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Gearing Up

Trustbusters Try To See Through Windows 98

PC vendors still bundling Microsoft browser, despite Justice's action.

BY KAREN DONOVAN
NATIONAL LAW JOURNAL STAFF REPORTER

JAY MALLIN

Q&A with Microsoft legal adviser Charles Rule, A16

AT THE TIME, it was called a bit of savvy lawyering.

Joel I. Klein, the Department of Justice's antitrust chief, won kudos when he sued Microsoft Corp. last October for contempt, alleging the company had violated a 1995 consent decree by forcing computer makers to buy its Internet Explorer 4.0 browser along with Windows 95. The case required no proof of new antitrust violations, which struck Microsoft's critics as a deft move by a regulator who finally realized that technology markets move faster than investigations.

But Mr. Klein's precision strike in the courtroom has been a bust in the marketplace. To date, no major computer manufacturer has taken advantage of the remedy Mr. Klein won in a settlement Jan. 22, when Microsoft agreed to allow computer makers to license Windows 95 but remove the IE 4.0 icon from computer desktops. PC makers are continuing to bundle the products.

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Confirmations—At Last?

The stalemate over appointing federal judges may finally be over.

BY MARCIA COYLE
NATIONAL LAW JOURNAL STAFF REPORTER

WITH A HANDFUL of judicial nominees winning Senate confirmation recently and another handful getting long-delayed hearings, many observers wonder whether the confirmation logjam has been broken.

Targeted by conservatives as a potential "activist" judge, Margaret M. Morrow, of the Los Angeles office of Washington, D.C.'s Arnold & Porter, nominated to a district court seat in May 1996, seemed barely controversial when confirmed Feb. 11 by a vote of 67-28.

Clinton administration officials and Senate Democratic leaders believe there is renewed hope for the confirmation of other nominees tagged "controversial" for various reasons and left twisting in the wind for one, two and even three years, such as Prof. William A. Fletcher.

The April 1995 nomination of the law professor from the University of California at Berkeley School of Law (Boalt Hall) to the 9th U.S. Circuit Court of Appeals originally got bogged down when Senate Republicans discovered an 1887 anti-nepotism law. The law had never been applied to judicial appointments, but some claimed it should prevent Professor Fletcher from serv-

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RUSS CURTIS

Minding Her Elders
Lesley A. Clement won a $1.5 million settlement in a suit alleging that Ben Bretz had been abused.

End of Life Valued

Suits alleging abuse or wrongful death of nursing care patients draw big settlements and awards.

BY GAIL DIANE COX
NATIONAL LAW JOURNAL STAFF REPORTER

LESLEY A. CLEMENT was a business litigator in the Sacramento, Calif., area when her "grandma" Dorothy, 83, suffering from Alzheimer's disease, changed her life. Dorothy Palmer, actually Ms. Clement's great-aunt, was found locked outside her nursing home one night with a broken rib, blood streaming down her face and a mango-sized bruise on her forearm.

No criminal charges were brought, but Ms. Clement, as the only family member with a law degree, filed a suit, though she'd never before read a medical chart. In the third week of trial, in February 1994, the suit settled confidentially, and state regulators ultimately revoked the license of the woman who ran the nursing home.

Ms. Clement was a lawyer transformed. She set up her own practice devoted to litigating nursing home abuse cases full-time on a contingency fee basis. Four years later, she enthuses, "Talk about feeling good about what you do!" And, she says, in 1997 she paid more in taxes than she ever grossed doing business law.

What's striking is that anyone could find elder abuse law lucrative. For years, personal injury and especially wrongful-death suits against nursing homes were the province of a few

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Fee Fact

Plaintiffs' lawyers suing tobacco for the state of Massachusetts say they're unfazed by talk in the state capital of a proposed fee cap to reduce the **$1.25 billion** in fees they hope to win.
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An Indian tribal court has jurisdiction over a smoke suit. **Page A6**

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JAY MALLIN

Susan DeSanti, of the FTC.

The NLJ Corporate Counsel Report takes a look at joint ventures worldwide. Section C

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Baby Boomers' Fears Make Elder Law Lucrative

['ELDERLAW' FROM PAGE A1]
true believers with independent sources of income. Conventional wisdom had it that juries typically did not place a high cash value on lives already so diminished—not to mention on people who had already exceeded their life expectancies and had been left in the care of strangers. Or, as Ms. Clement calls it, the "he-used-to-be-a-vegetable, he's-still-a-vegetable, these-things-happen-and-who-cares?" defense.

Big Verdicts

But a glance at recent verdict reports shows the landscape has changed. Seven-figure settlements and awards are no longer rare. On Feb. 11, a West Palm beach jury awarded $6.3 million—$1.5 million in compensatory damages plus $4.8 million in punitives—to the widow of Charles Barnes, a man who was institutionalized after suffering seven strokes that left him with vascular dementia. He wandered away from the nursing home, fell in a pond and drowned. *Hamilton v. First Healthcare Corp.*, 97-1621.

