

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
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## Attorney Fees

An 8-year long class action challenging Oregon's disability determination system resulted in a global settlement and a fee award of nearly a million dollars in 1999. One defendant appealed the fee award and the Ninth Circuit affirmed the decision to award fees to the plaintiff, but reversed and remanded for additional findings. On remand, Judge Robert E. Jones increased the award by approximately a quarter of a million dollars. Pursuant to the Ninth Circuit's directive, he addressed objections to the adequacy of the specificity of plaintiffs' billing records and applied varying historical and adjusted fee rates under the EAJA for the federal portion of the award and market rates for the state portion of the award. Sorenson v. Concannon, CV 94-874-JO (Opinion, September, 2001).

Plaintiffs' Counsel:

N. Robert Stoll

Defense Counsel:

Gregory Chaimov (OR)

Craig Casey (U.S.)

## Labor

Current and former emergency medical technicians claimed that their employer violated overtime compensation requirements of the FLSA by failing to pay for all time spent in training. In a follow-up to a February Opinion, Judge Janice Stewart held that for para-medics working in Oregon, training time in excess of 24 hours over a two-year period was compensable work time. Hazard v. American Medical Response Northwest, Inc., CV 00-0084-ST (Sept. 20, 2001).

## Criminal Law

Defendant was charged with being a felon in possession of a firearm. After a jury trial in April, he was found guilty and Judge Redden granted motion for a new trial because, without evidence that had been improperly admitted, there was insufficient evidence to convict defendant. Ninth Circuit law is that, under such circumstances, a new trial, not an acquittal, is appropriate because the government must be

given an opportunity to supplement its evidence in a new trial. After a second jury trial in July, defendant was again found guilty. Judge Redden granted a motion for judgment of acquittal, with a conditional grant of a new trial in event the judgment of acquittal should be vacated or reversed. It was undisputed that defendant had fled from police when they attempted to approach him on an outstanding warrant, and that police later found him hiding in the attic of a nearby house. Police testified that when he ran from them, he grabbed his jacket pocket as if holding something heavy in it. Police later found a gun in the backyard of a neighboring house and the government argued that defendant's path of travel from the police to his hiding place led him through the backyard where he had either dropped or discarded the gun. Defendant's jacket was never found. Judge Redden concluded that, although the jury might have found from the evidence that defendant had a gun in his pocket when he ran from the police, there was no physical

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evidence and insufficient circumstantial evidence for a jury to find beyond a reasonable doubt that the gun found in the backyard was ever in defendant's possession. Further, in the second trial, the government had offered testimony that had weakened its case, *i.e.*, testimony of an officer who searched the backyard with his search dog and found no indication defendant had been in the yard. And, the testimonies of two government witnesses at the second trial made it more clear than at the first trial that a noise heard by one in the backyard the day of defendant's arrest could not have been defendant. Thus, even viewing the evidence in a light most favorable to the government and with all reasonable inferences in favor of the verdict, there was no evidence establishing defendant's presence in the backyard, and no evidence tying him to the gun found there. United States v. Jasmine Lusk, CR 00-564-RE (Sept. 25, 2001).

## Patents

Judge Dennis J. Hubel denied a defense motion to stay a declaratory judgment patent suit based upon a pending Federal Circuit appeal. The court accepted plaintiff's argument that a stay would cause it significant harm because plaintiff would be

unable to recover losses in future sales of parts and service for any allegedly infringing sales made by the defendant during the interim. The court found that defendant failed to make out a clear case of hardship or inequity required to justify a stay despite defendant's claim of the financial burden posed by having to defend and prosecute actions in dual courts. Judge Hubel noted that the Federal Circuit proceeding involved only 2 of the 3 patents at issue in the district court proceeding and thus, litigation here was "inevitable." Versa Corp. v. Ag-Bag Int'l Ltd., CV 01-544-HU (Opinion, Sept. 14, 2001).

Plaintiff's Counsel:

Jeffrey Love (Local)

Defense Counsel:

David Axelrod

## Trade Practices

Competitors for college oriented on-line services were engaged in a publicity dispute. Plaintiff claims that a Board Member for the defendant created a sham investigation into a rankings report and falsely claimed that the rankings were inaccurate. Defendant republished the Board Member's statements without disclosing his connection to the company and disseminated other allegedly false

information. Plaintiff filed an action for defamation, unfair trade practices and unfair competition under Oregon statutes and the Lanham Act.

Judge Janice Stewart granted a defense motion to dismiss the UTPA claims because plaintiff was not a "consumer." The court examined the legislative history of the act and determined that it was not intended to protect competitors.

The court denied a defense motion to strike a punitive damage claim under Article I, § 8 of the Oregon Constitution. Judge Stewart found that plaintiff's allegations were not directed solely against speech, but rather targeted a "larger course of an improper commercial practice that encompasses the allegedly false or misleading speech."

Finally, the court granted in part and denied in part a motion to strike allegations of "puffery." The court sustained the objection to claims that were too vague to be actionable and overruled the objection to sufficiently definite assertions. College Net, Inc. v. Embark.Com, Inc., CV 00-981-ST (F & R, Dec. 15, 2001; Adopted by Order of Judge Robert E. Jones, April, 2001).

Plaintiff's Counsel:

David Markowitz

Defense Counsel: David F. Rees