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CONSIDERING "CLAIMS CRISIS" CLAIMS CLEARLY

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Introduction. Critics of lawyers and tort law argue that a "claims crisis" is undermining the nation's competitiveness, and that legal doctrines favor plaintiffs by encouraging insignificant claims and directing too much compensation to all types of claims.[1] Proponents of that viewpoint might be surprised that the Tenth Circuit Court of Appeals' decisions in 1991 showed evenhanded treatment of important federal torts issues concerning the Federal Tort Claims Act ("FTCA")[2] and procedural and evidentiary principles, and concerning state law torts issues raised in diversity cases. While the decisions of one circuit may not represent national trends and while a single year's work may not wholly demonstrate the court's direction, a qualitative assessment of the decisions is possible: they contradict the allegation that current tort litigation routinely favors plaintiffs.

General Description of Decisions. Several of the Tenth Circuit's FTCA decisions are consistent with a restrictive trend that broadens the government's immunity under the discretionary functions exception. One decision, however, exposed the United States to liability for the actions of an alleged "independent" contractor at a public hospital.[3] Applying federal procedural doctrines, the court found that a $25 million punitive damages award in a products liability case was excessive, but not based on prejudice, and it reduced the amount by half rather than ordering a new trial. Applying the Federal Rules of Evidence in several instances, the court held that trial judges improperly excluded testimony by plaintiffs' experts.

Clarifying or applying state law, the court of appeals held that Indiana's statute of repose for product liability cases does not violate the United States Constitution, refusing to invalidate a pro-defendant legislative choice. Another decision that contradicts the alleged plaintiff-oriented trend in tort law held that, even after the adoption of comparative fault, Wyoming's application of the rescue doctrine continues to include an absolute requirement of a reasonable belief by the plaintiff that rescue was needed.

In decisions favoring plaintiffs, the court of appeals held that Oklahoma and Kansas doctrines allow recovery in products liability cases where the plaintiff's evidence of the defendant's noncompliance

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1. *See, e.g.*, Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988); Studies cited in American Law Institute, Reporters' Study "Enterprise Liability for Personal Injury," 1 A.L.I. Reporters' Study 4 (1991).

2. 28 U.S.C. § 2680 (1988).

3. Bird v. United States, 949 F.2d 1079 (10th Cir. 1991).

with the relevant standard is only circumstantial, that Colorado's statute of limitations for personal injuries includes the anniversary date of the injury, and that Colorado precedents currently permit punitive damages for negligence in the context of breach of contract.

Federal Tort Claims Act Decisions. In three decisions, the court of appeals applied the "discretionary function exception" of the FTCA, relieving the United States of liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. . . ."[4] The cases are *Zumwalt v. United States*,[5] involving a hiker's injury at a national monument and a claim that a trail was marked inadequately; *Johnson v. United States*,[6] involving a climber's death in a national park and claims that recreational climbing was inadequately regulated and that a rescue effort should have been started sooner and accomplished better; and *Redmon v. United States*,[7] involving a pilot's death in a plane crash and claims that the Federal Aviation Administration ("FAA") negligently certified the pilot and negligently failed to begin enforcement proceedings against him.

In analyzing these cases, the court of appeals relied on *Berkovitz v. United States*.[8] *Berkovitz* requires a two-step analysis. First, the court must decide whether the challenged conduct is a matter of choice for the employee or was specifically prescribed by a statute, regulation or policy:

> [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.[9]

Second, where challenged conduct involves an element of judgment: a court must determine whether that judgment is the kind that the discretionary function exception was designed to shield. . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.[10]

A more recent Supreme Court decision, *United States v. Gaubert*,[11] makes it clear that when government policy found in a statute, regulation or agency guidelines allows an employee to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when

4. 28 U.C.C. § 2680(a) (1988).
5. 928 F.2d 951 (10th Cir. 1991).
6. 949 F.2d 332 (10th Cir. 1991).
7. 934 F.2d 1151 (10th Cir. 1991).
8. 486 U.S. 531 (1988).
9. *Id.* at 536.
10. *Id.* at 536-37.
11. 111 S. Ct. 1267 (1991).

