



ROBINS KAPLAN JUSTICE REPORT

FALL 2017 | VOL. 11 NO. 3

ROBINS  KAPLAN^{LLP}

REWRITING THE ODDS

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A LOOK INSIDE THE DEPARTMENT OF JUSTICE: UNDERSTANDING THE CIVIL DIVISION IN A UNITED STATES ATTORNEY'S OFFICE

BY TIM PURDON AND BRENDAN JOHNSON



TIM
PURDON



BRENDAN
JOHNSON

We had the honor of serving as United States Attorneys in South Dakota and North Dakota during President Obama's administration. We have seen a lot of change in a short period of time since we left the Department of Justice to join Robins Kaplan. However, the purpose of this article is not to discuss the shifting criminal justice philosophy under President Trump, but rather how the new administration could change the way in which the federal government defends civil cases.

THE CIVIL DIVISION STRUCTURE

Each United States Attorney's office comprises civil, criminal, and appellate divisions. The criminal division employs the majority of attorneys, and it receives the most public attention. The role of the Civil Division in each U.S. Attorney's Office is to represent the interests of the United States in civil litigation involving the federal government. One responsibility is to bring affirmative litigation, which often involves allegations that individuals have committed fraud against entities such as the Department of Agriculture, Department of Defense, or Medicare. But another critical responsibility of the civil division is *defending* the United States in tort cases where the federal government is involved. These cases often arise from negligent medical care at a VA or HIS hospital, law-enforcement-related issues, or other torts committed by federal employees.

THE PHILOSOPHY OF THE UNITED STATES ATTORNEY REFLECTED IN THE CIVIL DIVISION

The philosophy of the U.S. Attorney is important because it is often reflected in the cases the office chooses to bring as well as how it deals with valid claims against the federal government. As U.S. Attorneys, we had the delegated authority to accept offers in compromise of claims (or to administratively settle those claims) against the United States in all cases in which the principal amount of the proposed settlement did not exceed \$1,000,000.¹ Prior to becoming U.S. Attorneys, we both had backgrounds as plaintiff's attorneys. We brought that history and those experiences with us to the U.S. Attorney's Office and, in exercising our delegated authority, drew on that background in working with the career lawyers that made up our Civil Divisions. It is likely that we will see few former plaintiffs' lawyers appointed to serve as U.S. Attorneys under President Trump. The impact of this change on valid civil claims against the federal government will likely be mixed. On one hand, the attorneys working in the civil divisions are career employees and are not subject to removal simply because there is a new United States Attorney. On the other hand, United States Attorneys are responsible for authorizing settlements, and the philosophy they bring with them on civil cases can greatly affect the direction of the civil division.

DON'T FEAR THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act is the statute that allows private parties to sue the United States in federal court. Too often, attorneys are reluctant to bring FTCA claims for a number of reasons, including confusion over federal procedures, the absence of punitive damages and prejudgment interest, the lack of a jury trial, or because the attorney fees are capped at 25 percent for any judgment in a litigated case and 20 percent for any settlement made by an administrative agency.

However, during our time as U.S. Attorneys, we have identified some real advantages that plaintiffs' attorneys sometimes overlook when considering an FTCA case. The first advantage is that you are litigating against the federal government as opposed to an insurance company, and in our experience, U.S. Attorney Civil Division lawyers will bring considerations to a case that may be different from those brought by the average insurance defense lawyers. In some states and with the right case, it might also be advantageous to make your argument directly to the district court judge instead of a jury. As U.S. Attorneys, we saw plaintiffs' verdicts in bench trials that were likely larger than a South Dakota or North Dakota jury would have awarded. In fact, in multiple instances during our tenure, we advised assistant U.S. Attorneys to settle a case because we felt the judge would not look kindly on the federal government's negligence.

CONCLUSION

It is important to understand both the process and the people involved when bringing a claim against the federal government. It is possible that settlement philosophies might change during the Trump Administration, but the option of bringing a federal tort claim act should remain a strong and viable option.

1. <https://www.justice.gov/usam/civil-resource-manual-46-redelegation-authority-compromise-civil-claims>



2017 TRIAL ADVOCACY SEMINAR

THURSDAY, OCTOBER 12, 2017
RADISSON BLU | MINNEAPOLIS

In this age of frequent injustices, it is imperative that we as trial lawyers come armed with an effective and complex trial toolkit to best advocate for our clients. Please join us for the 2017 Trial Advocacy Seminar, a daylong conference where we will address a wide range of topics such as the opioid epidemic and sex trafficking.

