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MONOGRAPH

Judicial Approach to Medical Malpractice Reform

FEATURE ARTICLES

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THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
P.O. Box 3144 • Springfield, IL 62708-3144
800-232-0169 • 217-585-0991 • FAX 217-585-0886 • idcoffice@insightbb.com
SANDRA J. WULF, CAE, IOM, *Executive Director*

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Manuscript Policy

Members and other readers are encouraged to submit manuscripts for possible publication in the *IDC Quarterly*, particularly articles of practical use to defense trial attorneys. Manuscripts must be in article form. A copy of the *IDC Quarterly* Manuscript Guidelines is available upon request from ***The Illinois Association of Defense Trial Counsel*** office in Springfield, Illinois. No compensation is made for articles published, and no article will be considered that has been submitted simultaneously to another publication or published by any other publication. All articles submitted may be subjected to editing and become the property of the *IDC Quarterly*, unless special arrangements are made.

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A copy of the *IDC Quarterly* Editorial Policy is available upon request. Letters to the Editor are encouraged and welcome, and should be sent to the Illinois Association of Defense Trial Counsel headquarters in Springfield.

Editors reserve the right to publish and edit all such letters received and to reply to them.

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President's Message

By: Jeffrey S. Hebrank
Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC
Edwardsville

We have great problems. We are receiving so many offers from IDC members, board members, and committee chairs to put on conferences and mini-seminars that our Executive Director, Sandra Wulf, is having difficulty finding the time to pencil all of them in.

In the first half of the 2007-2008 term, we had programs in September, October, and November. We already have programs scheduled in January, March and April, with more to follow.

Though I had to use the dreaded trial excuse to explain my absence from the September Construction Insurance Symposium and Trial Tactics Seminar in St. Louis, I received countless compliments on the program. I was told that the CLE was top notch, the gala dinner exceptional, **Mark Shields** entertaining, and **Illinois Supreme Court Justice Karmeier** inspiring. And while it was a very ambitious, first-of-its-kind program, it was a financial success as well, netting nearly $7,000 with a total budget of over $60,000.

Unfortunately, our Basic Skills Programs were not as financially successful, and we are left scratching our heads as to why. As we understand it, all new Illinois admittees need to comply with the 15-hour basic skills CLE requirement within their first year. By some reported estimates, there are over 3,000 new admittees to the Illinois Bar every year. We are not sure where they are getting their CLE. Of course, some of the big firms are providing that CLE, but other than a few ITLA and ISBA programs, there should be an untapped market out there for basic skills requirements. Our programs were excellent and we are looking into ways to remedy the poor attendance.

The IDC Board recently authorized us to communicate with the new Supreme Court Commission on Professionalism, which is headed up by former ISBA President, Cheryl Niro. The Commission on Professionalism has two things in common with IDC:

1. The goal of promoting professionalism and civility in the legal profession in Illinois; and
2. The belief that the best way to accomplish that goal is to begin with new admittees.

I will be talking with Ms. Niro to see how we can help support the Commission's efforts in this regard. We also will be inviting CLE Board members to our upcoming IDC Board meetings to find out how we can reach a bigger audience and achieve better attendance at our excellent basic skills programs.

In the coming months, we will be organizing and energizing a Task Force to promote our organization and its members as experts in civil practice and guardians of the common law jury system.

In November, we had a terrific Employment Law Program with joint sponsorship from the Illinois Chamber of Commerce. **Scott Stewart** and **Durga Bharam** headed the program**.** Of course, one of the IDC's core goals is to increase our visibility. The Chamber promoted our program to all of its members; and, although attendance was modest, it was a very successful program.

In the coming months, we will be organizing and energizing a Task Force to promote our organization and its members as experts in civil practice and guardians of the common law jury system. We hope to do that by mobilizing our Legislative and Supreme Court Rules Think Tank. Despite the fact that election years are typically quieter, we anticipate a busy legislative year.

Of particular interest to our members is the potential for a Constitutional Convention, which may reconsider how judges are elected/appointed and who contributes to campaigns for judicial elections.

We also have heard that pro-plaintiff legislation may be on the horizon in the areas of joint and several liability, prejudgment interest, liens and verdict set-offs relating to medical bills and other payments. There are many challenges ahead. Please visit the new IDC website for updates.

Editor's Note

By: Kimberly A. Ross
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

It was a real pleasure to recently read some of the positive comments received from the IDC membership about the *IDC Quarterly* in response to the survey sent out in late 2007. Overwhelmingly, the responses were very positive, acknowledging how terrific our publication is and how important it is to our members and to all defense counsel. All IDC members, especially those who have contributed to the *Quarterly*, should be very proud of their contributions. We strongly encourage all members to consider submitting an article or to become involved in other ways. Don't forget that authors can earn CLE credit for writing for the *Quarterly*! (See the Editor's Note in the Third Quarter 2007 issue, Vol. 17, Number 3, for more details on earning CLE credit.)

One request made by many members was for the *Quarterly* to include more practical advice for defense counsel to utilize in every-day practice. Both the *Quarterly* editorial board and the IDC Board of Directors have committed to trying to implement that request. We have written to all current columnists and have asked them, when possible, to consider the members' suggestions when writing their articles. Hopefully, you will begin to notice this change in future issues.

The suggestion has also been made to encourage our members to cite to articles from the *Quarterly* in legal briefs, where appropriate. This will help in our attempts to bring awareness of our organization and our publication to the Illinois judiciary and the general public.

As for this issue of the *Quarterly*, it is bursting (almost literally) with informative articles. Nearly every columnist submitted an article, and we received more feature articles than we could include in this issue. (Don't worry, those articles will appear in the next issue.) To that end, however, we are asking all columnists to be cognizant of our space constraints, and to try to limit their columns to no more than four pages, where possible, so that all articles submitted can be published. (Features should be about six pages.) The details of this request, and a few additional changes, will be posted on the IDC's website for future reference.

All IDC members, especially those who have contributed to the* Quarterly, *should be very proud of their contributions.

The articles in this issue include a nice summary of the state of insurance coverage in post-*Virginia Surety* construction cases, written by **Gregory Vacala & Allison McJunkin**. **C. Kinnier Lastimosa** provides a feature article on how residual funds from class action lawsuits are dealt with in Illinois. Both the Monograph, written by **Barbara Livingston-Taft**, and the Medical Malpractice column, written by **Ed Aucoin**, discuss issues of medical malpractice reform. **Joe Feehan's** Evidence column covers the recent case of *Nickon v. City of Princeton*, which held that Medicare payments are not admissible into evidence. On a related note, **Michael Resis** reports that IDC was granted leave to file an *amicus* brief for the appeal to the Illinois Supreme Court in *Wills v. Foster*, regarding whether a plaintiff can recover medical expenses billed versus those actually paid. Finally, **Bill Tribler's** column pays tribute to **Francis D. Morrissey**, one of the founders of the IDC, who passed away on October 11, 2007. He also provides a brief history of the founding, development, and advancement of the organization.