exercising that discretion."[12] *Gaubert* stated:

> For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[13]

In *Zumwalt*, the plaintiff was injured at Pinnacles National Monument, while hiking with his family on a trail identified in a Parks Service pamphlet. Markers along the trail correspond to points of scenic interest. The plaintiff became confused as to the trail's direction and walked a few steps to his right. He then slipped on loose gravel, slid down an incline, fell through the roof of a cave and landed on the cave floor suffering severe and permanent injuries. He sought damages claiming that the government had been negligent in its operation of the National Monument.[14] The district court granted a summary judgment motion, holding that the challenged conduct involved protected policy judgments.[15]

The plaintiff attempted to show that his cause of action was permissible under the first *Berkovitz* requirement. The Park Service had decided to construct and mark the trail on which he was injured, and had also produced a Management Plan calling for improvements to the trail to increase safety. The plaintiff argued that implementing these two Park Service actions did not call for the exercise of any discretion.[16] The court of appeals rejected this contention, stating that the Park Service actions were general in nature, and included no time limits. Necessarily, park personnel would have to use individual judgment in identifying portions of the trail that were hazardous, and in deciding what types of improvements were necessary.[17]

Under the second *Berkovitz* requirement, the plaintiff asserted that failing to warn hikers of the trail's dangers did not implicate any social, economic or political policy judgments.[18] That argument was plausible, in light of earlier Tenth Circuit cases with similar facts where the FTCA actions were permitted to be maintained for injuries allegedly caused by failures to warn of thermal pools[19] or dangerous swimming conditions.[20] The court of appeals held, however, that the absence of signs in the current case was part of an overall policy decision to maintain the

12. *Id.* at 1274.
13. *Id.* at 1275.
14. The plaintiff alleged negligent operation, ownership, maintenance, control, inspection or failure of inspection, and management. *Zumwalt*, 928 F.2d at 952.
15. *Id.* at 951-52.
16. *Id.* at 953-54.
17. *Id.* at 954.
18. *Id.* at 955 (quoting Boyd v. United States, 881 F.2d 895, 898 (10th Cir. 1989)).
19. Smith V. United States, 546 F.2d 872 (10th Cir. 1976).
20. Boyd v. United States, 881 F.2d 895 (10th Cir. 1989).

trail in a wilderness state.[21]

The court supported that conclusion by referring to Park Service Management Policies stating that wilderness areas will be administered "in such manner as will leave them unimpaired for future use and enjoyment as wilderness. . . ."[22] The court quoted but did not specifically refer to another portion of those Policies stating that " '[s]igns and markers may be provided only where they are necessary for visitor safety, management, or resource protection.' "[23] In *Smith v. United States*[24], there was testimony by a ranger that warnings were not given because of a decision that they were not necessary, rather than because of an overall plan to avoid use of warning signs.[25] In *Boyd v. United States*,[26] there was no showing that omission of warnings to snorklers and swimmers was based on any public policy considerations. The court of appeals summarized the basis for distinguishing the earlier cases by stating that "[t]he decision to leave the Trail in its wild state, whether explicit or implicit, related directly to the overall scheme set out in the Management Policies."[27] It held that decisions such as those challenged by the plaintiff, which are components of an overall policy decision, are protected by the discretionary function exception.

In *Johnson*,[28] the plaintiff's decedent became separated from three companions while climbing a mountain in Grand Teton National Park. His companions completed the descent and then reported to rangers that the decedent was overdue. Because of confusion over the identities of various climbers, a decision to search for the decedent was delayed. When the rangers finally undertook a helicopter search, they found the decedent's body in about twenty minutes. He had apparently died from hypothermia about six hours after rangers had first been notified that he was missing. Allegedly, a helicopter search instituted when rangers were first informed of the possible danger would have saved the decedent's life. The district court granted summary judgment to the government. On appeal, the court affirmed the summary judgment ruling under the discretionary function exception.

