

Consideration is hard, dismissal is easy

By David Schraub

Lawyers have an ambiguous relationship with the usefulness of legal norms and decision-making processes outside of the courtroom. On the one hand, we have first-hand experience with the troubles of litigation: It can be expensive, acrimonious, cumbersome and time-consuming. Some of us (perhaps as a naïve first year law student) have made the mistake of trying to bring in legal rules of evidence or civil procedure into everyday disputes with friends or romantic partners, to predictably catastrophic effect.

On the other hand, there are many aspects of legal decision-making that are worthy of respect and admiration in any context. In everyday deliberation, we often aspire to the virtues of a good judge. Judges are (or are supposed to be) thoughtful, non-biased and fair-minded. They should verse themselves in the important elements of a dispute before making a decision, and they should fairly appraise the arguments made by all sides of the proceeding. These characteristics, however, only matter if one very important precondition is met. We have to agree to consider the controversy in the first place.

In law, the decision about whether to even consider a proffered claim is formalized via the motion to dismiss. Legal dismissal allows a case to be thrown out of court prior to the hard, substantive work of discovery. Of course, some of the time the only significant issues are on the face of the pleadings. But frequently, dismissal means that a court need not consider the substantive merit of the claim. The case is tossed without any substan-



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tive investigation.

This treatment has an analogue in everyday life. All of us, if we're being honest with ourselves, probably will concede that we do not always meet the Platonic ideal of the impartial and unbiased judge. We are vulnerable to confirmation bias and to motivated readings of proffered evidence that reinforce rather than challenge our deeply held beliefs. But even before we get to that point, we are also selective regarding what sorts of controversies and arguments we are even willing to devote attention to at all. If a given claim discomferts us, it seems to pose even a significant likelihood of forcing a reassessment of certain cherished truths, often our instinct is to turn away without even attempting a refutation. We change the channel, give a derisive snort, or just alter the subject. In short, we dismiss the argument.

This sort of behavior is ubiquitous. To be sure, none of us has the time or energy to devote full attention to every single claim brought before us. Yet it is hope-

fully obvious that there is significant risk of bias in how we elect to triage our scarce deliberative resources. Whereas truly grappling with uncomfortable contentions is hard, dismissal is easy. And it is particularly easy when dealing with persons or groups whose experiences are unfamiliar to us. When a person from a foreign community or social outgroup makes a statement that rankles, it is easy to simply assume she lacks adequate foundation for her view instead of inquiring into the actual reasons, experiences and arguments that grounds it. To do the latter requires a sort of open-ended curiosity and ideological humility that takes time and effort to inculcate. It does not come naturally.

At this point, it is worth stressing that this problem is one that affects people of all social backgrounds and all ideological dispositions. Dan Kahan, a legal psychologist who has measured the impact of motivated cognition on how we appraise ambiguous arguments, has ruefully observed how following his presentations audience mem-

bers from both sides of the aisle excitedly rush to file blog posts explaining how his work explains why *the other side* is so bad at reasoning ("they're culturally biased!"). But of course the problem isn't limited to one ideological camp. When liberals don't watch Fox News or conservatives skip past MSNBC, they are not substantively refuting the arguments of their ideological adversaries. They are refusing to consider them outright. Likewise with persons who dismiss Black Lives Matter protesters as simply "playing the race card," or who deride rural gun owners as yahoo hicks. In all of these cases, people are making excuses for why their adversaries don't have an argument worth considering, instead of engaging in open-minded and curious exploration of what others have to say.

Judges, of course, dismiss cases, too. But they are differently situated from everyday people in important ways. Judges dismiss cases for technical reasons: lack of standing, failures of jurisdiction, or the simple fact that the alleged injury is

not of the sort upon which a legal claim can be made. But what judges generally cannot do is dismiss a case because the allegations make them squirm. Undoubtedly, many conservative judges would have rather not considered the possibility that their traditional views on marriage were in fact incompatible with American ideals of equal protection. Likewise, many liberal judges probably would have preferred not to reckon with the claim that President Barack Obama's signature health care initiative was outside the bounds of power constitutionally granted to the federal government. Nonetheless, the strictures of their position meant that they had to listen to these arguments, and they had to provide a decision backed by reasons. Legal procedure forces judges to embody a virtue that all of us should aspire to: the willingness to consider and reason over thoughts we'd rather not think.

There is no need to be naïve: A decision supported by reasons is not the same thing as a decision supported by good or even impar-

tial reasons. Yet it is also clear that it is better to be in the space of reasons than to be outside of it. Historical examples abound of judges whose cultural, political or educational background would predict reflexive opposition to the claims of marginalized communities, who upon being exposed to their claims instead became unlikely champions. More broadly, our entire democratic system is predicated on the belief that fair-minded citizens considering arguments are capable of revising even passionately held commitments. But for the process to work, we need to actually engage in the consideration. Democracy can tolerate disagreement over what a good reason is, but it can't survive refusing to reason at all.

David Schraub is the Darling Foundation Fellow in Public Law and a Senior Research Fellow in the California Constitution Center at UC Berkeley School of Law. This piece was adapted from his article "Dismissal," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710377.