Finally, before turning the pages to the President's Message and this note, hopefully all of you noticed the *IDC Quarterly's* new and improved logo on the cover. (If you didn't notice, you can flip to the cover now!) This new logo is a symbol of the evolution of the IDC and the *Quarterly*, as well as the positive changes to our organization that take place every day.

On behalf of the Editorial Board, we strongly encourage all members to submit articles for the *IDC Quarterly*. If you have a suggestion for an article, or other questions or comments, please contact me at **kross@cksslaw.com**.

Feature Article

By: C. Kinnier Lastimosa
Sedgwick, Detert, Moran & Arnold LLP
Chicago

What To Do with the Leftovers?

Residual Funds in Class Action Common Funds Under 735 ILCS 5/2-807

I. Summary of Statute

On August 27, 2007, Governor Blagojevich signed into law Public Act 95-0479 following the Illinois legislature's unanimous passage of Illinois Senate Bill 486. The new law adds 735 ILCS 5/2-807 to the Code of Civil Procedure, and provides guidelines for the distribution of residual funds in common funds created by class action settlements and judgments. The statute applies to all class actions commenced on or after July 1, 2008, as well as to pending class actions in which a court enters an order of preliminary settlement approval on or after July 1, 2008. The statute does not apply to class actions against the State of Illinois or its political subdivisions.

Under the statute, when a court approves a class action settlement that creates a common fund, it must also detail the claims administration process, and must provide for the distribution of any "residual funds" to certain "eligible organizations." The statute defines "residual funds" as those monies that remain in the settlement fund after the payment of class member claims, attorneys' fees and any agreed reversions to the defendant. An "eligible organization" is a charitable public interest organization that provides legal information or services, or assistance in dispute resolution, to persons of limited means. Specifically, the statute defines an "eligible organization" as a not-for-profit organization that has existed for at least three years as a section 501(c) tax exempt organization, that complies with the registration and filing requirements of the Charitable Trust Act, 760 ILCS 55/1-55/19, and the Solicitation for Charity Act, 225 ILCS 460/0.01-460/23, and that is eligible for funding under the Illinois Equal Justice Act, 30 ILCS 765/1-765/50.

The statute also permits distribution of up to 50% of any residual funds to other organizations that "serve the public good" if the court finds good cause to include such distribution in the settlement. Thus, in the case of a class action settlement, the parties have the ability to allocate a portion of the settlement funds to public interest organizations, even if those organizations do not meet the statute's specific requirements for "eligible organizations."

In the context of class action judgments, the statute requires that the distribution of residual funds go to "eligible organizations." However, unlike class action settlements, with respect to class action judgments, the statute does not provide for the potential distribution of residual funds to other organizations that "serve the public good." The legislature most likely made this distinction based on a view that a losing defendant should not have any control over the distribution of unclaimed funds, and that the best recipient in lieu of an eligible class member is an "eligible organization."

II. Approval of Reversions and Charitable Donations

Prior to the passage of section 5/2-807, neither the Illinois Code of Civil Procedure nor the state appellate courts had given specific recognition to the propriety of common fund reversions, nor any specific guidance as to how trial courts should handle unclaimed funds. From the vantage of the defense bar, the two most noteworthy aspects of the new statute are (1) its recognition of the propriety of "reversion" payments to settling defendants, and (2) its preservation of the parties' right to designate a portion of unclaimed funds for charitable purposes.

As to the former, the statute explicitly *excludes* from the definition of "residual funds" any reversion to a defendant agreed upon by the parties and approved by the court. *See* 735 ILCS 5/2-807(a). This language is particularly important because the propriety of reversions is often a subject of objections to class action settlements.

As to the latter, the statute recognizes that, in the context of settlement, it can sometimes be useful for the parties to

About the Author

C. Kinnier Lastimosa is an associate in the Chicago office of *Sedgwick, Detert, Moran & Arnold LLP.* His practice focuses on the defense of state and nationwide class actions, other complex commercial litigation, and international arbitrations.Substantive areas include consumer remedies, trade practices, insurance, reinsurance and products liability. He is a member of the Defense Research Institute, Illinois Association of Defense Trial Counsel, Chicago Bar Association, and Chicago Bar Foundation.

designate charitable organizations to receive a portion of settlement funds. Such designations can supply settlement consideration to support a class wide release where individual class members have insufficient incentive or opportunity to claim individual settlement benefits. Also such charitable donations can give a settling defendant an opportunity to generate some goodwill and positive publicity in the wake of whatever controversy generated the litigation.

In the absence of a statute such as section 5/2-807, trial courts have followed several different approaches to distributing unclaimed funds, but each has had the potential to generate criticism.

1. Escheat to the Government

In certain circumstances, courts have allowed the government to take custody of unclaimed funds. Under federal law, after the U.S. government serves as custodian of the funds for a period of at least five years, it can deposit the funds in its name. *See* 28 U.S.C. § 2042 (2006); *see also In re Folding Carton Antitrust Litig*., 744 F.2d 1252, 1255 (7th Cir. 1984) (applying the statute to affirm escheat to government of residual antitrust funds from settlement agreement). Federal law permits a claimant to petition for payment of such funds; but in the context of a class action fund, subsequent claims and payments would be unlikely. *See In re Folding Carton Antitrust Litig.*, 744 F.2d at 1255. In contrast to federal statute, no Illinois statute permits escheat to the government in the context of class action common funds. *See Canel v. Topinka*, 342 Ill. App. 3d 65, 793 N.E.2d 845 (1st Dist. 2003) (analyzing the Uniform Disposition of Unclaimed Property Act, 765 ILCS 1025/1-1025/30, and the Escheats Act, 755 ILCS 20/1-20/24.), *aff'd*, 212 Ill. 2d 274 (2004); *see also* 755 ILCS 20/1-20/7 (1991) (establishing escheat for estate assets in the absence of any heirs to the estate). Moreover, Illinois courts disfavor escheat. *See Canel*, 342 Ill. App. 3d at 71. Illinois statute does not provide for escheat of residual funds, and a class member would be unlikely or unable to make an untimely claim on a common fund. Thus, escheat has not been a viable option for residual funds in Illinois.

2. *Cy Pres*

Cy pres, also known as fluid class recovery, involves the distribution of unclaimed funds for the indirect benefit of the class. Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 10:17 (4th ed. 2002). Some courts, including the Court of Appeals for the Seventh Circuit, have permitted the use of *cy pres* when unclaimed balances remain in common funds. *See, e.g., Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir. 1989) (confirming that a court has discretion to distribute residual funds through *cy pres* and citing *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252 (7th Cir. 1984)). Various courts have reasoned that *cy pres* distributions serve the objectives of indirect compensation to the class, judicial relief for the claimants, and deterrence of the wrongful activity. *See* Conte & Newberg, *supra*, § 10:16. Some courts have further asserted that a defendant lacks standing to dispute any distribution after it has been found liable for aggregate damages. Some courts have even found that a plaintiff class likewise has no further right to the residue of a common fund, rendering a *cy pres* distribution preferable to a *pro rata* increase in class member settlement awards. *See, e.g., Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-07 (8th Cir. 1997) (affirming both the *cy pres* distribution and the denials of reversion and *pro rata* distribution to the class after the trial court had found Title VII violations and the parties subsequently settled regarding remedies without allocating unclaimed funds); *In re Folding Carton Antitrust Litig.*, 744 F.2d at 1254 (finding that a common fund payment represented full satisfaction of a class member's claim against the fund, and affirming the district court's denial of requests by the plaintiff class and the defendants for the residual settlement funds).

