DEFENSE NEWS

Fighting for Justice and Balance in Civil Courts

WDTL
WASHINGTON DEFENSE TRIAL LAWYERS
Fighting for Justice and Balance in Civil Courts

Playing the Exchange Rate: Foreign Currency Fluctuation as a New Element of Damages

By Charles A. Willmes, Bullivant Houser Bailey

Where a party brings suit in an American court to recover losses sustained in a foreign currency, courts have periodically struggled over how to convert the damages award into a judgment in U.S. dollars. The issue has typically centered on which date to use in determining the applicable exchange rate between dollars and the foreign currency. Because exchange rates fluctuate continuously in today's global economy, and because complex litigation matters can take several years to resolve, the operative date used for conversion can make a significant difference in the net amount of a judgment or award. This inquiry has generally involved courts choosing between the date the cause of action accrued (e.g., when the loss occurred or the contract was breached), or the date judgment is entered. The general rule that evolved from two U.S. Supreme Court cases was where the cause of action arises under foreign law the date of judgment is used, and where the claim arises under American law, the date of loss or breach applies. Some courts have moved away from this "breach date" vs. "judgment date" analysis and adopted a more flexible, equitable approach. This approach is embodied in the Third Restatement of Foreign Relations Law and allows the court to look to whether the foreign currency has appreciated or declined relative to the dollar from the date of loss and to select the conversion date that best serves the purpose of making the plaintiff whole.

However, with the adoption of this equitable approach comes the risk that parties may attempt to use the exchange rate as means of obtaining an artificial upward adjustment of damages awards. There should be no adjustment for the exchange rate where a party's losses are incurred solely in U.S. dollars. In such cases, a party may nonetheless seek to characterize a claim as one arising in foreign currency, based on the case having some tangential connection to a foreign country, despite the fact that the operative events occurred in the United States and actual damages were sustained in American dollars. Therefore, an exchange rate adjustment should be limited to cases actually involving a loss in foreign currency.

One of the first cases to address this issue was the U.S. Supreme Court case *Hicks v. Guinness*, 269 U.S. 71 (1925). *Hicks* arose out of a German firm's debt to an American company. The debt predated World War I. The plaintiff brought suit against the Alien Property Custodian under the Trading with the Enemy Act of 1917. The underlying debt was due in the United States, but was

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payable in German marks. After the war, the German mark had dropped in value. In an opinion by Justice Holmes, the Court held that the American company had a right to recover the value in dollars that the marks had as of the date of breach. *Id.* at 80. Justice Holmes reasoned:

> The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It no longer could be compelled to accept marks.

Id.

One year after *Hicks*, the Court reached a seemingly different holding in the case *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926). The plaintiff in this case had deposited money in a German bank. He made demand for the money, which was not paid. After the war, he brought suit under the Trading with the Enemy Act of 1917. The lower court held that the plaintiff was entitled to judgment in dollars at the exchange rate existing as of the date he made his demand to the bank. In an opinion also authored by Justice Holmes, the Supreme Court held that the plaintiff was entitled to recover the value of the marks as of the date of judgment. The Court distinguished this holding from *Hicks* as follows:

> In this case, unlike *Hicks v. Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L. Ed. 168 (1925), at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. . . . A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. [citations omitted]. . . . An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether the creditor or debtor profits by the change the law takes no account of it.

Deutsche Bank, 272 U.S. at 518-19.

Subsequent cases interpreted *Hicks* and *Deutsche Bank* to mean that the "judgment day" rule applies where a contractual obligation is payable in a foreign country and in that country's currency, and that the "breach day" rule applies where payment is to be made in the United States. *In re Good Hope Chemical Corp.*, 747 F.2d 806, 810 (1st Cir. 1984). Another approach to the issue looked to the jurisdiction in which the plaintiff's cause of action arose. *Id.* at 811. Under this approach, the judgment day rule has applied when the claim arises under foreign law, and the breach day rule has applied when the claim arises under American law. *Id.; see also, Conte v. Flota Mercante del Estado*, 277 F.2d 664 (2d Cir. 1960) (date of judgment rate applied where plaintiff's maritime personal injury claim governed by Argentine law);

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Jamaica Nutrition Holdings v. United Shipping Co., 643 F.2d 376 (5th Cir. 1981) (applying date of loss conversion rate where cause of action arose under U.S. law).

More recent cases have adopted a more flexible, equitable approach to the foreign currency issue and departed from the "breach date" vs. "judgment date" dichotomy emanating from *Hicks*, *Deutsche Bank*, and their progeny. This flexible approach is based in part on the Restatement (Third) of Foreign Relations Law of the United States. Section 823(2) of the Restatement provides as follows:

> (2) If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.

Rst. (3rd) Foreign Relations Law of the United States, § 823(2) (1987).