DAVID SCHRAUB
California Constitution Center

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Is your healthy resolution tax deductible?

By Robert W. Wood

The end of the holidays leaves many Americans unhappy with their waistlines. For that reason, many of us make New Year's resolutions about our health. We also often start worrying about taxes in January. All of those annoying but terribly important Internal Revenue Service Forms 1099 will start showing up later this month. After that, tax season will be fully underway.

This confluence of events is one reason many people think about claiming tax deductions for their new year's resolution. As millions of people are looking for tax deductions, can you deduct the cost of getting healthy? The answer can often hinge on exactly what the doctor orders and for what condition. But the safest answer is to look elsewhere for deductions.

The IRS has ruled Weight Watchers meals aren't deductible, even if weight reduction has been ordered by a doctor. Even a special diet for a sufferer of Crohn's disease — a serious inflammatory disease affecting the gastrointestinal tract — isn't deductible because the patient has to eat to survive. On the other hand, a doctor-prescribed supplement taken on top of normal nutrition should be deductible. What qualifies as a medical expense for tax purposes is surprisingly broad.

In fact, swimming pools, vacations and spa visits, all might qualify. An expense for the diagnosis, cure, mitigation, treatment or prevention of disease qualifies. In contrast, an expense merely beneficial to general health does not. False teeth, prescrip-

tion eyeglasses, contact lenses, laser eye surgery, hearing aids, crutches, wheelchairs and guide dogs for the blind or deaf are deductible.

You can also deduct premiums you pay for nursing home and health insurance. You cannot deduct funeral or burial expenses, health club dues, over-the-counter medicines, toothpaste, toiletries or cosmetics. Costs of special foods and beverages qualify if prescribed by a doctor to alleviate or treat a specific illness.

However, they only qualify if they are in addition to the taxpayer's normal diet, and if they are not part of the patient's nutritional needs. To be deductible, the food cannot substitute for something else you would consume. For more line-drawing, consider Revenue Ruling 79-151, where the IRS said a weight-loss program to improve general health or appearance didn't qualify. But in Revenue Ruling 2002-19, the IRS said you can deduct a weight-loss program treating for a specific disease diagnosed by a physician. If you're diagnosed as obese that should be sufficient.

Medically needed modifications to your home are deductible — to the extent they do not add value to your home. For example, a wheelchair ramp you build to accommodate your mother when she moves in probably deductible.

In contrast, a home renovation that includes a luxurious wheelchair-accessible bathroom you might need some day is not deductible. In the same vein, if you need a home care attendant, only part of their salary is likely deductible. The pay you lay out for nursing services the aide performs, such as changing dressings, are qualified medical expenses. But

the cost of other household services are not deductible.

With all of these items, you should obtain written advice from your doctor prescribing your particular treatment regimen. Then, keep proof that you followed the prescribed regimen, and that you actually incurred the expenses. Much will depend on how good your records are and how high your expenses are compared with your income.

On that point, this may be the most important rule of all when it comes to medical expenses. You will get no deduction unless you itemize your deductions. Even for costs that qualify, there is a very high threshold. You can only deduct qualified medical expenses to the extent they exceed 10 percent of your adjusted gross income.

That means if your adjusted gross income is \$100,000, the first \$10,000 of medical expenses are on you. If you or your spouse is age 65 or over, you can still use the prior law 7.5 percent threshold until 2017. Of course, even 7.5 percent of adjusted gross income is a high hurdle.

Some of the line-drawing can seem bizarre. For example, the IRS ruled that a mother with a double-mastectomy could not deduct the cost of her baby's formula as a medical expense. See Private Letter Ruling 200941003. Although the baby's need for formula was clear, the infant was healthy and the formula was satisfying his normal nutritional needs. That meant no deduction.

In contrast, it may seem odd that some taxpayers have successfully written off everything from swimming pools to patio awnings to clarinet lessons (needed for a dental

problem) as medical expenses. The deduction is allowed for out-of-pocket spending on the medical care of a taxpayer, spouse or a dependent.

Medical care includes diagnosis, cure, mitigation, treatment or prevention of a disease or disability. Note that the "mitigation" of a disease or disability can cover a lot of expensive territory.

Not surprisingly, you cannot deduct expenses covered by insurance or those paid from otherwise tax-advantaged accounts, such as Flexible Spending Accounts or Health Savings Accounts. Normal living expenses don't qualify.

So is your diet deductible? If it's special, medically required food you're claiming, you'll need a statement from your doctor. Plus, no matter what your doctor says, you need to make sure the food items do not substitute for something else you would otherwise be consuming. For that reason, prescribed low calorie foods do not qualify as medical expenses. They are substitutes for the food you would normally consume to satisfy nutritional requirements.

Written documents are key. Many unusual medical expenses have passed muster under the tax law because of good documentation. You want written advice from your doctor prescribing the particular treatment regimen. You should also maintain proof that you followed the prescribed regimen, and proof that you actually incurred the expenses.

Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of "Taxation of Damage Awards & Settlement Payments" (www.TaxInstitute.com). This is not legal advice.