Despite those arguments in favor of *cy pres* distributions, some courts have criticized the use of *cy pres* distributions in the context of class action judgments. One criticism is that *cy pres* distributions can misallocate benefits. For example, a *cy pres* distribution can result in a windfall to nonmembers of the class and to class members who have already recovered on individual claims. *See Van Gemert v. Boeing Co.*, 553 F.2d 812, 816 (2d Cir. 1977) (disallowing fluid class recovery). Sometimes, there is a risk that a *cy pres* distribution will not benefit *any* member of the class at all. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (reversing the district court's order of *cy pres* distribution of unclaimed statutory damages following a class action judgment, because there was "no reasonable certainty that any member [would] be benefited," and remanding for the development of an appropriate *cy pres* distribution or alternatively, escheat to the government). Where no class member benefits, *cy pres* might serve no purpose but punishment of the defendant. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1013 (2d Cir. 1973) (finding fluid recovery inappropriate as a punitive remedy for potential class recovery where neither a criminal statute, antitrust statute, nor punitive damages are at issue), *vacated on other grounds by*, 417 U.S. 156, 94 S. Ct. 2140 (1974); *see also Simer v. Rios*, 661 F.2d

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655, 676-77 (7th Cir. 1981) (weighing the factors of deterrence of wrongful activity, disgorgement of illegally obtained profits, and compensatory purpose of the violated statute).

A second criticism by the courts is that a *cy pres* distribution can result in double recovery and create an intra-class conflict that favors poor class notice. As the Court of Appeals for the Second Circuit has observed, the interests of named plaintiffs potentially conflict with the interests of absent class members. *Van Gemert*, 553 F.2d at 816. That is, named plaintiffs may be able to obtain a double benefit by leaving absent class members uninformed so as to leave a large residue. Because compensatory damages serve to compensate plaintiffs, *cy pres* distribution is not appropriate where it would overcompensate class members. *See Simer v. Rios*, 661 F.2d 655, 677 (7th Cir. 1981) (finding lack of support for plaintiffs' fluid recovery where the plaintiffs had already been compensated under a federal assistance program). While these recovery issues may always be potentially present, in the context of class judgments neither the plaintiff class nor the defendant has the power to negotiate the allocation of damages.

Cy pres distributions can raise other issues in the settlement context. First, court-ordered *cy pres* could bind a defendant and plaintiff class with settlement results that differ from those intended. *See In re Folding Carton Antitrust Litig.*, 744 F.2d at 1254-55 (reversing the district court's establishment of a private foundation with a multimillion dollar residue in a settlement fund, but ordering that the residue escheat to the government despite the parties' motions for alternative distributions). In the case of class action settlements, the parties should be able to negotiate the disposition of unclaimed settlement funds. *See Houck*, 881 F.2d at 502 (allowing plaintiffs to retain an additional portion of the residue where the settlement agreement provided for such distribution of any residue). Under these circumstances, where *cy pres* is inappropriate, a reversion to the defendant may be the best method of distributing residual funds.

3. Reversion to the Defendant

Although professional objectors often protest the reversion of settlement funds to defendants, courts have usually found reversions appropriate, especially when specifically contemplated by the settling parties. *See, e.g., Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989). Despite a number of published authorities in other jurisdictions, Illinois state courts have not closely addressed the use of *cy pres* or reversion in the context of residual funds. *But cf. Kennedy v. Nicastro*, 546 F. Supp. 267 (N.D. Ill. 1982) (granting reversion of settlement funds to corporation in action by individuals against a corporation's former officers). Defendants have nevertheless argued that the parties to a class action settlement should have the freedom to agree explicitly to a reversion of residual funds, and that courts should not withhold a finding that a settlement is fair, reasonable and adequate based on the presence of a reversion clause.

On balance, the law nationwide has favored the use of reversions. Courts and commentators have recognized that reversions facilitate settlement by giving a defendant an incentive to contribute a larger amount of money to fund the settlement than it otherwise would. *See* Conte & Newberg, *supra*, § 10:15; *see also In re Folding Carton Antitrust Litig.*, 744 F.2d at 1255. Additionally, in most class litigation, the nature, amount, extent, even the existence, of class damages is disputed and not subject to quantification. A "claims made" settlement, where the number of qualified claims defines the defendant's indemnity liability, provides a fair and convenient way to resolve such disputes. Indeed, such provisions replicate the damage proofs that claimants must often submit, even after a class-wide finding of liability. Therefore, in many cases, the possibility of a reversion provides incentive for a defendant to fund a class action settlement extensively, thereby providing complete compensation to the class.

III. Conclusion

The new statute, 735 ILCS § 5/2-807, will help promote the settlement of those class actions that remain in the Illinois state court system in the wake of the Class Action Fairness Act of 2005. First, it will deprive professional objectors of any perceptible leverage they might gain by protesting the presence of reversion provisions. The explicit language of section 5/2-807 also demonstrates that the Illinois legislature supports the use of agreed upon reversions to defendants. Second, the new statute explicitly authorizes parties to allocate the distribution of settlement funds and even residual funds to other recipients. To that end, the parties may designate the distribution of unclaimed funds to charitable organizations that may or may not have a connection to the underlying dispute. In the absence of such a designation, the statute designates not-for-profit legal service providers as the *cy pres* recipients of all other unclaimed funds. The new statute thus facilitates the interests of private litigants, and promotes the public interest as well.

Employment Law

By: Geoffrey M. Waguespack
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

Family Medical Leave Act

Issues of Constructive Notice of Need for FMLA Leave Lead to Reversal of Summary Judgment

In *Stevenson v. Hyre Electric Co.*, 505 F.3d 720 (7th Cir. 2007), Beverly Stevenson sued her former employer, Hyre Electric Company, for violations of the Family Medical Leave Act (FMLA), 29 U.S.C. §2601, *et seq.* The district court granted Hyre's motion for summary judgment, finding that the company was unaware that Stevenson might be suffering from a serious mental health condition. The Seventh Circuit, in a 2-3 decision, reversed, finding genuine issues of material fact as to whether Hyre had constructive notice of Stevenson's need for FMLA leave and whether she had a serious health condition.