According to the official comments to § 823, the objective of civil money judgments is to place the judgment creditor in as close a position as possible to that it would have been in if the breaching party had performed or the injury had not occurred. Rst. (3rd) Foreign Relations Law of the United States, § 823, comment c (1987). To achieve this, the comment states that the date used for conversion should depend on whether the foreign currency has appreciated or depreciated relative to the U.S. dollar. *Id.* If the currency has depreciated, the rate in effect at the date of breach or injury should be used. *Id.* If the currency has appreciated, the court should look to the date of judgment, or alternatively, the date of payment. *Id.* However, this comment also suggests that a court may depart from these guidelines where required by the interests of justice, such as where the creditor engages in forum shopping by declining to pursue available remedies in the country where the obligation arose and instead brings suit in the United States "in anticipation of a more advantageous result." *Id.*

One case that has adopted this equitable approach to the foreign exchange question is *Aker Verdal A/S v. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992). The case involved the collapse of a large transi-lift crane at a jobsite in Norway. *Id.* at 179. As a result of the accident, the plaintiffs incurred repair costs and consequential damages while the crane was not fully operable. *Id.* Most of the repair costs, and all of the consequential damages, were incurred in Norwegian kroner. *Id.* at 182. Aker Verdal and Factoring Finans, two Norwegian corporations, brought suit in Washington against the crane's designer Lampson and Manitowoc, a manufacturer of one of its components. Lampson settled prior to trial. A jury verdict finding Manitowoc partly at fault was entered on October 15, 1990. The verdict was entered just over four years after the date the crane collapsed. In this intervening time, the kroner had depreciated against the dollar. At trial, Manitowoc argued that the damages award should be computed based on the prevailing rate at the date of loss: 7.28 kroner to the dollar. *Id.* Aker argued that since the kroner had depreciated in value, it would not be made whole unless the

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judgment date rate of 6.0 kroner to the dollar was used. *Id.* For reasons not apparent from the opinion, the trial court chose a compromise rate of 6.65 based on the rate in effect on the date Aker filed its complaint. *Id.*

Division I of the Washington Court of Appeals reversed and held that the exchange rate should be determined as of the date of judgment. *Id.* at 193. In so holding, the court looked to Restatement § 823 as well as decisions from other jurisdictions adopting the equitable approach. *Id.* at 184-85. These included *Jamaica Nutrition Holdings v. United Shipping Co.*, 643 F.2d 376 (5th Cir. 1981); *El Universal v. Phoenician Imports, Inc.*, 802 S.W.2d 799 (Tex. App. 1990); *Teca-Print A.G. v. Amacoil Machinery, Inc.*, 138 Misc.2d 777, 525 N.Y.S.2d 535 (1988); *B.V. Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979). *El Universal* involved the defendant's failure to pay for advertisements run in a Mexico City newspaper. *El Universal*, 802 S.W.2d at 800. The parties' contract was payable in Mexican pesos. *Id.* *Teca-Print* involved a contract for the purchase of goods in Swiss francs. *Teca-Print*, 128 Misc.2d at 778. *B.V. Wijsmuller* was an admiralty action in which the plaintiff, a Dutch salvor, sought recovery of damages for towing services rendered to an American warship grounded on a sandbar off the Dutch coast. *B.V. Wijsmuller*, 487 F. Supp. at 158. *Jamaica Nutrition Holdings* involved a contamination of a shipment of soybean oil. The cargo was reprocessed in Jamaica, and the reprocessing was paid for in Jamaican dollars. To fulfill the primary goal of making the injured party whole, the court in *Aker Verdal* adopted the equitable approach and declined to follow the older *Hicks* and *Deutsche Bank* line of cases. *Aker Verdal*, 65 Wn. App. at 188.

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There is sound justification for utilizing the flexible, equitable approach to cases involving a foreign currency loss, instead of the rigid mechanistic rules derived from *Hicks* and *Deutsche Bank*. The distinctions used in these older cases to determine whether the breach date or judgment date applies appear somewhat artificial. In addition, the Court's statement in *Deutsche Bank* that "the law takes no account of" whether the creditor or debtor profits from currency fluctuation seems inconsistent with the fundamental goal of making the injured party whole.

Notwithstanding the reasons for the equitable approach, it should not be used as a vehicle to create an entirely new element of damages whenever a case has some arguable nexus to a foreign country. In today's global economy, numerous foreign companies do business in the United States. They frequently do so through American corporate subsidiaries. Where a party sustains a loss in the United States, in American dollars, it should not be permitted to seek an upward adjustment of a damages award simply by virtue of the fact that it is the subsidiary of a foreign corporation. The equitable approach to the foreign currency exchange issue adopted in cases such as *Aker Verdal* does not support such a result.

Where a party brings suit in the United States to recover damages suffered overseas and in a foreign currency, the Restatement approach adopted in *Aker Verdal* is appropriate. However, this does not mean that a plaintiff is entitled to a separate foreign exchange element of damages merely because it happens to be the corporate subsidiary of a foreign company. Where the events giving rise to the case occur in the United States and the party sustains losses in American dollars, a foreign exchange adjustment is unwarranted. If this were the case, anytime the American subsidiary of a foreign parent company suffered harm in the United States, it would be able to claim an adjustment of the verdict or award based on the exchange rate. The reason this would be improper is obvious. Where the American subsidiary suffers the loss, it alone has the right to bring a claim. Since its losses were sustained in U.S. dollars, the claim is not one arising in foreign currency. Therefore, no exchange rate adjustment should be applied. Merely arguing that its profits and losses ultimately find their way onto the foreign parent company's balance sheet does not justify the disregard of a subsidiary's status as a separate corporate entity.