The plaintiff sought to challenge Park Service decisions about the warnings given to visitors concerning the hazards of mountain climbing, as well as decisions not to require use of safety equipment and not to "clear" the mountain at the end of each day. Those decisions were discretionary under the first part of the *Berkovitz* analysis, the court held, because they were not prescribed by specific statutes or regulations.[29] With regard to the second portion of the *Berkovitz* analysis, the court

21. *Zumwalt*, 928 F.2d at 955.
22. *Id.*
23. *Id.* at 953-54 n. 3.
24. 546 F.2d 872 (10th Cir. 1976).
25. *Id.* at 877 n. 5.
26. 881 F.2d 895 (10th Cir. 1989).
27. *Id.* at 955.
28. 949 F.2d 332, 334-35 (10th Cir. 1991).
29. *Id.* at 336-37.

held that the decisions involve public policy considerations, and are thus the type of discretionary conduct that is meant to be insulated from judicial scrutiny under the FTCA. The court referred to testimony describing the implicated policies, including a policy of recognizing that "many Park visitors value backcountry climbing as one of the few experiences free from government regulation or interference."[30]

The plaintiff also alleged that rangers had responded negligently to information that a climber was in danger. The court held that the Park Service decisions about the timing of a rescue effort were also protected from suit. The Service is not controlled by a specific statute or regulation, so it passed the first prong of *Berkovitz*. To establish that they also satisfy the "policy considerations" requirement, the court reviewed the factors involved in rangers' decisions of this type. Those factors include: (1) limited human and economic resources; (2) visitors appreciation of the dangers of climbing and value "the individual freedom of a backcountry experience;"[31] and (3) variation in the risks inherent in a climber's being overdue caused by terrain, the number of climbers, the weather and the presence or absence of a leader at the scene. The court concluded that the rangers' decisions are "grounded in social and economic policy"[32] because they involve the balancing of these various factors. On that basis, application of the FTCA was properly prohibited.

In *Redmon*, wrongful death plaintiffs alleged that the decedent's death in an airplane crash was caused by an FAA employee's negligent change in the decedent's pilot certification. The district court dismissed the claim on the basis of the discretionary function exception. That result was affirmed by the court of appeals.[33] The employee changed the decedent's certificate to conform to regulations issued by the FAA; the agency had ruled that pilots who were rated for instrument flying (flying by instruments where visibility is too low for ordinary piloting) on single-engine aircraft could carry that rating over to multi-engine aircraft without a practical flight test. That decision and a related grace-period decision "fit squarely" within the agency's discretion to act to assure safety in air commerce and to make decisions about use of its limited resources to promote the goal of air safety.[34]

The *Redmon* plaintiffs also alleged that an FAA inspector violated "specific mandatory" regulations when he failed to investigate and take enforcement actions against the decedent.[35] That characterization of their cause of action was motivated by *Berkovitz*, since failure to follow prescribed requirements is conduct that is outside the protection of the discretionary function exception. The court of appeals quoted portions

30. *Id.* at 337.
31. *Id.* at 339.
32. *Id.*
33. *Redmon*, 934 F.2d at 1157 (remand required because the district court had dismissed on the basis of lack of subject matter jurisdiction; the proper treatment was summary judgment for the government).
34. *Id.* at 1156.
35. *Id.*

of the statute and regulations, however, and characterized them as having a "discretionary tone,"[36] and therefore different from the nondiscretionary licensing and approval provisions at stake in *Berkovitz*. The statute permits the Secretary of Transportation to reexamine any certified airman and amend, modify, suspend or revoke the airman's certificate if "safety in air commerce or air transportation and the public interest requires. . . ."[37] The corresponding regulations are similar in stating that investigation of violation reports is discretionary.[38] The court stated that decisions concerning specific enforcement actions inherently involve a balancing of the goal of air safety and the "reality of finite agency resources. . . ."[39]

While *Redmon* seems clearly to be the type of case that the Congress intended to cover by the discretionary function exception, the two Park Service cases, *Zumwalt* and *Johnson*, present closer questions. To exaggerate the positions taken by the court of appeals in those cases, it could be argued that they hold that park rangers can give inadequate consideration to requests for help because resources are limited, and that park administrators can ignore their own conclusions that better signs are needed on a trail because questions of social policy are involved in considering whether to act reasonably in response to a request for rescue or in following an agency's general plan for increasing safety on trails.

