter on which he was expected to testify the substance of the facts and opinions to which he was expected to testify and a summary of the grounds of each opinion.”

Id. at 189-90 (footnotes omitted).

Expert Disclosure

INCORPORATING
EXPERT REPORT BY
REFERENCE SUFFICIENT
FOR DISCLOSURE —
MILARDO V. KOWALESKI,
101 Conn. App. 822, (June
19, 2007); Gruendel, J.; Trial
Judge — Aurigemma, J.

RULE: Disclosing that an expert will testify in accordance with an attached report is sufficient to set forth “the substance of the facts and opinions to which the expert is expected to testify.”

FACTS: Rear-end collision in which the defendants contested whether the plaintiff’s neck and back pain were caused by the collision. Defendants offered expert testimony that the collision was not the cause of the plaintiff’s problems.

In their disclosure pursuant to Practice Book § 13-4(4), as to the substance of the facts and opinions to which the expert would testify, the defendants stated that he would testify “in accordance with his written report (copy attached).” 101 Conn. App. at 833. The trial court admitted the opinions. The Appellate Court affirmed.

REASONING: The court cited the *Wexler* case (above) as well as *Catalano v.*

Falco, 74 Conn. App. 86 (2002), which held sufficient an expert disclosure that clearly indicated that the expert was expected to testify in accordance with his treatment notes and evaluation and consultation reports, which had previously had been produced.

Peremptory Challenges

PEREMPTORY CHAL-
LENGES CANNOT BE
EXERCISED ON THE
BASIS OF GENDER —
STATE V. GEORGE J., 280
Conn. 51 (2006); Katz, J.;
Trial Judge — Hadden, J.

RULE: The constitutional rights to due process and a fair trial do not supersede the mandates of equal protection so as to render unconstitutional the rule prohibiting gender based peremptory challenges.

FACTS: Defendant was accused of sexually assaulting boys. He maintained that male jurors were more likely to be biased against him than female jurors, and sought to exercise peremptory challenges on the basis of gender. The trial court did not allow the defendant to exercise peremptory challenges solely on the basis of gender. The Supreme Court affirmed.

REASONING: Under established case law, no litigant is permitted to exercise peremptory challenges on the basis of race. The court rejected the proposition that gender-based challenges are permissible because a less exacting standard of scrutiny is applied by the court to gender-based equal protection argument.

Demonstrative Evidence

UNLESS MARKED AS A
FULL EXHIBIT, A PIECE
OF DEMONSTRATIVE
EVIDENCE DOES NOT
GO INTO JURY DELIBER-
ATION ROOM — *BARRY
V. QUALITY STEEL
PRODUCTS, INC.*, 280
Conn. 1 (2006); Borden, J.;
Trial Judge — McWeeny, J.

RULES: Evidence that is not marked as a full exhibit cannot be used by the jury in deliberations, even if requested.

FACTS: Plaintiffs, installing a roof, stood on staging attached to the roof with brackets designed and manufactured by the defendants. One of the brackets bent, toppling the plaintiffs off the roof. Plaintiffs brought this products liability

case, alleging the bracket was defective.

Defendants claimed that the bracket had not bent, but had been improperly affixed to the roof with nails that were too small. They claimed that the bend in the bracket after the fall was caused by impact with the ground.

At trial, the defendants used a model of the roof on which the plaintiffs were working when they fell, and marked it as a demonstrative exhibit.

During jury deliberations, the jury requested access to the model. The trial court did not permit the jury access to the model, because it had not been marked as a full exhibit. The Supreme Court affirmed.

REASONING: The defendants argued that the reason the model was never offered as a full exhibit was because it was large and heavy, but that it model should be treated like a request to view the scene of an accident, which also would not be marked into evidence. It would be within the court's discretion to allow a jury visit to the scene.

The court rejected this analogy, noting that it is within the court's discretion to admit demonstrative exhibits and mark them as full exhibits. This would have required the defendants to establish that the model was "substantially similar to the scene at the time of the accident" which they had not done. The defendants had not even offered the model as a full exhibit. 280 Conn. at 20.

COMMENT: The defendants could have offered the model as a full exhibit when the jury requested to see it.

Evidence in Arbitration

RELAXED RULES OF EVIDENCE IN UNRESTRICTED ARBITRATION — *KRASSNER V. ANSONIA*, 100 Conn. App. 203 (2007), Bishop, J.; Trial Judge — Nadeau, J.

RULE: In arbitration under an unrestricted submission, arbitrators are not required to follow the rules of evidence.

FACTS: Plaintiff police officer was discharged due to abuse of OxyContin, association with drug dealers, and lack of truthfulness. Under the collective bargaining agreement between the Police Union and Ansonia, the matter was submitted to arbitration. The arbitration panel admitted unsworn witness statements that the officer was using drugs and associating

with drug dealers.

Plaintiff filed an application to vacate the award for allowing unsworn statements of witnesses into evidence. The trial court held that the use of such statements deprived the plaintiff of the right to cross-examine these witnesses and vacated the arbitration award. The Appellate Court reversed.

REASONING: Since arbitrators are not bound by the rules of evidence, the trial court must find that the admission of the statements amounts to misconduct that substantially prejudiced the movant — in other words, that the improper evidentiary ruling likely affected the result.

The Appellate Court held that the unsworn statements were admitted in error, because under the Regulations of Connecticut State Agencies, § 31-91-39(a), they were required to be in the form of sworn affidavits. However, the court held that the admission did not constitute misconduct which deprived the officer of a full and fair hearing, and therefore reversed the trial court.

Collateral Source Adjustment

JURY INSTRUCTED TO DISREGARD REFERENCES TO MEDICAL INSURANCE — *CAPOZZIELLO V. ROBINSON*, 102 Conn. App. 93 (2007); *per curiam*. Trial Judge — Gilardi, J.

RULE: It is not necessary to redact references in exhibits to medical insurance coverage or payment of medical bills.

FACTS: In this collision case, defense counsel questioned of the plaintiff as to whether he had medical insurance. The medical bills marked as full exhibits contained references to payment by medical insurance. Plaintiff did not object, and claimed plain error on appeal. The Appellate Court affirmed.

REASONING: The Appellate Court approved the trial court's use of the following charge:

"Now, you've heard reference to insurance, and there may be reference on the medical bills to insurance, which may or may not cover some of the medical expenses incurred by the plaintiff. You're not to concern yourself with whether or not there was insurance coverage for some or any of these expenses, nor should you speculate or guess as to what amount, if any . . . may have been

[paid] by insurance. Any payments made are not your concern because after the case is over, the court makes any and all necessary adjustments to your verdict . . . and we take into account any payment . . . that were made from . . . collateral sources."

102 Conn. App. at 94 n.2 (ellipses in original).

Apportionment

APPORTIONMENT OF NEGLIGENCE IS NOT AVAILABLE AS TO A WITHDRAWN PARTY — *VIERA V. COHEN*, 283 Conn. 412 (2007); Katz, J.; Trial Judge — Eveleigh, J.

RULE: When a plaintiff withdraws a case against one defendant for no consideration, remaining defendants cannot claim apportionment as to the withdrawn defendant.

FACTS: This is a medical malpractice case arising out of the delivery of Jodee Viera, during which she suffered shoulder dystocia.

Dr. McNamee attended to Jodee's mother during her pregnancy, and was present during the early stages of her labor. However, McNamee left during the second stage of her labor and thereafter was unavailable.

Dr. Cohen, one of McNamee's partners, attended to the mother during the final stages of labor and delivery and delivered the baby.

During the delivery, Jodee's head delivered but her shoulders became lodged. In order to avoid catastrophic neurological injury or death, Jodee was delivered in a fashion which injured her brachial plexus, leaving her with permanent injury to her left arm.

The plaintiff, who sued both McNamee and Cohen, decided during jury selection to pursue only McNamee, and withdrew the case against Cohen. The plaintiff's theory at trial was that McNamee had breached the standard of care by failing to ascertain and recognize risk factors for shoulder dystocia before and during the mother's early stages of labor, and by failing to perform a cesarean section during those early stages. In particular, the plaintiff's expert opined that Jodee's unusually large size was the predominant cause of the shoulder dystocia. The plaintiff's position was that, by the

time Cohen appeared on the scene, it was too late to avoid the injury.

After the plaintiff filed the withdrawal, McNamee filed a notice of claim of apportionment as to his partner, the withdrawn defendant Cohen. The trial court refused to allow McNamee to claim apportionment against Cohen. The Supreme Court affirmed.

REASONING: *C.G.S.* § 52-572h(d) allows a jury to apportion to only two classes of persons: (1) the present parties to the action; and (2) “settled or released persons under subsection (n).” A “settled or released person” under subsection (n) is one who has entered into “release, settlement, or similar agreement . . .”

Defendant argued that, based on the public policy of requiring defendants in negligence cases to pay only their fair share, the statutory definition should be read broadly enough to include a simple withdrawal that is not a settlement. The Supreme Court rejected this claim in a 3 to 2 decision.

The defendant also argued that plaintiff had conditioned her withdrawal on Cohen agreeing not to meet with defense counsel, endeavor to meet with plaintiff’s counsel, etc. The Supreme Court held that the record did not establish that there was a quid pro pro for withdrawing the action.

COMMENT: It is essential that a plaintiff withdrawing an action against a defendant not seek anything in return if plaintiff wants to avoid apportionment. For example, an agreement that the doctor will not bring a vexatious lawsuit claim against the plaintiff would likely allow the remaining defendants to claim apportionment

Authority to Change the Code of Evidence

CAN THE SUPREME COURT CHANGE THE *C.C.E.*, OR MERELY INTERPRET AND APPLY IT? — *STATE V. SAWYER*, 279 Conn. 331 (2006); Zarella, J.; Trial Judge — Espinosa, J.

RULE: While authority to change the *C.C.E.* lies with the judges of the Superior Court in the discharge of their rule-making function, to the extent that changes to evidentiary rules implicate substantive rights, authority may reside in the Supreme Court in the exercise of its common-law

authority.

FACTS: In *State v. Kulmac*, 230 Conn. 43 (1994), the Supreme Court had held that in sexual assault cases prior misconduct evidence may be viewed more liberally. This holding was then codified in the *C.C.E.*

The question raised in *Sawyer*, a sexual assault prosecution, was whether or not the Supreme Court has the authority to reconsider Connecticut’s approach to prior misconduct evidence in sexual assault cases and change the rule.

DISCUSSION: The majority opinion, by Justice Zarella, declined to decide the issue.

In a concurring opinion, Justice Katz, Chair of the Evidence C.C.E. Oversight Committee, set forth her opinion that the Supreme Court cannot “reconsider that holding absent a rule change by the judges of the Superior Court, guided by the Evidence Code Oversight Committee.” 279 Conn. at 363. Justice Katz continued:

“Nonetheless, the majority questions, but leaves to another day, whether, to the extent that evidentiary rules may ‘implicate substantive rights,’ those rules properly may be the subject of such judicial rule making, as opposed to common-law adjudication. In my view, for the reasons that follow, the answer to this question is clear and straightforward and we should not suggest otherwise to the trial judges who are charged with the daily application of the Code. The Code governs where it speaks, and the courts’ common-law rule-making authority governs either where the Code does not speak or where the Code requires interpretation. See Conn. Code Evid. § 1-2.

“The majority’s questioning of this judicial rule-making authority appears to be predicated on a distinction in evidentiary rules between those that are substantive in effect and those that are, I assume, merely procedural in effect. I disagree with the majority’s foundational premise. This court has stated unequivocally that ‘[t]he rules of evidence are procedural.’”

279 Conn. at 363-64 (footnotes omitted).

Justice Katz went on to opine that the Code of Evidence should be treated as “an extension of the Practice Book . . .” 279 Conn. at 366.

Justice Borden, who was chair of the

committee that drafted the *C.C.E.*, wrote a concurring and dissenting opinion agreeing with Justice Katz. His opinion contains a comprehensive discussion of the history of the *C.C.E.* Justice Borden wrote that, in his view, changes in the existing evidentiary law can be accomplished only by amendments to the *C.C.E.* voted on by the judges of the Superior Court, while the power to interpret the *C.C.E.* remains with the judges in their common-law authority.

Appellate Review of Code Decisions

STANDARD OF APPELLATE REVIEW FOR CODE OF EVIDENCE DECISIONS — *STATE V. SAUCIER*, 283 Conn. 207 (2007); Katz, J.; Trial Judge — D’Addabbo, J.

RULE: A trial court’s decision based on an interpretation of the *C.C.E.* is subject to plenary review. The trial court’s decision about whether particular evidence fits within a given rule is reviewed under an abuse of discretion standard.

FACTS: Sexual assault prosecution in which, after the victim reported the assault to the police, she told an acquaintance, “I got Richie, I got him good.”

The defendant offered this statement under the state of mind exception to the hearsay rule, § 8-3(4). The trial court did not admit the statement, ruling that the statement did not fit the exception because it was a statement about a past act not a “then existing mental or emotional condition. . . .” The Supreme Court affirmed.

The decision clarifies the standard of appellate review for cases involving the *C.C.E.* The court adopted a rule under which the standard of review depends upon the nature of the ruling in the context of the issues of the case:

“To the extent a trial court’s admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no ‘judgment call’ by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility . . .

“We review the trial court’s decision to

admit evidence, if premised on a correct view of the law, however, for an abuse of discretion . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. For example, whether a statement is truly spontaneous as to fall within the spontaneous utterance exception will be reviewed with the utmost deference to the trial court's determination. Similarly, appellate courts will defer to the trial court's determinations on issues dictated by the exercise of discretion, fact finding, or credibility assessments."

283 Conn. at 218-19.

Amendments to the Code of Evidence

Following years of careful scholarship and meetings, the Evidence Code Oversight Committee recommended to the Rules Committee on the Superior Court seven changes to the *C.C.E.*

The Rules Committee voted to submit five of the proposed changes to public hearing, and to table the two proposals which implicated the authority of the judges of the Superior Court to adopt the Rules of Evidence that are not in accor-

dance with common law or statute. (See discussion of *State v. Sawyer*, above.)

The five proposed changes were adopted by the judges at their Annual Meeting, and will take effect on January 1, 2008.

The Adopted Changes:

§ 2-1. *Judicial Notice of Adjudicative Facts*

The provision in § 2-1 regarding the court's instruction to the jury on the effect of judicial notice was deleted, in recognition of the fact that the *C.C.E.* "is not the appropriate repository for jury instructions."

§ 7-2. *Testimony by Experts*

A typo was corrected in the commentary that the Rule is 7-2 not 702.

§ 8-3. *Hearsay Exceptions: Availability of Declarant Immaterial*

Subsection 5 of § 8-3, dealing with statements for purposes of obtaining medical treatment, was amended to give substantive effect to all statements made to medical professionals. The change is described in the new commentary:

"Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of qualifying as an expert witness to testify at trial. Statements made to these so-

called 'nontreating' physicians were not accorded substantive effect. See, e.g. *Zawisza v. Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2 578 (1961); *Rowland v. Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418-19, 28 A. 102 (1893). This distinction was virtually eliminated by the Court in *George v. Erickson*, 250 Conn. 312, 73 A.2d 889 (1999), which held that nontreating physicians could rely on such statements. The distinction between admission only as foundation for the expert's opinion and admission for all purposes was considered too inconsequential to maintain. Accordingly, the word 'diagnosis' was added to, and the phrase 'advice pertaining thereto' was deleted from, the phrase 'medical treatment or advice pertaining thereto', in Section 8-3 (5)."

§ 8-5. *Hearsay Exceptions: Declarant Must be Available*

Subsection 1 (prior inconsistent statement) was amended to reflect the fact that statements covered by this section do not have to be in writing. They can be on audiotape, videotape, or some other equally reliable medium.

§ 8-6. *Hearsay Exceptions: Declarant Must Be Unavailable*

A new subsection 8 was added allowing the introduction into evidence of a statement against a party who caused the unavailability of a witness. This is aimed at a case in which the defendant murders the witness.

The Tabled Changes:

As noted above, the Rules Committee did not forward two of the Evidence Code Oversight Committee's recommendations to the judges.

The first involved an amendment to § 4-4(a)(1) regarding character evidence in criminal cases.

The second involved an amendment to § 8-3(1) that would have allowed into evidence "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The change would have abolished Connecticut's archaic rule that a statement of an agent is not admissible against the principal without proof that the agent was authorized to speak on behalf of the principal.



