Arbitration Clauses and Class Action Waivers

Part I:

Do you have any sort of user agreement that appears when people sign on to your website? *Yes.*

Are they "clickwrap agreements," where a user has to read the terms of agreement and click "I agree" at the end? Or are they "browsewrap agreements," where there is simply a notice on the website that conditions use of the site on compliance with the terms of the notice? *Click-wrap, I think.*

What do the agreements say? *Well, there are two types—a free membership and a premium version that users pay a monthly fee to access.*

Did you bring a copy of the terms? *Yes, I printed them out; here you go.*

Part II:

I've read the terms of agreement that the Jacksons gave me. If we want to avoid having to deal with a class action in this case, I know a way we can beat it. The terms of agreement contain a mandatory arbitration clause and a waiver of the right to bring a class action. And it looks like the terms of agreement are indeed part of a "clickwrap agreement," which, generally is more likely to be enforced than if they were merely part of a "browsewrap agreement."

Clickwrap agreement/browsewrap agreement?

Here, let me explain. The making of contracts over the internet has not fundamentally changed the principles of contract—in order to be binding, a contact requires a "meeting of the minds" and a manifestation of "mutual assent." This requirement of manifestation of assent applies to arbitration agreements; therefore, clarity and conspicuousness of arbitration terms are important in securing informed consent.

On the Internet, several means of demonstrating mutual assent have developed. The two most common types of agreements are "clickwrap agreements" and "browsewrap" agreements. Those names come from an analogy to "shrink-wrap" agreements, or software license terms that the customer can't read until she has purchased the product and opened the shrink wrap packaging. With clickwrap agreements, the user manifests assent to the terms of a contract by clicking an "I accept" button in order to proceed. This is the kind that Familysafenetworks uses. Because clickwrap agreements require affirmative action on the part of the user to manifest assent, courts regularly uphold their validity when challenged. The first case that found that clickwrap agreements were enforceable was a porno case too--*Hotmail v. Van Money Pie*, a case in the Northern District of California back in 1998. Hotmail sued customers who were sending spam pornographic messages. Hotmail alleged in part that these actions were a violation of the terms of service agreement that each customer had to agree to when opening an email account. In granting a preliminary injunction in favor of Hotmail, the court found that evidence supported a finding that Hotmail would prevail on its breach of contract claim because it appeared that

for the revocation of any contract, did not preempt its ruling. However, in Concepcion, the Supreme Court held that the Discover Bank rule is preempted by the Federal Arbitration Act.

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. In line with the FAA, courts must place arbitration agreements on equal footing with other contracts, and must enforce them according to their terms. The Supreme Court explained that the point of arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. The Discover Bank Rule, which would allow any party to a consumer contract to demand classwide arbitration, interferes with arbitration because it sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. Class arbitration also greatly increases the risks to defendants; the absence of multilayered review makes it more likely that errors will go uncorrected; defendants are generally willing to accept these risks in arbitration since their impact is limited to the size of individual disputes and is outweighed by avoiding the courts of going to court; this is not so true if there is classwide arbitration.

So, basically, after Concepcion, I think we can enforce the arbitration agreement even though it does not allow for resolution of classwide claims.

Great, so let's file a motion to compel arbitration.

We may want to consider whether we want to oppose class certification. I suppose if we really think that this case is frivolous, and we want to prevent other people from suing our clients on for the same thing, we may want to get the class certified and get a ruling on the merits in our clients' favor.

Insurance Issues To Consider

1) Initial Determination for Your Client - Is there Coverage

2) Insurance

A) Insurance is, essentially, a contract by which one party gives a consideration, typically paid in money, in exchange for a promise from another party to make a return payment if a certain loss has occurred.

B) The contract of insurance includes not only the policy itself, which is the written form embodying the agreement of the parties, but also, depending on varying circumstances, the application riders, endorsements, statutes, charters, bylaws, and whatever else the parties agree will be part of the contract. See, e.g., First Far West Transp., Inc. v. Carolina Casualty Ins. Co., 47 Or App 339, 344, 614 P2d 1187 (1980)

3) Interpreting Insurance Contract

A) Oregon follows the general rule that except as otherwise dictated by statute or public policy, insurance policies are interpreted in a similar manner as ordinary business contracts between individuals, subject to the same general principles of construction.

i) The intent of the parties is key

Look to the plain language of the insurance contract

a) Look at defined terms

ii) Ambiguity

b) Look at the context of agreement

c) May be able to bring in extrinsic evidence

1. Purpose of the policy
2. Construction by parties
3. Custom and trade practices

d) If ambiguity persists interpret against the drafter

4) Proving Existence of Policies and Coverage

A) Burden

i) The initial burden of proving coverage is on the insured. Lewis v. Aetna Ins. Co., 264 Or 314, 316, 505 P2d 914 (1973).

ii) The insured's duty of proving that the cause of the loss was an insured peril also extends to proving that the policy was in effect when the loss occurred.

5) Liability Insurance

A) In General

i) The typical liability insurance policy indemnifies the insured for damages that the insured becomes legally obligated to pay under certain specified circumstances. In addition to indemnifying the insured, the liability insurance policy generally obligates the insurer to defend any lawsuit against an insured for damages that are payable under the terms of the policy. Furthermore, the insurer has the right and duty to settle a claim or suit.

