

TEXAS LAWYER

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PRACTICE FOCUS

APPELLATE LAWYER OF THE WEEK: THIRD TIME'S THE CHARM

By JOHN COUNCIL

Sometimes an appellate win boils down to tenacity. And that's certainly the case for Robert Alden.

Alden represented his injured client three times in front of federal court juries in Austin, finally won a favorable verdict and preserved that victory at the 5th U.S. Circuit Court of Appeals.

The ruling in *Jacob A. Brochtrup v. Mercury Marine, et al.*, a boating design-defect case, is important, because it's "the first decision in the country holding that an unguarded propeller is an unreasonably dangerous product that is defectively designed," says Alden, a partner in Austin's Byrd Davis Furman.

According to the 5th Circuit's May 27 opinion, the background in the case is as follows: Brochtrup was severely injured after his right leg made contact with the spinning motor of a boat engine. His leg ultimately was amputated at the hip. Brochtrup sued Mercury Marine and Sea Ray (divisions of the Brunswick Corp.) in state court alleging a design defect — an unguarded propeller on the boat's MerCruiser engine. After the defendants removed the suit to federal court, the case proceeded to trial three times, twice resulting in hung juries. The third jury found a design defect and awarded



Robert Alden, a partner in Austin's Byrd Davis Furman

damages to Brochtrup.

Before and after the verdict, the defendants moved for a judgment as a matter of law, which the trial court denied. The defendants appealed those rulings as well as the trial court's denial of a jury instruction on the elements of a Texas design-defect claim.

"After reviewing all of the evidence presented and drawing all reasonable inferences in Brochtrup's favor, the court concludes that a reasonable jury could find the MerCruiser to be unreasonably dangerous," the 5th Circuit wrote in a per curiam opinion affirming the trial court's rulings. Fifth Circuit Judges Eugene Davis, Edith Brown Clement and Jennifer Elrod participated in the panel decision.

While the appellate victory is a big win for his client, Alden wants the decision to have broader implications. "I'm hoping

that the boat industry will finally develop guards and put them on their propellers," says Alden. "I hope it's the kind of the judgment that the rest of the boating industry will take note of."

Alden also has another wish: "I've argued cases to the 5th Circuit, but not after I've tried it three times. I hope I never have to try a case three times again."

Austin solo Craig A. Morgan, who represents the defendants, says his clients will ask the 5th Circuit to rehear the case, because the plaintiff failed to prove all of the elements of a design defect required under Texas law.

"There must be 100 million boats on the water right now that don't have propeller guards," Morgan notes. "You would have to change the design of every boat on the water" to satisfy the plaintiff's judgment.

"He's a good lawyer," Morgan says of Alden. "But I think the 5th Circuit got it wrong."

— JOHN COUNCIL