ROBINS KAPLAN SECURES \$20.6 MILLION JURY VERDICT IN WRONGFUL-DEATH MEDICAL MALPRACTICE CASE

BY ELIZABETH M. FORS



ELIZABETH FORS

In the span of less than a week, a brand-new family was forever, and horribly, changed. Nicole and Ed Bermingham gave birth to their first child on a Tuesday morning. Days later, the 30-year-old mother, experiencing fever and nausea, went to an emergency room. The defendant nurse practitioner ignored lab results showing that Nicole had sepsis – a severe systemic infection. Instead of admitting Nicole to the hospital and treating the infection, the nurse practitioner sent Nicole home.

Twelve hours later, and after passing out, Nicole returned to the same emergency room. By this time the infection had progressed, and despite heroic efforts to save her, Nicole died just six days after giving birth.

After a five-day trial and five hours of deliberation, a Hennepin County jury returned a verdict of \$20.6 million in favor of Ed Bermingham and Nicole’s family. The jury found that the negligence of the defendant corporation’s employee, the nurse practitioner, was a direct cause of Nicole’s death. Nicole was a mother for just days – what Ed called the happiest days of his life. Hopefully, her family may now find closure in the jury holding the wrongdoer accountable. This jury’s verdict is believed to be the largest medical malpractice wrongful death judgment in state history.

Chris Messerly and I had the distinct honor to represent and obtain justice for this family. But before even reaching the courtroom, we worked alongside an entire team of legal and medical professionals. For months, and for some years, the team diligently prepared for trial.

The team consisted of:

- **Pat Strom**, RN. Pat is one of seven medical analysts working on medical malpractice cases at Robins Kaplan. Pat contributed her vast medical knowledge and trial experience – a valuable asset.
- **Lisa Birchen**, senior paralegal. Lisa touched all facets of the case, including economic and non-economic damages.
- **Jill VanVleet** and **Lori Anfinson**, legal administrative assistants. Lori and Jill supported the entire trial team, handled court filings, and organized everything.
- **Kelsey Hightman-Nocon**, case assistant. Kelsey conducted essential research and uncovered pertinent background information.
- **Paul McCaffrey**, Robins Kaplan trial consultant. Paul organized and facilitated focus groups, and coordinated courtroom technology.
- **Scott Schermerhorn**, Robins Kaplan e-discovery technical specialist. Scott prepared all exhibits within the trial presentation software. At the click of a button, Chris and I could access each page of evidence and show the jurors.
- **Chris Sullivan**, Robins Kaplan senior graphics designer. Chris designed and produced graphic exhibits that enabled the jurors to easily understand our case.

This team, along with our entire department, contributed significant time, expertise, dedication, and aggressive advocacy, which resulted in our ultimate goal: obtaining justice for this family.

SELECTED CASE RESULTS

SURGICAL MISADVENTURE HARMS YOUNG MAN:



CHRIS
MESSERLY



ELIZABETH
FORS

A 21-year-old college student began experiencing calf discomfort while running. An orthopedic surgeon diagnosed Chronic Exertional Compartment Syndrome, which is a build-up of pressure in the compartments of the lower leg. The doctor recommended a relatively simple surgery (fasciotomy) to relieve the pressure. Unfortunately, the doctor chose to blindly cut under the skin and he severed the peroneal nerve in the young man's leg. Despite the good work by a clean-up surgeon to repair the damage, the young man has ongoing pain and foot drop. Without the need to file a lawsuit, Chris and Liz recovered \$1.5 million for their client.

\$2 MILLION SETTLEMENT IN WORKPLACE INJURY



PHILIP
SIEFF



PATRICIA
YOEDICKE

Philip Sieff and Patricia Yoedicke represented a 35-year-old man who was injured in a workplace accident. The man injured his back and lost his spleen when he was caught in a pinch point while working with a robotic machine. The case resulted in a pre-suit settlement of over \$2 million.

OTHER DRUG AND DEVICE INVESTIGATIONS

Robins Kaplan LLP is currently investigating many new potential cases. Please contact our Mass Tort team if you have any questions or know of any individuals whose case should be evaluated.

- **Abilify** – This atypical antipsychotic—used to treat a variety of disorders, including schizophrenia, bipolar, and depression—may cause impulse-control behaviors, including compulsive gambling.¹
- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.²
- **Premature Hip Implant Failures** – Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Stryker LFIT COCR V40, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.³
- **Invokana, Farxiga, and Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis—very elevated blood acid levels—which may require hospitalization.⁴
- **Stockert 3t Heater-Cooler Device** – This device used during open-heart surgery has been linked with a specific type of rare, nontuberculous mycobacterium infections, which can occur up to 5 years after exposure.⁵
- **Taxotere** – Studies and reports have associated permanent hair loss (alopecia) with the use of chemotherapy drug Taxotere (docetaxel).⁶
- **Viagra** – Use is associated with increased risk of melanoma.⁷
- **Xarelto** – Anticoagulant (blood thinner) linked to serious bleeding complications, intracranial hemorrhaging, gastrointestinal bleeding, wound infections from inhibited clotting, and lack of effectiveness in preventing dangerous clotting.⁸
- **Zofran** – This anti-nausea drug prescribed “off label” for morning sickness is associated with increased risk of cleft palate and congenital heart defects.⁹

