



Message from the CEO

By Carol J. Bernick, PLF Chief Executive Officer

The 2019 PLF assessment will drop \$200 to \$3,300. This is the first change to the assessment since 2011 and the first time the assessment has been reduced since 2000. Discounts for new lawyers will remain the same: 40% for the first 12 months of practice and 20% for 13 to 36 months of practice.

2017 was a remarkably successful year financially for the PLF. The combination of a lower claim count than anticipated, lower claim costs than anticipated, and significant investment gains resulted in the Fund exceeding its retained earnings (aka “net position”) goal of \$13.3 million. The PLF must maintain a reserve of funds in order to help fund operations and to protect against adverse claim development, among other contingencies. Once we exceeded our net position goal, the PLF Board of Directors undertook a comprehensive review of the assessment.

The PLF Board is committed to maintaining a stable assessment. We do not want to raise (or lower) the assessment annually if it can be avoided. The stability provides predictability for both the Covered Parties and the organization. It helps ensure that despite general inflation and rising costs, we are careful stewards of the funds. Thus, any decision to change the assessment comes with an analysis of our ability to maintain that assessment for a reasonable period into the future. To do that, the Board evaluated the current and likely future claim count, cost of claims, and operation costs. It also considered the potential for a decline in Covered Parties given the demographics of the Bar. Finally, as it has always done, the Board considered the assessment recommendation from our outside actuaries. Taking all of that into consideration, it concluded that a reduction in the assessment to \$3,300 was appropriate and a level we could likely maintain into the reasonable future. The Board of Governors approved that assessment at its September 21, 2018, meeting.

The fiscal health of the PLF will always be the key driver of our assessment decisions, and we will continue to evaluate the appropriate assessment on an annual basis. ■



Professional Liability Fund

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Judgment Enforcement – the Other Pre-Litigation Analysis

By Laurie R. Hager

Lawyers should, and typically do, evaluate the merits of their clients' claims before recommending to file a lawsuit. However, not all lawyers conduct a pre-litigation analysis of what will happen after the hopeful big win. This can lead to potential problems, as the following scenario demonstrates.

Picture this. You knew the case was a winner the moment you first reviewed your client's documents. You did an excellent job at trial. Your witnesses were compelling and you nailed your closing argument. You just received notice that the jury has finished deliberations and is ready to render a verdict. Your excitement mounts as the jury reads the sweet sound of millions of dollars awarded to your client on your client's claims for economic losses arising from a breach of contract. Enjoy that moment. Go ahead and splurge on the celebration, because the days that follow may be a real downer for you and your client. Why?

Because you sued on claims not covered by insurance and, after fighting the lawsuit, the defendant barely has the assets to pay the expense of enforcing the judgment, much less the judgment itself. Now your client is very upset that it has spent a fortune on legal fees to get a favorable verdict, but it has nothing to show for it.

How can you potentially avoid this bittersweet and sour result? Here are a few suggestions.

First, before you file a lawsuit, ask the client for permission to conduct an asset search on the potential defendant from sources available to the public (such as real property records, UCC filings, DMV records, lawsuits, and judgments). What you learn from this due diligence may play a role in how you manage the case, including whether your client decides to sue and, if so, where you decide to sue.

Second, as you and your client discuss the results of the asset search, you can explain what steps are necessary to collect the judgment from those assets. For example, if there is a real property asset, consider whether there are prior encumbrances on the property and, if so, what might happen if you executed on a junior judgment lien. If the potential defendant has personal property assets, consider where those assets are located, whether other parties have potential interests in the assets, and the logistics involved in executing on them. Comparing these costs to the expected value of the non-exempt equity in the assets will allow you to better conduct the cost-benefit analysis.

Third, consider whether there are any valid claims that may be covered by an insurance policy, such that insurance money may be available to pay any potential judgment or settlement of the claim.

Fourth, if you determine the claim is not substantially collectible, consider alternative resolutions to suing.

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Perhaps the parties can resolve the dispute quicker and more economically through pre-litigation mediation or another alternative dispute resolution process. For example, in a dispute over the balance due on a business account, the parties may agree to jointly use a neutral forensic accountant to decide the balance due. The goal with one of these alternative dispute resolution options is to achieve a relatively quick resolution and save your client the attorney fees, expert fees, and all the other fees and costs that would otherwise be spent on litigation. An alternative dispute resolution option could also maximize the defendant's funds available to pay the claim, before it spends the funds on defending a lawsuit.