President's Column: Jill's Last Column

As I write my last column, I have to admit conflicting feelings of loss and relief. Loss because I have enjoyed my term as president. I've met so many members at judicial receptions, CLEs and other WDTL functions. The quality of the individuals who comprise this organization - illustrated by the depth and breadth of knowledge, dedication and ability - is truly amazing and humbling. I'm relieved to pass on this role as well. The cycle of Board service creates opportunities for many, and becoming a past-president has its appeal!

One of the best parts of being president is acting as the steward for the organization's goals for the year. This past year, WDTL has profited from the volunteer activities of so many people. I want to recognize some of the great efforts that have been made this year, and let you all know how much we have accomplished as a Board.

Jillian Barron is our membership chair, and, with the assistance of Board member Matt Wojcik, has put together our first student chapters at the University of Washington and Seattle University law schools. Jillian and Matt rounded up volunteers to talk to law students about the defense bar at open houses, barbeques and other gatherings. We wore our WDTL polo shirts proudly and answered questions, gave out flyers and generally promoted the civil defense practice. Our student membership is small but growing.

Getting people to write articles on time and make them interesting is a hard job when editing the Defense News. Our editors, Greg Clark and Jody Reich, have nagged, cajoled and whined (including getting me going) to get articles that are relevant to the practice as well as being entertaining reading. They also got the Defense News into an online version for better archiving, referral and forwarding. This is a difficult, time-consuming job and we appreciate their efforts.

This year we furthered the goal of gaining business contacts for our members through cooperation with associations. We have begun a series of CLE-CME presentations in conjunction with the Washington Medical Association, which involves education for medical professionals at hospitals around the state. We have worked in conjunction with the Construction Industry Council on several projects. We have joined the Association for Washington Business and hope to create links and opportunities for our members there.

We are very proud of the efforts of past-president Jeff Frank, who has worked over the past few years as a member of the steering committee which created a dynamic Washington State summit meeting on judicial selection and independence this past fall. WDTL was one of the sponsors of this meeting, and the attendees included lawyers, judges, legislators, bar groups both locally and nationally, media representatives and civic groups. From that very significant meeting and its discussions, committees have formed to evaluate issues such as our state's system of selecting judges, judicial evaluation, campaign financing, media issues and voter education. Jeff continues to play a pivotal role in these efforts, and WDTL is well-represented by both Jeff and other officers who sit on these key committees.

The judicial liaison committee, under the able direction of chair and Board member Mark Scheer, was very active this year. We had three judicial receptions which were very well attended. The committee prepares judicial profiles for each issue of the Defense News. Mark and his committee have been working on key issues important to the Superior Court bench in the areas of education and public aware-

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ness. In addition, Mark was the "idea guy" and the Chair of our first Managing Partner's roundtable. We were honored to have the deans of all three Washington law schools in attendance, as well as representatives from Starbucks and Nordstrom. The discussion about training and retaining new legal talent for our firms was lively and interesting. We hope to make the roundtable an annual event.

One of our most significant accomplishments this year was the creation of a new strategic plan for the organization. While there are things that are arguably more interesting to talk about (or even write about) a multi-year strategic plan is vital for WDTL. Emilia Sweeney chaired the Strategic Plan Committee, which met innumerable times over this past year, attended faithfully by many members including Board members Mike Runyan, myself, Jesse Franklin, Matt Wojcik, incoming Board member Aaron Rocke, past-Board member Steve Jager, and many WDTL committee chairs.

Over time, the committee prepared a revised Mission Statement for WDTL, identified stakeholders, internal strengths and weaknesses, external opportunities and challenges and identified a list of specific goals focusing on creation of a broader base for the organization, increasing its visibility, identification of unified interests, and ways to increase revenue. These goals and specific ideas for implementation of each were approved by the Board at its annual retreat. Congratulations to Emilia and her committee for their hard work in this key area.

So - for my last column (whew!) - I wish to express my appreciation to the Board and WDTL members in making this a year to remember. The above list only reflects the highlights of our accomplishments. As I hand off to our very capable new president, Steve Stocker, I encourage all members to get involved in a big or a small way in WDTL. You'll definitely receive more than you give.

Youth Courts

By Margaret Fisher

Youth courts in Washington recently got a boost with a statewide conference to help new communities launch youth court programs. Chief Justice Gerry L. Alexander addressed the audience of approximately 80 high school students and adults, explaining how he himself served as a youth court judge when he was in high school. He relayed that his experience motivated him in some measure to become a judge.

An alternative to the traditional juvenile justice system, youth courts give young people the responsibility of sentencing their peers for minor crimes, traffic offenses, truancy or school rule violations. The defendants in youth court are usually first-time offenders who have admitted culpability and voluntarily choose to be sentenced by their peers. Whether housed in a school, community organization, prosecutor's office, traffic court or juvenile court, youth courts are required by state law to follow a set of national guidelines and use the principles of restorative justice, which emphasize rehabilitation of the offender and accountability to the victim and community.

Experienced youth court teams from Whatcom County, Clallam County, Shoreline-Lake Forest Park and Thurston County presented mock hearings and led discussions on practical implementation of issues involved in starting a youth court. The Administrative Office of the Courts and the Council of Public Legal Education organized and presented the conference at Seattle University School of Law. This is the third start-up conference that the AOC and CPLE have offered since it began partnering in 2001 with the Washington Judges Foundation. For more information, contact Margaret E. Fisher, mfisher130@msn.com.