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VERDICT AND SETTLEMENT REPORT

By Kathleen L. Nastri, Associate Editor

Please submit your Verdicts & Settlements reports online at www.cttriallawyers.org/forum or via email to forum@cttriallawyers.org. Please include the date on which the case was resolved and the insurance carrier, if any.

SETTLEMENT

60-Year-Old Physician Product Liability

Mediated Settlement of \$202,500

In the case of *Jeffrey R. Breiter, M.D. v. ARC International North America, Inc.*, et al. Docket No. HHD-CV-05-4014804-S, filed in the Superior Court for the Judicial District of Hartford at Hartford, the parties settled for \$202,500 after mediation. The plaintiff, Dr. Breiter, was a gastroenterologist with privileges at Manchester Memorial Hospital ("Hospital"). The Hospital purchased pedestal glass coffee mugs with the Hospital logo stenciled on them for use by physicians and staff members.

On May 30, 2003, just before performing procedures at the Hospital, the plaintiff attempted to use one of the mugs to get coffee. The mug was upside down and the plaintiff grabbed the base of the mug to turn it over. The stem fractured and the broken mug fell onto the plaintiff's wrist, causing the laceration of tendons and nerves and a resulting 16% permanent impairment of his master hand.

The mug was manufactured by ARC International. Cooper & Clement stenciled the logo onto the mug. A. Goldstein & Co., Inc. was the distributor who sold the mug to the Hospital.

The plaintiff had the mug examined by David A. Moore, P.E., Vice President of Packer Engineering, Inc., located in Illinois. Mr. Moore examined the mug and determined that it was defective in that it had an internal crack caused by thermal stress, which weakened the mug to such an extent that the pedestal separated in the plaintiff's hand when the minimal force was applied to turn the mug over. Mr. Moore was able to state that there was no exterior damage to the mug resulting from use and/or abuse.

Dr. Breiter required hand surgery, which was performed by Dr. Andrew Caputo. Dr. Breiter required six weeks to recover from the surgery, which resulted in substantial economic losses while he was unable to perform colonoscopies and other procedures on his patients.

Approximately one week before trial, the parties submitted this matter to private mediation. The plaintiff initially demanded \$300,000 and the defendants offered, in the aggregate, approximately \$100,000. The case was settled for \$202,500.

Submitted by Kerry M. Wisser, Esq. of Weinstein & Wisser, P.C., West Hartford.

SETTLEMENT

17-year-old student Wrongful death

Settlement of \$18.3 million

In the case of *Pamela Orefice, Administratrix of the Estate of Timothy Orefice v. Jason Secondino*, et al., Docket No.: UWY-CV-04-4012057S (Waterbury Complex Litigation), before Judge Dennis J. Eveleigh, the parties settled just before closing arguments on the damages phase of a bifurcated trial. Timothy Orefice, a senior at Daniel Hand High School in Madison, was killed at about 6:30 p.m. on January 25, 2002, by a tow truck driven by the defendant Jason Secondino. Tim was driving across Route 1 in Guilford from the driveway of Guilford Saab, where he had an after-school job, to Guilford Sporting Goods, to pick up his ice skates. The defendant was driving on Route 1 and struck Tim's car broadside on the passenger side.

Suit was filed against the driver, his employer Guilford Texaco, Inc., and GELCO, the owner and lessor of the tow truck. (The crash occurred before lessor liability was eliminated by statute.) Plaintiff claimed that the defendant driver was speeding and inattentive and that he was under the influence of the methadone he took as part of a drug rehabilitation program. Plaintiff further claimed that the defendant employer was negligent and reckless in its hiring, training and supervision practices.

Proving liability was difficult because the defendant had the right of way; the Guilford Police Department, the only investigators on-scene, concluded that the tow truck was driving under the 45 mph speed limit; and there were no surviving eyewitnesses to the crash other than the defendant driver. Additionally, an eyewitness who had seen the truck moments before the crash testified that the truck did not appear to be speeding; and the trial court precluded, on *Daubert/Porter* grounds, the plaintiff's evidence concerning the defendant's methadone use.

Plaintiff was nevertheless able to prove liability. Initially, each side produced an accident reconstructionist, and they agreed that the defendant was probably traveling slightly over the 45 mph limit: the defense expert said the likely speed was 1-9 miles over the speed limit; the plaintiff's expert said 7-10 miles over the limit. However, more significant evidence came from four other sources:

First, plaintiff introduced evidence from an expert in truck safety, Mr. Dave Dorrity, of Greenville, South Carolina. Mr. Dorrity testified that the standard of care for the operator of a commercial motor vehicle required the operator to drive substantially below the posted speed limit at the accident location, because it was immediately beyond an exit ramp from I-95. As a basis for his testimony, Mr. Dorrity drove at the crash location in a replica vehicle that was the same year, make and model as the defendant's vehicle. The credibility of his testimony was enhanced by the fact that he drove the route at the same time of the day and week, and on virtually the same date in January, as when the crash occurred.

Second, plaintiff introduced a series of photographs: one that the police had taken of the interior of the truck immediately after the crash; and five others taken of the replica vehicle from the same angle as the police photo, showing the shift lever of the truck in each of the five forward speed positions. Comparison of the photos showed that the defendant's truck was in fifth gear at the time the police photo was taken, and Mr. Dorrity testified that

this corresponded to excessive speed (over 50 m.p.h.) and represented a conscious choice by the driver to operate at a high rate of speed.

Third, plaintiff introduced evidence, again through Mr. Dorrity, that there are standards of care that govern the hiring, training and supervision of commercial motor vehicle operators, based both on industry standards and standards such as the Federal Motor Carrier Safety Administration. The evidence showed that the defendant employer had not complied with any of these standards, and in particular had not checked the driver's background. Defendants challenged the causal connection between hiring practices and the crash, particularly since the driver did not have any prior motor vehicle history at the time he was hired and during his employment had allegedly performed well, with only one minor incident, a dent in a parking lot. Plaintiff was able to show the connection by introducing evidence of the defendant driver's criminal and psychiatric history, which the Court admitted (in part) to show the defendant employer's negligence and recklessness under such cases as *Shore v. Stonington*, 87 Conn. 147 (1982).

Finally, plaintiff returned to the police photograph of the interior of the defendants' truck and enlarged the area showing the light button. Plaintiff then showed three photographs of the button in the replica truck: one all the way in (off); the next part way out (parking lights); and the third all the way out (headlights). Comparison of the photos showed that in the police photo the light button was not all the way out. Plaintiff used this evidence to argue that the truck's lights were off, explaining why Tim would pull out in front of it.

Trial was bifurcated at the plaintiff's request, and the jury returned a plaintiff's verdict finding the defendant driver liable under Section 14-295 for double damages; finding the employer liable in negligence and recklessness and liable for punitive damages; and finding the employer 70% negligent, the driver 20% negligent, and Tim 10% negligent.

The trial then proceeded to damages evidence, and plaintiff introduced evidence of Tim's wonderful character and his plans to be an airline pilot, like his father. The damages presentation benefited from presentation of a series of still photos and home video taken throughout

Tim's life, as well as material such as his college application essay. Plaintiff also introduced lost earning capacity evidence from Professor Arthur Wright, who testified to a lost earning capacity of \$2.9 million; and from Kit Darby, an expert on the earning capacity of commercial airline pilots.

Primary and excess insurance coverage totaling \$2 million was provided by Harleysville Insurance. GELCO as a division of GE had essentially unlimited coverage for any additional exposure it had based on its vicarious liability for the defendant driver. (By statute it had no liability for the employer.)

Before trial, the plaintiff had filed an offer of judgment for \$1 million, and the defendants had offered \$100,000.

The parties settled on the Sunday afternoon preceding Monday's scheduled charge and argument on damages. On behalf of all defendants Harleysville paid \$6 million, and on behalf of GELCO, Electric Insurance paid an additional \$12.3 million. GELCO has announced its intention to pursue Harleysville for claims arising out of Harleysville's refusal to settle in response to plaintiff's offer of judgment or to make more substantial offers than it did.

Submitted by David N. Rosen and Barbara Goren of David Rosen & Associates, New Haven.

SETTLEMENT

**Anesthesiology and Hospital
Medical Malpractice
Failure to Monitor Oxygen Level
During Routine Cesarean Section;
Failure to Properly Credential Monitor
or Remove Physician From Staff;
Devastating Anoxic Brain Damage;
Mother Remains in Coma;
Total Settlement of \$16,725,000**

In the case of *Jane Doe v. Anesthesiologist ("Dr. A.") Anesthesiology Group, P.C. ("Dr. B") and Hospital ("C")*, filed in the Judicial District of Stamford, a total settlement of \$16,725,000 was reached prior to jury selection.

In July of 2003, Jane Doe was a healthy 34-year-old woman, who underwent a cesarean section delivery of her first child at Hospital C. During the procedure, Dr. A silenced the audible alarms on the anesthesia monitoring equipment, failed to assess the level of her spinal anesthesia and monitor her critically low oxygen level. As a result of Dr. A's failure to recognize Jane

Doe's life threatening blood oxygen level and initiate prompt resuscitative measures, she sustained a devastating brain injury resulting in a permanent vegetative state and requiring total care for the rest of her life. At the termination of the procedure, Dr. A did not properly account for controlled narcotics used during the procedure. The State of Connecticut Department of Public Health instituted an investigation into the Jane Doe case and Dr. A surrendered his license to practice medicine shortly thereafter.

The plaintiff also made a direct claim against Hospital C for its reckless conduct in its failure to properly credential, monitor or remove Dr. A from its staff based on professional incompetence in a prior similar case, aberrant behavior, failure to attend patients, and violations of Hospital controlled drug policies. The plaintiff adduced evidence of Dr. A's medical incompetence occurring five years before Jane Doe's operation when Dr. A caused a 36-year-old mother of three ("Susan Roe") undergoing a simple tubal ligation procedure to suffer irreparable brain damage resulting in a vegetative state. The negligence was similar: Silencing the audible monitoring alarms; failing to recognize the patient was unconscious and in grave danger; removing all monitoring devices while unresponsive and unconscious in critical condition; delaying nine minutes before beginning CPR; and failing to properly account for narcotics used in the surgery. That patient filed suit. During the discovery process, the plaintiff learned that Dr. A violated Hospital controlled drug protocols, failed to attend patients and demonstrated emotional instability, and that he had concealed that he had previously been on probation in a sister state. Hospital C's expert in the Roe case admitted that Dr. A was negligent and did not support the Hospital's proximate cause defense. Even after the Hospital obtained this damaging evidence against Dr. A, it consciously disregarded it and took no action against Dr. A. Plaintiff counsel in Jane Doe's case took the position that Hospital C acted recklessly in choosing to defend the lawsuit in the Roe case and maintaining Dr. A on staff without monitoring or supervision, thus jeopardizing the safety of its patients.

Plaintiff's expert economist estimated a lost earning capacity in excess of \$1,000,000. Special damages and medical expenses relating to plaintiff's future medical and nursing care and ancillary expenses were estimated to be in excess of

\$270,000 per year.

The total amount of the settlement was \$16,725,000, of which the Hospital paid \$12,275,000 and the anesthesiologist and his professional corporation paid \$4,000,000.

Submitted by Richard A. Silver, Esq., Ernest F. Teitell, Esq., Peter M. Dreyer, Esq., and Joanne Sheehan, Esq. of Silver Golub & Teitell, Stamford.

SETTLEMENT

Medical Malpractice

In the case of the *Estate of John Doe v. Hospital* (the settlement contains confidentiality provisions), the parties settled the claim for \$850,000 before suit.

In summary, John Doe sought medical attention at the emergency department of the Hospital at 5:07 p.m. on March 9, 2006. He reported several days of weakness, difficulty eating and sleeping, feelings of agitation and burning in his chest. Evaluation at the emergency department revealed elevated blood pressure (initially 235/118), elevated blood alcohol at 0.103 and an abnormal serum sodium level of 120. Despite his complaint of "burning in his chest" recorded by the triage nurse, no EKG was obtained, no cardiac monitoring was performed and no cardiac laboratory studies were obtained. Mr. Doe was discharged from the emergency department at 10:45 p.m., with a written diagnosis of "Hyponatremia, Depression, Alcoholism, Hypertension."

Mr. Doe had been treated with a single administration of 500 ml of intravenous fluid (for his low sodium level) and 1 mg of oral Ativan (for his depression/anxiety) and he was instructed to follow-up with his regular physician within 2-3 days. Later that night at 1:30 a.m., Mr. Doe became unresponsive and despite immediate CPR by family members, and after prolonged efforts of resuscitation by paramedics, he had no response. CPR was discontinued in the field and Mr. Doe was pronounced dead on arrival back at the Hospital. Plaintiff alleged that the E.D. medical staff of the Hospital did not meet the standard of care in their evaluation and treatment of Mr. Doe on March 9, 2006, by failing to evaluate his complaint of chest pain and treat him appropriately. The plaintiff claimed that a complaint of chest pain reported by a 53-year old male with a known history of hypertension must be investigated. Such an investiga-

tion would typically include additional history taking, the performance of an EKG and ordinarily the obtaining of a chest x-ray and cardiac lab tests. The plaintiff contended that this departure from the standard of care directly contributed to Mr. Doe's death due to cardiac causes within hours of his discharge from the Hospital. The plaintiff argued that if the medical staff had performed basic medical tests on Mr. Doe, as a routine evaluation of his report of chest pain, Mr. Doe's acute cardiac condition would have been identified and he would have received appropriate treatment, most likely resulting in his survival.

Upon presentation of a report from an expert certified by the American Board of Emergency Medicine, who had served as full-time faculty in the teaching of both clinical and academic emergency medicine at the Johns Hopkins School of Medicine and at Harvard Medical School, the Hospital quickly negotiated a settlement of the case for \$850,000. Although the plaintiff was still a young man, he had little in terms of economic losses, because his work history and income was limited.

Submitted by Kerry M. Wisser of Weinstein & Wisser, P.C., West Hartford, CT.

SETTLEMENT

Injury to Football Player at Camp Settlement of \$125,000

The case of *Dolan v. Randy Edsall Football Camp*, Docket No. CV-03-0823198, filed in the Superior Court for the Judicial District of Hartford, settled during trial before Judge Tanzer.

On June 29, 2001, the plaintiff, age 15, was attending the defendant's football camp in Storrs. Camp was "non-contact" but every player was required to bring or rent a helmet. Edsall required players to wear helmets for "individual skills instruction," where contact between players was highly unlikely. The players also participated in daily "7 on 7" competitive passing tournament on a 40 yard field. The "7 on 7" games were two-hand touch and, unlike the individual skills instruction, helmets were not allowed. The plaintiff was playing defensive back and was injured when he collided with another defensive back. The plaintiff suffered a broken nose, with prolonged bleeding, which required hospitalization, nose packing and eventually embolization of an

artery to stop the bleeding.

The plaintiffs' experts were Richard Borkowski, athletic administrator and football coach, who stated that it made no sense to require helmets for the individual skills drills, but not to require helmets for the "7 on 7" drill; and Dr. Stephan Ohki, interventional radiologist from Hartford Hospital. One of defendant's liability experts, Richard Cavanaugh, head football coach at Southern Connecticut State University, admitted that as a high school and college coach, he required his players to wear their helmets at all times during practice. Randy Edsall, who attended trial, claimed that he did not allow the players to wear helmets for safety reasons.

The offer just before trial was \$20,000. The parties settled after four days of evidence for \$125,000. The carrier was Fireman's Fund.

Submitted by John J. Pavano, Esq. of Faulkner & Boyce, New London.

JURY VERDICT

Motor Vehicle/Bicyclist Accident; 51-Year-Old Male; Orthopedic and Neurological Injuries Verdict of \$221,146.71

In the case of *Alex Hanna v. Kirk J. Hosfelt, et al.*, Docket No. CV-01-0386886-S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, a jury returned a verdict in favor of the plaintiff in the total amount of \$221,146.71, on March 31, 2005.

On September 5, 2002, the plaintiff was riding his ten-speed bicycle southbound on Black Rock Turnpike in Fairfield. The defendant turned left into his path and crashed into the bicycle. The impact caused Mr. Hanna to be thrown from the bicycle. He struck his head on the windshield of the car and landed face down on the roadway. He lost consciousness, the duration of which was disputed.