The economic realities of litigation and judgment

enforcement can certainly be disappointing to a party that has a valid claim (or defense). Waiting until after the client has spent money on your legal fees to receive nothing more than an electronic document (the modern judgment) that cannot be redeemed for payment can cause client relations issues. Addressing the issue at the front end typically helps set your client's expectations and may lead to a better result. ■

Laurie R. Hager is a commercial litigator at Sussman Shank LLP. This article is not intended as legal advice. If you want to discuss any of the issues in this article, feel free to call Laurie at 503-227-1111 or email her at lhager@sussmanshank.com.

Adjusted Public Body Tort Liability Limits

Effective July 1, 2018, the Office of the State Court Administrator (OSCA) has calculated the annual adjustment to the limitations on liability of state and local public bodies for personal injury, death, and property damage or destruction using the statutory formula identified in ORS 30.271(4), 30.272(4), and 30.273(3). Based on these calculations, the limitations are adjusted as shown in this table:

PUBLIC BODY	CLAIMANT(S)	CLAIM	ADJUSTED LIMIT
state	single	injury or death	\$ 2,181,600
state	multiple	injury or death	\$ 4,363,100
local	single	injury or death	\$ 727,200
local	multiple	injury or death	\$ 1,454,300
state or local	single	property damage or destruction	\$ 119,300
state or local	multiple	property damage or destruction	\$ 596,400

These new limitations became effective on July 1, 2018, and apply to all causes of action arising on or after July 1, 2018, and before July 1, 2019.

OSCA opened a public comment period on the adjustments from March 15, 2018, to 5:00 p.m. on May 11, 2018. The OSCA received no public comment.

A list of past and current limitations on liability of public bodies can be found on the Oregon Judicial Department website at <http://www.courts.oregon.gov/Pages/tort.aspx>.

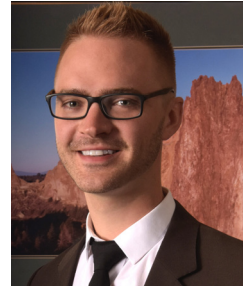
Please submit questions or comments to Bruce.C.Miller@ojd.state.or.us.

Welcome, Lee!

Lee Wachocki received his BA from the University of Michigan and his JD and Certificate of Completion in Criminal Law from the University of Oregon. He is a member of the Oregon Criminal Defense Lawyers Association, and the American Bar Association Practice Management work group.

Prior to joining the Professional Liability Fund in 2018, Mr. Wachocki practiced law as a sole practitioner, with Multnomah Defenders, Inc., and as an associate in several law firms. His practice areas included criminal defense, family law, and civil litigation.

In his role as a practice management advisor for the PLF, Mr. Wachocki provides practice management assistance to Oregon attorneys to reduce their risk of malpractice claims and enhance their enjoyment of practicing law. His assistance is free and confidential.



The PLF Practice Management Advisors write for the PLF's *inPractice* blog and tweet technology and practice management tips on Twitter (www.twitter.com/osbplf). To view their blog posts, visit www.osbplf.com/inpractice. ■

Excess Corner

As we enter the 2019 Excess application cycle, we are pleased to announce the addition of an online payment option for PLF Excess-covered law firms. The online payment process is now part of the Excess Portal. The portal, developed in 2017 in response to lawyers' requests for an electronic renewal process, allows law firms to log in, review and complete their renewal application, view coverage quotes, and obtain declarations.

We estimate that over 90% of the applications during the 2018 renewal period were completed and submitted via the Portal. Having the applications arrive electronically dramatically reduced processing time and enabled law firms to obtain a coverage quote sooner than in prior years. Many firms commented on the ease of completing the application online and appreciated receiving communications about Excess coverage electronically.

As always, it is our goal to improve the Excess application process for law firms. If you have suggestions for changes or improvements, contact excess@osbplf.org. ■

Malpractice Risk Factors and How to Avoid Them

By Hong Dao, PLF Practice Management Advisor

After reviewing PLF claims data for the past five years, I want to highlight some of the major factors that lead to malpractice claims filed against our covered parties. Those factors are represented in the chart below.