Last year one of the largest verdicts nationwide was $83 million—reduced to $55 million—awarded to the niece and grandnephew of an 84-year-old Texas woman, Ruth Waites, who jurors came to believe was killed by an untreated bedsore. *Williams v. Beverly Enterprises.*, 95-437, (Dist. Ct. Rusk Co., Texas).

What must be unnerving for the nursing home industry and its insurance carriers is that the facts in Mr. Barnes' and Ms. Waites' deaths are not unusual. Wandering and bedsores are two of the most common circumstances in wrongful-death suits against homes, says Steven M. Levin, of Chicago's Levin & Perconti. He is a former chair of the American Trial Lawyers Association's nursing home litigation group.

"Nursing home abuse is one of few growth areas left in litigation," he says. "Now you're getting my standard speech, but I tell lawyer groups that nursing home wrongful deaths are where we were 20 years ago with medical malpractice and product liability. You can argue today there are too many of those suits, but you have to admit those fields are much safer as a result."

Mr. Levin recalls nursing home litigation group meetings at the ATLA's annual conventions in the early 1990s. He says there were "maybe five or six guys wandering in." As of the 1997 gathering, the group boasted 140 members in 40 states.

"It's the tort of the '90s," agrees Arnold R. Gellman, who has represented plaintiffs in the past but today defends nursing homes as a partner at New York's Epstein Becker & Green P.C. Fresh from a trial in South Florida where, he says, he settled a bedsore death case for an amount in the high six figures, he observes, "These are very jury-friendly lawsuits."

The tide of healthy verdicts for the elderly is attributed by both the plaintiffs' and defense bars to baby boomers' concerns and to the growing waves of terror and guilt the public feels about institutions that take over what families, a few generations back, would have been forced to do themselves. Mr. Gellman adds that the trend toward corporations buying nursing home chains adds the element of corporate defendants and managed care plans. "It's a confluence of great targets," he says.

Steven M. Levin: *He says nursing home cases are one of the few growth areas left in litigation.*

Plaintiffs' attorneys acknowledge that even in states where punitive damages aren't allowed formally, the cases have a large punitive element.

"A great deal does ride on the family, how close they were, how often they visited. So sure, you argue loss of love. But frankly, the main value of these cases isn't so much the loss, but the jury's perception of–how badly the defendant acted," says Steven Levin.

That doesn't mean Mr. Levin and his colleagues concede the quality-of-life issue.

"You say, 'She had already lived longer than the average,' and I reply, 'That means her few remaining years were that much more precious,'" says Mr. Levin.

As Jules B. Olsman, of Detroit's Olsman, Ganos & Mueller, who has a general personal injury practice and is the current head of ATLA's nursing home litigation group, puts it, "I don't care if they're 140. I'll tell the jury, 'No one deserves to die this way. Look, multiple fractures. Unexplained.'"

Quality of Life

And these cases can be graphic. A jury, for instance, can be asked to look at an easel with a blow-up of a decubitous ulcer. In Ruth Waites' case, the hospital reported removing eight pounds of dead flesh while trying to save the woman's life. In some bedsores, a ball-and-socket hip joint is visible. Occasionally, there is caked feces or maggots.

"Ninety-nine percent of the photos are admissible, with the judge finding their probative value outweighing any effect they might have on the jurors," says Mr. Gellman.

Countering bedsore photos is a familiar educational challenge for defense attorneys, says Joseph F. Babiarz Jr., of Detroit's Plunkett & Cooney P.C., who estimates he has defended more than 30 wrongful-death cases during the past five years. "Bedsores look so horrendous that the lay juror's reaction is that someone must be to blame. But virtually any expert will testify that no matter how good care is, some bedsores are inevitable," Mr. Babiarz says. "I tell the jury that just as there can be heart failure or kidney failure due to age, and they can accept that, so, too, there can be skin failure. Why question that? Skin is the body's largest organ."

The Defense Research Institute of Chicago has printed a guide to defending nursing home cases, written by Davis Carr and his colleagues at Mobile, Ala.'s Carr, Alford, Clausen & McDonald L.L.C. It suggests the defense may be able to neutralize bedsore photos by presenting some of its own: "The wound should be as clean as possible.... You should not be able to identify that the wound is on a human body."

It's a tactic that Mr. Babiarz says he'd try only if he was lucky enough to have a bedsore photo taken by the nursing home at the time of the resident's admission—that is, a bedsore brought from home.

Ms. Clements volunteers, "I'll tell you what doesn't work for them. I've actually had defense attorneys say, 'That may look bad, but it isn't. It's like diaper rash.' You should see the female jurors recoil."

Richard Schuler: *Says he would've settled his first elder abuse case for $2.5M; he got more than $6M.*

A state-of-the-art defense in wandering cases entails taking the high ground, arguing that patients have a right—often spelled out in state statutes passed in the first wave of nursing home legislation in the late 1970s—to be free of oppressive chemical or physical restraints.

