

TRIAL STRATEGY: ADMITTING LIABILITY AND OTHER DAMAGE-LIMITING TACTICS

Steve Fogg
Corr Cronin Michelson Baumgardner & Preece

1 **Admitted Liability Lawsuits: Tactics and Considerations**

Steven W. Fogg

Corr Cronin Michelson Baumgardner & Preece LLP

1001 Fourth Avenue, Suite 3900

Seattle, Washington 98154

(206) 625-8600

www.corrcronin.com

2 **Introduction**

- Admitting liability: always a difficult psychological decision, but frequently the correct tactical decision.
- Can paradoxically lead to a win by allowing jury to focus on damages or causation.
- Must be done correctly and carefully, as stakes are high if strategy backfires.
 - SAP: \$1.3 billion verdict in admitted liability trial (Largest copyright infringement award ever.)

3 **Hallmark of Admitted Liability Lawsuit**

- Bad facts.
- Bad jurisdiction.
- Intransigent plaintiff (or plaintiff's attorneys).
- Strong arguments on damages or causation that risk occlusion or credibility bleed due to weak or non-existent liability arguments.

4 **Advantages of Admitted Liability**

- If no punitives, can't argue conduct:
 - Plesance v. City of Chicago*, No. 1-08-1510 (Ill. App. Ct 1st Dist. Dec. 14, 2009)
 - Knowles v. Estate of Levan* (Pa. Supreme Court 2011)
- Avoids defending the indefensible.
- Focus on damages/causation.
- Protects credibility of defendant and defendant's lawyer.
- Avoids instilling jurors with desire to "send 'em a message" or

punish defendant.

- Proves that defendant “gets it”.

5 **Legal Issues: Admit Liability to Bar Inflammatory Evidence**

- Once liability admitted, move in limine to prohibit introduction of inflammatory liability evidence that is irrelevant to damages. See *Holbert vs. Staniak*, 359 Mich. 283 (1960) (“the jury should not be permitted to consider the question of liability when it has been admitted.”); *Pleasance v. City of Chicago*, No. 1-08-1510 (Ill. App. Ct 1st Dist. Dec. 14, 2009); *Knowles v. Estate of Levan* (Pa. Supreme Court 2011).

6 **Legal Issues: Admit Liability to Extinguish Other Claims**

- In respondeat superior case, admitting liability for underlying negligence may extinguish claims like negligent hiring and negligent entrustment, which has the effect of barring evidence of employee’s prior bad acts (of which employer allegedly should have been aware). See, e.g., *Diaz v. Carcamo* (Supreme Court of California, 6/23/11).

7 **Issue: Does Plaintiff Have to Accept Admission of Liability?**

Answer: Not always.

- *Ingram v. Rinehart*, 108 S.W.3d 783, 792 (Missouri, 2009)
–Plaintiff allowed to present evidence of fault even though defendant admitted liability.

8 **Admitting Responsibility: Do’s**

- Admit mistake directly and apologize.
- Take responsibility and do not equivocate.
- Make meaningful amends if necessary.
- Timing!

9 **Admitting Responsibility: Don’ts**

- Don’t equivocate.
- Don’t apologize half-heartedly.
- Don’t delay taking responsibility.
- Don’t show anger or disgust.

- 10 **Admitted Liability: Trial Considerations**
- Determine whether liability evidence will be presented to jury notwithstanding the admission of liability. If answer is yes, key witness will be the individual who made the mistake. That witness must be direct and contrite.
 - Be aggressive about damages. The entire point of admitting liability is the tactic frees the defense lawyer to vigorously attack damages. Do not squander this advantage by being overly apologetic.
- 11 **Admitted Liability: Trial Considerations (*continued*)**
- MIL re: timing of admission of liability. Jury should not be permitted to learn when defendant admitted liability.
 - Use voir dire to garner credibility with jury by focusing on defendant's acceptance of responsibility. Subtle message should be the reason trial is taking place is not to assess blame, but because plaintiff is being greedy, is seeking a windfall, etc.



1001 Fourth Avenue Ste. 3900 Seattle, WA 98154

Steven Fogg

sfogg@corrchronin.com

Mr. Fogg is a partner in the firm. An experienced jury trial lawyer who has tried more than sixty cases to verdict, Mr. Fogg's practice focuses on complex trial work, including product liability litigation, labor and employment lawsuits and the defense of securities and other class action lawsuits. Mr. Fogg also uses his experience as a former SEC attorney and criminal prosecutor to help individuals and companies respond to civil and criminal investigations.

Prior to joining the firm, Mr. Fogg was a senior homicide prosecutor in Seattle, where for several years he exclusively tried murder cases, including a number that received front-page media attention. Before moving to Seattle to become a prosecutor, Mr. Fogg practiced in Washington, D.C., where he began his career as a staff attorney for the Securities and Exchange Commission Division of Enforcement.

Education / Background

- University of Virginia School of Law (J.D., 1989)
- College of William and Mary (B.A., English, 1986; Honors all eligible years)

Representative Cases

- *Johnson, et. al. vs. Bulls Eye et. al.* – Mr. Fogg was part of a Corr Cronin team that represented Bushmaster Firearms in a civil lawsuit sponsored by the Brady Center in connection with the “D.C. Sniper” shootings. The case received national attention before being settled on terms favorable to the client.
- *Metropolitan Mortgage Securities Litigation* (E.D. Wa., D. Ore, Wa. And Ore. State courts) – Mr. Fogg is currently representing the former CEO and Chairman of the company in putative class actions asserting fraud claims, as well as defending the client in parallel investigations conducted by a number of state and federal authorities, including the SEC.
- *Ex Officio vs. Cerf Brothers* – Mr. Fogg was trial counsel for the defendant in a three day arbitration before a three arbitrator panel. Plaintiff sought a seven figure damages award. Result: defense verdict and an award of attorney fees for the defendant.
- *Fluke vs. Milwaukee Tool* – Mr. Fogg defended Milwaukee Tool in a one week evidentiary hearing in a dispute regarding an alleged non-competition agreement. Mr. Fogg also successfully prosecuted the appeal in which the alleged Fluke non-compete agreement was held to be invalid.
- *In re Public Company* – Mr. Fogg is currently representing a public company in parallel criminal and civil investigations, as well as serving as trial counsel for the company in a related securities class action.
- *In re Attorney* – Representation of an attorney in a SEC investigation regarding stock sales.