The malpractice risks resulting from many of these factors (e.g., failure to follow through, inadequate preparation, failure to meet deadlines, and poor client relations) can be avoided by focusing on one major risk factor: inadequate office systems.

This and a later article will explore ways to improve your office systems as a risk management tool.

Reduce Malpractice Risks by Improving Your Office Systems

Having the necessary law office systems helps ensure that your law practice runs smoothly. The systems set out procedures and processes to handle daily firm operations such as screening and engaging clients, checking for conflicts, entering deadlines, managing the file, and disengaging clients. With these in place,

lawyers will not have to scramble to come up with a way to do things or reinvent the wheel for each new client or matter. Most importantly, lawyers can reduce their malpractice risk by having reliable systems in which to practice law. Necessary office systems consist of the following components:

- Client screening and case assessment
- Calendaring
- File management
- Client management
- Conflict checking
- Time tracking and billing

These systems need not be thoroughly planned out or perfected before you open your law practice. But consider how you will set up and manage each component. As you practice, you figure out what works and what does not, and continue to refine and improve your systems.

This article will discuss the first three components on this list: client screening and case assessment; calendaring; and file management. The last three components will be discussed in a later article.

CLIENT SCREENING AND CASE ASSESSMENT

Proper client screening is one of the most effective ways to reduce the risk of malpractice claims. The purpose of screening is to filter out high-risk clients, who are more likely to bring an unmerited malpractice claim against lawyers or otherwise make your practice unenjoyable. Client screening will help you identify unwanted clients from desirable ones.

You can screen clients with the help of a checklist. (Read my blog post about why lawyers should use a checklist at <https://www.osbplf.org/inpractice>.) The checklist should consist of questions to evaluate the client's attitude toward the case, the client's experience and relationship with previous lawyers, the client's ability to pay, and other areas that may raise a red flag. Below are some red flags and what they could mean:

- **Client had multiple prior lawyers for the same matter** – This may indicate a problem client, a non-paying client, or a case with serious flaws (lacks merit, no evidence, no witness, etc.).
- **Client is motivated by revenge, a feeling of victimization, or other extreme emotions** – This may indicate the client has her or his own agenda and may be difficult to work with.
- **Client waited until the last minute to look for a lawyer** – This may be a signal that the client is unprepared, not proactive, and may not cooperate or respond to your requests for information, thus preventing you from performing competently.
- **Client has unrealistic expectations that cannot be changed** – This may indicate the client will be difficult or impossible to please, second-guess your legal advice, impose unreasonable demands on you, and will not be satisfied with the result, no matter how good.
- **Client expresses difficulty or inability to pay fees** – This may be a sign that the client will not

pay on time or at all, will likely dispute the bills, will expect you to advance costs, and will blame you if anything goes badly.

Screen every prospective client. If a red flag is raised during the consultation or interview, put extra effort into evaluating the client by asking follow-up questions. If many alarm bells are going off, you will be better off declining the client. Send that person a nonengagement letter. Sample nonengagement letters are available at our website at www.osbplf.org > *Practice Management* > *Forms*.

Besides screening clients, it's also important to assess the case to ensure you can provide competent representation. Decline cases that fall outside your practice area. Dabbling is dangerous. Reject cases if you do not have and cannot acquire the requisite skill or knowledge to take them on. Consider rejecting cases if you don't have the needed time and resources to be thorough and prepared. Properly assessing your cases will help you reduce your exposure to other malpractice risk factors, including inadequate experience in the law and inadequate preparation.

CALENDARING SYSTEM

A calendaring system is an important risk management tool to manage deadlines. Claims resulting from a missed deadline may be due to a clerical error, miscalculating deadlines, filing at the last minute, not knowing the statute of limitations, or general neglect due to procrastination or personal difficulties. Here are some calendaring errors the PLF has seen:

- Waiting until the last minute to electronically file a complaint that got rejected and missing a statute of limitations;
- Failing to appear at a final resolution conference in a case because the date was not calendared, resulting in judgment by default against the client;
- Missing a statute of limitations by untimely serving the registered agent of the corporate defendant;
- Miscalendering an administrative hearing in a case, resulting in the lawyer not appearing at the hearing.