B) Common Exclusions

i) The typical liability insurance policy contains several exclusions. An exclusion for intentional acts or injury, are common to all policies. Within an exclusion, it is not unusual to find an

insurer accepts defense, it undertakes fiduciary duties, the breach of which may result in tort damages. On the other hand, when an insurer merely denies its duty to defend, it has not undertaken any fiduciary duties.

ii) If the insurer fails to defend, it obviously loses not only its right to control the litigation, but also its right to insist on the insured's compliance with both prohibitive and affirmative policy provisions (e.g., the insured can settle the claim even if the policy would normally prohibit such a settlement).

iii) In some jurisdictions, if an insurer has wrongfully refused to defend, it is estopped from denying coverage. Because Oregon law does not allow the doctrine of estoppel to expand insurance coverage, Oregon has rejected the rule that an insurer may not contest coverage if it has wrongfully refused to defend its insured.

Forensic Analysis of computer systems: Things to consider

Defense Strategy: Unless the client has a document retention strategy that calls for recycling email, documents and other data on a regular schedule, clients will look very suspect if data goes missing shortly before they receive a request or subpoena for it. To the best of the client's ability, counsel should hire an expert consultant to make a "forensic image" of all the relevant electronic media of the company. This creates a bit-for-bit copy of our hard drives and/or other electronic media. If some of services are run off servers, the client may need to momentarily take them out of service to make the forensic image; depending on how many servers the client uses, they might be able to approach this task sequentially so that there will be minimal interruption to business, or it's possible they'll need to interrupt business for a day or two to accomplish this. Client should be informed of and prepared for this.

Beyond company servers, counsel may want to have a consultant take forensic images of laptops or personal computers of key employees who may know something about how the offending image got swept onto the system. Looking at internal emails could expand understanding of whether or not there have been similar incidents earlier, of which clients are unaware, or if there are any disgruntled/rogue players within the organization.

In the case of cloud based computing — the situation gets more complicated. The most the client can obtain is to give the consultant their active data (b/c they can take a snapshot of the active data which we back up to the cloud.) Beyond that, clients don't know where data is stored. Cloud severs often have so many servers in so many different locations providing the cloud based service that even they may not know where the information is stored.

Plaintiffs should be sent a letter of preservation. Counsel needs to decide from a financial perspective whether or not to use your own expert or their expert to make a forensic image of their computers. If using their expert, you need to make sure they are using an industry standard tool, such as Encase*, to make the forensic images. The letter of preservation should instruct them to make forensic images of all computers, laptops, smartphones, etc. that were used to access a client's website.

To be more thorough, you could have your expert examine the original computers and other devices used by the plaintiffs. Often times, it's critical to determine when something happened and so our expert, if examining their devices, can validate the system clock (which is the actual mother-based clock.)

*EnCase® Forensic, the industry-standard computer investigation solution, is for forensic practitioners who need to conduct efficient, forensically sounds data collection and investigations using a repeatable and defensible process. The proven, powerful, and trusted EnCase® Forensic solution, lets examiners acquire data from a wide variety of devices, unearth potential evidence with disk level forensic analysis, and craft comprehensive reports on their findings, all while maintaining the integrity of their evidence.

Joint Statement of Principles Governing Certain (as published on OSB's website) Lawyer-Press-Broadcasters Relationships

Oregon's Bill of Rights provides both for fair trials and for freedom of the press. These rights are basic and unqualified. They are not ends in themselves but are necessary guarantors of freedom for the individual and the public's rights to be informed. The necessity of preserving both the right to fair trial and the freedom to disseminate the news is of concern to responsible members of the legal and journalistic professions and is of equal concern to the public. At times these two rights appear to be in conflict with each other.

In an effort to mitigate this conflict, the Oregon State Bar, the Oregon Newspaper Publishers Association and the Oregon Association of Broadcasters have adopted the following statement of principles to keep the public fully informed without violating the rights of any individual.

1. The news media have the right and the responsibility to print and to broadcast the truth.

2. However, the demands of accuracy and objectivity in news reporting should be balanced with the demands of fair play. The public has a right to be informed. The accused has the right to be judged in an atmosphere free from undue prejudice.

3. Good taste should prevail in the selection, printing and broadcasting of the news. Morbid or sensational details of criminal behavior should not be exploited.

   Joint Statements of Principles 5 Current versions of this document are maintained on the OSB website: www.osbar.org

4. The right of decision about the news rests with the editor or news director. In the exercise of judgment he should consider that:

   (a) an accused person is presumed innocent until proved guilty;
   (b) readers and listeners are potential jurors;
   (c) no person's reputation should be injured needlessly.
   (d) Reporting on the eve of trial may prejudice potential jurors. Just prior to trial, stories reviewing a suspect's criminal history, incriminating statements, or other prejudicial detail should be avoided whenever possible.

5. The public is entitled to know how justice is being administered. However, it is unprofessional for any lawyer to exploit any medium of public information to enhance his side of a pending case. It follows that the public prosecutor should avoid taking unfair advantage of his position as an important source of news; this shall not be construed to limit his obligation to make available information to which the public is entitled. In recognition of these principles, the undersigned hereby testify to their continuing desire to achieve the best possible accommodation of the rights of the individual and the rights of the public when these two fundamental precepts appear to be in conflict in the administration of justice.