"They say the patient was dirty. Well, you've got a right to refuse to bathe, and so do nursing home residents, unless they have had conservators appointed, and most haven't," says Mr. Babiarz.

When defense counsel argued that solicitude for Charles Barnes' remaining dignity and independence stopped the home from making him wear a "wander guard," his widow's attorney, Richard Schuler, was prepared. The nursing home had never asked Mr. Barnes about wearing an alarm and, his widow testified on the stand, when she brought it up that after an earlier wandering incident, her husband said he would wear one.

Mr. Schuler, of West Palm Beach, Fla.'s Schuler, Wilkerson, Halvorson & Williams, complains that the defense and its insurance adjustors were "behind the curve all the way" in their settlement offers. But he also underestimated the worth of the case, his first wrongful-death suit against a nursing home.

He says he would have settled for $2.5 million. And when the jury came in with compensatory damages after less than two hours of deliberation, he thought he'd lost. On the contrary, "because they found there was a statutory violation of Mr. Barnes' patients' rights, all right—his right to be cared for and supervised—the attorneys' fees and costs will be computed on top of the $6.3 million."

Joseph F. Babiarz Jr.: *Explaining the inevitability of some bedsores is part of the defense's work, he says.*

On the Defense

Some defense attorneys, when asked to describe a major victory, tend to cite cases with offbeat facts. In one, the decedent was a long-term, but ambulatory, resident who was running errands for staff to a convenience store across a four-lane highway at night when a car struck and killed him. The defense won by arguing that the driver, who had settled early, was primarily at fault.

Another defense attorney told of a woman with advanced AIDS dementia who had apparently drowned while taking a bath unattended. A coroner testified that the bite marks on her tongue and the lack of water in her stomach indicated she had, in fact, died of an end-stage convulsion. As the defense attorney reminded the jurors in closing arguments, it could have happened if she had been both in her bed and supervised.

Asked about the change in climate for nursing home cases, Mr. Babiarz maintains that for the great bulk of cases, the conventional wisdom still prevails, and plaintiffs' demands are unrealistic. "We settle a lot, where there is no value, in the $15,000 to $20,000 range," he says. "You write it off to nuisance value because the cases are so hard to try. And there's a simple reason why they're hard to try, besides the image of nursing homes. Your witnesses aren't usually the doctors and registered nurses you have testifying for you in [medical malpractice] cases. Typically, the aides are unsophisticated—if you can even find them, the turnover is so great—and it's easy for plaintiffs' counsel to intimidate people with minimal education, or to twist what they say."

But he won't deny that seven-figure awards are on the rise. "If this keeps up, the insurers will just refuse to cover the homes. They're going to be closing and sending residents back to their families, whether they can take them or not. Then you're going to see a legislative backlash."

But so far, plaintiffs' attorneys get safe passage through the tort-reform war zone when their targets are nursing homes. "Suddenly you've got [the American Association of Retired Persons] and the Grey Panthers and all these other advocacy groups on your side, and the 'reformers' aren't just up against nasty trial lawyers," says Mr. Levin.

For example, last year's tort reform caps in Ohio expressly excluded nursing homes from the bar against collecting punitive damages on statutory wrongful death claims. And a Florida appellate court in 1995 upheld a special statute for nursing home cases that allows the recovery of pain-and-suffering damages by the estate of the deceased. *Beverly Enterprises-Florida Inc. v. Spilmam*, 661 So.2d 867.

The reasoning behind these rulings is the same as that behind the private attorney general statutes in California, Illinois and a number of other states, Mr. Levin explains. Lawmakers recognize the policing value of lawsuits and the ineffectiveness of state and federal regulation of nursing homes. It's not an accident, he adds, that a number of his colleagues—among them David Marks, of Houston, who won the *Williams* case—are former prosecutors.

Ms. Clement says she's looking forward to the day when an abuse suit is framed in such a way that it will provoke federal criminal action against a corporate officer of a nursing home. In the meantime, she says she's working to "get the word out" about the value today's jurors are placing on the lives of the institutionalized elderly. She has taught five continuing education courses in the past year, and she regularly secures from clients commitments that any settlements will not be kept confidential.

'Ben Gets Good Care'

The Ben Bretz case is her favorite example of what she calls defense attorneys' not getting it. She represented the man's daughter-guardian, who brought a personal injury suit on his behalf, alleging that the octogenarian had been so malnourished and dehydrated that he could no longer swallow. Opposing counsel brought a motion last April arguing that the daughter's refusal to accept a $150,000 immediate cash settlement on behalf of a man who had less than six months to live showed the daughter was interested only in enlarging her inheritance.

Ms. Clements substituted a new guardian, former California Supreme Court Justice Armand Arabian.

"It was a little hard for them to say he had a conflict of interest." The ultimate settlement with the nursing home's insurer was $1.5 million.

"Ben gets very good care these days," Ms. Clements brags. "He's put on 30 pounds." NLJ