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MASS TORT NEWS

CONSUMER PROTECTION ALERT: ELDER FRAUD

Robins Kaplan's mission to provide justice to clients extends to many areas of law, including consumer and financial protection. Recently, the Department of Justice announced efforts to train professionals to combat elder financial abuse. National studies conclude that nearly 10 percent of older Americans have experienced some form of financial exploitation in the last year, some finding that it is the most common form of elder abuse. Given the growing elder population, more Americans will be exposed to elder fraud, which is estimated to cost billions of dollars to older Americans. If you suspect financial or customer fraud against elders or others, please feel free to contact Stacey Slaughter at 612-349-8500.

HOLLY DOLEJSI APPOINTED CO-LEAD COUNSEL IN FARXIGA MULTIDISTRICT LITIGATION

On July 13, 2017, Federal Court Judge Lorna Schofield in the Southern District of New York appointed Robins Kaplan LLP attorney, Holly Dolejsi, to serve as co-lead counsel of the Farxiga Multidistrict Litigation, pending there. The case involves the Type 2 diabetes drug, Farxiga, which has been associated with a potentially life-threatening condition called diabetic ketoacidosis – a condition in which too much acid accumulates in the bloodstream. The Farxiga MDL was formed after Holly filed and argued a motion with a federal panel of judges (the seven-member Judicial Panel on Multidistrict Litigation) to send all Farxiga cases to one court for pretrial handling.

\$300 MILLION SETTLEMENT REACHED IN BENICAR MULTIDISTRICT LITIGATION

On August 1, 2017, a settlement of \$300 million was reached with Daiichi Sankyo, a global pharmaceutical company selling olmesartan medoxomil, a popular prescription blood pressure medication marketed as Benicar®, Benicar HCT®, Azor®, and Tribenzor®.

More than 2,000 individuals have alleged severe and sometimes life-threatening gastrointestinal injuries as a result of ingesting the medications containing the active ingredient olmesartan medoxomil, which has been linked to sprue-like enteropathy and celiac-disease-like symptoms that inhibit a person's ability to absorb nutrients.

Robins Kaplan had a pivotal role throughout the litigation. Upon consolidation of the MDL in 2015, Robins Kaplan attorneys Tara Sutton, Gary Wilson, Holly Dolejsi, and Rayna Kessler all took leadership positions in the case.

Under the settlement, claimants who meet specified criteria will be eligible for payouts. Information regarding settlement eligibility criteria and deadlines for the Olmesartan Products Resolution Program may be found at www.OlmesartanProductLitigationSettlement.com.

MEET OUR NEW ATTORNEYS

TONY SCHRANK



TONY
SCHRANK

As a personal injury and medical malpractice attorney, Tony Schrank is proud to help clients who have suffered due to another party's negligence. In all cases, his goal is to make the legal process as worry-free as possible, enabling his clients to focus on their recovery rather than legal matters.

Tony has worked his entire career helping individuals who have been injured. Before joining Robins Kaplan, he was a solo practitioner in Anoka, Minnesota. He has experience in pleading, motion practice, court hearings, arbitrations, mediations, and all other stages of litigation.

ERIC LINDENFELD



ERIC
LINDENFELD

The Mass Tort Practice Group's newest member, Eric Lindenfeld, focuses his practice on representing individuals who have been harmed by defective pharmaceutical and medical device products. He is experienced in all phases of mass tort litigation, including trial practice, motion practice, conducting depositions, and written discovery.

Eric earned his law degree, with honors, from the University of Minnesota. He has authored several scholarly articles on cutting-edge and developing topics in mass tort litigation.

AWARDS

KATHLEEN FLYNN PETERSON RECEIVES MYRA BRADWELL AWARD



KATHLEEN
FLYNN
PETERSON

Kathleen Flynn Peterson has won Minnesota Women Lawyers' 2017 Myra Bradwell Award, presented to an MWL member who reflects the highest ideals of the legal profession. The award recognizes attorneys who possess qualities exemplified by political activist and legal publisher Myra Bradwell, including courage, perseverance, and leadership on issues of concern to women.

Kathleen has devoted her life to advocating for those who have been harmed as a result of medical negligence. She became a lawyer after working as a registered nurse, speaking for her patients' needs and speaking up against institutional problems in the medical system in order to provide the best possible care.

MINNESOTA ASSOCIATION FOR JUSTICE CHOOSES KATE JAYCOX AS MEMBER OF THE YEAR



KATE
JAYCOX

Kate Jaycox was recently named 2017 Member of the Year by the Minnesota Association for Justice (MAJ). The award, which recognized Kate's exceptional leadership and devoted service to the organization, was announced at the MAJ's annual summer convention, on August 17.