Prior to February 9, 2004, Stevenson had no documented history of misconduct or health problems while working at Hyre. In the morning of that day, however, a stray dog climbed through a window of the Hyre warehouse and approached Stevenson, who immediately felt physical symptoms. Immediately after the incident, Stevenson's supervisor, Mary Cicchetti, found her acting very agitated and spraying room deodorizer. When Stevenson saw Cicchetti, she began yelling and cursing, screaming obscenely about how animals should not be in the workplace. Cicchetti found Stevenson to be very intimidating and belligerent. Her agitation lasted three or four minutes.

Two hours later, Stevenson told Hay Lee Yuen, the accounting manager, that she was ill and had to go home, which she did immediately. The next morning, Stevenson left a voice message for Cicchetti, stating that she was not feeling well and would not be in that day. Instead, she went to the hospital for an unrelated medical test.

On February 11, Stevenson went to the warehouse and spoke with Hyre president Charles Guest. The encounter was explosive, with Stevenson charging into Guest's office yelling and acting in a very aggressive manner. In another obscenity-laced tirade, which lasted for about eight to ten minutes, Stevenson said that it was wrong for her to be subjected to dogs running by her desk and threatening her, and that management needed to do something about it. Guest unsuccessfully tried to calm her down, and assured her that every effort would be made to prevent anything similar from happening in the future. After the meeting, Stevenson told Cicchetti that she could not work and left the warehouse.

Later that day, she filed a complaint with the Occupational Safety and Health Administration (OSHA), and went to the emergency room. At the hospital, a doctor examined her and ran an EKG test and a CAT scan, both of which were normal. The doctor diagnosed her as having anxiety and stress, and prescribed anti-anxiety medication.

On February 12, Stevenson left a message for Cicchetti, stating that she was ill and would not be coming to work. Later that day, she met with a union representative to discuss the incident. On the following Friday and Monday, Stevenson called in sick, but gave no additional information.

On Tuesday, February 17, Stevenson went to work, but Cicchetti had moved the contents of Stevenson's office to another room, in order to accommodate her fear of stray animals, by providing her a space with a door that could be closed. Stevenson stayed at work for a few hours, but was still agitated, and ultimately called the police, because she believed that somehow she was being harassed. Later that morning, she told Cicchetti that she was not feeling well and left work. Before leaving, however, Stevenson left the hospital's emergency room report on Yuen's desk. After Stevenson left, Guest authorized the changing of the locks on the warehouse doors, out of concern about a very angry employee coming into the workplace. Guest then sent a letter via overnight mail to Stevenson, informing her that her

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About the Author

Geoffrey M. Waguespack is an associate with the law firm of *Cremer, Kopon, Shaughnessy & Spina, LLC*, where he concentrates his practice in employment law and general tort litigation. Prior to joining that firm, Mr. Waguespack served as the judicial law clerk to the Honorable Morton Denlow, Presiding Magistrate Judge for the United States District Court, Northern District of Illinois, and as a research staff attorney for the Appellate Court of Illinois, Second District. He earned his B.A. from the College of William & Mary in Virginia and his J.D. from Loyola University Chicago School of Law, where he was a member of a moot court team and the Executive Editor of Publications for the *Loyola University Chicago Law Journal*.

Employment Law *(Continued)*

available leave had expired and that she had 15 days from the commencement of her leave to obtain a medical certification for a serious health condition leave under the FMLA. The letter explained that failure to submit a valid certificate would result in any additional leave being deemed as unexcused absences, resulting in termination.

On February 18, Stevenson again called in sick. Instead of going to work, she saw her primary care physician, who prescribed a sleep aid and scheduled a follow-up visit in two days. Stevenson claims that the doctor told her to stay home for two days. On February 20, Stevenson met with a union representative, and then went to her follow-up appointment. She told a doctor that she wanted to return to work, but needed a doctor's note to do so. Her doctor wrote a note excusing her absences from February 9 through February 20, but the note did not establish that Stevenson had been instructed not to work for those days.

Although the notice requirement is not overly formalized, the notice must successfully alert the employer to the seriousness of the health condition.

On February 23, Stevenson did not return to work, claiming that the union did not want her to return. The union representative, however, recalled telling her that she could not return to work until she had a doctor's release. That day, Stevenson faxed a copy of her doctor's note to the union, which in turn passed it along to Hyre.

The next morning, Stevenson, in keeping with the union's instructions, initially informed Hyre that she was not going to work. Nevertheless, she later arrived at Hyre, only to discover that the locks on the doors had been changed. Her knock on the door was answered by Guest, who refused to accept her doctor's note and gave her a box containing her personal items. The union called Guest, who stated that the doctor's note was insufficient. Stevenson obtained a second note from the doctor, who excused her absence through February 24. Despite the union's attempts at intervening, Guest never responded, even though the second note was faxed to him. Instead, on March 9, Hyre sent a letter to Stevenson, stating that she had been terminated effective February 25.

Stevenson then sued Hyre for violations of the FMLA, claiming that Hyre had notice that she was suffering from a serious health condition and thus wrongfully fired her. On appeal from the district court's grant of summary judgment in favor of Hyre, the Seventh Circuit first addressed the issue of notice.

Absent notice of the need for FMLA leave, an employer has no duty to give such leave. *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 951 (7th Cir. 2004). Typically, an employee must inform an employer 30 days prior to the need for FMLA leave. 29 C.F.R. §825.302. When an unexpected need for FMLA leave arises, however, an employee should give the employer notice as soon as practicable under the facts and circumstances of the particular case. 29 C.F.R. §825.303(a). In that case, the employee must give notice to the employer within two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. *Id.* The FMLA places the burden of giving notice on the employee in exchange for the employer's partial surrender of control over its work force.

The notice requirement, however, is not a demanding one, as the employee's duty merely is to place the employer on notice of a probable basis for FMLA leave. The employee need only give the employer enough information to establish probable cause to believe that the employee is entitled to FMLA leave, and need not mention the statute. Although the notice requirement is not overly formalized, the notice must successfully alert the employer to the seriousness of the health condition. Once that is done, the employer has the duty to request such additional information from the employee's doctor or some other reputable source as may be necessary to confirm the employee's entitlement. FMLA leave is available only for a "serious health condition" affecting an employee or a member of the employee's family.

In this case, the court found that, at the latest, Stevenson was aware of her serious medical condition on February 11, when she went to the emergency room and was given a diagnosis of anxiety, along with anti-anxiety medication. At that point, her obligations under the FMLA were triggered. Stevenson, however, failed to provide Hyre with any explicit notice of her need for FMLA leave within two working days of her emergency room visit. Instead, she called in sick, and each subsequent time she stated only that she was ill or would not be in that day. Stevenson had an obligation to tell Hyre something more than simply that she was out sick for a day,

something that could be explained by an ailment as mundane as a 24-hour flu.