Guidelines For Disclosure and Reporting of Information on Criminal Proceedings

It is generally appropriate to disclose or report the following:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge.

3. The amount of bail.

4. The identity of and biographical information concerning both complaining party and victim.

5. The identity of the investigating and arresting agency and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit and weapons used.

It is rarely appropriate to disclose for publication or to report prior to the trial the following:

1. The contents of any admission or confession, or the fact that an admission or confession has been made.

2. Opinions about an arrested person's character, guilt or innocence.

3. Opinions concerning evidence or argument in the case.

4. Statements concerning anticipated testimony or the truthfulness of prospective witnesses.

5. The results of fingerprints, polygraph examinations, ballistic tests or laboratory tests.

6. Precise descriptions of items seized or discovered during investigation.

7. Prior criminal charges and convictions.

8. Evidentiary details that were excluded in prior judicial proceedings in the same case.

Photography

1. Photographs of a suspect may be released by law enforcement personnel provided it doesn't interfere with enforcement of the law. It is proper to disclose such information as may be necessary to enlist public assistance in apprehending fugitives from justice. Such disclosure may include photographs as well as records of prior arrests and convictions.

2. Law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. However, they should not pose the defendant.

Joint Statements of Principles

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The above Guidelines are supplemental to and should be interpreted with the "Oregon Bar-Press-Broadcasters Joint Statement of Principles" adopted in 1962.

The Guidelines are cautionary, not mandatory. They do not prohibit release of, or publication of, information needed to identify or aid in the capture of a suspect or information required in the vital public interest after arrest. Neither do they proscribe publication of information which is already in the public domain.

Oregon Rules of Professional Conduct
(effective January 1, 2005 and amended effective December 1, 2006)

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

See Formal Bar Ethics Opinion (under RPC 3.6): **Formal Opinion No. 2007-179**:

http://www.osbar.org/_docs/ethics/2007-179.pdf

Code of Professional Responsibility
(effective through December 31, 2004)

DR 7-107
Trial Publicity

(A) A lawyer engaged in a matter shall not make an extrajudicial statement pertaining to that matter that a reasonable person would expect to be disseminated by means of public communication if the statement poses a serious and imminent threat to the fact finding process in a governmental adjudicative proceeding and if the lawyer either intends to affect that process or reasonably should know that the statement poses such a threat and acts with indifference to that effect.

(B) The foregoing provision of DR 7-107 does not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative or other investigative bodies.

(C) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107(A).

Interesting and Noteworthy Cases (under former rule, DR 7-107)

In re Laswell, 296 Or 121, 673 P2d 855 (1983): Court found no violation where DA reported that the people arrested sold narcotics and that he expected a high conviction rate:

> "[It is] not whether the tribunal believes that the lawyer's comments impaired the fairness of an actual trial, which may or may not have taken place. The question, rather, is the lawyer's intent or knowledge and indifference when making published statements that were highly likely to have this effect." *Id.* at 126.

In re Burrows, 290 Or 131, 618 P2d 1283 (1980): Court found no violation where DA read homicide defendant's letter to high school students while defendant's case was pending. DA did not intend to reach the media, and the letter was not likely to have any prejudicial effect. Defendant's letter expressed regret for unspecified events only, and thus its relationship to the pending charges was tenuous.

In re Richmond, 285 Or 469, 591 P2d 728 (1979): Court found no violation where 1000 Friends of Oregon attorney wrote letter to the governor regarding an administrative proceeding initiated by the attorney on behalf of private parties concerning a land use decision, and then mailed the letter to various legislators and newspaper editors. Court held that the proceeding was not the type covered by the rule, and was unlikely to interfere with the fair adjudication of factual issues because the letter did not request the governor or anyone else to enter the land use proceeding.

In re Porter, 268 Or 417, 521 P2d 345 (1974): Court found violation where attorney made several statements during the pendency of the case he was litigating on behalf of the husband of a woman who died of hypothermia while engaged in an Outward Bound program. Attorney made several statements regarding the program's failure to tell the women the dangers of the cold and hypothermia, and that the offer of settlement was inadequate.

> "Such continual haranguing of the public through the news media about the virtues of his client's case and the vices of the opposition would tend to have had some effect and was certainly unprofessional." *Id.* at 422-23.

As an initial matter, we need to consider the utility of moving to have the action filed against our client dismissed as an improperly filed class action. Such motion would be based on the 2010 U.S. Supreme Court decisions in the cases of Wal-Mart Stores v. Dukes 131 S. Ct. 795, 178 L. Ed. 2d 530 (2010) and AT&T Mobility, LLC v. Concepcion et ux. 130 S. Ct. 3322, 176 L. Ed. 2d 1218 (2010), both of which are summarized below. It is virtually certain that our motion would succeed on the basis of AT&T making Dukes a less significant case, a happy situation for our client given that the class in the present case is small and discrete enough that it might survive a Dukes challenge.

Wal-Mart Stores v. Dukes 131 S. Ct. 795, 178 L. Ed. 2d 530 (2010).

