

SUCH A SILLY GAME

By Charles Kramer

In Stowe, Vermont, a former maid is suing a ski resort, contending she was fired because she has no upper teeth and refuses artificial replacements. Apparently, the resort is claiming the right to hire only indentured servants.

In Florida, an elderly woman brought a paternity suit on behalf of her granddaughter's French poodle. She lodged the claim against a neighbor's German shepherd (and sued the dog's owner for good measure).

In San Diego, California, a pair of identical twins brought suit over a treasure map buried on inherited land. They asked a court to determine their respective ownership rights in the pirate booty. Unfortunately, neither brother had ever been to the land in question and neither had even attempted to locate the map, let alone the buried treasure.

A few years ago, in Springfield, Illinois, a man brought suit against the rock group Pink Floyd, alleging the cover of the Group's album, "The Wall," depicted events from his

personal life. He claimed "the Floyd" had somehow intercepted his brainwaves in order to get the purloined information.

Each day, all across the country, hundreds of plaintiffs walk into our nation's courthouses, plunk down required filing fees, and begin lawsuits. Years later, they get their day in court. The long waiting period is caused, in part, by the number of cases filed. Included in this number, and contributing to overcrowded dockets, delays and skyrocketing costs, are two types of lawsuits which, arguably, should not be filed. The first, the "eccentric lawsuits" includes those suits just discussed. The second includes cases that are wasteful because, even if the plaintiff wins, the defendant can't pay. Of the two, the latter category creates the larger problem. Although the eccentric cases involve bizarre subject matter, they still seek a judicial determination which will compel a wrongdoer to pay just compensation. If a case of liability is proven, the offending defendant pays the judgment and life goes on. The court system has worked.

A case against a destitute defendant, on the other hand, achieves no practical justice. If Ike the Injured sues Starving Sam and the jury finds for defendant Sam, what happens? Ike goes home, receiving nothing. Ike's contingent fee attorney does not get paid. Starving Sam's appointed attorney feels vindicated (and has gained wisdom, if not cash). Starving Sam goes home to starve.

If Ike the Injured sues Starving Sam and the jury finds for plaintiff Ike, little changes. Sam says "Sorry, can't pay the judgment". Ike goes home, receiving nothing. Ike's contingent fee attorney doesn't get paid. Sam's appointed attorney feels terrible (although he's gained wisdom if not cash). Starving Sam still goes home to starve. No matter what the jury's verdict, nothing has been gained by the use of the courts. Cases against judgment-proof defendants take up the time of judges, court personnel, and lawyers, waste judicial resources and clutter the docket for other cases. Many court systems implicitly recognize the inability of some defendants to pay judgments by extending the use of public defenders and court appointed, pro bono, defense attorneys to the civil arena. If the defendant can't even afford the cost of litigation, how can he or she pay a verdict?

If reasonable investigation reveals there is no means to recover a successful verdict, why should our nation's courts be tied up in vain? There are three typical responses: "the garnish response"; the "Vegas principle"; and the "psychic release" theory.

Advocates of the "garnish response" are quick to point out that a victorious plaintiff can garnish the wages of the destitute defendant. If the defendant has a stable, garnishable income, suit should be brought. If the defendant is a low-wage laborer or holds some other low-skill position, however, garnishment may not be feasible. The defendant may earn so

little that it takes years to collect even a minimal judgment. Further, such defendants typically do not retain one job for long periods, turning the garnishment into a game of economic hide-'n-seek. Finally, the defendant's employer often finds some "reason" to terminate the defendant's employment rather than deal with the garnishment hassle. Then the plaintiff doesn't get paid, and the defendant has lost his \$3.00/hour job. The plaintiff gains nothing. Society is worse off.

The Vegas principle rests upon the hope that the defendant might turn his life around, winning at Blackjack, Baccarat or even the California lottery. It is a hope against the odds.

Finally, the "psychic release theory", rests upon the belief that societal recognition of a plaintiff's wronged status serves a useful purpose -- even if the plaintiff doesn't collect a dime. Public vindication, so the theory goes, makes it easier for the plaintiff to accept the loss and move on. Given the time and expense of modern litigation, however, the numerous "collectible" cases waiting to be tried, and the disruption a trial causes in the lives of jurors, parties and witnesses, the costs of the plaintiff's psychic release is simply too high.

A modern plaintiff's attorney owes it to himself, his client and our society to make a preliminary investigation into the collectibility of judgment before a case is filed. If that investigation proves inconclusive, he should, to the extent permissible, seek the needed information through discovery

immediately after filing. Rules of evidence and procedure should be changed to allow an inquiry into a defendant's financial status for the limited purpose of determining an ability to pay. The ability or inability to satisfy a judgment is always relevant. If the investigation reveals an objectively verifiably inability to pay, the suit should be dropped.

A few years ago, a movie entitled "War Games" enjoyed a popular run. At the end of the film, a highly "intelligent" defense computer named Joshua was about to destroy the world, believing it was merely playing a nuclear war game. In order to prevent the debacle, the heroes attempted to "prove" to Joshua the futility of war. They were successful. After lengthy computation, Joshua concluded that the nuclear war game is "a silly game" because, in a practical sense, nobody wins. Although the wasted resources which result from litigating against a destitute defendant are far removed from the carnage of nuclear war, the game is equally unwinnable and equally as silly. Why play?

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under analysis is a nationally syndicated column of The Levison Group. Charles Kramer is a practicing attorney with the St. Louis firm, Riezman & Blitz.