



A Newsletter Published by Durrett Law Firm

# The Legal Update

POLICYHOLDER REPRESENTATION

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## The Three Phases of the Civil Litigation

**D**urrett Law Firm represents small businesses and individuals who typically are seeking legal representation for the first time. Our clients have been wronged by a big insurance company or big business and need a lawyer to right these wrongs. Often, they are naive of the time and costs involved in civil litigation.

To educate our clients, I describe three different phases of civil litigation: discovery, mediation, trial preparation/presentation. I use the analogy of a barbell to illustrate anticipated costs for each phase. Just as a barbell has a weight on each end and a tube in the middle, a typical civil lawsuit has costs that mimic the barbell. Costs are expensive during the discovery phase, reduced during the mediation phase and expensive again in the trial preparation/presentation phase.

### Discovery

After the initial pleadings are filed, the parties engage in the discovery process. During discovery, each party has the opportunity to serve other parties with various discovery documents to learn facts about the case. Essentially, there are four major discovery documents: requests for disclosure, requests for production of documents, interrogatories, and requests for admissions. Each document is aimed at a specific area of inquiry.

Requests for disclosure are standardized requests for information that are usually sought in every civil case. The information covers such items as a more expansive discussion of claims and defenses than provided in the pleadings, the identification of damages claimed, a list of fact witnesses, a list of expert witnesses, their opinions and the basis for

their opinions and whether there is an insurance policy to cover potential liability in the lawsuit. Another type of request — requests for production of documents— allow parties to discover other types documents within a party's possession or control. These can include documents such as communications between the party and witnesses in emails or letters, contracts, photographs, videos, tax returns, complaints, copies of other lawsuits, personnel files — essentially any relevant document to the lawsuit. Alternately, interrogatories are designed to elicit answers to

specific questions. This type of discovery can be used to require parties to identify facts, witnesses and documents related to the litigation. Finally, requests for admissions are used to get a party to admit facts. For evidentiary purposes, admissions can be used to have a party confirm the authenticity of documents.

Other useful discovery devices include requests to inspect property and oral depositions. Inspections are used to determine

facts and gather evidence at a property. To the extent a property has changed since the dispute arose, an inspection can document the changes to the property and be a basis for an expert witnesses opinion. Oral depositions are question and answer sessions that occur under oath — just as if the witness were in court. Oral depositions are useful to pin a witness to a version of



*A Barbell Is An Appropriate Analogy For Civil Litigation Costs*

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For more articles, reports, studies, news, and commentary on these and other legal matters...

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## Ask the Attorney ...



**Brant Durrett**  
Attorney at Law

**Q: If I purchase something from a retail store in Texas, do I have three days to return the item for a full refund?**

**A:** A common misperception exists that there is a general three day return rule for all consumer transactions. In fact, three day return rules are generally found only in specific consumer protection statutes. For example, if you purchase an encyclopedia set from a door to door salesman and you change your mind about the purchase, a consumer protection statute exists that allows you three days to rescind the agreement because the transaction occurred at your home. Another consumer protection statute exists that allows an insured to rescind a contract with a public insurance adjuster within three days of signing the contract.

But, in the context of a public sale at a retail store, there does not exist any consumer protection statute that allows you to return the item within three days. Any such return allowance is within the sole discretion of the retailer.

If you have a question you would like Mr. Durrett to answer, please email it to [brant@durrettlaw.com](mailto:brant@durrettlaw.com)

## The Three Phases of Civil Litigation cont.

the story, to preserve evidence if a witness can not attend trial and to use as evidence in pretrial motions.

During the discovery process, each party can use these devices to discover the facts involved in the case. In addition, subpoenas and depositions can be used to discover facts from non-parties in the case. As with any litigation process, disputes arise as to the scope, breadth and expense of such requests and objections to specific discovery requests can be lodged. If this happens, and the dispute can not be resolved by negotiation, a motion must be filed and a ruling obtained from the court. As you can imagine, such motions irritate judges greatly.

### Mediation

After the substantial completion of the discovery process, the court usually requires parties to attend mediation prior to allowing them to proceed to trial. Mediation is a formal process of assisted settlement negotiations. Typically, a mediator (a lawyer trained in mediation techniques), will be selected and agreed upon by the attorneys representing each party. The parties will schedule a convenient time to attend mediation with the mediator. The attorneys and a person

with decision making authority for each party are required to attend.

The mediation process itself is fairly straight forward. Prior to the mediation each lawyer will submit a memo outlining their case. On the day of mediation, the mediator will moderate a joint caucus of the parties where each side will present its version of the case. Next the parties separate into private caucuses and the mediator meets separately with each side. The mediator will try to help the parties to assess the risks and costs of continued litigation. Thereafter, the mediator begins the negotiation process with parties by soliciting and exchanging offers of settlement.