The plaintiff suffered a comminuted fracture of the left non-master wrist, a fracture of the right wrist, multiple fractures of the metatarsal bones of the right foot, a strain of the lumbosacral spine, a large laceration and permanent scarring of the right arm, post-traumatic headaches, and a traumatic brain injury, manifested by difficulty with memory, concentration and functioning.

Dr. James Fitzgibbons of Bridgeport treated the plaintiff's orthopedic injuries, most of which healed. The lone exception

was his left wrist injury, which resulted in a 5% permanent partial impairment. The defendants did not contest this rating. They did, however, vigorously challenge the plaintiff's neurological injuries, which were evaluated several years after the accident by Dr. K. N. Sena of Stratford, who found them to be causally related to the crash and permanent in nature. The defense expert was Dr. James O. Donaldson, who opined that those injuries were a result of pre-existing depression and, in any event, were not permanent.

The plaintiff's medical expenses were \$8,141.71 and all were outstanding. The plaintiff claimed that as a result of his injuries, he was unable to work for approximately 18 weeks. The medical records, however, showed that he returned to work within eight weeks. The plaintiff also contended that his earning capacity as a hairdresser in Westport was impaired as he was much slower and less skillful and, therefore, could not see as many customers. The jury awarded \$115,000 in damages for lost wages and loss of earning capacity.

Before the accident, Mr. Hanna led an active, energetic lifestyle. He was an avid bicyclist and also enjoyed running, hiking, working out at the gym, and socializing with friends. After the crash, he stopped doing most of these activities. Testimony from family members and friends revealed that his personality also changed and he became much more withdrawn. The jury awarded \$98,000 in non-economic damages.

The defendants were insured with Progressive Northern Insurance Company. Before trial, the defendants offered to settle the case for \$55,000. This offer was increased to \$75,000 during trial.

Submitted by Robert R. Sheldon, Esq. of Tremont & Sheldon, Bridgeport.

**ALASKA AIRLINES CRASH
DEATH CASES**

Confidential 7-Figure Settlement

The case of *William Margiotta, et al. v. The Boeing Company, et al.*, Docket No. C-00-2115-SI-ARB, filed in the United States District Court for the Northern District of California, settled for a confidential sum well into seven figures.

On January 31, 2000, Dr. David Clemetson and his family, including his

wife Carolyn and 7-year-old son, Miles, were killed in the crash of Alaska Airlines Flight 261, off the coast of Southern California. At the time, the flight was enroute from Puerto Vallarta, Mexico to Seattle.

Before the crash into the ocean, there were two separate losses of control of the aircraft during which the plane dove nearly 20,000 feet. The post-accident NTSB investigation disclosed that the jackscrew component of the 40 foot long stabilizer of the tail assembly which enables the pilot to control the aircraft was stripped of his threads. The conclusion of the NTSB was that the stabilizer had failed in-flight causing the crash. Post-accident investigation also disclosed that Alaska Airlines had the most reported jackscrew problems of domestic carriers. Also, before the accident, a computer program had alerted Alaska Airlines of potential wear problems with the jackscrew on certain of its aircraft.

The lawsuit against Alaska Airlines and the manufacturers of the component parts in question was filed in May, 2000. The case was consolidated with 102 other wrongful death cases filed in the Northern District of California from the crash. During the litigation, a claim was asserted by Miles Clemetson's natural father for loss of consortium even though he had previously given his son up for adoption once Miles' mother, decedent Carolyn Clemetson, had remarried. That claim was dismissed by the court on the basis that the natural father had divested himself of standing in the adoption. A claim was also made by a Florida attorney on behalf of a Guatemalan girl, who alleged she was fathered out of wedlock by Dr. Clemetson. Investigation, including DNA testing, established that the child's claim was false.

The defendants, faced with the possibility of paying punitive damages, settled the case for a confidential sum well into seven figures.

Submitted by Stephen Jacques, Esq. of Moore, O'Brien, Jacques & Yelenak, Cheshire.

JURY VERDICT

**Motor Vehicle Accident;
64-Year-Old Male;**

**Non-Surgical Bilateral Carpal Tunnel
With No Impairment Rating**

In the case of *Zbigniew Rozbicki v. Richard E. Carter*, Docket Number CV-

01-0084372, filed in the Superior Court for the Judicial District of Litchfield, the jury returned a verdict in the amount of \$129,800. After prejudgment interest in the amount of \$47,052.11, the total judgment was \$176,852.11. The medical bills totalled \$3,591.25. There was no wage claim, but there was evidence regarding future surgery. The final offer was \$20,000 and the final demand was \$45,000.

The plaintiff, who is an attorney in Torrington, was traveling on Route 4 in Harwinton in January of 1999, when the defendant's vehicle crossed over and struck the plaintiff's pick-up truck. The property damage to the pick-up truck was approximately \$10,000.

The primary issue in the case was whether the injuries were caused by this accident or two other auto accidents in which the plaintiff had been involved within a five year period.

The case was tried to a verdict before the Honorable Elizabeth Bozzuto on January 5, 2006.

Submitted by Everett H. Madin, Esq. of RisCassi and Davis, P.C., Hartford.

SETTLEMENT

**Accident on Golf Course
14% Permanent Impairment of
Function of the Brain
Settlement of \$1.17 Million**

The case of *Crystal Rugar, et al v. Daniel Wiknik*, Docket No. CV-02-0125669-S, filed in the Superior Court for the Judicial District of New London at Norwich, settled for the sum of \$1.17 million, guaranteed over the course of the plaintiff's lifetime.

Crystal Rugar, age 16, was riding on a golf cart operated by Daniel Wiknik at the Sunrise Resort, where both Crystal and Daniel worked. Wiknik drove the cart backwards down a path and turned the cart sharply at the bottom of the path, which caused Crystal Rugar to be thrown out of the cart and onto the pavement. She struck her head on the pavement and was brought to the emergency room, where she was diagnosed with a traumatic brain injury. Crystal Rugar was a sophomore in high school at the time of the incident, July 23, 2000. Crystal required special accommodations to be made for her in her senior year in order to graduate and as a result of her traumatic brain injury. She has undergone counseling,

regular visits with a neurologist, and neuropsychological testing in treatment of her traumatic brain injury. She was left with a 14% permanent impairment of function of the brain. Crystal hoped to go to college before her accident, but feels she will be unable to succeed at college as a result of her traumatic brain injury. She is currently employed as a veterinarian assistant at an animal hospital.

This case was scheduled to go to trial in the Complex Litigation Docket in Middletown in July 2005. Defense counsel requested mediation of the case. The case was mediated before the Honorable F. Owen Eagan in late May 2005. The case was settled on a structured basis. The lump sum cash and guaranteed payments total \$1.17 million.

The plaintiff's expert witnesses were: Kenneth Gilstein, Ph.D. — treating neuropsychologist; Richard Schuster, Ph.D. — vocational rehabilitation expert; Edward Tucker, M.D. — treating neurologist; Robert Novelty, Ph.D. — consulting neuropsychologist; Kenneth Selig, M.D. — consulting psychiatrist; and Gary Crakes, Ph.D. — economist.

Submitted by Dennis A. Ferdon, Esq. of Anderson & Ferdon, Norwich.

SETTLEMENT

Automobile Accident

Neville Warburton v. Samantha Preston, et al., Docket No. CV-05-4002813-S, filed in the Superior Court for the Judicial District of Fairfield at Stamford, was a typical soft-tissue injury automobile accident case.

The plaintiff, age 35 at the time of the accident, reported no injuries to police officer at the scene, but took himself later that day to the emergency room with complaints of left shoulder and left foot injuries. There was no history of any orthopedic injuries. The plaintiff was in very good shape and worked part-time as a personal trainer in area sports clubs. The diagnosis was a sprain to the left shoulder and a soft tissue injury to the left foot. The next day, Mr. Warburton took himself back to the emergency room with neck and back complaints. The diagnosis was sprains to the cervical and lumbar spines.

The case was referred to trial counsel several weeks before trial. By that time, Mr. Warburton had already testified at deposition that his prior lawyer had sent

him to the 1867 Medical Center in Stamford (internist on site as medical director — oversees chiropractic, physical therapy and massage therapy modalities). Mr. Warburton was treated from February to July, 2003, approximately two to three times a week, and incurred charges totaling \$5,201. The total bills, including two ER visits, totalled \$6,625.90 (total specials in case).

The internist rated the plaintiff with 6% permanent partial disability to his lumbar spine based upon musculoligamentous sprain. The plaintiff testified that his neck and left foot injuries resolved months after the accident, but that the left shoulder and lower back injuries never did. Although there were no "lost wages" in a classical sense, the plaintiff's short-term earnings were impaired as personal trainer.

The defendants contested liability claiming unavoidable accident due to a "phantom" car and icy road conditions. They also argued that the prior attorney and doctor were in cahoots, and that the plaintiff could not have been injured as evidenced by the lack of treatment from June 2003 to November 2006.

The jury deliberated for approximately two hours and awarded \$40,000 in economic damages and \$25,000 in non-economic damages. Although the plaintiff did not do an excellent job testifying, he did not try to overreach or over-exaggerate his injuries. He was in excellent physical shape and did not try to hide from it.

Submitted by Jeffrey M. Cooper, Esq. of Zeldes, Needle & Cooper, P.C., Bridgeport.

SETTLEMENT AT MEDIATION OF A MARITIME CASE INVOLVING A JET SKI AND A TOWING OPERATION

Plaintiffs filed this wrongful death action (*Frederick R. Wood, et al. v. Towboat U.S. Inc., et al.*, Docket No. KNL-CV-04-4000281-S, Superior Court for the Judicial District of New London) in 2004 (the Federal Maritime three year Statute of Limitations applied for inland navigable waters). Defendants Seaforth improperly removed the case to Federal Court, which remanded it back to Superior Court under the Saving to Suitors clause of the first Judiciary Act of 1789 (now 28 U.S.C. §1333). Defendants Seaforth then filed a Petition for Exoneration or Limitation of Liability based on 46 U.S.C. §181 et seq. in Federal Court. Under this statute (an

anachronism from an 1851 statute designed to further American maritime commerce for the young nation, but now applied to recreational boats), if the vessel owner or operator can prove lack of "privity" (knowledge of any negligent acts or condition causing the incident), he can limit his liability to the value of the vessel — in this case, \$65,000. The burden of proof is on the vessel owner to show lack of privity. The filing of the Petition causes an automatic stay of the State Court action.

On August 2, 2001, defendant, Frank Seaforth, Jr., age 54, took his father's boat, the SEAFORTH, for a pleasure cruise on the Connecticut River with ten passengers, who brought beer and soda. He left from the Ragged Rock Marina in Saybrook at around 6 p.m., going north on the Connecticut River. He was captain of the 35-foot Cruiser with twin 340 hp. Mercury engines. The sun was bright and low on the horizon. He was planing, that is, going so fast he was riding on top of the water. The glaring sun caused him to miss the red buoy channel marker, go out of the channel and run aground on a sandbar at Nott Island. He had over 30 years of experience and many trips on this portion of the Connecticut River. There was no proof that the defendant was drinking.

Defendant, Paul Ucello, was the operator of a professional towboat called TOWBOAT U.S., acting under the corporate entity of Saybrook Marine Towing and Salvage, LLC and under a national license agreement with the defendant, BOAT U.S. He tried to pull the Seaforth pleasure boat off the sandbar two or three times with a 3/4-inch towline extended 75-110 feet. He was unable to do so. He and Seaforth decided to wait for high tide which was three hours away, with the towline attached. Ucello testified that the towline was slack, but several witnesses testified the rope was taut, 3-4 feet above the water, and in place for 20 minutes to 1 hour.

Eric Wood was 23 years old. He had less than three weeks of experience on the water with a jet ski for which he had a temporary license from the State. On August 2, 2001, he had been skiing with his friend in Long Island Sound. He was returning to where he had launched the jet ski near the Goodspeed Opera House, north of Nott Island. As Eric rode north on the Connecticut River at 7:30 p.m.,

the sun was low on the horizon and the glare was strong.

As Eric Wood approached the Seaforth vessel, some of the passengers began to wave at him, including one passenger who extended his thumb as if to hitchhike. Eric Wood steered his jet ski 35-40 feet left of the Seaforth vessel and was looking at the Seaforth passengers, when the extended towline "clotheslined" him at his neck. The impact was 49 feet from the towboat. A doctor in a boat north of the scene went to Eric's rescue, administered CPR but was unsuccessful and Eric Wood died of a broken neck and fractured skull. He left a daughter, then two years old.

Plaintiffs argued that half of the towline was tied to the Seaforth vessel and the other half was tied to TOWBOAT U.S.; therefore, the two defendants together obstructed up to 110 feet of navigable waters for up to one hour. Frank Seaforth, Jr. was seated at his controls and had been conversing off and on with the defendant, Paul Ucello, by VHF radio. The controls at his fingertips included an air horn and a VHF radio by which he talked directly to Ucello in the towboat.

Seaforth turned from his captain's chair to see the jet ski 200 yards away speeding up river. He saw his passengers waving at Eric. He then chose to leave his controls, including his air horn and abandon his VHF direct communication to Paul Ucello, to join the other passengers waving at the jet ski.

Plaintiffs claimed liability on the part of Seaforth because:

1. Seaforth held one-half of the towline 3-4 feet above the navigable waters stretched out 75 to 110 feet, thereby obstructing a navigable waterway for up to one hour in violation of C.G.S. 15-133(b);
2. He left his VHF communication and thereby failed to warn the towboat of the approaching jet ski and to slack off or release the towline;
3. He failed to direct his passengers on the bow near the cleat, near his end of the towline to release the line; and
4. He failed to sound his air horn which was at his fingertips (five blasts equals danger)(Rule 34(d) of the Federal Inland Waterway Rules).

The claims against Paul Ucello and

Towboat U.S. were:

1. He obstructed 75 to 110 feet of a navigable waterway for up to one hour in violation of C.G.S. 15-131(7);
2. He failed in his positive duty to keep a lookout for other vessels in violation of Inland Rule 5 and C.G.S. 15-131(7); and
3. Ucello admitted that he was aware that jet skis frequented this part of the river at this time of day; therefore,
 - (a) He should have untied or released the towline until high tide;
 - (b) He should have looked for small vessels heading into the setting sun rather than a couple observing the towboat away from the sun; and
 - (c) He should have sounded his air horn, which was less than five feet from where he was supposedly standing watch (Inland Rule 34(d)).

Plaintiffs claimed the Boat Owners Association of the United States, (BOAT U.S.), was liable because of its principal-agency relation with Paul Ucello and Saybrook Marine Towing and Salvage. Callers for assistance dial a 1-800 number for BOAT U.S. which dispatches towboats, like AAA does for road calls.

The defendants claimed that Wood was exclusively responsible for his own death because he was speeding, not keeping a lookout and not reducing his speed in the setting sun. There was evidence he was traveling a minimum of 26 mph, the planning speed for this jet ski. The jet ski was capable of going up to 60 mph. The general speed limit on this part of the river was 45 mph, but 5 mph near anchored boats or shorelines. Eric had less than three weeks of experience; therefore, he should have traveled much slower. He was traveling into a setting sun with blinding glare.

Expert Captain Mitchell Stoller wrote an extensive report and testified that the defendant Ucello/TOWBOAT U.S. and SEAFORTH were negligent:

"Every vessel shall at all times maintain a proper look-out by sight and hearing . . . so as to make a full appraisal of the situation and the risk of collision."

Evidence of statutory violations leads to a change in the burden of proof in maritime cases; the vessel owners and opera-

tors must then prove that their conduct did not and could not have caused the accident. *The Pennsylvania*, 86 U.S. (19 Wall) 22 L. Ed. 148 (1874); *American Dredging Co. v. Lambert*, 81 F.3d 127, 1996 AMC 2929 (11th Cir. 1996). All parties claimed the benefit of The Pennsylvania Rule. Also, The Oregon Rule holds that vessels that strike a fixed object are presumed to be liable unless the fixed object is invisible (like a towrope).

Hendrik van Hemmen was an expert on behalf of the Seaforth defendants. He placed the sole cause of the accident on the "lack of caution" by the decedent. He claimed the decedent was "not looking where he was going" and claimed that his speed was excessive because he should have anticipated a possible obstruction in the water.

The national defendant, BOAT U.S. (and presumably the defendants, Paul Ucello and Saybrook Marine), retained Captain Larry Strouse as an expert. His opinion was basically the same as the Seaforth expert.