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A missed deadline is an avoidable mistake if lawyers have a reliable calendaring system to keep track of deadlines and dates. Some lawyers use rule-based calendaring software to generate a list of deadlines for a case based on applicable statutes and court rules in their local jurisdiction. When a statute or rule changes, affecting a deadline, the software automatically recalculates all the dates in the system. Other lawyers calculate manually to determine the deadlines. Whatever method you use, make sure the deadlines are promptly entered into your calendaring program.

Have one calendaring system as the main point of entry. Don't use multiple calendars (one for the office, one for home, one on your phone, and one using sticky notes). It's hard to keep track of dates and deadlines when you enter them in different places.

Enter all dates related to a case, including court dates, statutes of limitation, litigation deadlines, discovery deadlines, and client appointments. Also enter reminder dates so you have advance warning before the deadlines. Tickle dates to review your files on a recurring basis.

Adding reminders to follow up or confirm that work is complete and blocking out time to do work prior to a deadline will help you avoid at least four other risk factors — failure to follow through, inadequate preparation, failure to file/record documents, and failure to meet deadlines.

The firm should have a master calendar that pulls important deadlines and dates in cases from all the lawyers' individual calendars. This practice makes it easier for one lawyer to cover for another if an emergency occurs. A calendaring error made by one person could also be noticed and caught by another.

Make sure you back up your calendar by making a duplicate copy of the calendar. Synchronize your calendar across all your devices so you can have easy access to it. If calendaring is delegated to staff, make sure they are properly trained on how to calculate deadlines and how to use the calendaring program.

The PLF has CLEs and practice aids on calendaring available at www.osbplf.org > *CLE* > *Past* and at www.osbplf.org > *Practice Management* > *Forms*.

FILE MANAGEMENT

How you manage your files can present a malpractice risk. Proper file management can help you reduce the risk because it allows you to find the documents you need and encourages documentation. One aspect of file management is implementing a system to organize, store, and retrieve files. When you cannot find documents because they are misplaced, lost, or not properly labeled, it might jeopardize the success of your client's matter or affect your ability to represent the client. It also may lead to missed deadlines and other malpractice risks.

The second important aspect of file management is documentation. It is essential that lawyers keep a record of their communications with clients and other parties, as well as major events and milestones related to the client matters.

Documentation serves many useful purposes. It conveys information in writing to clients and gives them time to process the information. It helps prevent misunderstanding by giving the client a chance to dispute the content of the conversation. It also helps the lawyer articulate the thought process behind an action or a decision. Finally, it may help ward off a claim for legal malpractice and provide the lawyer with evidence to defend against one. If a conversation is not documented, the client can later argue that it never occurred. But if the conversation is followed up with a letter to the client, it is harder to dispute it later.

Lawyers can document the files in different ways. One effective method is to contemporaneously memorialize the conversation or event in writing and then promptly send it to the person with whom you had the conversation by mail or email or any manner you know he or she will receive it. A second method is to write a contemporaneous and detailed memorandum to the file. A third method is to take handwritten notes during the interaction or conversation. The least effective method is doing any of these things after the fact — instead of contemporaneously.

Lawyers need to use judgment in deciding which method to use while keeping client relations in mind. Some clients may get annoyed when you send them too many "CYA" letters. You might want to explain the purpose for sending the letters (e.g., convey information, give them time to process, prevent misunderstanding, etc.).

Below are some areas you should document:

- **Commencement, scope, and termination of representation** – Use an engagement letter to document when your representation of a client begins and the scope of your legal services to avoid misunderstanding on what you will do for the client and when. Use a disengagement letter to document the termination of the attorney-client relationship when the matter is concluded or for other reasons. Use a nonengagement letter when declining a prospective client. This type of letter documents that an attorney-client relationship does not exist and that the lawyer is not responsible for any deadlines or statute of limitations in the matter. Both nonengagement and disengagement letters will help protect lawyers against allegations they failed to take an action before the statute of limitations expired. Sample engagement, nonengagement, and disengagement letters are available at www.osbplf.org > *Practice Management* > *Forms*.
- **Client's instructions and lawyer's advice** – Follow up with a letter to a client to document any advice given to the client and the client's instruction. Decisions about settlement, authority to settle, dismissal, or appeal should all be

documented. This will help avoid finger-pointing if the matter goes south and the client does not get the desired result.