This sexual discrimination lawsuit was the largest civil rights class action suit in United States history. It charged Wal-Mart with discriminating against women in promotions, pay, and job assignments in violation of Title VII of the Civil Rights Act of 1964.

The case started in 2000, when a 54-year-old Wal-Mart worker in California named Betty Dukes filed a sex discrimination claim against her employer. Dukes claimed that, despite six years of hard work and excellent performance reviews, she was denied the training she needed to advance to a higher salaried position. Wal-Mart's position was that Dukes clashed with a female Wal-Mart supervisor and was disciplined for admittedly returning late from lunch breaks.

In June 2001, the lawsuit began in U.S. District Court in San Francisco. The plaintiffs sought to represent 1.6 million women, including all those who work or have previously worked in a Wal-Mart store since December 26, 1998. In June 2004, the federal district judge, Martin Jenkins, ruled in favor of class certification under FRCP 23(b)(2). Wal-Mart appealed the decision.

On February 6, 2007, a three-judge panel of the Ninth Circuit affirmed the district court's class certification.

On March 24, 2009 a panel of eleven Ninth Circuit judges, led by Chief Judge Alex Kozinski, heard oral arguments for the En Banc appeal On April 26, 2010, the en banc court affirmed the district court's class certification on a 6-5 vote.

On December 6, 2010, the Supreme Court agreed to hear Wal-Mart's appeal as Wal-Mart v. Dukes. Oral argument for the case occurred on March 29, 2011.

On June 20, 2011, the Supreme Court ruled in Wal-Mart's favor, saying the plaintiffs did not have enough in common to constitute a class

Although two statisticians gave evidence that Wal-Mart promoted fewer women than men, and fewer women than its competitors did, the question before the Supreme Court judges was not, in fact, whether the giant retailer discriminated against women. It was whether the women had suffered a single wrong that allowed them to sue Wal-Mart as a block. This required

showing that an identifiable policy had had a disparate impact on women. But Wal-Mart's policy actually prohibited sex discrimination, and the company punished those who violated this policy.

This left the employees' lawyers trying to weave several threads into a coherent theory. First, they claimed that a "culture" inimical to women existed. Second, they noted that Wal-Mart's policy was to give local managers broad discretion in hiring decisions. They relied on a sociologist who claimed that these together would make it likely that many individual promotion decisions would go against women.

Justice Antonin Scalia, writing for the majority that sided with Wal-Mart, noted that the sociologist could not put any numerical estimate on what share of decisions went against women because of bias. He would not even be drawn on whether 0.5% or 95% of decisions were determined by bias. This uncertainty was "worlds away" from satisfying the commonality test, wrote Judge Scalia. Whether 0.5% or 95% of women suffered sex discrimination was exactly the issue in certifying a class.

The effect of the case will not be to kill class-action suits, but probably to trim class sizes. The court has laid down a standard that the commonality of a class cannot be presumed just because all presumptive members feel the same grievance. Some level of proof is needed that a single wrong (say, a biased promotion test) affected them all: a "culture of bias" is not enough. This forces a would-be class to prove part of the merits of their case at the procedural stage, rather than in a full trial. Knowing that the Supremes have raised the bar, this makes it likely that lawyers will tell would-be classes to keep their claims narrow and specific

AT&T Mobility, LLC v. Concepcion et ux. 130 S. Ct. 3322, 176 L. Ed. 2d 1218 (2010).

In 2006, Vincent and Liza Concepcion sued AT&T Mobility over their mobile phone contract, contending that the cell phone company had engaged in deceptive advertising by falsely claiming that their wireless plan included free cell phones. Their suit became a class action. AT&T asked the U.S. District Court for Southern California to dismiss the suit, because in their contract with the company, the Concepcions had agreed to use an individual arbitration process, rather than filing any class-action lawsuits. The district court declined to dismiss the suit, ruling that California law prohibits contracts that unfairly exculpate one party from its wrongdoing, such as clauses that do not allow class action lawsuits in consumer adhesion contracts where the individual damages are small. AT&T appealed the case, saying that the Federal Arbitration Act should preempt state law. On October 27, 2009, the Ninth Circuit Court of Appeals upheld the lower court decision. AT&T then appealed to the Supreme Court.

The majority opinion was written by Justice Antonin Scalia, and joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito. "Requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration," Scalia wrote. "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."

The minority opinion was written by Justice Stephen Breyer, and joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Breyer stated that class arbitrations are appropriate ways to resolve claims that are minor individually but significant in the aggregate. "Where does the majority get its contrary idea — that individual, rather than class, arbitration is a fundamental attribute of arbitration?" He said that without class actions, minor frauds would not be remedied. "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"

There's no denying that it's now much, much easier for large businesses to contract their way out of class-action lawsuits. Congress can, if it so desires, amend the FAA to nullify this decision but, with Congress being what it is, who knows when this will happen, if ever. So, for the foreseeable future, it appears that businesses will be able to place arbitration agreements in their contracts, effectively doing away with the right of consumers to file class-action lawsuits.

In addition to the procedural problems with the case being filed as a class action, there are serious questions regarding the causes of action brought under IIED and NIED theories as outlined below.