An autopsy was performed on the decedent by the State Medical Examiner. The examination found no evidence of any alcohol or drugs. Ucello, on the other hand, was required by Coast Guard rules to test for drugs and alcohol, but did not do so for four days. Seaforth, who had cases of beer on board, was not tested by the D.E.P.

Eric Wood lived with the mother of his two-year-old daughter. He worked part-time while going to a community college to study computers. He was devoted to his family, especially his two-year-old daughter, Amanda.

The pleasure boat had \$300,000 coverage with Travelers/St. Paul and the towboat had \$500,000 with The Hartford, with BOAT U.S. as an additional named insured. The case was mediated by Judge Frederick Friedman in Norwalk, CT and settled for \$200,000, of which \$50,000 was paid by the pleasure boat (Travelers/St. Paul) and \$150,000 by the tow boat (The Hartford).

Submitted by Matthew Shafner, Esq. of O'Brien, Shafner, Stuart, Kelly & Morris, P.C., Groton.

Workers' Compensation Review

June 1, 2007, through October 4, 2007

Robert F. Carter

LEGISLATIVE

Additional penalties against employers for undue delay and failure to carry workers' compensation insurance; period to contest Form 36 now 15 days.

The legislature enacted at the end of the session additional penalties against non-compliant or fraudulent employers. Under Sec. 31-288, failure to carry workers' compensation insurance is now a Class D felony, as are misrepresentation of employees as independent contractors and misrepresentation of the number of employees to the insurer. These transgressions also subject the employer to stop work orders, which may be issued by the Labor Commissioner. P.A. 07-89, effective Oct. 1, 2007.

In addition, the legislature in a separate act also amended Sec. 31-288 to provide for a civil penalty of up to \$1,000.00, to be paid to the claimant, where the employer or insurer has unduly delayed payment or adjustment of "compensation due under this chapter." P.A. 07-80, effective Oct. 1, 2007, which also extended to fifteen days the time within which a Form 36 notice of intention to discontinue benefits may be contested by a claimant.

SUPREME COURT

Wage loss benefits for prior injuries not barred by later injuries or *Hatt*

Correcting another overreaching decision by the CRB aimed simply at eliminating benefits, the Court held that "when a prior disability is a substantial cause of the loss of earning capacity that a claimant suffers after a second disability, the commissioner may consider both disability awards in determining entitlement to and duration of a Sec. 31-308a award." What does that mean? The claimant was injured in 1989 and was paid 104 weeks of permanent partial disability benefits based on 20% impairment of her back. She continued working at her regular job without wage loss until a subsequent back injury in 2000, which made her back worse, increasing her impairment by 5%, for which she was paid an additional 18.7 weeks of permanency; the subsequent injury, however, significantly reduced her earning capacity. The 1989 injury was a significant factor in the claimant's inability to continue her regular employment. The Court held that the claimant was entitled to Sec. 31-308a benefits for the

effects of the 1989 injury as well as of the 2000 injury. The CRB, bizarrely relying on *Hatt v. Burlington Coat Factory*, 283 Conn. 279 (2003), interpreting apportionment among carriers under Sec. 299b, had held that the claimant was entitled only to 18.7 weeks of 308a benefits, apparently on a theory that, since the employer on the later accidental injury couldn't apportion liability for consequences of the injury, the claimant should be deprived of benefits for the combined consequences of both injuries. Fortunately, the Court corrected the CRB holding. *Pizzuto v. Commissioner of Mental Retardation, State of Connecticut*, 283 Conn. 257 (July 24, 2007). So apparently a claim under such circumstances may be made for at least $[104 + 18.7 =]$ 122.7 weeks of 308a benefits.

In this case there was only one employer: the State of Connecticut. Unless I am misreading the opinion, the Court seems pretty clearly to suggest that, where there are two different employers or carriers, the employer or carrier at the time of the second injury would be liable for all wage loss benefits, at least where the second injury really is the straw that broke the camel's back. Presumably this result follows from Sec. 31-349(a). See *Fimiani v. Star Gallo Distributors, Inc.*, 248 Conn. 635 (1999). This result may indeed be unfair to the later carrier. Certainly the availability of the Second Injury Fund and the acknowledgment of physical defect made the system fairer to both employers and employees, and encouraged the employment of workers with disabilities, unlike the feeble Americans with Disabilities Act.

The Court, however, did not reach the issue of whether the number of weeks of 308a benefits available was to be determined under the law in effect in 1989 (unlimited duration) or in 2000 (duration of permanent partial disability, here 122.7 weeks), since the claimant had not, at the time of the formal hearing, sought an award in excess of 104 weeks. Unless violence is again done to the constitutional authority of the date-of-injury rule, the law applicable in 1989 should continue to govern the claimant's rights with respect to benefits available for the effects of the 1989 injury; but because of political rather than legal considerations, I would not bet on that outcome.

What has not been addressed, either

here or in post-*Hatt* thinking generally, is that where the second injury has no permanent effect, or where the permanent effect is insubstantial, then, as a matter of medical fact, liability for additional medical treatment and indemnity benefits should revert to the carrier for the first injury. Since *Hatt*, the knee-jerk response of the carrier for the prior injury has been to assert that all prior carriers are always off the hook, which, as a matter of medical fact, just shouldn't be true.

Finally, the broader question is whether a second, non-work-related injury precludes the claimant from seeking additional workers' compensation benefits after the second injury. The claimant should remain eligible for workers' compensation benefits for the effects of the first injury even after a second non-work-related injury to the same body part, depending on the medical effects of the second injury. But save that for another litigation.

Statute of non-claim in death cases clarified

The Supreme Court got it right in a major decision in an asbestosis death case, clarifying appropriately the murky, ramshackle language of Sec. 31-294c concerning death cases. Where a man died from asbestosis less than three years after the date of first manifestation without filing a claim, but where his widow filed a claim prior to the running of the three years after the first manifestation, her claim was timely. The Court held that as long as some claim, either by the claimant, his estate or a dependent, is filed within the three-year period in occupational disease cases, the claim is timely. *Fredette v. Connecticut Air National Guard*, 283 Conn. 813 (Sept. 18, 2007). The Court rejected an argument that the widow's claim was barred because the claimant didn't die within two years of the date of first manifestation, an argument based on the language of the statute that "provided, if death has resulted within two years from the date of the accident or first manifestation," then the dependent can file within the two year period or within one year from the death, whichever is later. This two-year language now makes no sense for occupational disease cases, since the statute was amended in 1980 to allow

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three years from first manifestation, so that the statute of limitations is always three years in occupational disease cases. The Court accordingly held that the "within two years" was meant to expand the statute, not to provide a restriction after the 1980 amendment; and proved it in a scholarly opinion.

What was left explicitly dangling by the Court was what is the period (assuming there is such a period) during which a dependent must file a claim, where the claimant has filed a claim or otherwise satisfied the statute of non-claim? The Court stated that this was a question for another day. Which brings us back to the screwed-up law concerning notices of claim for widows. Prior to the imposition of a CRB-made rule requiring a separate notice of claim within a year of death for surviving spouses in *Sellew v. Northeast Utilities*, 12 Conn. Workers' Comp. Rev. Op. 135, 138, 1422 CRB-8-92-5 (Apr. 7, 1994), no separate notices for dependents in death cases were ever required where the underlying claim had been accepted or a timely notice filed. This doctrine, though not based on the statute, has wormed its way into the law. In *Kuehl v. Z-Loda Systems Engineering, Inc.*, 265 Conn. 525 (2003), the Court dismissed a widow's claim for failure to file a timely separate notice of claim, even though a timely claim had been filed for the injured spouse prior to his death. The Court in *Kuehl*, however, did not consider the actual law with respect to the CRB-imposed requirement of a separate dependent's claim; the Court noted explicitly that the claimant did not contest the interpretation of the law requiring a separate widow's claim to be filed within a year of the death of the claimant. The Court in *Kuehl* also noted that the doctrine had been recognized by the Appellate Court (in *dicta*) in *Tardy v. Abington Constructors, Inc.*, 71 Conn. App. 140, 144, 801 A.2d 804 (2002); but again it was without real examination of the law or questioning of the CRB rule. Most importantly, until this new decision of the Court in *Fredette*, the Court for decades never really looked at its 1924 holding in *Tolli v. Connecticut Quarries Co.*, 101 Conn. 109 (1924), which has been totally ignored by the CRB (and was ignored in both *Kuehl* and *Tardy*.) In *Tolli*, after an instantaneous death, the widow's claim was timely and accepted based on a hearing within weeks of the death. Years later dependent parents

of a decedent requested benefits, after the widow had remarried. The Court in *Tolli* held that no separate dependents' claim was required, so long as some claim had been made originally within the applicable time period. The Court in *Fredette* thankfully has finally recognized the reasoned precedent of *Tolli*, which governed workers' compensation practice until the gratuitous and baseless holding in *Sellew*. Perhaps seeing that the separate-notice-for-dependents rule, applied but unquestioned in *Kuehl*, is flatly contradicted by *Tolli*, the Court in *Fredette* actually made a strong plea for the legislature to straighten out the statute.

Longshore claim does not save untimely widow's claim

In a death case argued and decided with *Fredette*, the Court held that the filing of a Longshore and Harbor Workers claim within the time period for filing under the Connecticut Act did not provide notice of the claim for benefits under the Connecticut Act. Where, after the death of the injured employee, who had received benefits for many years under the Longshore act, the widow filed a claim for surviving spouse benefits, her claim was therefore held untimely, since no timely claim under the Connecticut statute had been filed during the limitations period running from the first manifestation of symptoms of the claimant's asbestos disease. *Chambers v. Electric Boat Corp.*, 283 Conn. 840 (Sept. 18, 2007). The Court rejected the claimant's argument, that all the elements of notice under the Connecticut Act were provided by the Longshore notice, stating that there was no indication at the time of the original claim that benefits were being sought under the Connecticut Act.

New Jersey law applies to New Jersey employee's death

An employee who lived and worked in New Jersey as a mechanic for a lumber company with facilities in New Jersey and Connecticut was killed at the New Jersey location by the alleged negligence of a fellow employee from Connecticut, a truck driver who ran over the mechanic while he was under the truck. The employee widow was paid death benefits under the New Jersey workers' compensation law. The employee's estate sued the Connecticut driver in Connecticut. The action was barred by New Jersey law, which has no motor vehicle exception to the bar against actions against fellow employees. New Jersey law applied under the test of *Cleveland v. U.S. Printing Ink, Inc.*, 218

Conn. 181 (1991), on the ground that Connecticut had too insignificant a relationship to the employment relationship or the employment contract to provide a basis for applying Connecticut law. *Johnson v. Atkinson*, 283 Conn. 243 (July 24, 2007).

Fall in hold of ship compensable under Connecticut Act

The injuries sustained by a dock worker in a fall in the hold of a floating ship which he was unloading may be compensated under the Connecticut Act, at least where the employee's employment relation is local. Federal jurisdiction under the Longshore and Harbor Workers' Act, normally concurrent with the state system in Connecticut, is not rendered exclusive by the fact that the injuries took place on navigable water. *Coppola v. Logistec Connecticut, Inc.*, 283 Conn. 1 (July 3, 2007). *Seble, Gerte v. Logistec Connecticut, Inc.*, 283 Conn. 60 (July 3, 2007), remanded for lack of a final judgment. The enormous, learned opinion in *Coppola* turns on the byzantine ambiguities of federal maritime law. Kudos to anyone who reads it, much less understands it. Sometimes judges more than deserve their pensions.

APPELLATE COURT

Scienter rule slightly relaxed for Sec. 7-433c hypertension SOL

The trial commissioner had applied the CRB-made rule, that scienter triggers the running of a one-year statute of non-claim in Sec. 7-433c hypertension claims, to dismiss as untimely a claim where the commissioner found that the claimant was aware that he had elevated blood pressure "and that he had a potential hypertension problem that may require medication" more than a year prior to the notice of claim. The dismissal, affirmed by the CRB, was reversed by the Appellate Court on the basis that awareness of "potential hypertension" is not enough to trigger the running of the statute. This holding indicates that the rule, for now, may revert to what it previously was for a while: that diagnosis of hypertension at least, if not treatment, is required to trigger the running of the limitations period. *Arborio v. Windham Police Dept.*, 103 Conn. App. 172 (Aug. 14, 2007). The Court ducked what seems to me the real issue, which had been raised and briefed: that the scienter rule has no basis in the statute. The CRB has for years progressively increased the severity of its interpretation of the law, in order to bar more of these disfavored

claims. However, scienter under Sec. 294c is relevant only to occupational disease claims (which the CRB originally held hypertension claims to be, and which is how hypertension probably should be treated) and to claims for conditions caused by repetitive trauma which more closely resemble occupational diseases than accidental injuries. The CRB and the courts have consistently rejected characterizing these hypertension claims as occupational disease claims, despite the legislative history. In *Discuillo v. Stone and Webster*, 242 Conn. 570 (1997) and *Malchik v. Division of Criminal Justice*, 266 Conn. 728 (2003), the Court suggested the proper approach, short of applying the occupational disease statute of non-claim to hypertension cases under Sec. 7-433c. Hypertension is not an accidental injury, but rather the result of incremental insult over many years; that is the legislative basis of Sec. 7-433c. As a condition produced by repetitive trauma, hypertension, which is certainly a disease, much more closely resembles an occupational disease than an accidental injury. Even if the courts insist on calling the condition an "accidental injury" produced by the repetitive stress, under *Discuillo* the limitations period is clearly a year from the date of the last repetitive exposure. But the Appellate Court here showed that it will have to be the Supreme Court which rationalizes the law.

Principal employer finding affirmed

In *Samaoya v. Gallagher*, 102 Conn. App. 670 (July 24, 2007), the Court, in affirming on the basis of the facts a finding of liability of a principal employer, reminds us that there may be, and frequently are, more than one principal employer, all of whom may be liable for compensation. This legal issue may arise more frequently these days, where illegal immigrants commonly work for uninsured construction labor contractors. Recall, however, that principal employers who do not pay compensation benefits may be liable civilly to the injured worker, if one can prove a case.

Suarez dismissal draws dissent

On egregious alleged facts of bad safety practices and an amputated arm, a dismissal of an intentional injury action against the employer drew a dissent from former Justice McDonald. *Martinez v. Southington Metal Fabricating Co.*, 101 Conn. App. 796 (June 19, 2007). These days it's hard to imagine facts which would survive summary judgment on a

claim of intentional injury based on *Suarez v. Dickmont Plastics Corp.*, 242 Conn. 255 (1997)

COMPENSATION REVIEW BOARD

Practice tip: have the doctor take the claimant out of work

The claimant found that his injured shoulder hurt too much on his light duty job operating a drill press; but he declined to try other light duty work and was laid off. The denial of 308a benefits was upheld based on the finding that light duty work within the claimant's restrictions was available but declined. *Morales v. Marlin Firearms*, 5123 CRB-3-06-8 (Aug. 10, 2007). Much better to advise the client, where possible, that if he feels he can't do the light duty job, he should explain the situation to his doctor and have the doctor note that the particular light duty job is medically inappropriate, if that's the case, and restrict the claimant from doing the job.

Injuries en route to therapy compensable

The claimant's injuries in a motor vehicle collision en route to his authorized physical therapy were held compensable. The CRB approved the trial commissioner's analysis that the trip was mutually beneficial to the employer and the employee, since it was in the employer's interest for the employee to get well. The CRB, however, emphasized that the finding of mutual benefit in this situation was a question of fact. Does that mean that sometimes having the guy go to authorized physical therapy might not be in the interest of the employer? Apparently most states where the issue has arisen have held such injuries compensable. *Houlihan v. City of Waterbury Police Dep't*, 5141 CRB-5-06-10 (Sept. 26, 2007).

After parking in designated lot, claimant's fall on sidewalk on the way to work is compensable

The company provided a parking lot for employees. The claimant parked and was walking on the sidewalk down the street towards her place of employment when she fell. She always came to work an hour early and met co-workers in the cafeteria. Held compensable. The only twist on the established law is the coming to work early, which the CRB held simply didn't matter: there was mutual benefit in the walk to work. *Meeker v. Knights of Columbus*, 5115 CRB-3-06-7 (July 3, 2007).

Surgery interrupts permanency payments, temporary partial is payable until maximum medical improvement

The claimant was receiving permanent partial disability benefits for his back condition but had to go in for another surgery. After the period of temporary total disability, the commissioner appropriately ordered temporary partial disability benefits paid until the claimant reached maximum medical improvement. *Esposito v. New Haven*, 5096 CRB-3-06-5 (June 19, 2007). Sensible decision, good affirmance by the CRB.