Judicial Profile: An Interview with the Honorable Helen Halpert, King County Superior Court

By Dennis G. Woods, of Scheer & Zehnder LLP

This column continues our commitment to profile a judge for each session of the Defense News. This month, we profile Judge Helen Halpert of the King County Superior Court. Judge Halpert has served in this position since 1999. Prior to serving on the Superior Court bench, Judge Halpert served on the Seattle Municipal Court bench for ten years; the last two as Presiding Judge. Judge Halpert received her undergraduate degree in American Studies from Occidental College prior to graduating from the University of California at Davis law school. Thereafter, Judge Halpert served as a judicial clerk in the Court of Appeals, Division II. Judge Halpert has taught legal research and writing, among other subjects, at the University of Washington and also served as the Assistant Dean. Judge Halpert's legal practice also includes four years with the Public Defender Association before being appointed to the Seattle Municipal Court. Of note, Judge Halpert also served as the Chairperson for Governor Locke's Taskforce on Domestic Violence. Judge Halpert is married and the mother of two children. Below are Judge Halpert's responses to questions that she was kind enough to answer.

Why did you want to become a judge?

Partly, it was an interest in working with younger lawyers. I really liked teaching, and I thought Municipal Court would be a fun way to continue that. I felt I could bring a strong interest in legal scholarship to the bench. Finally, I think my strength and weakness as a lawyer was that I could almost always see both sides and that I would be well-suited to a job as a judge.

What one thing did you find most surprising while serving as a judge at the Superior Court level?

What a generalist position it is. I could be confronted with a variety of issues and areas of law on any given day. With that in mind, I would like to remind those who appear before me to consider the complexity of an issue or whether an area of law is particularly specialized, and to recognize the same in terms of one's briefing to the courts.

Do you find persuasive decisions that have been entered by other judges in King County when considering a given issue?

Maybe subconsciously. I think that rarely are the issues so completely parallel that reviewing other trial court's decisions will do anything other than indicate "this is what someone else may have thought about an issue similar to mine." I do not believe it does any harm to submit other trial court decisions, but I do not think such a practice is highly compelling.

What are your favorite and least favorite aspects of serving as a judge?

Favorites would be researching and learning new legal issues. Being exposed to good briefing and thinking about new issues is really interesting. Also, I have enjoyed the "people part" of my job: the human stories. My least favorite aspect is lawyers bickering about discovery. (What a surprise!)

In your opinion, what is the greatest challenge facing the judicial branch?

At Spring Judicial Conference, there was an excellent presentation by Professor Geyh of University of Indiana School of Law on attitudes towards the judiciary. He believes that throughout the history of this country we have gone through cycles

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Defeat of Drastic Changes to Offers of Judgment

By Aaron Rocke[1]

The WDTL helped defeat a WSTLA-suggested rule change in the Washington State Bar Association Court Rules Committee. The plaintiffs' bar suggested drastic changes to Civil Rule 68 offers of judgment. WDTL President Jill Haavig Stone sent a letter to the court rules committee explaining our opposition to the rule change, and we had a representative present to explain our position. The committee rejected the suggested rule.

The suggestions from the plaintiffs' bar were extreme. Three of the most important changes would (1) allow plaintiffs to make offers and earn more pre-judgment interest if the plaintiff met or beat the offer at trial; (2) eliminate the defensive use of offers of judgment in certain fee-shifting cases; and (3) intrude on governmental sovereign immunity from pre-judgment interest. The impact of the suggested rule was unclear, but it may have prevented the defense from recovering attorney's fees in those situations when it otherwise was entitled to them.

After reading WDTL's explanation of the suggested rule, a court rules subcommittee at the State Bar corrected the most egregious issues. However, the work and consensus of the subcommittee gave the suggested rule some momentum coming back to the full committee.

On June 19, 2006, the State Bar Committee met to discuss the rule. Our organization sent a representative to that meeting, who advocated against changing the rule. Committee chairman David Swartling allowed our representative to debate freely with the committee. The committee voted narrowly (6 to 9) against the suggested rule. In light of the committee's final vote, the chairman stated his intention to write to the Bar Association Board of Governors and the Supreme Court that the committee does not recommend adopting the rule.

WSTLA's Distortion of California Statute

The suggested change was prompted by a California statute. California enacted a statute affecting offers of judgment. That statute was expressly limited to personal injury torts, and excluded governmental defendants. It allowed plaintiffs to make offers of judgment, and penalized defendants by increasing the rate of pre-judgment interest if the defendant rejected the offer and plaintiff beat the offer at trial.

In March, WSTLA wrote to the Washington Supreme Court suggesting changes in our rule. WSTLA started with that California statute, but it tipped the balance further. The WSTLA rule was not limited to personal injury torts, it did not exclude governmental defendants, and it arguably invoked compound interest. Furthermore, it distorted the prevailing party test towards the plaintiff when plaintiff made an offer and against the defense when it made an offer.

Offers of judgment can be used defensively in certain fee-shifting cases. The defense can cap the award of attorney's fees by making an offer of judgment. Because the California statute did not apply to those cases, it did not affect the rule in those cases. However, the WSTLA-suggested rule sought to eliminate this defensive use of the rule.

The One-Way Offer is Fair

WSTLA suggested that the CR 68 is unfair in that it allows only a party defending a claim to assert an offer. However, when viewed in an objective light, the current rule is fair.