The court rejected Stevenson's argument that Hyre's letter to her requesting more information constituted an admission that Hyre was aware of an illness. The argument failed, first, because it came after the two-day time period during which Stevenson had to provide notice. Second, and more importantly, the court refused to conclude that notice could be presumed whenever an employer asks an employee if she needs FMLA leave. Doing so would render the notice requirement of the FMLA meaningless. At best, Hyre's letter expanded beyond the statute the time in which Stevenson had to give notice of her need for FMLA leave. But she failed to provide explicit notice even within that time. Therefore, the court held that Stevenson did not, within the period provided by the FMLA, verbally or in writing make Hyre aware of the possibility that her illness might trigger Hyre's FMLA responsibilities.

Direct notice of the need for FMLA leave, however, is not necessarily required. The court held that Stevenson's case could proceed if Hyre had constructive notice of the need for FMLA leave. The court noted its decision in *Byrne v. Avon Products*, 328 F.3d 379 (7th Cir. 2003), in which it held that either an employee's inability to communicate her illness to her employer or clear abnormalities in the employee's behavior might constitute constructive notice of a serious health condition. A sudden change in behavior may supply notice, even if the employee is coherent. In *Byrne*, the court found constructive notice of the need for FMLA leave where an employee who had four years of highly regarded service started to sleep on the job for hours, the employer learned that the employee was very sick, eventual direct communication with the employee revealed that he could only mumble several odd phrases, and the employer learned that the employee had been hospitalized. Under the circumstances, the employee's unusual behavior alone was enough to notify a reasonable employer that the employee suffered from a serious health condition.

The court in this case likened Stevenson's abnormal behavior to that of the employee in *Byrne*. The court found that a trier of fact could find that her behavior was so bizarre that it amounted to constructive notice of the need for FMLA leave. There was no dispute that Stevenson was a model employee prior to February 9, 2004. Her behavior dramatically changed immediately after the incident with the dog, and the testimony of her supervisors confirmed the change. In fact, they were so concerned with her erratic behavior that they changed the locks on the warehouse doors. Hyre also was aware of the fact that Stevenson had called the police because her belongings had been moved to another desk. The court, however, did recognize that a fact finder could find that Stevenson simply had a bad temper that erupted during the time in question. Therefore, the court concluded that a genuine issue of material fact existed so that reversal of summary judgment was warranted.

Providing notice alone, however, is not sufficient to receive FMLA benefits, because an employee must show that she had a serious health condition. The FMLA defines a serious health condition as "an illness, injury, impairment, or physical or mental condition that involves-(A) inpatient care in a hospital * * * or (B) continuing treatment by a health care provider." 29 U.S.C. §2611(11). The FMLA regulations state that continuing treatment by a health care provider includes a period of incapacity, such as the inability to work, of more than three consecutive calendar days, that also involves either treatment at least twice by a health care provider or treatment at least once that results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. §825.114(a)(2).

The court found that Stevenson easily met the medical treatment requirement, because of her emergency room visit and two doctor's visits and her ongoing prescriptions could be seen as a regimen of continuing treatment. With regard to whether Stevenson was incapacitated, the record was inconclusive, as the doctor's records were unclear as to that issue. Therefore, the court found that a genuine issue of material fact existed so that the reversal of summary judgment was warranted. Therefore, the court reversed and remanded the case to the district court for further proceedings on the remaining claims.

Judge Evans dissented from the majority opinion, convinced that no genuine issues of material fact existed in the case. The judge found no evidence that allowed any conceivable inferences that would bring Stevenson's case within shouting distance of *Byrne*, because the facts in that case were so dramatic that almost no other conclusion could have been possible. To say that Stevenson's behavior was comparably unusual to the employee's behavior in *Byrne* would be to allow the exception to swallow the rule.

Also, Judge Evans was troubled by the majority's conclusion that a factual dispute existed as to Stevenson's serious health condition, because there was no evidence that would prevent summary judgment on the issue. Anxiety comes in all degrees, and Stevenson did not provide information as to how her anxiety level prevented her from working. Judge Evans did not believe that it was too much to expect Stevenson to do that. Therefore, the judge would have affirmed the district court's decision.

(Continued on next page)

Employment Law *(Continued)*

TITLE VII

Termination of Teenage Employee for Complaints of Harassment Made by Parent Constitutes Actionable Retaliation; and Employer's Procedures for Reporting Harassment Insufficient for Affirmative Defense gainst the Claim

In *Equal Employment Opportunity Commission v. V&J Foods, Inc.*, 507 F.3d 575 (7th Cir. 2007), the EEOC brought suit on behalf of a teenage girl against the owner of a Burger King restaurant, charging hostile working environment and retaliation. The district court granted summary judgment on behalf of the owner, finding that the girl had failed to avail herself of the company's procedure for complaining about harassment and that there was no genuine issue of material fact as to the legitimate reason why the girl had been terminated. The appellate court reversed.

Although an employer is not required to tailor its complaint mechanism to the competence of each individual employee, a company must consider the vulnerability of a protected class.

The defendant restaurant owner hired Samekiea Merriweather, a high-school student who had recently turned 16. Working at the restaurant was her first paying job. The general manager of the restaurant was a 35-year-old bachelor named Tony Wilkins, who was having sexual relations with several of the restaurant's female employees. He began making suggestive comments to Merriweather, rubbed against her, and tried to kiss her. She rebuffed his persistent advances, feeling as though she were working with a stalker. Wilkins told Merriweather that he wanted a young girl, because her body would not be all used up. He also offered to take Merriweather to a hotel and to pay her $600 for sex. When she refused, he became hostile toward her. Eventually, he fired her when she missed an afternoon of work after he altered the work schedule without telling her. He did rehire her later, but continued to harass her.

To no avail, Merriweather repeatedly complained to the junior managers and to the assistant manager at the restaurant. When she asked the assistant manager for a phone number to call to complain about sexual harassment, the manager at first said he did not know whether he could give her a number or even if one existed. Eventually, the manager did give her a number, but it was the wrong number. When Merriweather pointed that fact out, the manager said that he did not know.

Merriweather's mother then went to the restaurant and complained to a junior manager about Wilkin's sexual harassment. Wilkins was present. That manager claimed ignorance of the matter, and reported the mother 's complaints to Wilkins upon his return. Wilkins promptly fired Merriweather, on the ground that she had involved her mother in the matter rather than handling it "like a lady."

The district court dismissed the case, because Merriweather had failed to invoke the company's procedure for complaining about harassment. The appellate court disagreed.

An employer can avoid liability under Title VII for harassment by one of its employees of another employee by creating a reasonable mechanism through which the harassed employee can complain to the company and get relief, but which the victim failed to activate. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257 (1998). If the harasser is a supervisor, however, and the harassment takes the form of firing or taking other employment action against the harassed employee, the employer's liability is strict. The mechanism must be reasonable, and the reasonableness of the mechanism depends on the employment circumstances. Therefore, reasonableness depends on the capabilities of the class of employees in question.

Although an employer is not required to tailor its complaint mechanism to the competence of each individual employee, a company must consider the vulnerability of a protected class. In this case, part of the defendant restaurant owner's business plan was to employ teenagers, who worked part time and who often were working for the first time. Knowing that it employed many teenagers, the defendant was obligated to tailor its procedures to the understanding of the average teenager.