CRB decides coverage dispute

The CRB decided that, for purposes of ordering benefits, the trial commissioner could decide that the workers' compensation policy had been cancelled and was not in effect, so that the Second Injury Fund was ordered to pay the benefits. *Velez v. LSP Enterprises, Inc.*, 5105 CRB-1-06-6 (Sept. 26, 2007). When the trial commissioner may decide coverage disputes is vague; some cases have suggested that all coverage disputes must be decided in Superior Court. The basic legal approach here by the CRB is practical: the commissioner has jurisdiction to decide whatever it takes to get the claimant paid the benefits due. It's not at all clear, however, that in many cases deciding the coverage dispute is necessary prior to ordering benefits. The problem is that, in this case as in many others, the claimant suffered for a long time in need of surgery while the respondents wrangled about coverage. It would sometimes be better to award the benefits against the employer as soon as possible and then, when unpaid for whatever reason, order payment by the Fund under Sec. 31-355, even though, because of the quibbles of the Fund, getting a payment order in no-insurance cases can itself be stupidly time-consuming. After a Sec. 31-355 order, the respondents can then battle out the coverage issue, after the claimant's benefits are paid, at leisure. Whether that battle is in the commission or in the court at that point doesn't matter so much.

SUPERIOR COURT

Employee may intervene in third party suit after limitations period

Like an employer, an employee may intervene in a third-party action by an employer after the statute of limitations has run, as long as the motion to intervene is filed within thirty days of the

(Continued on page 160)

notice of the pendency of the third-party action. *Town of West Hartford v. Rizikow*, Dkt. CV07-5009216S (Hartford, June 13, 2007), 43 Conn. L. Rptr. No. 16, 574 (Aug. 13, 2007).

CIGA liable for loss of consortium but not wrongful death damages in third-party case for work-related deaths

In an interesting Guaranty Fund case, the Fund was on the risk for the defendant in a civil action by the estates of two workers killed in a construction accident, where the workers' compensation lien exceed \$400,000.00 in each case. The Fund was held not to be liable for the wrongful death claims, which were not "covered claims" because the payment of the Fund per-claim limit of \$300,000.00 in each case would have gone to reimburse the workers' compensation carrier; in addition, the Fund's liability limit would have been in any case reduced to zero by the payments by the other insurer. However the Fund voluntarily paid \$300,000.00 each on the loss of consortium claims, on the theory that these were not covered by workers' compensation and therefore were, in these circumstances, covered claims under Sec. 38a-838(6). *Stearns & Wheeler, LLC v. Conn. Ins. Guaranty Ass'n*, Dkt. X03 CV 05 4022256S (Hartford, July 13, 2007), 43 Conn. L. Rptr. No. 21, 772 (Sept. 17, 2007).

Inadvertently putting car into drive is not operation of motor vehicle

A garage mechanic was inspecting the interior of a car after positioning it in the garage. Twisting around, he knocked the transmission lever from neutral into drive, which caused the car to lurch forward into the plaintiff, a fellow employee. The mechanic had allegedly not set the emergency brake. His causing the car to move forward by putting it in gear, however, was held not to constitute the operation of a motor vehicle for purposes of the motor vehicle exception to actions against fellow employees. *Colangelo v. Heckelman*, CV01-0168331S (Waterbury, June 26, 2007), 43 Conn. L. Rptr. No. 20, 719 (Sept. 10, 2007). The squashed plaintiff probably felt that the car was operating pretty vigorously.

The Attack on Trial Lawyers and Civil Justice

Robert S. Peck and John Vail

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I. Introduction

In the 60s Dr. King told America, "[T]he arc of the moral universe is long, but it bends toward justice."¹ Certainly, legal history is characterized by a broadening of access to justice, as well as a recognition that a person's right to a day in court is virtually an American birthright.² In the 70s, some straight-thinking Americans decided they could not tolerate that arc. "[L]iability insurers, product manufacturers, and other repeat-play tort defendants began a concerted effort to enact laws that would limit tort liability that they contended had run amok."³ Their work continues, funded at rates that would make a defense contractor blush.⁴

The Supreme Court, which itself had been bending toward justice, also showed signs of becoming an arch-enemy. For two hundred years the American legal system had been governed by the venerable common-law principle, where there is a wrong, there is a remedy.⁵ In 1979 the Court decided that the well-honored principle is not so venerable after all.⁶ It was enough to make a lover of the common law cry.

As Sonny and Cher would say, "the beat goes on."⁷ The assault on the remedial imperative of the common law continues⁸, masked as an assault on trial lawyers. Why attack the remedial imperative? Corporations — artificial persons — want an ever bigger piece of the pie that feeds real persons. They promote the idea that the civil justice system is simply a tool to serve the economy, and that trial lawyers are harbingers of economic ruin. The role of the civil justice system as glue that holds the polity together is denigrated or forgotten, and trial lawyers are portrayed as enemies of the good — sometimes, literally, as terrorists.⁹

Those who campaign for tort reform and against trial lawyers see courts as one-way streets, available for their efforts to

hold others accountable¹⁰ but never to hold themselves accountable.¹¹ Their rhetoric refers to meritorious lawsuits — those where liability was successfully established — as "frivolous," and blames wealth-redistributing juries and complicit judges for falling under the sway of heart-string-pulling trial lawyers.¹²

From the earliest stages of the "tort wars," a half-century ago, the insurance industry set its sights on trial lawyers.¹³ Trial lawyers' success in increasing payouts on automobile claims had captured their ire.¹⁴ The damage to insurers' economic bottom lines inspired a creative campaign to use all available media — the press, movies, and even television sitcoms — to reinforce the public's unsavory image of trial lawyers.¹⁵

The campaign refocused the industry's dissatisfaction with a civil justice system that had opened its doors more widely, as well as with the increasing professionalism and heightened capabilities of the trial bar.¹⁶ In doing so, the campaign attempted to tap into preexisting antipathy toward lawyers and courts to further a private, corporate-driven economic agenda that increasingly became a political agenda. This preexisting suspicion of the legal profession is so deeply rooted that even colonial America referred to members of the profession as "bloodsuckers," "pick-pockets," "windbags" and "smooth-tongued rogues."¹⁷ This antipathy existed, and still exists, despite the centrality of legal arguments and lawyers in making the case for self-determination, individual rights, and American independence from Mother England,¹⁸ and it exists, despite Americans' willingness to resort to the courts to settle our most vexing issues. Thus, as Professor Charles Silver has observed, "[a]ntipathy for lawyers did not develop overnight. It has existed for centuries, and it has been carefully and extensively nurtured in recent decades."¹⁹

The tactic is extensively used by tort reformers and their political supporters. One rhetorician at the tort-reform-supporting Manhattan Institute tapped into that reservoir of lawyer hostility by establishing a website, www.overlawyered.com, that seeks to feed the negative predisposition with tales of unscrupulous lawyers and frivolous lawsuits.²⁰ Another pundit, Republican pollster and television commentator Frank Luntz, has advised candi-

dates to attack trial lawyers as good politics, adding that it is “almost impossible to go too far in demonizing lawyers.”²¹

At the same time, attacks on judges and courts as “activist” and controlled by the trial bar have increased, and have been bootstrapped to controversial decisions on wedge issues outside the realm of torts. The United States Chamber of Commerce has entered the judicial election fray, sponsoring hard-hitting television advertisements aimed at judges who rule against business interests, and even utilizing non-business issues to make political hay.²²

Yet, for all its sound and fury about trial lawyers, the campaign is really one against the nature of our civil justice system, where corporate bosses must stand on an equal footing with the “unwashed masses” and suffer the ignominy that comes from being held accountable by those who lack their education, wealth, political clout, or status in the community.²³ The attack on trial lawyers, at bottom, is merely a surrogate for the real object of their disaffection: the civil justice system and its accommodation of peoples’ claims.

The sections that follow detail some of those areas of attack. Part II addresses assaults on the contingency fee system, where lawyers incur costs but do not recoup those expenses, or get paid, unless favorable results are obtained. Part III discusses mandatory arbitration, which by definition is entered into without any real consent, and has become a ubiquitous device for liability limitation. Part IV addresses the current expert witness environment where physicians courageous enough to break the code of silence and testify that colleagues have wrongly harmed patients are being forced to spend huge sums to defend themselves before “peer review” tribunals that send a clear message: don’t testify. Part V discusses legislatures, perhaps caught in bird-flu frenzy, who seem to have decided all immunity is good, even when it fails to serve the public interest. Finally, Part VI discusses the efforts of artificial persons to manipulate and alter rules of evidence and procedure. The deterrent effect of tort law²⁴ and the imperative it creates for safer products²⁵ is given no stature. Instead, missing no opportunity to curtail liability, the artificial persons of the world want rules of evidence and procedure to treat their electronic memories more favorably than we treat the real memories of real persons: where a real person has to say what they know, an artificial person

would be required merely to say what is convenient.

II. Attacks on Contingency Fees

If representing the rank-and-file were not potentially profitable, there would be no need to seek various types of tort reform to render it unprofitable. For that reason, the contingency fee, the key to the courthouse for those who cannot afford to pay for legal representation upfront, is under constant attack — with the attack focused on the capacity of the fees to generate trial lawyer “wealth.”²⁶

It is no coincidence that the contingency fee aligns counsel’s interests with that of the client. As eloquently stated by Judge Frank Easterbrook:

[t]he contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest alignment device is not perfect. . . . But [an] imperfect alignment of interests is better than a conflict of interests, which hourly fees may create.²⁷

Pennsylvania Justice Michael A. Musmanno agreed and famously declared:

If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on this part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.²⁸

In the view of those who attack the system, this alignment of interests is precisely the problem — it enables lawsuits that otherwise never would be filed. In fact, attacks on the contingency fee system stretch back before the tort reform era and recur to this day. It is not those who cannot otherwise afford a lawyer who protest the contingency fee system. Rather, these attacks are mounted by frequent defen-

dants and insurers.²⁹ That, in itself, is telling.

One of the most prominent recent attacks was mounted by the tort-reform group, Common Good, which petitioned the supreme courts of a dozen states to change the rules governing contingency fees by limiting them in cases where defendants made an early settlement offer.³⁰ The petitions uniformly were unsuccessful.³¹ Common Good hardly hides its objectives; it states that a major element of its mission is convincing “judges and legislatures to create clear standards on who can sue for what.”³² In an absurdly skewed and decidedly defendant-oriented view of the civil justice system, Common Good labels “[o]ur system of justice. . . a tool for extortion.”³³

A similar tack was adopted by the Florida Medical Association (“FMA”). The FMA successfully proposed a state constitutional amendment intended to cap contingency fees in medical malpractice cases at thirty percent of the first \$250,000 awarded, and ten percent of any amounts above \$250,000.³⁴ After voters approved the FMA initiative, which was framed as “The Claimant’s Right to Fair Competition,”³⁵ the doctors stealthily proposed a new ethical rule that was aimed at preventing clients from waiving their right to restrict their attorney’s fee.³⁶

The gambit proved unsuccessful. Recognizing that the amendment created a personal constitutional right in the medical malpractice claimant, plaintiffs’ counsel began to seek client waivers to assure that such cases would not be rendered uneconomic to pursue. They were able to seek these waivers because, under Florida precedent,³⁷ state courts have recognized that various personal constitutional rights, including the right to trial by jury, the right to access to the courts, and the right to due process of law, are all subject to waiver.³⁸ A Florida intermediate appellate court has recognized:

Although the constitution and the statute do not expressly recognize a person’s right to waive their [homestead] protection, it has long been recognized that an individual is free to knowingly and intelligently forego a right which is intended to protect only the property rights of the individual who chooses to make the waiver.³⁹

The proposed ethical rule prohibiting waiver attempted to make a personal constitutional right inalienable was without warrant in the constitutional text. The Florida Supreme Court saw the issue in

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precisely that light. Finding the right to be personal, and thus subject to waiver, it ordered the Florida Bar to propose a rule that would permit, rather than prohibit, waiver.⁴⁰

While these two modern attempts at limiting contingency fees in order to discourage litigation have failed, more attempts unquestionably will be made in the future. Although aimed at the pocket-books of trial lawyers, the attempts to limit contingency fees ultimately result in increased difficulty for potential plaintiffs to find representation for their complex cases, and therefore they, not trial lawyers, have become the object of these attacks.

III. The Expansion of Mandatory Arbitration

Mandatory arbitration — the requirement in adhesion contracts that disputes must be resolved in private by private decisionmakers — is the beast that might eat the civil justice system. Beloved by credit card issuers, sub-prime lenders, non-union employers, and any industry that wants to avoid class-action liability, it is ubiquitous in modern American life. In purchasing a personal computer, for example, a little slip of paper at the bottom of the shipping box may establish that you indicate your agreement to arbitrate any dispute by turning on the computer.⁴¹

Born of a Supreme Court decision that a sitting majority of the Court has acknowledged was wrongly decided, it will live until Congress kills it.⁴² The Court has made clear that it is not about to destroy the Frankenstein's monster it created. Given the political clout of the limited liability investment interests that support it, the beast is apt to have a long life.

The story has been told elsewhere in greater depth,⁴³ but the Cliff Notes version goes like this: In the early part of the 20th century, state courts often were unwilling to specifically enforce arbitration agreements.⁴⁴ Prodded by large commercial entities that wanted agreements between each other to be enforceable, Congress passed the Federal Arbitration Act ("FAA").⁴⁵ The language and history of the act indicate that it was written as a set of procedural rules for federal courts.⁴⁶

Long after the Depression and the

Civil Rights era established that the Commerce Power is broad, the Court decided that Section 2 of the FAA, which mandates enforcement of certain arbitration clauses, is a substantive rule of contract law applicable in state courts.⁴⁷ As a matter of statutory construction, the decision clearly is wrong,⁴⁸ and a majority of the members of the Rehnquist court agreed.⁴⁹ But the Court in general does not reverse itself on longstanding statutory interpretations and it clearly has indicated that it does not intend to do so here.⁵⁰ Even so, it has long been assumed that state courts could determine whether an arbitration clause exists depending on whether the underlying contract was valid under state law.⁵¹ However, the Court's most recent decision in this area reversed the Florida Supreme Court, which had refused to enforce an arbitration clause in a contract it had found to be criminal as a matter of Florida law.⁵² The Supreme Court said that, in the first instance, an arbitrator, not a court, must decide whether the contract containing the arbitration clause is void.

The practical effect of all this is striking. It is difficult to ascertain just how ubiquitous mandatory arbitration clauses are in American life, in part because their use is expanding so rapidly, and in part because the promoters of arbitration are the proprietors of the collected results.⁵³ One cleverly conceived experiment created an imaginary character, Joe, and looked at how dispute resolution in his life had been privatized through the use of adhesion contracts.⁵⁴ Thirty-five percent of the contracts he encountered in everyday life had mandatory arbitration clauses, as did nearly seventy percent of the contracts in the financial services industry (credit cards, banking, etc.).⁵⁵ Think about how many purchases are made by credit card, and think about how few disputes about them can be litigated.

The results of all this are troubling. The costs of arbitration can inhibit plaintiffs from bringing claims.⁵⁶ Industries use arbitration clauses to protect themselves from class actions,⁵⁷ with great success.⁵⁸ An arbitration clause effectively can insulate from liability any industry that causes harms individually small but collectively large, robbing the law of its power to disgorge ill-gotten gain. Industries use arbitration clauses to insulate themselves from public scrutiny. Claims of discrimination,⁵⁹ retaliation,⁶⁰ and professional negligence⁶¹ can be hidden from public view; if Big Tobacco had put arbitration clauses onto cigarette packs, they might never had to

admit that they knew that smoking causes lung cancer.

Industries use arbitration clauses to limit the amounts they have to pay when they are found responsible for misdeeds.⁶² Victims are robbed of redress, and, as importantly, the public is deprived of the opportunity to judge the reprehensibility of misconduct: a jury of one's peers is not a feature of arbitration.