Elements Of Intentional Infliction of Emotional Distress

To plead the tort of intentional infliction of emotional distress, the plaintiff must allege facts showing that:

(1) The "defendant intended to inflict severe mental or emotional distress" or that the distress is certain or substantially certain to result from the defendant's conduct;

(2) The defendant's acts "in fact caused] the plaintiff severe mental or emotional distress"; and

(3) The defendant's acts consisted of "'some extraordinary transgression of the bounds of socially tolerable conduct'" or exceeded "'any reasonable limit of social toleration.'" *Patton v. J.C. Penney Co.,* 301 Or 117, 122, 719 P2d 854 (1986) (quoting *Hall v. The May Dept. Stores.* 292 Or 131, 135, 137, 637 P2d 126 (1981)).

Many appellate cases have been decided on the defendant's ORCP 21 motions against the complaint. The plaintiff should allege facts showing the elements with some specificity, including all the actions of the defendant that, when taken together, show the extraordinary transgression of the bounds of socially tolerable conduct. Any "special relationship" or known susceptibility of the plaintiff should also be alleged. *See* §§3.5, 3.9, 3.12, *infra.*

A. Infliction

1. Intentional Infliction

For purposes of intentional infliction of severe emotional distress, *intent* means that the actor desired to inflict severe emotional distress, or that the distress is certain or substantially

certain to result from the actor's conduct. *McGanty v. Staudenraus.* 321 Or 532, 550, 901 P2d 841 (1995) (adopting definition of *intent* from Restatement (Second) of Torts §8A (1965)); *Babick v. Oregon Arena Corp..* 333 Or 401, 40 P3d 1059 (2002) (to state claim for intentional infliction of severe emotional distress, plaintiff must allege either that defendant desired to inflict severe emotional distress or that defendant knew that such' distress was substantially certain to result from volitional act).

2. Reckless Infliction

Conduct that is merely "reckless" does not satisfy the element of intent in an action for intentional infliction of emotional distress. *See sneal v. Metropolitan Prop. & Cas. Ins. Co.,* 909 F Supp 775, 779 (D Or 1996), *aff'd.* 116 F3d 486 (9th Cir 1997) (no claim for reckless infliction of emotional distress exists under Oregon law after *McGanty* ***v. Staudenraus,*** 321 Or 532, 901 P2d 841 (1995)); *Logan v. West Coast Benson Hotel.* 981 F Supp 1301, 1322 (D Or 1997) (same).

> COMMENT: Section 46 of the Restatement (Second) of Torts (1965) specifically allows recovery for the reckless infliction of severe emotional distress. Although the court in the *McGanty* case adopted certain elements of §46, it specifically did not adopt the recklessness standard articulated in that section. The court repudiated a long line of cases that allowed recovery for intentional infliction of emotional distress when the defendants' conduct was reckless and when a "special relationship" existed between the parties. See, e.g., cases cited in §3.5, *infra.*

3. Special Relationship

Before 1995, Oregon case law required proof that the defendant intended to cause emotional distress to the plaintiff or that a "special relationship" existed between the parties, and that the defendant acted despite a "high probability" that his or her conduct would cause severe emotional distress to the plaintiff. *See. e.g.. Hall v. The May Dept. Stores.* 292 Or 131, 135, 637 P2d 126 (1981); *Bodewig v. K-Mart. Inc..* 54 Or App 480, 485, 635 P2d 657 (1981); *Williamson v. McKenna.* 223 Or 366, 394-399, 354 P2d 56 (1960).

In *McGanty v. Staudenraus.* 321 Or 532, 543-551, 901 P2d 841 (1995), the Oregon Supreme Court held that the relationship between the parties had no bearing on the level of intent necessary to establish the tort of intentional infliction of severe emotional distress. In every case, the plaintiff must establish that the defendant intended to inflict severe emotional distress or knew that severe emotional distress was substantially certain to result from the defendant's conduct. Although the relationship between the parties has no bearing on the issue of intent, it has a significant bearing on the potential characterization of the conduct as extreme or outrageous. *See, e.g.. Delaney v. Clifton,* 180 Or App 119, 130-131, 41 P3d 1099 (2002); *see also* §3.12, *infra.*

B. Severe Emotional Distress

1. Emotional Distress

Emotional distress includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry." RESTATEMENT (SECOND) OF TORTS §46 comment j (1965). Emotional distress must be real and in fact exist. *Rockhill v. Pollard.* 259 Or 54, 63, 485 P2d 28 (1971); *Hall v. The May Dept. Stores.* 292 Or 131, 135, 637 P2d 126 (1981).

No objective evidence of the severe emotional distress, such as medical, economic, or social problems, is required. In *Bodewig v. K-Mart, Inc.,* 54 Or App 480, 488, 635 P2d 657 (1981), the plaintiff characterized herself as a shy, modest person, and said that she suffered two or three sleepless nights, cried a lot, and still became nervous and upset when she thought about being strip-searched for a customer's money. The court held that this was sufficient evidence of severe emotional distress to be submitted to a jury.