The defendant, however, failed to do so, instead adopting complaint procedures that the court found likely to confuse even adult employees. The company's employee hand-

book had a brief section on harassment and stated that complaints should be lodged with the "district manager," but did not explain who that functionary was or how to communicate with him. In fact, the list of corporate officers and managers at the beginning of the handbook did not list a "district manager" or a "general manager," but rather listed a "restaurant manager." Evidence suggested that employees confused "district manager" with "restaurant manager" or "general manager." Additionally, a phone number was listed on the handbook's cover, and calling it would result in getting a receptionist or a recorded message at the company's headquarters. But an employee would not know for whom to ask, because the handbook did not identify the district manager.

The court stated that a policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law.

If a harassed employee complained to a shift supervisor or to an assistant manager, that manager was supposed to forward the complaint to the general manager, even if the complaint was about the general manager. The general manager was supposed to "turn himself in." Additionally, employees' pay statements contained a company "hotline" that was available for "comments" about the company.

The court found the company's policy in this case entirely unreasonable. The primary concern was that every complaint of harassment in this case had to go through Wilkins, the harasser. The court stated that a policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law. Regardless, the defendant has the burden of proving that is had and implemented an effective complaint mechanism, which is the company's affirmative defense. The defendant failed to do so, and presented no evidence at all about the cost of adopting and administering an effective complaint machinery to show that it would be too onerous to do so.

Workers' Compensation Report

By: Kevin J. Luther and Brad A. Antonacci
Heyl, Royster, Voelker & Allen
Rockford

Loaning Employer Not Liable in Tort When Borrowing Employer Assumes Liability

With limited exceptions, an injured worker can only obtain recovery from his or her employer pursuant to the provisions of the Illinois Workers' Compensation Act. 820 ILCS 305/1 *et seq.* In many situations, an employer loans an employee to another borrowing employer. The exclusive remedy provision of the Illinois Workers' Compensation Act does protect both the loaning and borrowing employer against liability for an independent tort action brought by the injured worker. *See Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 734 N.E.2d 1025 (4th Dist. 2000).

In a recent appellate court decision, a worker was employed by a temporary employment agency and was directed by an employee of another temporary employment agency (Staffing Resources) to move an item at a warehouse main-

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About the Authors

Kevin J. Luther is a partner in the Rockford office of *Heyl, Royster, Voelker & Allen* where he concentrates his practice in areas of workers' compensation, employer liability, professional liability and general civil litigation. He also supervises the workers' compensation practice group in the Rockford office. Mr. Luther received his J.D. from Washington University School of Law in 1984. He is a member of the Winnebago County, Illinois State and American Bar Associations, as well as the IDC.

Brad A. Antonacci is an associate with the Rockford office of *Heyl, Royster, Voelker and Allen.* A graduate of Northern Illinois University College of Law, he was admitted to practice law in Illinois in 2002. Brad concentrates his practice in the areas of workers' compensation and civil litigation.

Workers' Compensation Report *(Continued)*

tained by a third party. The injured worker sought and received worker's compensation benefits from his employer (his own temporary employment agency) following the injury. The employee then filed suit against the owner of the warehouse as well as Staffing Resources, whose employee directed the petitioner to perform a certain act that led to his injury. *See Behrens v. California Cartage Co.*, 373 Ill. App. 3d 860, 870 N.E.2d 848 (1st Dist. 2007).

The owner of the warehouse filed a Motion to Dismiss pursuant to Section 2-619 of the Illinois Code of Civil Procedure, which was granted. The temporary employment agency, defendant Staffing Resources, moved for summary judgment, arguing that as a loaning employer, it cannot be held liable when the borrowing employer assumed liability under the doctrine of *respondeat superior* for the actions of the employee. The circuit court granted summary judgment on behalf of the loaning employer, Staffing Resources.

The petitioner argued in the appellate court that the exclusive remedy provision of the Illinois Workers' Compensation Act contained no language exempting a "third party loaning employer" from tort liability and therefore could not be utilized by Staffing Resources to avoid liability. The appellate court noted that Staffing Resources was not relying upon exclusivity provisions of the Act but rather, was relying on the common law argument and defense of respondent superior.

The petitioner also argued that the correct test for determining loaned employee liability is the scope-of-employment test, not the right-to-control test. The appellate court cited an Illinois Supreme Court decision that held that Illinois uses the right-to-control test to determine liability under the loaned-servant doctrine. *See Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 656 N.E.2d 154 (1st Dist. 1995). The appellate court also noted that Staffing Resources had offered an affidavit from the warehouse chief operating officer, which stated that the warehouse had the right to direct and control the petitioner's work and the manner in which it was performed while in the warehouse. This unrebutted affidavit established that the petitioner was under the direction and control of the warehouse, not the third party loaning employer, Staffing Resources.

Therefore, under the doctrine of *respondeat superior*, the petitioner was not allowed to maintain an independent tort action against the third party loaning employer. This defense, in addition to the exclusive remedy provision, is helpful to loaning employers who are faced with independent tort actions as a result of injuries that take place at borrowing employer facilities and operations.

Personal Comfort Doctrine

When an employee has taken a break during work hours and suffers an injury at work, the personal comfort doctrine may apply to bring the activity within the scope of the Illinois Workers' Compensation Act. The personal comfort doctrine holds that certain activities of an employee, which are purely for his or her personal comfort at work, are so closely incidental to the work that injuries occurring during those activities are within the course of the work itself. The personal comfort doctrine can apply to acts such as eating, drinking, obtaining fresh air, seeking relief from heat or cold, showering, resting and smoking. 2 A. Larson & L. Larson, Workers' Compensation Law, Section 21.10 at 5-5 (1998). The personal comfort doctrine has also encompassed the use of a restroom at the place of employment. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 732 N.E.2d 49 (5th Dist. 2000).

The personal comfort doctrine holds that certain activities of an employee, which are purely for his or her personal comfort at work, are so closely incidental to the work that injuries occurring during those activities are within the course of the work itself.

If an employee is injured while engaged in any of the above acts while at work, his injury may be found compensable under the Illinois Workers' Compensation Act pursuant to the personal comfort doctrine. However, an employee seeking coverage under the personal comfort doctrine must still prove that his injury "arose out of" and "in the course of" his employment by the employer. This article will analyze the personal comfort doctrine in relation to both the "in the course of" and "arising out of" requirements of the Act. This article will also review the case law regarding the personal comfort

doctrine and illustrate recent Illinois Workers' Compensation Commission decisions with respect to the personal comfort doctrine.