- **Important conversations with clients, opposing parties, and other parties involved** – By documenting these conversations, you will have evidence to help defend any claims for malpractice.
- **Major events and milestones in the matter** – Any significant event that happens in the client's matter should be documented, such as filing of pleadings or the court's ruling on a motion. Even when the matter is not currently active, it's still a good idea to inform clients in writing of major milestones in the case and its status. This might help stave off a claim that you didn't take action on the matter.

Proper file management, particularly documentation, can help improve client relations and allow you to prove what went on in the case, which can go a long way in avoiding malpractice.

I will discuss the last three components of an effective office system in the next issue of *inBrief*. ■

Special thanks to Bruce Schafer, recently retired Director of Claims at the PLF, for his input on documentation.

Scam Alert

Scammers continue to target lawyers and law firms. We will occasionally publish scam alerts to help Oregon lawyers avoid these scams. Here is the story of another Oregon lawyer who narrowly averted a sophisticated scam.

- A person who appeared to be a sophisticated client contacted the lawyer by email. The "client" was from Illinois and said he was "purchasing a machine in Gresham" for \$500,000. The "purchaser/scammer" wanted the lawyer to "be the escrow for the deal."
- The lawyer asked to see the paperwork on the transaction and looked it over. The "client's" documents looked correct and like they had been

written by another lawyer.

- The lawyer looked up the supposed "seller" of the machine and found that the named seller did indeed own a machine company in Gresham.
- The "purchaser/scammer" wanted to give the lawyer a "certified check." The lawyer said no to a cashier's check or certified check. He agreed to let the "purchaser/scammer" "wire" him the money, which was to be placed in an account that was not the lawyer's trust account. The lawyer gave the "purchaser/scammer" the account number and the routing number of the bank account where he was to "deliver" the money.

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- A few days passed and the client asked for a SWIFT code and the Tax ID #. The lawyer did some research and found out that SWIFT codes are needed only when money is being transferred from a foreign bank or with an international transaction. This tipped off the lawyer that the client wasn't really from Illinois.
- The lawyer then found the phone number of the "local seller" in Gresham and called the number to verify whether the owner of the Gresham machine company was the "seller" in the transaction. The Gresham machine company owner had never heard of the purchaser and was not selling the type of machine that the "purchaser/scammer" referred to.
- The lawyer noted that if he had not called the alleged "seller," he might not have known for sure that it was a scam. He said the emails and alleged legal documents all looked appropriate, with no grammar mistakes or other red flags.
- Once the lawyer was suspicious, he googled the "purchaser/scammer's" name and found obituaries that listed that name and nothing else. He also googled the address the "purchaser/scammer" gave him. The image shown for the address looked like a shack and not like the home of a client who would have the money to purchase an expensive piece of equipment.

Scammers continue to evolve, and their attempts at fraud continue to become even more sophisticated. Some scams seem very realistic and credible, even upon initial investigation. The sophisticated level of today's scams mandate a lot of investigation to ascertain legitimacy. While nothing substitutes for due diligence, always trust your intuition: If it seems too good to be true, it probably is.

As a reminder, the PLF Coverage plan doesn't cover lawyers acting as escrow agents. See Madeleine S. Campbell, "Lawyers Acting as Escrow Agents Excluded Under PLF Plans," *inBrief*, May 2018. ■

Our thanks to the law firm who notified the PLF of this scam so that other law firms could also protect themselves from scammers.

Cyberattack Prevention Series

A cyberattack can be a security incident in which the confidentiality, integrity, and availability of electronic data are threatened. Examples of these incidents include ransomware, attempted hacks, or malware. A cyberattack could also escalate to a data breach in which sensitive, protected, or confidential data is potentially viewed, stolen, or used by an unauthorized source.

A cyberattack can have devastating consequences for a law firm. The impact of an attack can include the financial effects of lost revenue due to shutdown as well as the costs associated with protecting clients following a data breach. A cyberattack can also affect the firm's reputation and ability to sustain or bring in future business.