In its most recent opinion on this subject, the Supreme Court provided an example of conduct by a government employee that involves discretion, but is not shielded by the discretionary function exception: if a government official "drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply."[40] For the court of appeals, the way a park worker responds to a rescue request is significantly different from the way that same worker might respond, while driving, through heavy traffic making decisions about whether to pass or stay in a lane. *Berkovitz* may require that result, but the court of appeals seems highly willing to find social policy implications (and thus characterize behavior as discretionary) in conduct as mundane as failing to post signs that decision-makers have described as needed or failing to respond to a claimed need for rescue. That stance towards applying the teachings of the *Berkovitz* case strongly contradicts claims of pro-plaintiff litigation trends.

Two decisions on procedural points also represent positions that contradict the "claims crisis" image of compensation-oriented courts routinely favoring plaintiffs. In *Bradley v. United States*,[41] the plaintiff specified his injury, in the required presentation of his claim to the rele-

36. *Redmon*, 934 F.2d at 1157.

37. 14 U.S.C. app. § 1429(a) (1988).

38. 14 C.F.R. §§ 13.3 and 13.5 (1991).

39. *Redmon*, 934 F.2d at 1154 (quoting United States v. Varig Airlines, 467 U.S. 797, 820 (1984)).

40. United States v. Gaubert, 111 S. Ct. 1267, 1275 n. 7 (1991).

41. 951 F.2d 268 (10th Cir. 1991).

vant agency, as " 'in excess of $100,000.' "[42] The court of appeals held that this claim was not definite enough to satisfy the statute's requirement of a "claim for money damages in a sum certain."[43] That failure could be relied upon by the United States as a complete defense. The court stated: "[w]e sympathize with Plaintiff's plight and recognize the harsh result of our decision. . . ."[44] But despite that empathy, the decision represents a point of view that narrows, rather than broadens, plaintiffs' access to redress. On parallel facts, the Fifth Circuit reached the opposite result, holding that a similar statement regarding the amount of a claim complied with the government's need for information used to determine its treatment of a plaintiff's claim.[45]

On another procedural issue, in *Aldrich Enterprises, Inc. v. United States*,[46] the Tenth Circuit consolidated its authority by abrogating its practice of applying the "local judge" rule to give deference to interpretations of state law by district court judges in FTCA cases. It reached that result by analogy to *Salve Regina College v. Russell*,[47] that dealt with the issue in the context of diversity cases.[48] If appellate courts are more sensitive to broad policy problems than trial courts may be, then decreasing deference to trial court rulings may moderate the effect of any pro-plaintiff trends influencing litigation at the trial level.

In one FTCA case, a district court's pro-defendant ruling was reversed. In *Bird v. United States*,[49] the wrongful death plaintiff sought damages for the death of his wife at a hospital operated by the United States. The plaintiff claimed that the death was caused by negligence on the part of a certified nurse anesthetist. The district court denied recovery, finding that the nurse was an independent contractor and not an employee of the United States.[50] Closely reviewing the facts found by the district court, the court of appeals stressed that the power to supervise and control the nurse was vested in the hospital. It noted:

> [s]ome concepts and relationships are inherently implausible—a two-year old yearling, a white blackbird . . . a certified registered nurse anesthetist serving in a hospital in the circumstances of this case under the license, supervision and control of a surgeon or physician anesthesiologist as an integral part of a government operating team, but at the same time as an independent contractor.[51]

Therefore, the court placed responsibility for the nurse's negligence on the United States, and remanded the case.

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42. *Id.* at 270.
43. 28 C.F.R. § 14.2(a) (1991).
44. *Bradley*, 951 F.2d at 271.
45. Martinez v. United States, 728 F.2d 694 (5th Cir. 1984).
46. 938 F.2d 1134 (10th Cir. 1991).
47. 111 S.Ct. 1217 (1991).
48. In applying that result to FTCA cases, the court relied, in part, on David Goodnight, *Chaos on Appeal: The Tenth Circuit's Local Judge Rule*, 67 DENV. U. L. REV. 515 (1990).
49. 949 F.2d 1079 (10th Cir. 1991).
50. *Id.* at 1080.
51. *Id.* at 1088.

