

## MARKETPLACE

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Breast-Cancer  
Misdiagnosis  
Suits Increase

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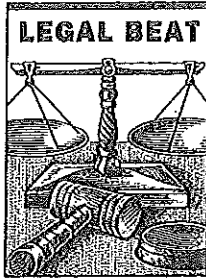
Staff Reporter of THE WALL STREET JOURNAL

Spurred by evidence that early detection of breast cancer can save lives, an increasing number of women are suing their physicians for failing to diagnose the disease early enough.

Women are turning to the courts as their health deteriorates, and families sometimes are continuing the fight after a relative's death. Most of these cases escape public notice because women typically are in a hurry to settle and physicians want to avoid visible trials. But for both sides, the stakes are high. Settlements range from \$50,000 to more than \$2 million.

In the past, it had been very difficult for patients to win cancer-misdiagnosis cases, in large part because doctors could maintain that the patient would have died with or without an early diagnosis. But lawyers who represent women in breast-cancer suits say advances in treatment make it tougher for doctors to make that case. And, at the very least, plaintiffs can show that disfiguring mastectomies can be avoided when breast cancer is detected in its early stages. In addition, they can prove in some cases that doctors violated breast-cancer-screening guidelines endorsed by various medical organizations.

The National Cancer Institute screening guidelines for women over 40 call for yearly breast exams and mammograms at least every two years. "If a doctor doesn't follow them and as a result breast cancer is not timely diagnosed, we have a good case for negligence," says Honolulu attorney Richard Turbin, who has handled roughly 10 such cases and has organized a panel on the subject scheduled for the annual meeting of the American Bar Association next month.



The guidelines recently proved helpful to Mr. Turbin in a case against units of Kaiser Permanente, a big health-maintenance organization based in Oakland, Calif., for failing to diagnose breast cancer in Helen Ann Beiser, a clinical psychologist. Ms. Beiser had pneumonia but had also complained of chest and breast discomfort that she said felt different from her pneumonia symptoms. Yet she was not given a clinical breast exam by her Kaiser doctors. Two years later, she discovered a lump and was diagnosed with advanced cancer, according to Mr. Turbin.

Late last year, an arbitration panel awarded Ms. Beiser \$1.5 million, and the case was then settled without an appeal. Ms. Beiser, who had a modified radical mastectomy, died in May. "Without the guidelines, I wouldn't have won the lawsuit," Mr. Turbin says.

William S. Hunt, the Honolulu lawyer for Kaiser, says that for defendants, breast-cancer-misdiagnosis suits "are very difficult." Ms. Beiser, he notes, "was a very sympathetic plaintiff. She was 45 years old, and she was going to die." Still, he says, he was surprised at the size of the award because "she knew as well as the doctors that she was supposed to get breast exams."

Mr. Turbin and other lawyers say breast-cancer litigation has been fueled not only by medical developments but also by the women's movement and new attention being paid to women's health issues.

(Men also get breast cancer and, particularly because it happens so rarely, the disease is sometimes misdiagnosed. In a case that will be tried this fall, a 49-year-old male accountant from New York state is claiming that his breast cancer was misdiagnosed by a doctor.)

Many diagnosis cases hinge on whether a doctor should have been more vigilant in investigating a breast lump. Jeffrey B. Bloom, whose firm is handling about 15 breast-cancer-diagnosis cases, says he recently settled a case on behalf of a 38-year-old woman who was under the care of a breast surgeon because of a family history of breast cancer. The woman developed a lump but had two negative mammograms. Almost three years after the discovery of the lump, the doctor did a needle biopsy that showed a malignancy. Mr. Bloom argued that the biopsy should have been done much earlier, and settled the case for more than \$600,000. "You cannot say that mammography is the end-all," he says.

Proving that a lump was investigated expeditiously is often the linchpin of a doctor's defense. A six-week delay in discovering breast cancer is not usually significant, says Bruce G. Habian, a New York defense lawyer. But if a doctor doesn't find cancer for six months, "he can be nailed on that," says Mr. Habian.

And a doctor's record keeping can make or break a case. Because when a woman first reported her symptoms often is disputed, the cases can come down to "who do you believe," Mr. Habian says.

Increasingly, the cases are also becoming battles between experts because the scientific understanding of the disease keeps changing. In 1985, Kaiser Permanente settled a misdiagnosis case filed by Barbara Rosenblum, a Bay Area sociologist, for about \$450,000. The case involved allegations that her mammogram was misread and that her breast lump was not sufficiently investigated. Ms. Rosenblum died in 1988.

Milton Cooper, a lawyer for Kaiser, says that these days the company might not have settled because there are more tools available to analyze the nature of the cancer. Defense lawyers are increasingly turning to a battery of medical experts to look at everything from a woman's genetic architecture to the so-called doubling time of the cancer. If the cancer is found to be especially virulent, defense lawyers can argue, says Mr. Cooper, that "even though there was a deviation of the standard of care, that misreading didn't cause any lessened life expectancy."