Our current rule has effect only if the plaintiff wins its civil action in an amount lower than the offer. The rule has no effect when the person defending the claim is found not liable.[2] In other words, the current rule is ineffective where the issue of liability significantly affects the value of the case. The current rule only deters a plaintiff from over-valuing a case where liability will be found.

Information on damages is generally within the exclusive control of the plaintiff. The defense must ask plaintiff for its information on damages. Reading a plaintiff's statement of damages, assuming they provide one, is not sufficient information to evaluate a case. Areas of damages must be explored, and that exploration usually cannot be done without the plaintiff's attorney because of restrictions on ex parte contact or privacy concerns. Plaintiffs have exclusive control of damages information.

Information on liability is often in control of the defendant. Even though the plaintiff may not have all the information on damages to properly evaluate a case, putting the defendant in control of writing offers of judgment is efficient. This is because an offer lowering damages by taking liability information into account will not be effective. It is not effective because both a defense verdict

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(finding of no liability) and plaintiff's verdict (finding more than the offer) moot the offer. The defendant can determine when he or she has enough information on liability and damages to make the offer.

Giving plaintiffs the power to make offers is inefficient. Under the WSTLA-suggested rule, allowing the plaintiff to write offers of settlement unbalances the process. Writing an offer costs the plaintiff nothing, because it is only an agreement to settle for full value of the case. In other words, the plaintiff is not giving up anything except the chance at an unfairly high award.

If the plaintiff had the power to make an offer of judgment, the plaintiff could disregard all liability information (i.e., plaintiff may assume a finding of liability) in setting the value. Often, the pre-trial value of a case is reduced by the chance of a defense verdict. However, the plaintiff would not have to discount her offer of judgment by the risk of a defense verdict. Under the suggested rule, the risk of a defense verdict might play a smaller role in negotiations. If plaintiffs could make offers of judgment, it might actually make more defendants take cases to trial.

The real need for reform is in areas not addressed by the suggested rule. Aside from fee-shifting cases, offers of judgment will be rare for three reasons. First, they do not allow parties to adjust the value of cases by the chance of a defense verdict. Second, the current penalty for a plaintiff over-valuing a case is limited to statutory costs (a nominal amount often waived by defendants). Third, accepting the offer requires that judgment is entered instead of reducing the agreement to a settlement and release. If these issues are addressed, more cases would settle through offers of judgment.

1 Aaron is an Assistant Attorney General in the Torts Division of the Office of the Attorney General of Washington.

2 See Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) (interpreting federal rule).

A Springboard to Success?

By Shannon Whitemore

Bruce G. Lamb & Shannon M. Whitemore of Merrick, Hofstedt & Lindsey hope to use their recent successful defense of a personal injury case defended under a homeowner's policy as a "springboard" to a successful boutique practice in cases with similar fact patterns. Plaintiff sued her ex-boyfriend for a shoulder injury suffered when she fell from his bed onto an end table. According to plaintiff, the injury occurred when she, lying on top of the defendant following sexual intercourse, fell or was somehow flung off of him and off of the bed, rotating 180º before striking her left shoulder on the end table before landing on the floor. Plaintiff testified at her deposition that defendant did not push or force her to fall off the bed, and that she "all of a sudden" rolled off of him.

When challenged on summary judgment to present evidence of defendant's negligence, plaintiff submitted an affidavit stating that defendant caused her injury when, while holding on to her, he suddenly let go and "sprung her like a spring" off of him. Defendant argued that plaintiff had articulated no act or failure to act that could constitute a failure to exercise ordinary care, and further that simple physics would dictate that, if plaintiff were lying atop defendant when he let go of her, she would simply fall down on top of him, and not be flung off the bed.

During oral argument, Judge Cayce questioned both sides on the applicable standard of care "under this fact pattern" before granting defendant's motion and dismissing plaintiff's claims. There were no published Washington tort cases prescribing the applicable standard of care for intimate relations, and so the "ordinary care under the circumstances" standard was applied. Interestingly, Massachusetts has recently applied the higher "wanton or reckless" standard in a case with a remarkably similar fact pattern, although it was the unfortunate male who was injured in that case, and the injury sustained was more closely connected to the alleged negligence on the part of the female defendant. See Doe v. Moe, 63 Mass. App. Ct. 516, 520-21, 827 N.E.2d 240 (2005), in which the parties wisely litigated under fictitious names. Mr. Lamb and Ms. Whitemore are gratefully accepting referrals of bedroom injury cases, in which they are currently undefeated.

Judicial Profile

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of how the judiciary has been valued and devalued. We are in a period of real mistrust of the judiciary, which I find disconcerting. I think that the biggest challenge facing judges is finding a way to let people understand that almost every judge is trying to be fair and do the best job possible. The increasingly popular idea that many judges are carrying out a political agenda is very unfortunate and untrue.

How would you describe your judicial philosophy?

Just to be fair, to apply the rules fairly and make sure people have their day in court. In a jury trial, a judge is primarily a referee, while the judge's role in a bench trial is more complex but should not stray from that of being a neutral fact-finder. I suppose I have a belief that cases should be decided on their merits if possible, not on procedural defaults. However, there are rules for the conduct of a lawsuit, and it is only appropriate for a court to enforce such rules.

What do you find persuasive or compelling when presiding over oral argument?