The consequences for the body politic are potentially enormous.⁶³ Some rules of law are simply placeholders, designed to extrapolate terms in agreements and to allow commerce to continue. For example, if a contract doesn't specify the number of widgets, we will extrapolate a reasonable amount and enforce the otherwise sound agreement. We care little whether disputes involving these rules are privately resolved. But many other laws applicable to private disputes embody policy judgments about how we want people to behave. We care whether an employment contract specifies a wage below a mandated minimum or specifies different wages for persons of different races. Placing the resolution of such disputes into the hands of persons who are not accountable to the public, operating in a system that is not transparent and that yields no precedent, deprives the public of assurance that its rules of behavior are followed. Adherence to the rule of law requires faith in the rule of law. Mandatory arbitration erodes that faith.

IV. The Harassment and Intimidation of Expert Witnesses

In the early 1980s, the American Association of Neurological Surgeons ("AANS") — a group for which one court has characterized a quarter of a million dollars a year as merely "moonlighting income"⁶⁴ — decided that persons who appear as expert witnesses in cases involving AANS members should have their testimony subjected to extrajudicial peer review. Traditionally, peer review had taken place only when medical care resulted in an adverse event. Such review initially was designed to identify medical errors and establish procedures aimed at avoiding them in the future. It also was capable of identifying physicians who should not be practicing medicine. The results of peer review proceedings are not public, and are immunized from liability.⁶⁵

When the AANS decided to "peer review" testimony, it never said that its intent was to give pause to plaintiffs' expert witnesses. Still, in the twenty years between the initiation of the AANS pro-

gram and the 2001 *Austin v. AANS* decision, which involved a challenge to the authority of the AANS to conduct such reviews, 24 of the 27 cases the AANS reviewed had been brought by physicians who had been defendants in malpractice cases.⁶⁶

In the late 1990s, the American Medical Association (“AMA”) decided that peer review of expert testimony would be a good function for medical associations in general.⁶⁷ At the time when the AMA adopted a resolution to that effect, its membership was in steep decline.⁶⁸ It also was fighting a political war against full recovery for victims of medical malpractice. A way to reign in doctors who crossed the thin blue line to testify about malpractice might have seemed an attractive way to rally the troops.

Expert witness peer review has taken many forms. One model is the AANS model, which is limited to review by a cadre of members of the group. That model has been adopted by numerous other specialty societies.⁶⁹

The Florida Medical Association (“FMA”), a private organization, also adopted a peer review program that extends to any physician who testifies in Florida, regardless of whether she is licensed in Florida or is a member of the FMA. The Florida Court of Appeals recently ruled, in *Fullerton v. FMA*, that the immunities available for peer review in the Health Care Quality Improvement Act⁷⁰ and a similar Florida law⁷¹ do not apply to peer review of testimony.⁷² Those statutes were designed to deal with rendering care to patients, not rendering words in court.

State medical licensure boards also have asserted authority over expert witness testimony.⁷³ The Mississippi licensure board has recently adopted a rule purporting to prescribe rules of conduct for any physician who testifies in any medical malpractice case involving a Mississippi defendant, regardless of whether the case is pending in state or federal court, and regardless of whether the case is even pending in Mississippi.⁷⁴ An assertion of authority over expert witnesses by the Texas Medical Board has been challenged in *Doe v. Texas Medical Board*.⁷⁵ The North Carolina Court of Appeals recently exonerated a neurosurgeon, Dr. Gary Lustgarten, who had been condemned by the licensure board,⁷⁶ but not before the innocent doctor spent six figures on defense costs.⁷⁷

What is wrong with these programs?

Whether by purpose or only in effect, they stem the free flow of testimony to courts, and they impinge protected free speech.⁷⁸

Their purpose — promulgated by politically and economically powerful groups to advance economic self-interest — should be suspect. Their effect is clear, at least anecdotally. Plaintiffs’ medical malpractice attorneys report that securing medical expert testimony is continually more difficult. Physicians under contract to testify have, under peer pressure, sought release from their obligations, even on the eve of trial. Physicians who have previously testified relate that they are becoming more reluctant to testify in the future, given experiences such as Dr. Lustgarten’s in North Carolina.⁷⁹

The danger we all face from such programs is recognized by the common law testimonial privilege. We are so concerned that testimony be unfettered that we do not allow remedies even against witnesses who have perjured themselves:

“[T]he dictates of public policy. . . require[] that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.” A witness’s apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. Even within the constraints of the witness’s oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence. But the truth-finding process is better served if the witness’s testimony is submitted to “the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.”⁸⁰

V. The Creation of New Immunities

Other immunities have been handed out to favored classes. These immunities afforded to special interests with enormous political clout, are utterly inconsis-

tent with the arc of justice.⁸¹ In recent times, hospital emergency rooms have benefited from constitutionally problematic immunity provisions enacted in Nevada⁸² and Georgia.⁸³ Yet even more questionable is the immunity Congress granted gun manufacturers and dealers in 2005, which prevents third-party liability from attaching to their marketing and sales practices, as charged in a series of public nuisance lawsuits brought by municipalities.⁸⁴ The enacted law demonstrates how far into the exercise of judicial authority a legislature may be willing to intrude in order to support the litigation posture of a political patron industry.

While advancing a pretextual claim about burdens on interstate commerce, Congress more accurately identified its real purpose in enacting the gun immunity law when it characterized the litigation it disfavors as the “use [of] the judicial branch to circumvent the Legislative branch.”⁸⁵ The odd idea that a person adversely affected under existing legal principles must be a supplicant to the legislature, even when it is under the sway of an opponent, rather than a petitioner in a neutral court, indicates that Congress has little idea what separation of powers is really about. That enmity directed at judicial declarations of the law of the state also unmask the judicial nature of Congress’s undertaking: it is an attempt to take on the role of “super-judiciary” and overrule any “maverick” judge who would entertain this type of action by declaring Congress’s own understanding of the common law extant in every state.⁸⁶ In contrast, while Congress opined that such lawsuits are without “foundation in hundreds of years of the common law and jurisprudence of the United States,”⁸⁷ the American Law Institute has reached precisely the opposite conclusion,⁸⁸ as have courts of last resort in the states.⁸⁹ The Constitution, however, grants Congress only legislative powers — and enumerated ones at that. Its authority under a system of separated powers does not extend to determinations of the merits of a legal argument, an individual case, or a class of cases.⁹⁰

The disingenuously named gun law, the Protection of Lawful Commerce in Arms Act (“PLCAA”), prohibits “qualified civil liability actions” against gun manufacturers or sellers unless, *inter alia*, the defendant “knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm

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for which relief is sought. . . .⁹¹ Hence, the act prohibits actions based upon judicial construction of a state's law, including its common law, but permits the identical actions when based on a legislative act.

Congress, however, holds no authority to select among branches of state government that branch which can declare federally cognizable law. It is axiomatic that "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."⁹² It is equally true that "rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."⁹³ As such, a congressional enactment, like the PLCAA, that denies state courts the authority to declare the law and requires exclusive reliance on state legislatures for the definitive pronouncement of that state's law invades state sovereignty, and must be regarded as unconstitutional. After all, it is "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."⁹⁴

By recognizing state legislative authority to authorize such lawsuits while denying state judicial authority to construe existing law to permit the very same lawsuits, the PLCAA plainly violates the principle that "states are free to allocate the lawmaking function to whatever branch of state government they may choose."⁹⁵ On this point, the U.S. Supreme Court has been emphatic: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁹⁶

The federal government can neither dictate the form of government a state adopts, nor require that a state respect federal separation of powers principles within its government.⁹⁷ It then follows that Congress may not require that the laws of a state be a product of legislative action, rather than authoritative construction by its courts. The U.S. Supreme Court has recognized only one justification for overriding a state's sovereign power to order its own affairs: when text of the federal Constitution explicitly provides for a different arrangement.⁹⁸

Because Congress may not choose

which branch declares the law of the state, Congress may not, consistent with constitutional requirements, require a state to exercise its authority to make law through the legislature rather than through the courts and may not constrict state judicial power to declare "what the law is."⁹⁹ Nor may Congress override the construction that courts give to state law.¹⁰⁰ Yet that is precisely what Congress attempted in the gun law. Congress made plain its concern that third-party liability would be imposed on gun manufacturers and dealers by a "maverick judicial officer or petit jury" in a manner that was not supported by "hundreds of years of the common law and jurisprudence of the United States [or] a bona fide expansion of the common law."¹⁰¹ This statutory expression of congressional preference for legislative determinations over judicial ones is not a legitimate exercise of federal power and an overt expression of hostility to judges.

The Constitution also does not invest Congress with any judicial powers, yet, through the gun act, Congress plainly arrogated to itself the authority to construe the meaning and applicability of existing state law and then rule legislatively based on that interpretation. Fundamental separation of powers doctrine, though, holds that Congress may not adjudicate a case in order to reach a result contrary to what courts have already held.¹⁰²

In *United States v. Klein*, the Supreme Court held that Congress cannot direct the outcome of a pending case without changing the underlying substantive law governing the lawsuit.¹⁰³ Directing the outcome, it held, constituted an unconstitutional exercise of judicial power by the legislative branch.¹⁰⁴ Although Congress may "enact[] new standards" and leave "to the courts the judicial functions of applying those standards,"¹⁰⁵ it may not otherwise "adjudicat[e][]" particular cases legislatively."¹⁰⁶ The gun law similarly violates this separation of powers principle by ordering courts to dismiss pending cases because Congress, attempting to construe the common law of every state, believes that there is no legitimate basis for such a lawsuit. Congress established no contrary law; merely a directive that courts "immediately dismiss[]" such cases.¹⁰⁷

In *Klein*, the Court concluded that the disputed law could not be regarded as a proper exercise of congressional authority over jurisdiction because it took the form of a congressional command to the courts to reach a particular outcome in a defined set of cases — an attempt, in the Court's

words, to "prescribe rules of decision to the Judicial Department of the government in cases pending for it[.]"¹⁰⁸ The Court particularly criticized the law because Congress deemed a judicial determination it did not like as untenable.¹⁰⁹ It concluded that Congress could not thus "prescribe a rule for the decision of a cause in a particular way"¹¹⁰ without "pass[ing] the limit which separates the legislative from the judicial power."¹¹¹ The Court contrasted a case where Congress permissibly changed the underlying law, "[n]o arbitrary rule of decision was prescribed," and "the court was left to apply its ordinary rules to the new circumstances created by the act."¹¹² *Klein* stands for "the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case."¹¹³ The PLCAA's immediate dismissal requirement plainly violates this rule. It leaves courts "no adjudicatory function to perform"¹¹⁴ and directs the "ultimate decision" in pending cases.¹¹⁵ On October 23, 2006, an Indiana trial court invalidated the Act on separation of powers grounds.¹¹⁶

VI. Bending the Rules to Advantage One Side

Proponents of the interests of artificial persons have also been seeking to bend the rules of procedure and evidence toward the interests of their clients, and have done this through active lobbying of both federal and state rulemakers.

Take federal rules first. New rules relating to electronic discovery were recently promulgated.¹¹⁷ In commentary reacting to these rules, the plaintiffs' bar took the position that, in general, there was little that needed to be addressed by rule and that most problems being encountered by the courts were being dealt with expeditiously under existing rules.¹¹⁸ The artificial persons' defense bar took the position, in general, that hellfire and damnation were imminent if changes to the rules were not made.¹¹⁹ The federal rulemaking committee found it prudent to avoid hellfire and damnation.

Controversially, the amendments create a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer system (Rule 37).¹²⁰ The amendment to Rule 37 has the potential to sanction the destruction of information critical to demonstrating that bad acts happened.¹²¹ The amendment on privilege was only a partial victory for the busi-

ness community, which wanted a rule that allowed it to assert or breach privilege at will.¹²²

Not satisfied with partial victory, the defense bar carried its fight to Congress, which in turn asked the evidence committee to consider rules on privilege.¹²³ Federal rules on privilege raise dainty constitutional issues, especially in diversity cases governed by state substantive law, and the Rules Enabling Act reserves to Congress the power to enact them.¹²⁴ Generally the Advisory Committee on Civil Rules does not consider rules related to privilege at all.¹²⁵ But having been asked by the chair of the House Judiciary Committee to develop new rules on privilege, the Committee will do so, through its normal processes, and, assuming Supreme Court approval, will then send the proposal to Congress for enactment.¹²⁶

The committee has before it one issue that has become one of corporate America's favorite whines: whether the attorney-client privilege can be selectively waived.¹²⁷ Guidelines governing certain corporate prosecutions and certain administrative agency enforcement actions suggest lower penalties when the target of the action cooperates with the enforcer.¹²⁸ One measure of cooperation can be whether the target waives the attorney-client privilege. Eager to placate their watchdogs but unwilling to forfeit any future claim to privilege, corporations have suggested a doctrine of selective waiver: the privilege could be waived for purposes of the enforcement action, but the privilege would be available for any other purpose.¹²⁹

Selective waiver addresses the wrong problem. If the waiver guidelines are encouraging prosecutorial overreaching, the solution is not to vitiate one of the core protections the law affords to persons — the right to confer confidentially with their lawyer — but to control the overreaching. We will see what the Committee does.

Like measles, the desire to make rules is contagious. It has infected the states. In the wake of federal rule changes, the National Commission on Uniform State Laws has proposed a "Uniform Discovery of Electronic Records Act."¹³⁰ State judges discussing the federal rules have seen no need for similar changes at their level.¹³¹

VII. Conclusion

When powerful forces in American life began to be held accountable for not paying minimum wage, for profiting mightily

from renting substandard housing, or from charging predatory rates for loans, they didn't attack the popular laws that created the causes of action under which they were held liable. Instead, they attacked the politically vulnerable Legal Aid lawyers who prosecuted those claims.¹³² With trial lawyers, it's the same playbook. The public doesn't want unsafe cars or flammable pajamas or toxic drinking water. So the purveyors of those things do not attack the popular laws; they attack the lawyers who pursue these claims.

Artificial persons might not have emotions. But they have agendas. They also have tenacity, and they have resources. They have long sought to bend the body politic in their direction, and in modern times they are trying hard to bend the civil justice system their way, too.

But the arc of the moral universe is still long, and there are still real people, trial lawyers among them, who work hard to keep it bending toward justice.

¹ Martin Luther King, Jr., Annual Report at the 11th Convention of the Southern Christian Leadership Conference: Where Do We Go From Here? (Aug. 16, 1967) (alteration in original), www.stanford.edu/group/King/publications.

² See, e.g., *Queen City Coach Co. v. Burrell*, 85 S.E.2d 688, 692 (N.C. 1955).

³ John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1164 (2005) (alteration in original).

⁴ See DAVID CALLAHAN, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, \$1 BILLION FOR IDEAS: CONSERVATIVE THINK TANKS IN THE 1990S (1999), excerpt available at <http://www.commonwealthinstitute.org/ncrp.callahan.1.htm>; David Callahan, *\$1 Billion for Conservative Ideas*, THE NATION, Apr. 1999, at 21, available at <http://www.thenation.com/doc/19990426.callahan>; Dan Zegart, *The Right Wing's Drive for 'Tort Reform'*, THE NATION, Oct. 2004, at 13, available at <http://www.thenation.com/doc/20041025/zegart>; Don Hazen, *The Right Wing Express*, ALTERNET, Feb. 7, 2005, <http://www.alternet.org/mediaculture/21192/>; Eric Alterman, *Think Again: How We Got Here* (Apr. 8, 2005), <http://www.americanprogress.org/issues/2005/04/b617015.html>.

⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

⁶ In *Cannon v. U. of Chicago*, the court held, "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." 441 U.S. 677, 688 (1979) (alteration in original).

⁷ SONNY & CHER, *The Beat Goes On*, on IN

CASE YOU'RE IN LOVE (Atco Records 1967).

⁸ See generally Jay M. Feinman, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW (Beacon Press 2004).

⁹ During a speech to Boston College's Chief Executives' Club on Feb. 24, 2004, Maurice "Hank" Greenberg, then-chairman of the world's largest insurer by market value, American International Group, plainly stated: "I call the plaintiff's bar terrorists." Boston College, Carroll School of Management Executive Events Page, <http://www.bc.edu/schools/csom/cga/executives/events/greenberg/> (last visited July 27, 2006).

¹⁰ See, e.g., ERIK MOLLER, NICHOLAS M. PACE & STEPHEN J. CARROLL, PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS (1997).

¹¹ Of all the proposals that play the tort-reform tune, none tries to contain business-to-business litigation, which appears to be increasing at a greater rate than tort cases. Feinman, *supra* note 9, at 67. If one paid attention merely to the tort-restrictionist lyrics, one would never know that the so-called litigation explosion never occurred; see, e.g., Thomas A. Eaton *et al.*, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049 (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999).