If our legal system were truly experiencing a pro-plaintiff revolution, one would expect the Tenth Circuit to interpret the FTCA exceptions narrowly, permitting the greatest number of victims of accidental injuries to sue the government. *Redmon*, *Zumwalt* and *Johnson* show no tendency in that direction. Neither is the result in *Bradley*, where "excess of $100,000" was not a clear enough statement of the plaintiff's claim, evidence of a pro-compensation trend. Furthermore, the abrogation of the local judge rule in *Aldrich Enterprises* may be difficult to classify as favoring either plaintiffs or defendants in general, but since it effects a small reinforcement of the appellate court power, it may have a slightly conservative impact. Only *Bird* is balanced against these decisions, reversing a government victory where the facts of the wrongdoer's employment were overwhelmingly clear to the appellate court.

Additional Federal Substantive Law. The court of appeals clarified requirements of the Emergency Medical Treatment and Active Labor Act, sometimes referred to as COBRA.[52] Congress intended the statute to prevent private hospitals from avoiding treatment of low income and indigent patients. It covers any hospital that operates an emergency department and receives Medicare payments, and provides that when a person presents himself for examination and treatment of a medical condition, the hospital must give a screening examination to determine whether an emergency medical condition exists. The hospital may not, in general, transfer the person out of the hospital until his emergency medical condition is stabilized.

In *Abercrombie v. Osteopathic Hospital Founders Association*,[53] the jury charges covered situations where a hospital complies with or violates both of the COBRA requirements noted above, but were unclear as to the hospital's liability if it failed to comply with any one of the two requirements. Special interrogatories showed that the jury believed that the hospital had complied with all of the statutory requirements, so any error in the instructions was harmless.[54] Nonetheless, the court of appeals said that instructions should state that failure to comply with either requirement subjects a hospital to liability.[55]

Furthermore, the court stated that this liability is strict, and does not require a showing of negligence. A portion of the statute provides for civil fines on proof that a hospital or its agent has negligently violated the statute, but the section establishing civil enforcement by individuals omits the word "negligently." This reflects a strict liability standard.[56]

52. 42 U.S.C. § 1395dd (1988). The acronym "COBRA" comes from Consolidated Omnibus Budget Reconciliation Act of 1986 Pub. L. No. 99-272 § 9121, 100 Stat. 82, 184-671.

53. 950 F.2d 676 (10th Cir. 1991).

54. *Id.* at 684.

55. *Id.* at 680.

56. *Id.* at 680-81. *See also* Stevison v. Enid Health Sys., Inc., 920 F.2d 710, 713 (10th Cir. 1990)(language stating that hospital "must" provide medical screening is mandatory and imposes strict liability).

Federal Procedure and Evidence Issues. One of the Tenth Circuit's 1991 torts cases exemplifies current tort law controversies. In *Mason v. Texaco, Inc.*,[57] the defendant failed to provide adequate warnings of the health risks associated with use of its product, and the plaintiff's decedent, allegedly because of the defendant's failure, contracted cancer and died. Liability for wrongful death was established and damages were set at $9 million in actual damages and $25 million in punitive damages.[58] The court of appeals reduced the punitive damages by half, deciding that although the award was excessive it was not the result of tainted jury deliberations.[59] Another aspect of the case is highly significant. The victim filed suit in 1978, and died in 1979. It was not until the end of 1991 that the court of appeals affirmed the judgment against the defendant. In broad outline, this case shows a major flaw of the torts system in operation: it delivers a large sum of money to deserving plaintiffs, but makes them wait a very long time to get it. Because the compensatory damages were delayed so long, a kind of under-compensation has occurred, despite the vast amount ultimately awarded.