A really good grasp of what the law is and the legal standard that is to be applied, when the standard is not patent. Judges want advocates who are able to hone in on the two or three key cases or a controlling statute and really analyze how those cases or statutes apply to the factual setting before the court. A lecture on the black letter law in a vacuum is rarely helpful. You need to make sure that you can focus the court on what is important.

Do you have an opinion as to whether the appellate court should continue to issue unpublished opinions?

I understand why the Court of Appeals issues unpublished opinions, but we are all reading them. I think we should adopt what the federal courts are doing. That is, you can cite unpublished opinions but they don't have precedential value, merely secondary authority. I think that would be helpful and ultimately lead to more intellectual honesty.

What area of law do you find most challenging?

Land use because it is highly regulated with various statutory schemes.

Do you believe that public elections are the best method of selecting judges in Washington State? What would you propose if you were in charge?

I think the Missouri system of appointment and retention is probably the best way to make sure a judge is competent. It insulates judges from politics.

What are your hobbies or interests?

It seems to be primarily watching middle school basketball and track meets at this stage!

What is the last book that you read?

Anna Karenina.

Who is your favorite or most admired historical figure?

I think my favorite is Ben Franklin because he was sort of a scamp. He was a brilliant thinker, with wide-ranging interests, but also a complex human being.

What is your favorite or most memorable judicial opinion?

Brown v. Board of Education, it shook the world.

What is the strangest thing that has happened in your courtroom?

An individual showing up with a parrot on his shoulder; and a defendant, at the time of sentencing, claiming "you're being very judgmental!"

Judges and Kids Say Convention at Whistler Outstanding Success

The following is based on actual comments from happy attendees

Lawyers will tell you that at times anyone can be hard to please, especially Judges and kids. However, outgoing WDTL President Jill Stone, incoming President Steve Stocker and Executive Director Kristin Lewis made it look easy by organizing this year's convention at Whistler that was by all accounts, a real crowd pleaser.

Steve picked a great location, had a great schedule of events and invited excellent speakers. Jill Haavig Stone, Jeff Frank, Andy Cooley and Rick Roberts did an excellent job inviting judges to attend. Notably, in attendance were not less than 8 former and current Superior Court, Court of Appeals and Supreme Court justices. "Judging" from their comments and the smiles on their faces, these members of the bench were delighted to have been present.

Kids, and teens in particular, also gave Whistler two thumbs, in no small part because Kristin Lewis organized special events for kids of all ages, including WDTL's first "teen hospitality room." Having their own hangout was a tremendous hit with the easily bored teenage crowd. It was great to hear excited parents rave about how their kids were connecting and making friends, and how both would ensure their kids would attend in future years.

Now, we all need to get the word out to everyone in the WDTL about how fun and worthwhile WDTL's summer conventions are. If more people knew what a good time it can be, we might be able to even increase next years attendance over what appeared to be a very well attended 2006 convention!

Bravo to all those who planned and ran the Convention this year! We look forward to a comparable effort planning next year's convention on July 12-15, 2007 at the Sutton Place, Vancouver, B.C. See you there!

Help Wanted

WDTL Regional Representatives- Southwest Washington & North Sound

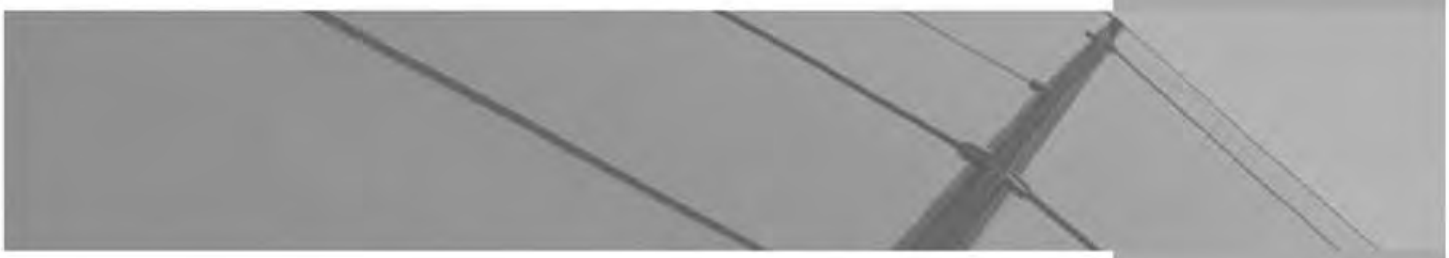
Duties may include:

- Recruitment of new members and planning activities of interest to the region
- Contacting local presiding judges(at least once a year) to advise that the WDTL is available as a resource on any issue.

For a full job description, and more information, please contact Kristin Lewis at 206.749.0319 or kristin@wdtl.org

Get involved in WDTL to promote fair and balanced civil justice.

Litigation Services



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The firm has represented clients in a number of high-profile cases around the globe and is committed to exercising that same diligence and care regardless of the size of the case. Since MD&D does not have regular corporate clients, they seldom run into conflicts on litigation assignments.

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Professionalism in Mediation

By: Michele M. Sales, Washington Arbitration and Mediation Service

A lawyer's "stock in trade" is her reputation, which is more than just a win/loss record. Our reputations are built on our day-by-day actions and interactions with courts, clients, opposing counsel and other professionals. Lawyers become known based on such things as whether we keep our word to opposing counsel (including co-defense counsel), and whether we behave with honesty to the extent allowed by our professional obligations. In essence, our reputations are indicative of how we conduct ourselves in every aspect of our practice.