Expert medical testimony is not necessary to establish causation in an action for intentional infliction of emotional distress. *Peery v. Hanlex,* 135 Or App 162, 165, 897 P2d 1189, *adhered to on reams..* 136 Or App 492 (1995) (plaintiff's testimony that she experienced symptoms of emotional distress as result of defendant's conduct was sufficient to establish causation).

2. Emotional Distress Must Be Severe

The emotional distress must be severe. *Rockhill v. Pollard.* 259 Or 54. 63, 485 P2d 28 (1971) (distress must be more than mild and transitory); *Pakos v. Clark,* 253 Or 113. 131-132. 453 P2d 682 (1969) (same). The intensity and duration of the distress are factors in determining its severity. *Checklev v. Boyd,* 170 Or App 721. 742-743, 14 P3d 81 (2000).

Although severe distress must be proved, "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." RESTATEMENT (SECOND) OF TORTS §46 comment j (1965). *See. e.g., McGregor v. Barton Sand & Gravel. Inc.,* 62 Or App 24, 33, 660 P2d 175 (1983).

3. Reasonable Person of Ordinary Sensibilities Would Suffer

The distress must be such that a reasonable person of ordinary sensibilities would suffer under the circumstances. W. PAG!-: KRCTON ET AL.. PROSSER AND KEETON ON THE LAW OF TORTS §12, at 63 (5th ed 1984 & Supp 1988). There is no liability when a person suffers from exaggerated and unreasonable emotional distress unless it results from a peculiar susceptibility of which the defendant has knowledge. RESTATEMENT (SECOND) OF TORTS §46 COMMENT J (1965); PROSSER AND KEETON ON TORTS, *supra..*

4. Plaintiffs with a Peculiar Susceptibility

If the plaintiff is particularly susceptible to emotional distress because of a preexisting physical or mental condition, and the defendant is aware of this fact, the plaintiff may have a cause of action for infliction of mental distress even though a reasonable person of ordinary

sensibilities would not suffer extreme emotional distress. Again. however, the conduct must constitute an "extraordinary transgression of the bounds of socially tolerable conduct." *Hall v. The May Dept. Stores,* 292 Or 131, 135, 637 P2d 126 (1981). The fact the actor knows that the conduct will be regarded by the plaintiff as insulting or will hurt the plaintiff's feelings is not enough. *Tinman v. Central Billing Bureau,* 279 Or 443, 445, 568 P2d 1382 (1977) (plaintiff was blind); *Pakos v. Clark,* 253 Or 113. 123, 129, 453 P2d 682 (1969); *Fitzpatrick v. Rabbins,* 51 Or App 597, 602-603, 626 P2d 910 (1981) (plaintiff was elderly and disabled); *Graf v. Don Rasmussen Co.,* 39 Or App 311, 321-322, 592 P2d 250 (1979); RESTATEMENT (SECOND) OF TORTS §46 comment f (1965); W. PAGE KEETON ET AL.. PROSSER AND KEETON ON THE LAW OF TORTS §12, at 62 (5th ed 1984 & Supp 1988).

Conversely, a plaintiff may have a physical or mental condition that prevents the plaintiff from experiencing extreme emotional distress. In such a case, the defendant is not subject to liability even though the defendant's conduct transgressed the bounds of socially tolerable conduct. *See, e.g., Checkleyv. Boyd.* 170 Or App 721, 742-743, 14 P3d 81 (2000).

Negligent Infliction of Emotional Distress

"The area is a mess. I would avoid it if you have alternatives. Why bother?" David Paul

"I plead it once more than 10 years ago and judge Marcus granted motion to dismiss. As I remember, he told me that the law was not the way I wanted it to be even though he wished it was that way, he must grant the motion."

A. Negligence Defined

Negligence is generally defined as "conduct falling below the standard established for the protection of others, or one's self, against unreasonable risk of harm." *Woolston* v. *Wells,* 297 Or 548, 557, 687 P2d 144 (1984).

B. Negligence Elements

A person may be held liable for his or her negligent conduct or omission only when the conduct or omission is a substantial factor in causing foreseeable injuries to another.

The elements necessary to state a claim for common-law negligence follow:

(1) A "foreseeable risk of harm";

(2) The "risk is to an interest of a kind that the law protects against negligent invasion";

(3) The conduct was unreasonable in light of the risk;

(4) The "conduct was a cause of [the] harm"; and

(5) The plaintiff was a member of the class of persons and the plaintiffs injury was within the "general type of potential incidents and injuries that made defendant's conduct negligent." *Solberg v. Johnson,* 306 Or 484, 490-491, 760 P2d 867 (1988).

C. The Oregon Approach

In 1987, the Oregon Supreme Court restated the method of analysis to be used in negligence actions. *See Fazzolari v. Portland School Disi. No. U,* 303 Or 1, 734 P2d 1326 (1987).

In common-law negligence actions, the defendant's liability for the plaintiff's injury depends on whether the defendant's conduct "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari, supra,* 303 Or at 17. The plaintiff must prove that the defendant's conduct was negligent and that the defendant's negligent conduct resulted in the plaintiff's injury.