Significantly, the *Mason* court analyzed the punitive damages award by stating that "[i]t is well settled that mere excessiveness in the amount of an award may be cured by a remittitur, whereas excessiveness which results from jury passion and prejudice may not be so cured. In that case, a new trial is required."[60] The appellate court agreed with the trial court's rejection of the claim that the punitive damages award was the product of passion, prejudice or bias. Detailing the district court's review of relevant factors that could have supported the jury's verdict, the appellate court supported its view against a finding of impermissible influence in regard to the amount of the award. Nevertheless, the court used its remittitur power by reference to an earlier trial of the same case in which the plaintiff sought only $8 million in punitive damages and did not appeal the jury finding that no punitive damages were appropriate.

The court of appeals apparently relied upon the inconsistency between the jury's verdicts in the first and second trials of the as its basis for ordering the remittitur. This may contradict the court's own quotation from the concurring opinion of Justice Kennedy in *Pacific Mutual Life Insurance Co. v. Haslip*,[61] asserting that variation in jury verdicts is a necessary consequence of the use of juries in single cases as opposed to the creation of a permanent body of decision makers. Following the logic of Justice Kennedy, the disparate results by the two juries on the question of punitive damages could have been considered an acceptable consequence of our jury trial system.[62] Instead of reaching that conclusion, the court of appeals chose to moderate the size of the judgment. Some have cited the courts' willingness to intervene this way as the best

57. 948 F.2d 1546 (10th Cir. 1991).
58. *Id.* at 1548-550.
59. *Id.* at 1561.
60. *Id.*
61. 111 S. Ct. 1032 (1991).
62. *Mason*, 948 F.2d at 1559.

approach to limiting occasional extraordinarily large verdicts, in contrast to the imposition of statutory limits on the size of verdicts. Thus the Tenth Circuit's action may be characterized as neither pro-plaintiff nor pro-defendant, but rather as a moderate response to the problems posed by unusually large punitive damage awards.

In several cases, the court of appeals took the straight-forward position that the Federal Rules of Evidence on expert testimony[63] incorporate only minimal restrictions on the introduction of expert testimony. In torts litigation, availability of expert witnesses may have crucial effects on outcomes, and defendants will typically contend that experts offered by plaintiffs do not have expertise adequately focussed on the topics in dispute. The Tenth Circuit's opinions give full effect to the Congressional choice embodied in the Federal Rules of Evidence, and reject a narrower approach that might have been available to trial judges under earlier standards.

Illustrative of the appellate court's treatment of expert witness qualification is its decision in *Wheeler v. John Deere Co.*,[64] upholding the trial court's admission of expert testimony. The trial court permitted a plaintiff's expert in a products liability case to testify that farm machinery, manufactured by the defendant, was dangerous beyond the expectation of the ordinary user. The witness was a mechanical engineer with expertise in design of farm equipment; the court of appeals stated that inherent in his field of work is "anticipation of how such equipment will be perceived and used by consumers."[65] On that basis, it held that the testimony was properly admitted.[66]

State Law Decisions. The Tenth Circuit's decisions involving the application of state law cover an array of issues that show both pro-plaintiff and pro-defendant resolutions. These decisions are partly controlled by state precedents and partly adopted within the narrow ambit for the court's own interpretation of state law issues.

For example, an Indiana statute of repose for product-related injuries was challenged as violative of the United States Constitution, in *Alexander v. Beech Aircraft Corp.*[67] In line with decisions from the Seventh Circuit, the Tenth Circuit rejected the challenge, stating that an unaccrued cause of action is not a property right protected by the Fourteenth Amendment. A limitation on product-related causes of action can therefore legitimately be imposed by a statute of repose that is related to legislative purposes such as "avoiding the risks and cost of litigation to manufacturers after a lengthy passage of time."[68]

In a suit applying Wyoming law, the court of appeals applied the

63. Fed. R. Evid. 702 & 703.

64. 935 F.2d 1090 (10th Cir. 1991).

65. *Id.* at 1100.

66. For a discussion of other evidence cases see Sheila Hyatt, *Evidence Survey* 69 DENV. L. REV. (Aug. 1992).

67. 952 F.2d 1215 (10th Cir. 1991)(a Kansas district court applied Indiana law).