¹² See generally Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (describing the tort reform campaign).

¹³ The New York State Trial Lawyers Association has documented such attacks as far back as 1958. NEW YORK STATE TRIAL LAWYERS ASSOCIATION, NYSTLA: THE FIRST 50 YEARS, 9-12 (2003), available at <http://www.nystla.org/nicecontent/documents/history-FINAL.pdf> [hereinafter NYSTLA].

¹⁴ See INSURANCE RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF INSURANCE CLAIMS 78 (1999). The report found that in 1997, bodily injury claimants represented by counsel recovered an average of \$11,640, compared to \$3,190 for those who did not retain an attorney.

¹⁵ NYSTLA, *supra* note 14, at 9-11.

¹⁶ In the post-World War II era, courts "lowered barriers to litigation-dismantling immunities, widening standing, and eliminating the requirement of privity in products liability cases-and enlarged remedies." Marc Galanter, *The Turn Against Law: The Recoil Against Accountability*, 81 TEXAS L. REV. 285, 287 (2002).

¹⁷ Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 810-11 (1998) (internal quotations omitted) (citations omitted).

¹⁸ See HENRY STEELE COMMAGER, THE EMPIRE OF REASON (1977); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969). Americans have long looked to the judicial branch to resolve knotty disputes. See 1 ALEXIS DE TOC-

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QUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley & Francis Bowen eds., Henry Reeve trans., Alfred A. Knopf 1945) (1835) (“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”).

¹⁹ Charles Silver, *A Rejoinder to Lester Brickman: On the Theory Class's Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765, 780 (2005).

²⁰ Overlawyered.com, <http://www.overlawyered.com> (last visited Oct. 12, 2006). Although the editor of Overlawyered.com, Walter Olson, acknowledges his own affiliation with the Manhattan Institute, he explicitly disclaims Institute affiliation with the website. About Overlawyered.com, <http://www.overlawyered.com/pages/aboutus.html> (last visited Oct. 12, 2006).

²¹ Joan Claybrook, 21 *Corporate Accountability: The Power of Citizen Access to the Courts*, PUB. CITIZEN 20-21 (2001), available at <http://www.citizen.org/documents/pcnews30ann.pdf>.

²² See MANHATTAN INSTITUTE, *JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE* 26-29 (2001), available at <http://www.manhattan-institute.org/pdf/mics6.pdf> (describing the use of so-called issue ads to evade restrictions on corporate campaign spending and contribution disclosure laws, as well as utilizing, in one instance, a soft-on-crime approach to unseating an Indiana appellate judge who drew their ire).

²³ Generally, the term “unwashed masses” is used to describe those who are less than equal to a more elite class of citizens who both bathe more regularly and feast on more intellectual or consequential fare. See Allan Ides, *The Jurisprudence of Wringing Hands: A Response to Professor Soifer*, 48 WASHINGTON AND LEE L. REV. 419, 419 (1991).

²⁴ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987) (“[A]lthough there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters . . .”) (alteration in original).

²⁵ See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 384-85 (1994).

²⁶ The attackers do not seem concerned about trial lawyers receiving no fee, or expending great amounts in expert and other costs, as well as opportunity costs, when the case fails.

²⁷ *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

²⁸ *Richette v. Solomon*, 187 A.2d 910, 919 (Pa. 1963).

²⁹ See Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 467 (1998); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 254 (1998).

³⁰ Adam Liptak, *In 13 States, A United Push to Limit Fees of Lawyers*, NY TIMES, May 26, 2003, at A10.

³¹ Most courts rejected the petitions out of hand. Only the Utah Supreme Court took the petition seriously enough to assign consideration of the petition to a bar committee. That committee received briefing and oral argument, only to unanimously reject the petition, a recommendation that the Utah Supreme Court accepted. Letter from Robert A. Burton, Chair, Utah Supreme Court Advisory Comm. on the Rules of Prof'l Conduct, to Steven T. Densley, Attorney, Strong & Hanni, and Nancy Udell, Gen. Counsel, Common Good (Jan. 28, 2004) (on file with authors).

³² Common Good Frequently Asked Questions, What Are You Proposing?, <http://cgood.org/learn-faq.html> (last visited Oct. 20, 2006).

³³ <http://cgood.org/assets/attachments/108.pdf> (last visited Nov. 3, 2006).

³⁴ FLA. CONST. art. I, § 26.

³⁵ *Id.*

³⁶ Petition, *In re Amendment to the Rules Regulating the Fla. Bar*, 2006 WL 2771252 (Fla. 2006) (No. SC05-1150). The FMA hired a former Florida Supreme Court chief justice to advance the petition. He gathered signatures from members of his law firm and from FMA or allied lobbyists who were lawyers. Gary Blankenship, *Board Asks Court Not to Adopt Petition to Limit Contingency Fees in Med Mal Actions*, THE FLA. BAR NEWS, Jul. 1, 2005, at 14, available at <http://www.floridabar.org> (click publications, then Fla. Bar News, then archives). Under the rules of The Florida Bar, one way to advance such a proposal is through a petition filed by fifty bar members in good standing. FLA. BAR. REG. R. 1-12.1(f). At oral argument about the proposal, hard questions were posed to the FMA lawyer about his failure to disclose that although he had advanced the petition as a member of the Bar, he was operating on behalf of a paying client; the court questioned the propriety of using the petition procedures to advance the interests of a client. Transcript and Video of Oral Argument, *In re Amendment*, 2006 WL 2771252 (No. SC05-1150), available at <http://www.wfsu.org/gavel2gavel/archives/05-11.html#NOV1>. Subsequently, the court ordered The Florida Bar to develop and submit a proposed amendment to the rule, which would create a proper procedure for client waivers. Order, *In re Amendment*, No. SC05-1150 (Dec. 14, 2005), available at http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2005+p_casenumber=1150+pscourt=FSC+psSearchType=. In 2006, the Court approved a waiver procedure. *In re Amendment*, __ So.2d __, 2006 WL 2771252.

³⁷ *In re Shambow's Estate v. Shambow*, 15 So.2d 837, 837 (Fla. 1943) (“It is fundamental that constitutional rights which are personal may be waived.”). See also *City of Treasure Island v. Strong*, 215 So.2d 473, 479 (Fla. 1968) (“[I]t is firmly established that such constitutional rights designed solely for the protection of the individual concerned may be lost through waiver . . .”) (alteration in original); *Bellaire Sec. Corp. v. Brown*, 168 So. 625, 639 (Fla. 1936) (“A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.”); *S.J. Bus. Enter., Inc. v. Colorall Tech., Inc.*, 755 So.2d 769, 771 (Fla. Dist. Ct. App. 2000) (“The law has long recognized an individual's right to waive

statutory protections as well as constitutional or contractual rights.”).

³⁸ See *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 642 (Fla. 1999) (recognizing that an agreement to arbitrate waives constitutional rights to trial by jury, due process, and access to the courts).

³⁹ *Hartwell v. Blasingame*, 564 So.2d 543, 545 (Fla. Dist. Ct. App. 1990) (citation omitted).

⁴⁰ *In re Amendment*, 2006 WL 2771252 (order to submit amendment proposal). See discussion, *supra* note 37.

⁴¹ Caroline Mayer, *Fine Print Erases Consumers' Right to Sue*, SEATTLE TIMES, May 24, 1999, at A1.

⁴² *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Cf. n. 50, *infra*.

⁴³ See, e.g., David S. Schwartz, *The Federal Arbitration Act and The Power of Congress Over State Courts*, 83 OR. L. REV. 541 (2004).

⁴⁴ See Julius Henry Cohen and Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (in which the drafters of the Federal Arbitration Act explain its background)

45 9 U.S.C. §§ 1-16 (2000).

⁴⁶ See, e.g., 9 U.S.C. § 4 (setting rules for enforcing arbitration agreements in federal courts). The FAA does not provide an independent basis of federal jurisdiction. By its terms, § 4 applies only to cases over which a federal court has an independent basis of jurisdiction, excluding many of the cases to which § 2 has been in held to apply.

⁴⁷ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴⁸ See Schwartz, *supra* note 44.

⁴⁹ Justice O'Connor, joined by Chief Justice Rehnquist, in *Southland*, argued in dissent that “Congress intended to require federal, not state, courts to respect arbitration agreements.” 465 U.S. at 23 (O'Connor, J., dissenting). Justice Stevens noted that Justice O'Connor was correct in her analysis of Congressional intent. *Id.* at 17 (Stevens, J., concurring in part and dissenting in part). In *Allied-Bruce Terminix Co. v. Dobson*, a dissenting Justice Scalia said that “[a]dherence to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes,” and noted that while he would no longer dissent from cases citing it as precedent, he would vote to overrule it. 513 U.S. 265, 284-85 (1995) (Scalia J., dissenting) (alteration in original). Justice Thomas also dissented in *Allied-Bruce*, and opined there that “the Federal Arbitration Act (FAA) does not apply in state courts.” *Id.* at 285 (Thomas, J., dissenting).

⁵⁰ See Opinions of Justices Stevens, Scalia, *supra* note 50; *IBP, Inc. v. Alvarez*, __ U.S. __, 126 S.Ct. 514 (2005) (stare decisis is particularly powerfully applied when dealing with longstanding construction of a statute).

⁵¹ 9 U.S.C. § 2.

⁵² *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

⁵³ Linda J. Demaine & Deborah Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 60-62 (2004). The authors relate a hilarious exchange, familiar to anyone who has encountered the nameless, faceless electronic responses

that pass as customer service in modern business plans, in which the company first responded to a consumer request for information about arbitration by noting that it did not engage in arbitrary disputes, and subsequently asked that the authors distinguish between “an arbitrary dispute and an arbitration clause so we can better answer your question.” *Id.* at 61.

54 *Id.* at 58.

55 *Id.* at 62.

56 See Matthew T. Ballenger, *The Price of Justice: The Role of Cost Allocation in the Employment Arbitration Fairness Analysis*, 18 LAB. LAW 485 (2003) (discussing prohibitive costs in the labor law context).

57 See Michael R. Pennington, *Every Health Insurer's Litigation Nightmare*, THE BRIEF, Summer 1999, at 47, 52.

58 See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us': Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1.

59 See *Sex Bias Suit Ordered Settled*, WASH. POST, Aug. 25, 1999, at A7.

60 See *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99 (Ill. 2006).

61 See *Milon v. Duke Univ.*, 559 S.E.2d 789 (N.C. 2002).

62 See U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 25 (1994) (expressing concern about bias among arbitrators).

63 See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (2004).

64 *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 971 (7th Cir. 2001).

65 See The Health Care Quality Immunity Act, 42 U.S.C. § 11101 et seq. at 11101.

66 Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment in *Austin v. AANS*, No. 98 C 7685, USDC, ND Ill., at 4 (reprinted in Donald C. Austin, *Trials and Tribulations*, (1994), at 551, 554. Judge Posner, in his opinion in the Circuit Court, found that this was no evidence of bias. No consideration was made in the opinion with regard to the effect of the existence of the program, even absent a showing of bad motive. Although often cited in support of these programs, the Austin case merely affirms a holding that the complaining physician failed to state a claim under Illinois law. *Austin*, 253 F.3d at 971.

67 In 1997 the AMA House of Delegates adopted Resolution 221. The resolution led to adoption of a policy that deemed physician expert testimony to be the practice of medicine subject to peer review, and called for study of mechanisms by which such peer review could be implemented. American Medical Association, H-265.993 Peer Review of Medical Expert Witness Testimony, <http://www.ama-assn.org> (search for H-265.993 and follow second link) (last visited Sept. 21, 2006).

68 In 1962, the AMA represented nearly 70% of American physicians. Yuji Noto, American

Medical Association (AMA) and Its Membership Strategy and Possible Applications for the Japan Medical Association (JMA) 14 fig.13 (June 1999) (unpublished Takemi Fellow research project, Harvard School of Public Health), available at <http://www.hsph.harvard.edu/takemi/rp157.pdf>. This percentage has declined continuously since the 1960s, dropping to only 28% today. This percentage has declined continuously since the 1960s, dropping to only 28% today. Stokely Baksh, *AMA Gets Facelift to Attract New Members*, UNITED PRESS INT'L, June 22, 2005, available at <http://www.upi.com/archive/view.php?archive=1&StoryID=20050616-033709-7222r>.

69 Since 1997, the following organizations have adopted or amended rules dealing with expert witness testimony:

- American Academy of Allergy, Asthma & Immunology (AAAAI) 06/2006.
- American Academy of Dermatology (AAD) 2003.
- American Academy of Family Physicians (AAFP).
- American Academy of Neurology (AAN) 2004.
- American Academy of Ophthalmology (AAO) 2003.
- American Academy of Orthopaedic Surgeons (AAOS) 2004.
- American Academy of Otolaryngology-Head and Neck Surgery (AAOHNS) 2004.
- American College of Emergency Physicians (ACEP) 1998.
- American College of Medical Genetics (ACMG) 2000.
- American College of Obstetricians & Gynecologists (ACOG) 2003.
- American College of Occupational and Environmental Medicine (ACOEM) 2002.
- American College of Physicians (ACP) 2005.
- American College of Surgeons (ACS) 2004.
- American Society for Clinical Pathology (ASCP) 2003.
- American Urological Association (AUA) 2006.
- Society of Thoracic Surgeons (STS) 2005.

70 42 U.S.C. §§ 11101-52 (2000).

71 FLA. STAT. ANN. § 766.101 (West, Westlaw through 2006 Second Regular Sess.).

72 Fullerton v. Fla. Med. Ass'n, Nos. 1D05-0185, 1D05-3632, 2006 WL 1888545, (Fla. Dist. Ct. App. July 11, 2006), Opinion Withdrawn and Superseded on Denial of Rehearing by Fullerton v. Florida Medical Ass'n, Inc., 2006 WL 2738878, 31 Fla. L. Weekly D2431 (Fla.App. 1 Dist. Sep 27, 2006) (NO. 1D05-0185, 1D05-3632).

73 See, e.g., *Doe v. Tex. Med. Bd.*, No. 13-06-00325-CV (Tex. App. appeal filed May 19, 2006), <http://www.13thcoa.courts.state.tx.us/opinions/case.asp?FilingID=16094>.

74 MISS. STATE BD. OF MED. LICENSURE REG. XXXII (2006), available at <http://www.msbl.state.ms.us/regulations/2007%20expert%20witness%20complete%20reg.pdf>.

75 *Doe*, No. 13-06-00325-CV, <http://www.13thcoa.courts.state.tx.us/opinions/>

case.asp?FilingID=16094.

76 *In re Lustgarten*, 629 S.E.2d 886, 892 (N.C. Ct. App. 2006).

77 Telephone Interview with Dr. Gary Lustgarten (July 2006).

78 Giving testimony as a witness in judicial proceedings is protected by the First Amendment. *Claiborne County Board of Education*, 828 F.2d 1096, 1100 (5th Cir. 1987). Free speech protection extends to expert witnesses. *Kinney v. Weaver*, 301 F.3d 253, 282, n. 24 (5th Cir. 2002) (fact that parties “testified as expert witnesses does not diminish the First Amendment interest in ensuring that the speech is uninhibited.”), affirmed in relevant part, *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (*en banc*), cert. den., 543 U.S. 872 (2004).

79 See generally Steve Ellman, *Code of Silence*, The Miami Daily Business Review, June 25, 2003, <http://www.dailybusinessreview.com/AwardStories/CodeOfSilence.html>.

80 *Briscoe v. LaHue*, 460 U.S. 325, 333-34 (1983) (finding absolute immunity for police officers who allegedly gave perjured testimony) (alteration in original) (citations omitted).

81 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793) (a judicial system, when it does its job, “leaves not even the most obscure and friendless citizen without means of obtaining justice.”).

82 NEV. REV. STAT. § 41.503 (2005). The statute creates a cap of \$50,000 on civil liability damages for hospitals, trauma centers, and the physicians who render care in such facilities for treatment of immediate traumatic injury.

83 GA. CODE ANN. § 51-1-29.5(a) & (d). The statute, as a practical matter, entirely immunizes emergency room staff and entire hospitals when the patient is admitted to the hospital through the emergency room.

84 Protection of Lawful Commerce in Arms Act (“PLCAA”), Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901-03). The theory of these lawsuits is explained in Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 st. louis u. pub. l. rev. 247 (1999).