An injury is compensable under the Workers' Compensation Act only if it "arises out of" and "in the course of" employment by the employer; *e.g.*, *Orsini v. Industrial Comm'n, et al*., 117 Ill. 2d 38, 509 N.E.2d 1005, 1008 (1987), *Karastamatis v. Industrial Comm'n, et al*., 306 Ill. App. 3d 206, 713 N.E.2d 161, 164 (1st Dist. 1999). The elements "arising out of" and "in the course of" are used conjunctively, and therefore both must be present at the time of injury in order to justify compensation. *Orsini*, 509 N.E.2d at 1008.

The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Eagle Discount Supermarket v. Industrial Comm'n, et al*., 82 Ill. 2d 331, 412 N.E.2d 492, 496 (1980). If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his or her duties, and occurs while he or she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. *Segler v. Industrial Comm'n*., 81 Ill. 2d 125, 406 N.E.2d 542 (1980).

Courts have held that the personal comfort doctrine applies to injuries during the lunch hour because lunch break is considered incidental to employment. In *Mt. Olive & Staunton Coal Co. v. Industrial Comm'n*, 355 Ill. 222, 189 N.E. 296 (1934), an employee was injured during his lunch break while still on the employer's premises. It was necessary for the employees to cross railroad tracks in going to and from the shed where they were to eat their lunch on the employer's premises. The employee was injured while crossing these tracks going to the shed in order to eat his lunch. The court held that these trips to and from the shed were necessary and incidental to employment. Thus, the employee's accident arose out of and in the course of his employment. *Mt. Olive & Staunton Coal*, 355 Ill. at 298.

Even if an employee is not paid for lunch, the injury can still be deemed to be in the course of employment. Further, even if the employee is not under the employer's control, being free to leave the employer's premises, the act of procuring lunch can still be found to be reasonably incidental to employment. 1A A. Larson, Workers' Compensation Section 21.21(a) at 5-5 (1979), found in *Eagle Discount Supermarket v. Industrial Comm'n*, 412 N.E.2d at 496-497.

The personal comfort doctrine has been extended to apply to work breaks even if the employee is not eating during the break. In *Sparks Milling Co. v. Industrial Comm'n, et al*., 293 Ill. 350, 127 N.E. 737 (1920), the employee fell from a fire escape and was killed. One of the conclusions that could have been drawn from these facts, according to the court, was that the employee fell from the fire escape while recovering from exhaustion caused by the heat and dust inside the mill in which he worked. *Sparks Milling*, 127 N.E. at 739. Based on these facts, the court held that it necessarily follows that the injuries resulting in the employee's death arose out of his employment. *Id.* Showering in a locker room provided by the employer has also been found to fall under the personal comfort doctrine. *Chicago Extruded Metals v. Industrial Comm'n, et al*., 77 Ill. 2d 81, 395 N.E.2d 569 (1979).

However, there are limits. In *Ealy v. Industrial Comm'n*, 189 Ill. App. 3d 76, 544 N.E.2d 1159 (4th Dist. 1989), an employee, during a break, went to a restaurant off of her employer's premises. The court held that the trip to the restaurant was not occasioned by the demands of her employment. The evidence did not demonstrate that petitioner's trip off site either benefited or accommodated her employer. Also, the court noted that the respondent did not retain authority over the employee during her break, and the Commission did not err in finding that the petitioner's injury from a fall on ice was not occasioned by a risk peculiar to or incidental to her employment. *Ealy*, 544 N.E.2d at 1161. Similarly, in *Lynch Special Services v. Industrial Comm'n*, 76 Ill. 2d 81, 389 N.E.2d 1146 (1979), the employee's act of going off premises to a restaurant was held to neither benefit nor accommodate his employer. In fact, the court noted that the employee left the employer's warehouse unprotected during his absence. *Lynch Special Services*, 389 N.E.2d at 1150. Therefore, the court held that petitioner's injury could not be said to have arisen out of and in the course of his employment when he fell on ice away from the employer's premises. *Id.*

Courts have held that even if the personal comfort doctrine applies, an injury is not deemed to have occurred in the course of employment if the employee voluntarily and in an unexpected manner exposes himself or herself to a risk outside any reasonable exercise of his or her duties. In *Segler v. Industrial Comm'n*, 81 Ill. 2d 125, 406 N.E.2d 542 (1980), the employee was injured when he tried to use a large industrial oven to heat a frozen potpie. The court held that the employee was not in the reasonable exercise of his duties at the time of the injury. The employee's actions were held to be "unnecessary, inherently dangerous, and unreasonable." *Segler*, 406 N.E.2d at 543.

However, even if an injury results from an unreasonable or unnecessary risk, it will be considered within the course of employment if the employer had knowledge of or acquiesced in the practice or custom. *White Star Motor Coach Lines*

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Workers' Compensation Report *(Continued)*

v. Industrial Comm'n, 336 Ill. 117, 168 N.E. 113 (1929). In *White Star*, the employee entered a closed bus and a closed garage for an hour's rest. Unfortunately, he also started the motor of the bus and died. *White Star*, 168 N.E. at 120-121. The court held that the employee went to an unnecessarily dangerous place and incurred an additional risk, which put him outside any reasonable requirement of the employment. *Id.* at 125. The court also noted that this was done without any knowledge or acquiescence on the part of the employer. *Id.* at 124.

For an injury to have arisen out of employment, the risk of injury must be a peculiar risk to the work or a risk to which the employee is exposed at a greater degree than the general public by reason of his employment.

In *Union Starch v. Industrial Comm'n*, 56 Ill. 2d 272, 307 N.E.2d 118 (1974), the court noted that it had apparently been the custom for the 15 years that the employee had been working for the employer for employees to seek refuge on the roof of the work building for fresh air. The court noted that this conduct might be deemed an added risk or unusual departure from the employee's duties. There was no express prohibition against using the window to seek access to the roof, and the roof was easily accessible through a window. The court noted that it was not unreasonable to infer from this that the employee could have assumed there was no prohibition against using this roof to seek fresh air. *Union Starch*, 307 N.E.2d at 121-122. The court held it was not improper for the Commission to determine that this injury arose out of employment, even though the employee's acts might be considered unreasonable, because it appeared that the employer had knowledge of the practice and did not prohibit the practice. *Id.* at 122. In contrast, in the *Segler* case, where the employee used an industrial oven to heat his potpie, there was no evidence indicating that the employer had knowledge of or acquiesced in the employee's actions. The employee testified that during the one and a half years he had worked in the specific area where the incident occurred, he had only seen one person place food in the oven. *Segler*, 406 N.E.2d at 543.