From my perspective as a professional mediator, your reputation as an advocate is built on how professional you are when you prepare for and attend a mediation.

Defense counsel often face this dilemma when the carrier does not provide as much authority as you recommended or thought you would obtain. In a worse situation, the carrier does not provide what you implied or suggested to plaintiff's counsel or co-defense counsel that you would have at the mediation. Plaintiffs' counsel then routinely complain to the mediator, "I told them that if they couldn't get to $X, there was no reason to mediate," or "They said they valued the case in the six figures, so why did they only bring $Y?" Or a co-defendant is very unhappy to learn that you brought only "nuisance" value when all prior discussions implied a more equal split as to settlement.

So what to do? First, either don't make misleading comments or be very careful in what you say to opposing counsel or co-defense counsel. "I don't know" is a perfectly acceptable answer to the question, "What do you think the carrier is willing to pay on the case?" Or you can couch a statement as, "I've asked for (or valued the case at) $X but do not have a response back." Or simply say (if true), "the claims rep hasn't told me what authority she has on the case so I don't know if she agrees with my evaluation." Then, if the carrier does not come close to the requested authority figure, or suggests that only if a jury awards $X will the carrier get there, you have not misled opposing counsel

"From my perspective as a professional mediator, your reputation as an advocate is built on how professional you are when you prepare for and attend a mediation."

or your co-defendant. When that occurs, let the other side know your situation *before* mediation. While the mediation may not be successful, no one feels blindsided by your actions if it goes forward.

Better yet, don't schedule the mediation until you know the general range of what your carrier is willing to do. In the current world of defense work, that option may not be realistic if the claims representative is not going to look at the file, much less get authority, until the mediation is imminent. But if you have done your evaluation sufficiently in advance of the mediation and have provided that evaluation to the carrier, you may be able to get an idea of where the authority is likely to fall.

Finally, give the other parties the option to cancel the mediation if the authority you get is not where you suggested or where you think it is unlikely to be worthwhile. For example, if the authority you are given does not cover the medical bills subrogation amount, notify plaintiff's counsel of that fact; it does not reveal your specific authority, but simply gives opposing counsel the informed option on whether to go forward with the mediation. ("My carrier sees this as only a nuisance value case and the authority likely to be offered won't cover the L&I lien".) Your client may have to bear the cancellation costs of the mediation if this occurs within the mediator's cancellation period, but you will likely have better relations with opposing counsel going forward. Ultimately, that will assist you in your settlement overtures.

Keep in mind that the court rules *do not* mandate mediation. King County rules simply require that the parties participate in a session of alternative dispute resolution. You may represent an insured whose carrier has a reputation for not paying five figures in MIST cases. If that is the case, and if you have every reason to believe this particular case is no different, suggest (strongly) that in lieu of a standard mediation, the parties consider a judicial settlement conference or less costly online mediation service. If the Plaintiff's counsel insists on a traditional mediation, advise him

Continued on Page 16

Mediation

From Page 15

upfront that you and the carrier consider the case to be only at nuisance value and are prepared to try the case if the plaintiff is not willing to accept settlement in that range. Again, you may not end up with a settlement at mediation, but you have at least given plaintiff's counsel a "heads up".

Mediators cannot force defense counsel or a claims representative to come to mediation with whatever "reasonable" amount of settlement authority is expected by plaintiffs' counsel. Mediators also cannot generally cajole a carrier participating by telephone *during* a mediation session to double what it was prepared to pay in settlement of a case before the mediation, simply because new information is revealed at the last minute. Nevertheless, professional mediators like me always go into mediation with a presumption that the participants want the effort to be productive and hopefully result in settlement.

Have miracles occurred in mediation, i.e., settlements of cases with limited authority or new information disclosed at mediation? Sure, but is that common? No, and these situations often result in hard feelings between attorneys and become the basis for negative comments on the WSTLA Eagle Listserv or WDTL discussion. It's safe to say that all of us become more wary of an attorney about whom comments like this have been made.

While the notion of "play fair and be nice" sounds like something we should have learned in kindergarten, it remains part of the broad definition of *professionalism*. If we did not repeatedly see this problem arising in mediation, I would not be writing about it. So, my advice is to be more professional in your work leading up to and in mediation and your reputation will reflect it.

Congratulations to Jody & Steve Reich!

Hunter Steven Reich was born on January 26, 2006 at 12:01 p.m., weighing 3 lbs., 5 oz. Dad is Steve Reich of Gordon Thomas Honeywell and mom is Jody Reich of Betts, Patterson Mines.

Mom, dad and baby are all doing great!

Welcome New Members

WDTL welcomes the following members who have recently joined our organization. A big THANK YOU to our members who referred these individuals to WDTL.

Gabriel Baker
Lane Powell PC
Referred by Mike Runyan

Michael Charles Bolasina
Stafford Frey Cooper

Robin N. Collins
Seattle City Attorney's Office

Matthew William Daley
Keefe, King & Bowman, P.S.
Referred by Edward J. Bruya

Shelly Damore
Lehner & Rodrigues, P.C.