The article that follows provides guidance on how to prevent and respond to cyber incidents. For an overview of cyberattacks, see "Anatomy of a Cyber Claim," August 2017 *inBrief*. ■



Incident Response Plan

By Hong Dao, PLF Practice Management Advisor

Law firms should be prepared to respond to cyberattacks. A cyberattack could be a security incident in which the confidentiality, integrity, and availability of data is threatened. Examples of these incidents include ransomware, attempted hacks, or a stolen or lost laptop. A cyberattack could also escalate to a data breach in which sensitive, protected, or confidential data is potentially viewed, stolen, or used by an unauthorized source.

Regardless of whether data has been accessed or exfiltrated, it's important for lawyers to have a plan to respond to the incident. An Incident Response Plan (IRP) is a set of protocols for managing the aftermath of a cyberattack. Properly handling the incident can limit damage, reduce recovery time and costs, and provide business continuity for the firm.

Lawyers could use an IRP template available on the Internet as a framework, but it should be customized to fit the firm's size, technology infrastructure, and business operations. An IRP for a solo attorney may consist of a checklist while it may be a manual or handbook for a big firm. Your plan may not be perfect, especially when used the first time, but you can improve it as time goes on. It's better than having no plan.

Preparation

Preparation is key. Know how your firm will handle different types of incidents — what steps will be taken and by whom. Your firm's response to a stolen laptop may differ from that for a ransomware attack.

Preparation has two components. The first is creating an incident response team. This means identifying the people in the firm with a function to perform and specifying the hierarchy of team involvement. Those individuals must be trained and prepared to handle the incident. Their name, title, and contact information should be listed in the IRP. The contact list should also include a data breach lawyer or legal ethics lawyer, an IT specialist or a digital forensic consultant, the local FBI office, and the cyber liability insurer.

The incident response team, with assistance from IT, should develop a process to identify the nature and scope of the incident, contain it, eradicate the source, and recover the affected systems. This process will be different depending on the types of incidents involved.

The second component of preparation is creating mock scenarios to test the IRP. The mock security incidents will help team members understand their roles and give them opportunities to implement the IRP before a real incident occurs.

After an incident — either real or staged — it is important for the incident response team to meet to discuss any lessons learned. This gives them the opportunity to evaluate the success or failure of each step taken and discuss strategies to make the systems more secure and to prevent similar attacks from occurring again. ■



CASES *of* NOTE

PERSONAL INJURY PROTECTION / ATTORNEY FEES: In *Berger v. State Farm Mutual Auto. Insur. Co.*, 290 Or App 485 (February 28, 2018), plaintiff contended on appeal that the trial court erred in determining that State Farm met the safe-harbor provision with respect to plaintiff's PIP claim and in rejecting plaintiff's claim for attorney fees. The Oregon Court of Appeals held that State Farm's denial of PIP benefits for the reason that additional medical services were not reasonable and necessary requires the conclusion that the dispute was not limited to the amount of benefits due plaintiff. Plaintiff was entitled to recover his reasonable attorney fees on that claim because plaintiff recovered more on his PIP claim than any tender by State Farm.

<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/14473/rec/1>

LIQUOR LIABILITY: In *Wilda v. Roe*, 290 Or App 599 (March 7, 2018), the Oregon Court of Appeals held that ORS 471.565(1) does not prohibit a defendant patron from impleading a tavern into a plaintiff's personal injury claim to share in paying for the damages to the innocent person injured by the intoxicated patron. The court considered legislative history and Oregon's comparative fault scheme.

<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/14783/rec/1>

LANDLORD-TENANT: In *Timmermann v. Herman*, 291 Or App 547 (May 2, 2018), the Oregon Court of Appeals decided a case of statutory interpretation under the Oregon Residential Landlord Tenant Act (ORLTA). The court held that nothing in the text or context of ORS 90.370(1)(b) requires a tenant to pay rent into court to be awarded possession of the premises in a forcible entry and detainer (FED) action if her counterclaim for damages exceeds any rent adjudged due.

<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll5/id/14975/rec/1>

PRODUCT LIABILITY: In *Miller v. Ford Motor Co.*, 363 Or 105 (June 7, 2018), the Oregon Supreme Court decided a certified question from the Ninth Circuit Court of Appeals. The court held that under ORS 30.905(2), when an Oregon product liability action involves a product that was manufactured in a state that has no statute of repose for an equivalent civil action, then the action in Oregon also is not subject to a statute of repose.

<https://cdm17027.contentdm.oclc.org/digital/collection/p17027coll3/id/6792/rec/1>