According to Rob Roe, president of Minnesota Association for Justice, "We were pleased to present the Member of the Year award to Kate Jaycox for her exceptional contributions to the organization over the last year. Her leadership and service as chair of our Education Committee and as a member of our Executive Board have advanced MAJ's mission to strengthen and improve access to the civil justice system for all."

TARA SUTTON ELECTED PRESIDENT OF PUBLIC JUSTICE



TARA
SUTTON

Tara Sutton, chair of the Firm's Mass Tort Practice Group and member of the Executive Board, has been unanimously elected president of Public Justice for a one-year term.

As president of Public Justice, a national public interest law firm that protects consumer rights through precedent-setting and socially significant litigation, Tara will guide the organization's litigation, fundraising, and advocacy work, and lead the Board of Directors and Executive Committee.

BISMARCK

1207 West Divide Avenue
Suite 200
Bismarck, ND 58503
701 255 3000 TEL

MINNEAPOLIS

800 Lasalle Avenue
Suite 2800
Minneapolis, MN 55402
612 349 8500 TEL

SILICON VALLEY

2440 West El Camino Real
Suite 100
Mountain View, CA 94040
650 784 4040 TEL

BOSTON

800 Boylston Street
Suite 2500
Boston, MA 02199
617 267 2300 TEL

NAPLES

711 Fifth Avenue South
Suite 201
Naples, FL 34102
239 430 7070 TEL

SIOUX FALLS

101 South Main Avenue
Suite 100
Sioux Falls, SD 57104
605 335 1300 TEL

LOS ANGELES

2049 Century Park East
Suite 3400
Los Angeles, CA 90067
310 552 0130 TEL

NEW YORK

399 Park Avenue
Suite 3600
New York, NY 10022
212 980 7400 TEL

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1. <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/55668a-eng.php>
2. <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>
3. *Concerns about Metal-on-Metal Implants*, available at www.fda.gov
4. <http://www.fda.gov/drugs/drugsafety/ucm446845.htm>
5. See <https://www.cdc.gov/hai/outbreaks/heater-cooler.html>
6. See, e.g., Kluger, *Permanent Scalp Alopecia Related to Breast Cancer Chemotherapy by Sequential Fluorouracil/Epirubicin/Cyclophosphamide (FEC) and Docetaxel: A Prospective Study of 20 Patients*, *Annals of Oncology* at 1 (May 9, 2012); Prevezas et al., *Irreversible & Severe Alopecia Following Docetaxel or Paclitaxel Cytotoxic Therapy for Breast Cancer*, 160 *Br. J. Dermatology* 883-885 (2009); Tallon et al., *Permanent Chemotherapy-Induced Alopecia; Case Report and Review of the Literature*, 63 *J. Am. Academy of Derm.* 333-336 (2010).
7. Wen-Qing Li, et al. *Sildenafil Use and Increased Risk of Incident Melanoma in U.S. Men: A Prospective Cohort Study*. *JAMA Intern. Med.* (June 2014)
8. Lissan, M.R., et al. *Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Total Knee Arthroplasty*. *N. Engl. J. Med.* 2008; 358:2776-86; Kakkar, A.K., et al. *Extended duration rivaroxaban versus short-term enoxaparin for the prevention of venous thromboembolism after total hip arthroplasty*. *Lancet* 2008; 372:31-39; Ericksson, B.I., et al. *Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Hip Arthroplasty*. *N. Engl. J. Med.* 2008; 358:2765-75; Jameson SS, et al. *Wound complications following rivaroxaban administration*. *J. Bone Joint Surg. Am.* 2012; 1554-8
9. M. Anderka et al. *Medications Used to Treat Nausea and Vomiting of Pregnancy and Risk of Selected Birth Defects*. *Birth Defects Res A Clin Mol Teratol.* (Jan. 2012); JT Anderson et al. *Ondansetron use in Early Pregnancy and the Risk of Congenital Malformations – A Register Based Nationwide Cohort Study*. *Pharmacoepidemiology and Drug Safety.* (Oct. 2013)

Past results are reported to provide the reader with an indication of the type of litigation in which we practice and does not and should not be construed to create an expectation of result in any other case as all cases are dependent upon their own unique fact situation and applicable law. This publication is not intended as, and should not be used by you as, legal advice, but rather as a touchstone for reflection and discussion with others about these important issues. Pursuant to requirements related to practice before the U. S. Internal Revenue Service, any tax advice contained in this communication is not intended to be used, and cannot be used, for purposes of (i) avoiding penalties imposed under the U. S. Internal Revenue Code or (ii) promoting, marketing or recommending to another person any tax-related matter.

ROBINS  **KAPLAN** LLP³

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