Abigail Gonzales Daquiz
Phillips Law Group, PLLC

Peter K. Diamond
Law Offices of Shahin Karim
Referred by Shahin Karim

Derek Edwards
Washington Attorney General
Referred by Aaron Rocke

Dan Nicola Fiorito
Johnson Graffe Keay Moniz & Wick LLP
Referred by Heath Fox

Brock B. Gavery
Keating Bucklin & McCormack, Inc., P.S.

Philip A. Gigler
Lee, Smart, Cook, Martin & Patterson, P.S., Inc.
Referred by Dan Lloyd

Anthony David Gipe
Scheer & Zehnder LLP

Lawrence Gottlieb
Betts Patterson Mines, P.S.
Referred by Karen Bamberger

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U.S. Attorneys Office
Referred by Dan L Johnson

Bree Healani Kame'enui-Ramirez
Bullivant Houser Bailey PC
Referred by Marnie Silver

Karen Kay
Cole, Lether, Wathen & Leid, P.C.

Sally Shiyon Kim
Cole, Lether, Wathen and Leid, P.C.
Referred by Adam Cox

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Williams, Kastner & Gibbs PLLC

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Meyer, Fluegge and Tenney PS
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Dorsey and Whitney LLP
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W. Scott Noel
Clement & Drotz
Referred by John Drotz

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Betts, Patterson, Mines

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Port of Seattle
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T-Mobile USA, Inc. - Legal Department
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Referred by Mark Conforti

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Referred by Bob Reinhard

Deborah E Swenson
Swenson & Associates, Legal Nurse Consultants, LLC
Referred by Marsha Keppler, LNS

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Allstate Staff Counsel
Referred by Max Nicolai

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Thomas H Wolfendale
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2005 - 2006

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WASHINGTON DEFENSE TRIAL LAWYERS

Application for Membership

1. The undersigned hereby makes application for membership with the Washington Defense Trial Lawyers, representing that a substantial portion of my practice is devoted to representing defendants, companies, or entities in civil litigation:

Name _____

Firm Name _____

Office Address _____

City _____ State _____ Zip _____

Home Address _____

Phone (_____) _____ WSBA Bar # _____

FAX (_____) _____

E-mail _____

2. Year of Admission to Bar _____ Legislative District _____

3. State degrees held, both academic and law, year of graduation and school:

_____

4. If you were referred to WDTL by a fellow attorney, please list name here:

_____

5. 2006-2007 Membership Dues

Attorneys	
Admitted to the Bar more than 5 years	$250.00
Admitted to the Bar less than 5 years	$200.00
Other	
Government Attorney	$125.00
Retired Member	$100.00
Paralegal	$75.00
Law Student	$10.00

6.a. YES! I would like to serve on the following WDTL Committees.

- ☐ Amicus
- ☐ Court Rules
- ☐ Community Service/Pro Bono
- ☐ Judicial Liason
- ☐ Legislative
- ☐ Membership
- ☐ Practice Development
- ☐ Programs
- ☐ Publications
- ☐ Strategic Planning
- ☐ Technology

6.b. YES! I would like to join the following sections

- ☐ Construction
- ☐ Employment
- ☐ Government Liability
- ☐ In-House Counsel
- ☐ Insurance
- ☐ Maritime
- ☐ Product Liability
- ☐ Professional Liability
- ☐ Workers' Compensation

7. ☐ I would like to contribute $150.00, $100.00, $50.00 (minimum $20.00) to fund WDTL's legislative advocacy and outreach program.

I understand that pursuant to Public Law 103-66, this portion of my annual WDTL dues is not deductible from federal income taxes as a business expense

8. Dues $_____ + Legislative Contribution $_____ = TOTAL:$ _____

Please make check payable to: WASHINGTON DEFENSE TRIAL LAWYERS and mail to:

MEMBER SERVICES, 4141 AGATE ROAD, BELLINGHAM, WA 98226

Or fax with credit card information to (360) 392-0468

Payment: ☐ MC ☐ VC Expires: ____/____ # _____

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Questions? Contact Kristin Lewis,WDTL Executive Director at (206) 749-0319 or kristin@wdtl.org

9. Dated this _____ day of _____, 20 _____

10. Signature of Applicant: _____

Proposed WDTL Events Calendar for 2006-2007 (register online at www.wdtl.org)

October

10 CLE - Fibromyalgia, Seattle (Preston Gates)
10 Judge's Reception, Seattle (Preston Gates)
11-16 DRI Annual Meeting, San Francisco
CLE - Defense Academy II

November

2 CLE - E-discovery
17 CLE - Managing Partners Puget Sound
CLE - Auto Cases

December

7 CLE - Ethics followed, Seattle (College Club)
WDTL Holiday Party, Seattle (College Club)

January

23 Judicial Dinner, Tacoma

February

1-2 CLE - Snowbreak Park City, Utah (Marriott)
9 CLE - Annual Update on Construction Law, Seattle

March

9 CLE - Annual Update on Construction Law, Portland
CLE - Yakima CLE, Yakima

April

6 CLE - Insurance Law Update, Seattle
CLE - Judicial Reception, Spokane

27 CLE - Joint Idaho/Washington Ethics Seminar

July

12-15 Annual Convention, Vancouver, B.C (Sutton Place)

WDTL
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Fighting for Justice and Balance in Civil Courts

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