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And The Defense Wins

David F. (Max) Beach



DRI member [David F. \(Max\) Beach](#) of [Perry, Johnson, Anderson, Miller & Moskowitz LLP](#) in Santa Rosa, California, obtained a defense verdict against a \$15 million demand in a case tried in federal court. The case was the lead trial in a series of actions involving 41 separate plaintiffs, in multiple jurisdictions, against an internationally known toxicology laboratory. The verdict turned back a tide of plaintiffs' claims precipitated by a 2006 *Wall Street Journal* article that criticized alcohol metabolite testing offered by the defendant testing laboratory.

Fujisawa, et al, v. National Medical Services, et al was tried in the United States District Court in San Francisco. It was the lead case in a series of cases filed in numerous venues and jurisdictions nationwide, including state and federal courts in Kansas, Pennsylvania, New Jersey and Northern and Southern California. Santa Rosa attorney David F. "Max" Beach was national trial and coordinating counsel for National Medical Services (NMS), the target defendant. Plaintiff Laura Fujisawa served as the lead plaintiff on behalf of at least 41 similarly situated claimants, as well as an indeterminate number of potential future claimants.

Defendant NMS is known worldwide as a premier medical and testing laboratory in the fields of clinical and forensic toxicology. The laboratory is based in Philadelphia.

In approximately 2002, NMS Laboratories began offering a body fluid testing panel for use in random drug testing screening programs, specifically including a test for Ethyl Glucuronide (commonly referred to as "EtG"), a minor metabolite of alcohol. The EtG test is an extremely sensitive test for the determination of whether an individual has consumed or been exposed to alcohol, and was initially used by drug and alcohol recovery and diversion programs, which required participants to maintain strict avoidance of alcohol and products containing alcohol. The test began to see widespread use in drug and alcohol monitoring programs after its introduction. Specific to this litigation, the EtG test was widely used in drug and alcohol programs that served licensed medical professionals (e.g., nurses and pharmacists).

Although the test was well received and began to gain acceptance in the practice of drug and alcohol rehabilitation, a *Wall Street Journal* article, "A Test for Alcohol – And Its Flaws," published in August 2006, called into question to accuracy of EtG testing. After the article was published, numerous medical professionals in recovery programs claimed that they had returned "false positives" for EtG testing indicating alcohol exposure, which they denied. A number of plaintiffs then joined various state and federal actions against NMS and others involved in challenging the scientific validity of EtG testing. Generally, the lawsuits claimed that EtG testing was flawed, and had been negligently marketed and promoted by NMS.

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All of the named plaintiffs were licensed health care professionals who were participating in recovery or diversion programs. These programs were operated by various state licensing agencies (e.g., the State Boards of Nursing and Pharmacy in California, New Jersey, Pennsylvania and Kansas) that required abstinence from alcohol as a condition of participation in the recovery programs. Each of the plaintiffs had returned one or more positive EtG tests, and claimed to have damages in the form of suspension or loss of licensure.

Plaintiff Laura Fujisawa was a pharmacist licensed in California. Due to prior issues with controlled substances, Ms. Fujisawa voluntarily entered a recovery program administered by the State Board of Pharmacy in 2006. As part of her participation in that program, she was required to undergo random drug screening, and in 2006 and 2007 returned several positive tests for EtG, indicating exposure to alcohol. Her license to practice pharmacy was eventually revoked by the State Board of Pharmacy. She and similarly situated plaintiffs contended that EtG test was unreliable, and that marketing and use of the test by defendant NMS caused the loss of her professional license or other adverse consequences.

The lead case (*Fujisawa*) was eventually tried in San Francisco Federal Court, Judge Bernard Zimmerman presiding, over the course of three weeks in December 2010. Plaintiffs' pretrial demand was \$15 million. The plaintiffs' case included testimony from Dr. Gregory Skipper, an Alabama-based specialist in addiction medicine who had been featured in the 2006 *Wall Street Journal* article, and in numerous professional bulletins attacking EtG testing.

Judge Zimmerman granted the plaintiffs' motions in limine to preclude defendant NMS from calling the defense expert physician witness in Addictionology, as well NMS's disclosed expert relating to the role of the Medical Review Officer in the interpretation of EtG results. The defense was allowed to call a single expert, Dr. Alan Wu, a board-certified toxicologist from UCSF.

At trial, plaintiffs' expert Dr. Skipper admitted that he continues to use the EtG test in the Alabama physicians' recovery program.

The federal jury returned a unanimous finding of no liability.

Following the verdict, 39 of the remaining 40 plaintiffs nationwide have dismissed their cases. No new cases have been filed, and EtG testing now continues to be used in many substance abuse and recovery programs nationwide.

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