68. *Id.* at 1225.

rescue doctrine in an action brought by the mother of a child.[69] The child was erroneously given an overdose of medicine by hospital personnel. As the mother rushed to the hospital to be with the child, she was injured in an auto accident. She sought damages for her injuries from the hospital. The court of appeals held that, under the facts most favorable to the plaintiff, the mother could not have had a reasonable belief that a rescue was necessary since she knew that the hospital, where the improper treatment had occurred, was caring for her child. For that reason, the district court had properly granted summary judgment to the defendant hospital.[70]

The appellate court rejected the plaintiff's claim that Wyoming's adoption of comparative negligence should be treated as modifying the rescue doctrine's requirement that the plaintiff have had a reasonable belief that rescue was needed. The court took this position with only a brief reference to Wyoming's requirement of a "reasonable undertaking" of a rescue.[71] A comparative negligence jurisdiction may, however, reasonably take the opposite view. For example, a recent decision of the Michigan Supreme Court holds that a rescuer's own subjective belief that rescue is needed can justify use of the rescue doctrine, so long as that belief is reasonable, even if the intended object of the rescue is actually safe at the time the rescue is attempted.[72]

In product-related injury cases, plaintiffs sometimes have difficultly establishing the precise manner in which injury occurred. In cases applying Kansas and Oklahoma law, the Tenth Circuit has held that circumstantial evidence can be adequate proof that a power tool's design contributed to a victim's injury,[73] and that a gas pipeline was inadequately constructed, inspected or maintained.[74] Requiring direct evidence of how a power tool severed a victim's fingers or of the exact connection between an explosion and a gas supply line maintained by a utility would provide complete protection for the product sellers from liability for injuries that were most likely caused by their products. Most states clearly reject that view. Likewise, the court of appeals applied Kansas and Oklahoma precedents to avoid this result.

In other state law cases, the court of appeals clarified two issues in Colorado law. In the first, *Simon v. Wisconsin Marine Inc.*,[75] the issue was whether the Colorado statute of limitations for personal injury actions included the anniversary day of the injury. The court of appeals concluded that a suit filed on the second anniversary of the injury was timely, holding that a Colorado Supreme Court decision had reached

69. Dinsmore v. Board of Trustees of the Memorial Hosp., 936 F.2d 505 (10th Cir. 1991).

70. *Id.* at 507-08.

71. *Id.* at 507.

72. Solomon v. Shuell, 457 N.W.2d 669 (Mich. 1990).

73. Werth v. Makita Electric Works, Ltd., 950 F.2d 643 (10th Cir. 1991).

74. Goodwin v. Enserch Corp., 949 F.2d 1098 (10th Cir. 1991).

75. 947 F.2d 446 (10th Cir. 1991).

that result by implication.[76] In a second suit, involving a defective onion seed,[77] the defect caused large losses to a commercial farmer. The court of appeals held that Colorado law permits exemplary damages in breach of contract cases, where negligence, such as mislabeling by a seed distributor, produces foreseeable injury.[78] This ruling permitted the plaintiffs to recover a judgment that included $1.2 million for emotional distress and exemplary damages.

Conclusion. Surveying one year's work of the Tenth Circuit Court of Appeals shows that the tort system continues to operate with a variety of doctrines that are far from one-sided. The FTCA cases show full compliance with the United States Supreme Court's restrictive interpretations of the discretionary function exception. On the other hand, the court has applied the Federal Rules of Evidence as generously as any torts plaintiff could wish. On state law issues, the court affirmed the constitutionality of a pro-defendant statute of repose and adopted a pro-defendant interpretation of Wyoming's rescue doctrine. It also, however, approved applications of state law that permit personal injury plaintiffs to recover with only circumstantial evidence of the link between defendants' conduct and their injuries. Despite the claim that the torts system has suffered a qualitative change in the pro-plaintiff direction, the 1991 pattern of litigation in the Tenth Circuit resembles patterns from previous years.

76. *See* Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985).
77. Lutz Farms v. Asgrow Seed Co., 948 F.2d 638 (10th Cir. 1991).
78. *Id.* at 647.