The *Fazzolari* case and its companion cases, *Donaca v. Curry Co.,* 303 Or 30, 734 P2d 1339 (1987), and *Kimbler v. Stillwell,* 303 Or 23, 734 P2d 1344 (1987), *overruled,* 316 Or 499 (1993) (the *"Fazzolari* trilogy"), were an attempt by the court to reject a perceived overuse of the old cliché,, "'duty' or "no duty,'" and to encourage courts and juries to decide each case on its own facts. However, the *Fazzolari* trilogy did not completely supplant the element of "duty" in all negligence actions. Duty continues to play an affirmative role when the parties invoke a particular status, relationship, or standard of conduct beyond the generalized standards of common law, which creates, defines, or limits the defendant's conduct in that particular case.

A defense of "no duty" in a common-law negligence action is simply a request to the court to limit the defendant's liability because (1) the harm was not foreseeable or (2) some rule or status disqualifies the plaintiff, individually or as a class member, from recovering damages. *See Yowell* v. *General Tire & Rubber,* 260 Or 319, 325, 490 P2d 145 (1971) ("A person who orders repairs or work to be done by a third party owes no duty to such third party or his workman to discover and warn of any unknown dangerous conditions surrounding the work which fall within a special expertise or knowledge, not shown to have been had by the person ordering the work, and which the third party impliedly represents to the public that he possesses."); *see also Esko v. Lovvold,* 272 Or 27, 30, 534 P2d 510 (1975). In *George v. Myers,* 169 Or App 472, 488 n 13, 10 P3d 265 (2000), the court explained that, "[r]ecast in *posi-Fazzolari* terms, *YowelVs* rule is that the relationship between a . . . contractor and a specialized subcontractor embodies a special 'status' or 'relationship,' taking precedence over application of ordinary principles of general foreseeability."

This chapter discusses the elements of negligence actions using the methodology set forth in the *Fazzolari* trilogy as refined by *Buchler* v. *Oregon Corrections Div.,* 316 Or 499, 853 P2d 798 (1993), and subsequent case law.

In *Donaca, supra,* the plaintiff was riding a motorcycle on a county road when he collided with a car entering from a private road. Tall grass on the public right-of-way obscured motorists' vision at the intersection. The plaintiff sued the county, claiming that the county had been negligent in failing to keep the grass cut. The trial court dismissed the complaint, and the court of appeals affirmed on the ground that the county had no duty to control the vegetation at that intersection. The supreme court reversed and remanded, holding that it was for the jury to determine whether the county's failure to maintain the vegetation created a foreseeable risk to a protected interest and whether the county's conduct was unreasonable in light of that risk. *Donaca, supra,* 303 Or at 38-39.

In the *Fazzolari* case, the plaintiff, a high school student, was assaulted and raped as she was about to enter her school at 7:00 a.m. The plaintiff sued the school district for damages, claiming that the school administrators were negligent in failing to provide security personnel, failing to warn students, and failing to provide adequate supervision of students. The trial court granted the defendant's motion for a directed verdict. The court of appeals reversed and the Supreme Court affirmed. The Supreme Court reviewed the concepts of duty and foreseeability and restated the analysis to be used in negligence cases. Under the circumstances of this case, the court determined that a reasonable jury could find that school administrators should have taken some precautions to avoid the type of injuries sustained by the plaintiff. *Fazzolari, supra,* 303 Or at 21-22.

In the third prong of the *Fazzolari* trilogy, *Kimbler, supra,* 303 Or at 27-28, the court held that it was for the jury to determine whether lightly secured firearms in a retail store might foreseeably be stolen and then used against third persons. The court stated that the fact that the decedent was killed by an intentional, even criminal, act of a third person did not preclude a finding of liability if the act was a foreseeable risk facilitated by the retail store's alleged negligence. However, the Oregon Supreme Court overruled *Kimbler, supra,* in *Bitchier, supra,* 316 Or at 511-512, holding that "mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it."

The court in the *Buchler* case followed the method of analysis for negligence cases set forth in *Fazzolari, supra,* but concluded that the *Kimbler* case had gone too far. The court made clear that not "all negligence claims based on general foreseeability of a plaintiff s-harm would reach the jury." *Bitchier, supra,* 316 Or at 510 n 8.

The plaintiffs in the *Buchler* case sought damages for injuries caused by a state prisoner who escaped from custody while on a work crew at a forest camp. The prisoner escaped in a state van in which the keys had been left. Two days later, the prisoner shot two persons with a gun that he had stolen from his mother's home. The plaintiffs' claims were broken down into three categories: (1) liability of the defendant as a jailor having custody of a prisoner, (2) liability based on the failure to warn of risks, and (3) liability based on a general foreseeability principle.

The court's analysis in *Buchler* began with consideration of the defendant's status as a jailor because that status was raised by the parties. Determining whether a particular status, relationship, or rule defines a defendant's duty is the first step in analyzing a negligence claim under *Fazzolari.* The court held that the common-law rule delineated in Restatement (Second) of Torts §319 (1965) was the defining rule of a custodian's duty concerning a prisoner in Oregon. *Buchler, supra,* 316 Or at 506. The question under §319 of the Restatement was whether the defendant knew or should have known that the prisoner was likely to cause harm if he escaped. Because the prisoner's criminal history involved only property crimes, and because the shootings occurred two days after the escape, the evidence would not allow a reasonable jury to so conclude. Awarding summary judgment to the defendant on that claim was proper. *Buchler, supra,* 316 Or at 506-507.