85 PLCAA § 2(a)(8), 119 Stat. at 2096 (alteration in original).

86 PLCAA § 2(a)(7), 119 Stat. at 2096. Liability actions against gun manufacturers and dealers “are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States, . . . do not represent a bona fide expansion of the common law, . . . [and could only be imposed] by a maverick judicial officer or petit jury.” *Id.* (alteration in original).

87 PLCAA, 15 U.S.C. § 7903 (2)(a)(7).

88 The American Law Institute found that liability for criminal acts foreseeably caused by one's own negligence has been an integral part of the traditional notions of third-party liability. See, e.g., RESTATEMENT (SECOND) OF TORTS § 449 (1965) (“If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused

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thereby.”).

89 See, e.g., *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

90 See generally *Plant v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

91 PLCAA § 4(5)(A)(iii), 119 Stat. at 2097.

92 *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

93 *West v. Am. Tel. & Tel.*, 311 U.S. 223, 236 (citing *Erie*, 304 U.S. at 64).

94 *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always a question for the state itself.”).

95 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) (citations omitted).

96 *New York v. United States*, 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) (“It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States.”).

97 *Dreyer v. State of Illinois*, 187 U.S. 71, 84 (1902).

98 See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76-77 (2000) (relying upon U.S. CONST. art. II, § 1, cl. 2, which gives a special role to state legislatures in administering federal elections to deny any role to a state supreme court).

99 See *Marbury*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

100 See *Erie*, 304 U.S. at 78 (“Congress has no power to declare the substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.” (citing *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893))).

101 PLCAA § 2(a)(7), 119 Stat. at 2096.

102 See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-25 (1995) (discussing the colonial practice of legislative review of judicial decisions and the Constitution’s Framers rejection of that practice).

103 80 U.S. (13 Wall.) 128 (1871).

104 *Id.* at 145-47.

105 *Nichols v. Hopper*, 173 F.3d 820, 823 (11th Cir. 1999) (alteration in original).

106 *Ruiz v. United States*, 243 F.3d 941, 948 (5th Cir. 2001) (alteration in original); see also *Hadix v. Johnson*, 144 F.3d 925, 939-40 (6th Cir. 1998); *Mount Graham Coal. v. Thomas*, 89 F.3d

554, 557-58 (9th Cir. 1996).

107 PLCAA § 3(b), 199 Stat. at 2097 (alteration in original).

108 *Klein*, 80 U.S. (13 Wall.) at 146 (alteration in original).

109 *Id.* at 147.

110 *Id.* at 146.

111 *Id.* at 147 (alteration in original).

112 *Id.* at 146 (alteration in original).

113 *Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (citing *Klein* 80 U.S. (13 Wall.) at 146-47).

114 *United States v. Sioux Nation*, 448 U.S. 371, 372 (1980) (citing *Cherokee Nation v. United States*, 270 U.S. 476 (1926)).

115 *Id.* at 370-71; cf. FED. R. CIV. P. 41(b) (stating that a dismissal generally “operates as an adjudication on the merits”).

116 *City of Gary v. Smith & Wesson Corp.*, Cause No. 45D05-0005-CT-00243 (order on File with authors).

117 The Supreme Court approved the rules on April 12th, 2006 and the rules are effective Dec. 1, 2006. U.S. Courts Federal Rulemaking, Supreme Court Action, <http://www.uscourts.gov/rules/index.html#supreme0406> (last visited Oct. 20, 2006). The amendments are available at U.S. Courts Federal Rulemaking, Pending Rules Amendments, <http://www.uscourts.gov/rules/newrules6.html#cv0804> (last visited Oct. 20, 2006).

118 See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 Nw. J. Tech & Intellectual Prop., 171, 192 (2006) (citing F. Paul Bland, Jr., Arthur H. Bryant, and Vicki Ni, *Comment of the Trial Lawyers for Public Justice and the TLPJ Foundation* (Feb. 14, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-239.pdf> (last visited Mar. 29, 2006), and stating that links to all 253 written comments submitted during the official public comment period are available at <http://www.uscourts.gov/rules/e-discovery.html>).

119 See generally testimony of corporate representatives during Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, January 12, 2005, San Francisco, <http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf#page=3>.

120 Proposed Fed. R. Civ. P. 37(f), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=171> (last visited Oct. 26, 2006).

121 See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 Nw. J. Tech & Intellectual Prop., 171, 200 (2006).

122 *Supra* n. 118. Background on the discussion is noted in Minutes of Civil Rules Advisory Committee, May 22-23, 2006, at 4, <http://www.uscourts.gov/rules/Minutes/CV05-2006-min.pdf>.

123 Metropolitan Corporate Counsel, The Editor interviews J. Walter Sinclair, Jr., President, Lawyers for Civil Justice (LCJ) and Partner, Stoel Rives LLP, available at

<http://www.metrocorpccounsel.com/current.php?artType=view&artMonth=December&artYear=2005&EntryNo=3946> (last visited Oct. 26, 2006). Compare proposed Section 4, Securities Fraud Deterrence & Investor Restitution Act of 2003, H.R. 2179 (proposing amending the Securities & Exchange Act of 1934 to allow persons to produce information to the SEC without waiving privilege as to third parties).

124 See U.S.C. § 2074.

125 See U.S.C. § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

126 Hon. Jerry E. Smith, Chair Advisory Committee on Evidence Rules, *Report of the Advisory Committee on Evidence Rules at 2, available at* <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf> (last visited Oct. 25, 2006) (stating that the “Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection.”).

127 See *id.*

128 See *id.* at 7; see also Thompson Memorandum, available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf; *Unites States v. Stein*, 435 F. Supp. 2d 330, 336-7 (S.D.N.Y. 2006) (discussing Thompson Memorandum and its predecessor document the Holder Memorandum).

129 See *Notes on Meeting of Discovery Subcommittee*, Washington, D.C. (Sept. 2003).

130 Current (November, 2006 meeting) draft available at http://www.law.upenn.edu/bll/ulc/udoera/2006novembermeeting_draft.htm.

131 THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS: REPORT OF THE 2005 FORUM FOR STATE APPELLATE COURT JUDGES (Richard H. Marshall ed., forthcoming 2006). The Conference of Chief Justices has promulgated flexible guidelines that state court judges can use. WORKING GROUP ON ELECTRONIC DISCOVERY, CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION (2005), available at <http://www.ncsconline.org/What'sNew/E-Discovery%20Gui+delines.pdf>.

132 See *Legal Services Corp. v. Velazquez* 531 U.S. 533, *544, 121 S.Ct. 1043, **1050 (U.S., 2001) (finding a restriction on Legal Services lawyers unconstitutional, and noting, “Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys...”)

Understanding the New Physician's Opinion Requirement for Medical Malpractice Actions

By Richard A. Silver and Amanda R. Whitman

This is an expanded version of an article by the same authors printed in the October 2007 Medical Malpractice issue of The Connecticut Law Tribune.

In 2005, the Connecticut Legislature significantly amended the requirements for bringing a medical malpractice action. See Public Act No. 05-275, § 2. Now, in order to bring a medical malpractice action, a plaintiff must first obtain a written opinion from a health care provider of the same specialty as the defendant, which states "that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." See General Statutes § 52-190a. In addition, the plaintiff must attach a copy of the opinion, with the name of the health care provider redacted, to the complaint. Finally, the statute provides that "[t]he failure to obtain and file the written opinion . . . shall be grounds for the dismissal of the action." § 52-190a (c).

Since its enactment, there has been voluminous motion practice over the meaning of this new physician's opinion requirement. This article briefly addresses three of the most important controversies: (1) does the failure to file a physician's opinion deprive the court of subject matter jurisdiction?; (2) what is the remedy if a physician's opinion is not sufficiently detailed?; and (3) is a physician's opinion required to address causation?

Does the Failure to File a Physician's Opinion Deprive the Court of Subject Matter Jurisdiction?

While no appellate court decision has yet addressed the issue, those Superior Courts which have examined the issue in detail, analyzing the statutory language in depth, have held that the failure to file a written opinion does not deprive the court of subject matter jurisdiction, and dismissal is discretionary, rather than mandatory. See, e.g., *Donovan v. Sowell*, 41 Conn. L. Rptr. 609 (June 21, 2006) (Matasavage, J.); *Greer v. Norbert*, 42 Conn. L. Rptr. 806 (Feb. 7, 2007) (Rittenband, J.T.R.); *Guido v. Hughes*, No. (X10) UWY-CV-06-5004889-S, 2007 WL 3173696 (Oct. 17, 2007) (Scholl, J.).

There are cases to the contrary. See, e.g., *Fyffe-Redman v. Rossi*, 41 Conn. L. Rptr. 504 (June 7, 2006) (Miller, J.); *Kudera v. Ridgefield Physical Therapy*, (Sept. 18, 2006) (Shaban, J.). However,

these cases do not discuss their rationale, nor do they give an in-depth analysis. Rather, they appear to assume that the failure to file a written opinion deprives the court of subject matter jurisdiction.

In our view, failure to file a written opinion does not deprive the court of jurisdiction. First and foremost, the terms of the statute do not deal with the failure to file an opinion alone; rather, the express terms of the statute state: "The failure to **obtain and file** the written opinion . . . shall be grounds for dismissal." Thus, dismissal is not warranted under the terms of the statute where a plaintiff *obtains* a written opinion but *fails to file* the opinion. See *Greer v. Norbert*, 42 Conn. L. Rptr. 806. In *Greer*, the plaintiff's counsel had obtained the opinion but had inadvertently failed to file it. Applying the terms of the statute, the court held that dismissal was not warranted.

Moreover, even where the plaintiff failed to obtain and file a written opinion, the statutory language does not expressly state either that this failure deprives the court of subject matter jurisdiction or that dismissal is required. As the court in *Greer* explained, "the statute does not say 'the action shall be dismissed,' which could make it mandatory," rather it uses the language: "shall be grounds for dismissal." 2007 WL 611265, *3. The court considered various definitions of "ground" and concluded they all supported the conclusion that dismissal under § 52-190a (c) is discretionary. *Id.*

The court in *Donovan v. Sowell* also pointed out the statutory language "does not state. . . that a plaintiff's failure to comply with [§ 52-190a] deprives the court of subject matter jurisdiction, or . . . that dismissal is mandatory." 2006 WL 1828579, *3. The court considered the statutory language in light of the related principles for determining whether a statutory time limitation implicates subject matter jurisdiction, noting that "our Supreme Court has stated . . . 'there is a presumption in favor of subject matter jurisdiction, and we require a strong showing of legislative intent that [a statutory] time limit is jurisdictional.'" *Id.*, quoting *Williams v. Commissioner on Human Rights & Opportunities*, 257 Conn. 258, 266 (2001). The court in *Donovan* explained that "the language of the legislature used in subsection (c) is not the type of mandato-

ry language that can only be read as implicating the court's subject matter jurisdiction." *Id.* Thus, the court held that the failure to file a written opinion is a curable deficiency and dismissal under § 52-190a (c) is discretionary.

Because the statutory language does not address subject matter jurisdiction and does not use mandatory language, the better interpretation of § 52-190a (c) is that failure to obtain and file a written opinion does not deprive the court of subject matter jurisdiction. Instead, the defect is curable, and the court has the discretion to decide whether or not it is appropriate to dismiss the case.

What is the Remedy if the Physician's Opinion is Not Sufficiently Detailed?

The Superior Courts are virtually unanimous that challenges to the sufficiency of a physician's opinion are not grounds for dismissal under the statute, and should only be made by a motion to strike. See, e.g., *Andriakis v. Phoenix Internal Medicine, Inc.*, 41 Conn. L. Rptr. 222 (April 19, 2006) (Matasavage, J.); *Hernandez v. Moss*, 2007 WL 1748121 (May 31, 2007) (Gallagher, J.); *Jervis v. Stekler*, 42 Conn. L. Rptr. 163 (Oct. 19, 2006) (Pickard, J.). This distinction is significant because unlike a motion to dismiss, if a motion to strike is granted, the plaintiff has an opportunity to amend the complaint to cure the defect under Practice Book § 10-44.

In *Andriakis*, a case that is frequently cited on this issue, the court concluded, after extensive discussion and analysis of the statutory language and legislative history, that dismissal of a case due to an inadequacy in the contents of the physician's opinion would be unfair and inconsistent with §52-190a. Specifically, the court found "[n]othing in the plain language of the statute or its legislative history indicate. . . that an insufficient opinion is grounds for dismissal of an action." 2006 WL 1230085, *5. Since then, the overwhelming majority of Superior Courts have adopted the *Andriakis* court's reasoning.

However, one court has taken an interesting alternative approach. In *Doe v. Priority Care, Inc.*, 2007 WL 1532859 (May 9, 2007) (Corradino, J.), the court

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agreed that neither the failure to file an opinion, nor the failure to file a sufficiently detailed opinion implicates the court's subject matter jurisdiction. Instead, the Court interpreted § 52-190a (c) to allow for discretionary dismissal both for the failure to file an opinion, and for the failure to file an adequate opinion. The court suggested that such discretionary dismissal should be handled similarly to a dismissal under Practice Book § 13-14 (dealing with sanctions). *Id.* at *3. The court found that the opinion filed with the apportionment complaint was inadequate, and ordered the apportionment plaintiff to file a proper opinion within twelve days or the apportionment complaint would be dismissed. *Id.* at *7.

Practically, the solution adopted by the court in *Doe v. Priority Care* achieved a result similar to the majority approach, because the party was still offered an opportunity to correct the deficiencies in its physician's opinion. However, relying on the express language of the statute, which only allows for dismissal for the "failure to obtain and file" a written opinion, the better interpretation is that challenges to the sufficiency of a physician's opinion must be made by a motion to strike.

Is a Physician's Opinion Required to Address Causation?

While there appear to be no written opinions on this issue, the language of the statute clearly does not require an opinion on causation.

§ 52-190a (a) provides:

the claimant or the claimant's attorney . . . shall obtain a written and signed

opinion of a similar health care provider, as defined in section 52-184c, . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.

By its express terms, the statute requires an opinion only as to "medical negligence." The statute contains no reference to, nor any requirement for, a physician's opinion regarding causation. Indeed, the word "causation" appears nowhere in the statute.

Under Connecticut law, medical negligence (whether the defendant violated the applicable standard of care) and causation (whether the defendant's negligence caused the plaintiff's injuries) are distinct concepts. See *Dilieto v. County Obstetrics and Gynecology Group*, 265 Conn. 79, 109 (2003) (finding trial court's error in excluding expert testimony on causation was harmless "[b]ecause the jury found that [the defendant] was not negligent, the jury never reached the issue of causation with regard to [his] alleged negligence"); see also Am. Jur. Negligence §420 ("negligence and proximate cause are not coextensive terms, and they are not the same conceptually . . . They are separate and distinct factors in assigning tort liability").

The legislative history further indicates that an opinion on causation is not required; rather, only an opinion that the defendant violated the standard of care was contemplated, as evidence by the remarks of Senator McDonald:

In Section 2 of the bill, Mr. President, we have modified the good faith certificate issue. This is an issue that requires a plaintiff's attorney to, under current law, to obtain a report from a qualified medical expert in a similar practice area, and to certify that, based upon that inquiry, the attorney believes that ***there is a good faith basis to believe that the standard of care has been***

breached in a particular case.

Remarks of Sen. McDonald, Connecticut General Assembly, Senate, June 6, 2005 (emphasis added). The legislative history makes no mention of an opinion as to causation.

Moreover, logically, the statute could not possibly require an opinion on causation. The statute clearly provides that the opinion must be from a "similar health-care provider," defined by General Statutes § 52-184c, as "one who: (1) is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty." However, in most medical malpractice actions, a similar health care provider to the defendant would not be qualified to opine on causation. For example, consider an action against a radiologist for negligent interpretation of radiological films resulting in a delay in diagnosis of cancer. Because the defendant is a radiologist, under the terms of § 52-190a, the physician's opinion must be by a radiologist. But a radiologist is not the proper person to give an opinion that the delay in diagnosis, and consequently the delay in treatment, caused the plaintiff injury. The proper expert to opine on causation in that instance would be a medical oncologist. It would be illogical to read the statute to require the physician's opinion to address causation, when a similar health care provider is often not qualified to opine as to causation.

In conclusion, each of these controversies can be resolved by applying Justice Felix Frankfurter's famous three rules of statutory interpretation: "read the statute; read the statute; read the statute." A careful reading of the statute demonstrates that express language of the statute itself provides the answer to each of these controversies.



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