Mediation has a high success rate. Statistics indicate that mediations resolve 85–90% of existing lawsuits. With this type of success, it's little wonder why courts require mediation prior to trial.

### Trial Preparation/Presentation

If mediation fails, the parties are left with trial. There is an enormous amount of work required to get prepared for a modern civil trial. Pretrial motions have to be researched, drafted, filed, argued and a ruling obtained. These motions deal from

motions to strike expert testimony, witnesses and documents to motions to prevent the presentation of evidence before a jury without first presenting it to the court outside of the presence of the jury (motion in limine). Some courts require a pre-trial order to be drafted and filed which include a summary of factual and legal disputes in the case, exhibits lists, witness lists, and jury issues. Attorneys must also prepare trial notebooks with notes for the presentation of evidence, including questioning of witnesses and arguments for the jury and court. The attorney is responsible for securing the attendance of witnesses and presenting the evidence for his client. Accordingly, it takes an enormous amount of time to organize and prepare a case for trial. Consequently, the costs for trial preparation and presentation are expensive.

### Conclusion

Just as a barbell contains weights at each end, the costs of the three phases of modern civil litigation is weighted heaviest at the beginning and end of the process – during the discovery and trial preparation/presentation phases. In the middle phase, mediation occurs. It is the least expensive and yet most productive part of the civil litigation process.

## Continental Airlines to Charge Extra for Exit Row Seats



In what can only be described as a clear sign of the end times, the Houston Chronicle is reporting that Continental Airlines will charge extra if a passenger wants more leg room on its flights. Continental does not plan to reconfigure its planes, but will charge more (approximately \$59 on a Houston to New York flight) for those who want to sit in exit row seats with at least 7 inches more leg room than other seats in coach. Coupled with Southwest Airlines discrimination against overweight people, it appears that to be eligible for “normal” rates, you must be a skinny midget. Since I fail on both counts, my flying costs have just increased.

## Durrett Inducted Into Forum

Recently, Mr. Durrett was inducted in the Million Dollar Advocates Forum.

The Million Dollar Advocates Forum is one of the most prestigious groups of trial lawyers in the United States. Membership is limited to attorneys who have won million dollar verdicts and settlements. There are over 3000 members throughout the country. Fewer than 1% of U.S. lawyers are members.



## Judge Issues Opinion on Waiver and Appraisal



**O**n January 27, 2010, Judge Nancy Atlas issued an opinion in Cause No. H-09-1763; *Sanchez v. Property and Casualty Insurance Company of Hartford et. al.*; In the United States District Court for the Southern District of Texas, Houston Division regarding waiver and the appraisal process.

Citing Texas caselaw from 1892, Judge Atlas found that an insurance company can waive the appraisal process by its conduct. “Waiver can be established by the conduct of an insurer, including (a) parol waiver; (b) refusal to arbitrate; (c) denial of liability; (d) failure to demand arbitration or appraisal; (e) acts inconsistent with intention to arbitrate; (f) appointment of prejudiced appraiser; (g) improper conduct during appraisal. ... The proper point of reference for determining whether an insurer waived the right to invoke appraisal by delay is the point at which the insurer knew the appraisal clause could be invoked because of a disagreement over the amount of damages, that is, the point of impasse with the insured.”

Often policyholders must aggressively fight insurers attempts to gain an advantage in the claims process by invoking the appraisal clause. One of the best ways to combat this tactic is to establish waiver on part of the insurer prior to invoking the clause.



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### ***Johnston Siblings Dominate State Swim Meet***



Few people know that I am related to a couple of up and coming celebrities in the swim world. Move over Michael Phelps and let me introduce you to my niece and nephew from Plano, Texas. They are Carolyn Johnston (10) and David Johnston (8).

On January 16, 2010, each competed in the Winter Games of Texas Swim Meet in Frisco, Texas.

Carolyn earned 3 gold, 1 silver and 1 bronze medal at the meet. In the process, she was able to beat her closest rival from El Campo, Texas in the 100 IM and 50 meter freestyle. She credits her victory in the IM to incorporating a new turn from backstroke to breaststroke. At the meet, she set one state record.

David earned 5 gold medals at the meet. Each of victories resulted in a new state record for his age group. David's favorite stroke is butterfly. Due to his success, he is known around Plano as the "Fly Guy".

**Carolyn, David Johnston With Swim Medals**

### ***Get Connected To Attorney Brant Durrett***

In the virtual world of the internet, social media is the way people get connected and stay connected. To learn more about Brant Durrett or the Durrett Law Firm make a connection on LinkedIn, Facebook and Twitter.



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