The court then analyzed the question of general negligence based on foreseeability of the risk of harm. Analyzing foreseeabihty is the second step of the analysis under *Fazzolari.* With respect to the allegations of failure to warn, no evidence showed that the defendant knew or should have known of the specific risk of harm presented by the prisoner to the plaintiffs. Without knowledge of the risk, there was no duty to warn. *Buchler, supra,* 316 Or at 514-515.

Regarding the claim based on the defendant's having left the keys in the van, the court concluded as a matter of law that the harm actually sustained by the plaintiffs did not result from a risk that was unreasonably created by leaving the keys in the van. *Buchler, supra,* 316 Or at 514.

More recent Oregon cases continue to follow the general approach set forth in the *Fazzolari* trilogy as refined by the *Buchler* opinion. The first step is to determine whether a particular status, relationship, or standard of conduct is raised by the parties. If so, then an analysis of that status, relationship, or standard must be undertaken to determine whether liability exists. If such a status, relationship, or standard of conduct is not alleged, then the next step is to analyze the case under principles of general negligence based on foreseeability of the risk of harm. In this regard, the *Buchler* decision effectively limited the scope of foreseeable harms for which a defendant can be held liable to *reasonably* foreseeable harms. *Washa* v. *DOC,* 159 Or App 207, 222, 979 P2d 273 (1999), *ajfd by equally divided court,* 335 Or 403 (2003). However, Oregon courts have declined to extend the *Buchler* rationale to cases other than those involving intervening intentional criminal conduct; intervening negligent conduct is not unforeseeable as a matter of law. *Knepper* v. *Brown,* 182 Or App 597, 622, 50 P3d 1209 (2002).

Regarding **Negligent Infliction of Emotional Distress** Oregon subscribes to the physical impact rule. That is, damages arising from purely emotional or psychological upset (that is, negligent infliction of emotional distress or NIED) are not typically recoverable for a defendant's unreasonable actions or failure to act unless there is an accompanying physical impact to the party seeking relief, no matter how slight. *Saechao v. Matsakoun,* 78 Or App 340, 341 n1, 348, 717 P2d 165 (1986) (no cause of action against driver by children who witnessed younger brother get run over and smashed into wall by vehicle). Note that the physical impact rule does not apply in cases of intentional infliction of emotional distress.

The singular exception is that NIED "may be actionable without physical injury if the negligent conduct infringed on an interest beyond those that are protected under the general obligation to exercise reasonable care to prevent foreseeable harm." *Paul v. Providence Health System-Oregon,* 237 Or App 584, 593, 240 P3d 1110 (2010) (no NIED by current and former patients for lost medical records). *See also Hammond v. Cent. Lane Communications Ctr.,* 312 Or 17, 28, 816 P2d 593 (1991) (no NIED for delayed response to 911 call and lack of medical response to unincorporated area); *Norwest v. Presbyterian Intercommunity Hospital,* 293 Or 543, 558–559, 652 P2d 318 (1982) (Oregon "has recognized common law liability for psychic injury alone when defendant's conduct was either intentional or equivalently reckless of another's feelings in a responsible relationship, or when it infringed some legally protected interest apart from causing the claimed distress, even when only negligently").

Thus, when the direct physical impact required for an intentional negligence action is lacking, a claim for NIED will lie (1) when the victim suffers severe emotional distress from the

defendant's act or omission; (2) when the invasion of a protected interest is of a sufficient quality or magnitude to warrant recovery of emotional distress damages; and (3) when the negligent party had either a special relationship or a specific legal duty to protect the victim from the particular source of harm. Illustrative cases include *Curtis v. MRI Imaging Servs. II,* 148 Or App 607, 621, 941 P2d 602 (1997) (relationship between plaintiff and defendant medical professionals was a legally protected interest, and invasion of that interest permitted plaintiff to recover emotional distress damages without any showing of concurrent physical injury); N*earing v. Weaver,* 295 Or 702, 707, 670 P2d 137 (1983) (recovery for police officer's failure to arrest estranged husband pursuant to restraining order because a "specific duty [was] imposed by statute for the benefit of individuals previously identified by a judicial [restraining] order"); *Shin v. Sunriver Preparatory Sch., Inc.,* 199 Or App 352, 365–366, 111 P3d 762 (2005) ("the relationship between an international homestay student and a school, under the circumstances presented here, gave rise to such a heightened duty on the part of the school to protect the student from emotional harm and that the student's legally protected interest is sufficiently important to support the imposition of liability for negligently causing emotional harm").

Note: In the *Shin* case, the boarding school expelled a foreign teenage student after her mother withdrew releases that had allowed the school to be privy to the girl's counseling sessions. The girl was in counseling because weeks earlier the school had allowed the girl's father—whom they knew had molested her in the past—to have time alone with her during his visit to the school, whereupon he again molested her several times.

In the childhood sexual abuse context, an NIED claim would seem to be rarely necessary because physical harm (sexual battery) almost always occurs during incidents of abuse. *But see Schmidt v. Mt. Angel Abbey,* 347 Or 389, 233 P3d 399 (2009) (plaintiff seminarian required to watch priest masturbate beneath his cassock)