Along with proving that an injury occurred "in the course of" employment, as indicated above, the employee must also prove that his injury "arose out of" his employment with the employer. An injury arising out of one's employment is defined as one which has its origin in some risk so connected, or incidental, to the employment as to create a causal connection between the employment and injury. *Orsini*, 509 N.E.2d at 1008. For an injury to have arisen out of employment, the risk of injury must be a peculiar risk to the work or a risk to which the employee is exposed at a greater degree than the general public by reason of his employment. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Id.* If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of his employhment. Thus, an injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment. *Id.* at 1009. Employer acquiescence alone cannot convert a personal risk into an employment risk. *Id.*

According to *Karastamatis*, *supra*, even if the personal comfort doctrine applies, the claimant must still prove that an injury arose out of his or her employment. *Karastamatis*, 713 N.E.2d at 165. In *Union Starch*, where the employee stepped onto an adjoining roof outside to get some fresh air, the court held that this injury arose out of the employee's employment. The employee was apparently seeking relief from the heat and stuffy air. The court held that "the Commission could reasonably infer that the cause of the injury was related to the employment environment" because the working premises were warm. *Union Starch*, 307 N.E.2d at 120-121. In *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 362 N.E.2d 325 (1977), the court held that the employee's hot, humid work environment was a causative factor of the employee's injury. *Scheffler Greenhouses*, 362 N.E.2d at 328. During a lunch break, the employee was injured while using a pool on the work premises. The court held that the Commission could have reasonably inferred that the hot work environment necessitated the use of the pool and thereby exposed the claimant to a risk to which she would not have been exposed apart from her work environment. *Id.* Therefore, the injury arose out of the employee's employment. In *Roberts and Oake v. Industrial Comm'n*, 378 Ill. 612, 39 N.E.2d 315 (1942), during a lunch break, the petitioner attempted to run for a truck that was driving down the street. *Scheffler Greenhouses*, 39 N.E.2d at 315-316. He attempted to jump on the

running board of the truck, lost his footing, was sideswiped by the truck, and died. *Id.* at 316. The court held that, "Where a lunch period is not subject to the employer's control or restricted in any way and the employee is free to go where he will at that time and that employee is injured on a public street, the injury does not arise out of the employment." *Id.*

Probably the best known case involving the personal comfort doctrine is *Eagle Discount Supermarket v. Industrial Comm'n, et al.*, 82 Ill. 2d 331, 412 N.E.2d 492 (1980). In *Eagle*, the employee, who was a shelf stocker, was on a lunch break when he suffered an injury while playing Frisbee on the employer's premises. *Eagle Discount*, 412 N.E.2d at 494. The supreme court held that the Commission decision that the personal comfort doctrine applied and that the employee's injury arose out of and in the course of employment was not against the manifest weight of the evidence. *Id.* at 497. The employee was injured while participating in a recreational activity on the employer's premises during an authorized lunch break. The employee voluntarily remained on the premises and was not paid for his lunch. However, the court noted that this will not defeat an employee's claim. The court further noted that the employee was not exposed to an unnecessary or unreasonable risk. Even if the employee did expose himself to an unnecessary and unreasonable risk, the court held that the Commission could still find that the injury occurred in the course of employment because the employer knew, acquiesced, and possibly participated in the employees' routine Frisbee game. *Id.*

In *Orsini v. Industrial Comm'n, supra.*, the employee was not on a lunch break but was waiting for parts to be delivered to continue working. During this time, the employee decided to work on his own car while still on the employer's premises. The employer knew and acquiesced to this activity. The employee was injured when his car lurched forward and pinned him against his workbench. *Orsini*, 509 N.E.2d at 1006. The parties agreed that the injury occurred in the course of employment, so the main issue was whether the injury arose out of the employment. *Id.* at 1008. The supreme court held that the Commission decision, that the injury did not arise out of employment, was not against the manifest weight of the evidence. *Id.* at 1010. The risk of injury in repairing or working on one's own automobile is not ordinarily related or incidental to the duties for which he or she is employed, even if the work is done on the employer's premises. The risk of harm was not increased by any condition on the employer's premises but was rather caused by a defect in the employee's car. *Id.* at 1009. The employee was not required to work on his own car by the employer. The employee voluntarily exposed himself to an unnecessary danger entirely separate from the activities and responsibilities of his job. *Id.* at 1009. Further, the court noted that the employee was performing an act of a personal nature, solely for his own convenience, an act outside any risk connected to his employment. *Id.*

In the 1999 *Karastamatis* case, the Illinois Appellate Court First District found that even though the personal comfort doctrine applied, the injury did not arise out of the employment. *Karastamatis*, 713 N.E.2d 161. In *Karastamatis*, the employee was hired to work at the employer's annual picnic to put up tents, drive a van, clean, and stock gear and food. During a break, with the employer's permission, the employee was allowed to dance with guests of the picnic. While dancing, the employee injured his leg. *Id.* at 163. The court held that the personal comfort doctrine might be applicable but that this only established that the claimant was in the course of his employment. According to the *Karastamatis* court, the personal comfort doctrine has no application to the "arising out of" requirement, otherwise, "one on break is in a better position to recover workers' compensation benefits than an individual injured while working." *Id.* at 165. With respect to "arising out of" and causation, the court held that the employee's injuries did not result from some risk or hazard peculiar to his employment. *Id.* at 164. The employee was not hired to dance but rather he was hired to set up, stock the picnic, and serve beer and food. The risk of injury from dancing was not peculiar to this work nor incidental to his employment because it did not belong to, nor was it in any way connected with, what he had to do in fulfilling his contract of service. *Id.* at 164-165.

Two recent Workers' Compensation Commission decisions have also interpreted the personal comfort doctrine. In *Huner v. Zaffiri Concrete Foundation*, 04 IL.W.C. 07321, 05 I.W.C.C. 0885, 2005 WL 3634622 (November 7, 2005), the court held that the *Eagle* decision controlled. In *Huner*, the employee and co-employees were playing Frisbee while waiting for a cement truck to arrive. There was no work that needed to be done until the cement truck arrived. Playing sports was typical during downtimes when there was no work to be performed, according to the record. A co-owner of the employer had participated in basketball and football in the past during the downtimes. The co-owner was on the site on the date of the accident. The employee was injured when he jumped off a truck after retrieving a Frisbee. The Commission held that the employer knew and acquiesced in the activity. Here, in fact, the employer also participated. The court held that liability is imposed where the employee is injured while engaged in a recreational activity occurring on the premises during an authorized break. *Id.*

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Workers' Compensation Report *(Continued)*

In *Livingston v. Abbott Laboratories*, 03 IL.W.C. 33110, 07 I.W.C.C. 0324, 2007 WL 1257234 (March 22, 2007), the Commission applied the personal comfort doctrine in a case involving a company picnic. The personal comfort doctrine was applied because this case involved a lunch hour and involved a recreational activity, making the claim compensable because the picnic took place during an extended lunch break. *Id.* The Commission cited to *Eagle* to support its position. The Commission essentially said that it was an important factor that the activity took place on the company premises during an authorized lunch break and therefore was not a recreational activity within the scope of Section 11, which governs work picnics. *Id.*

The injury will not be found to be "in the course of" employment if the employee voluntarily and in an unexpected manner exposed himself or herself to a risk outside any reasonable exercise of his or her duties.

In conclusion, although the personal comfort doctrine will likely apply to an injury suffered during a break, the employee must still prove that his or her injury arose out of and in the course of his or her employment with the employer. The injury will not be found to be "in the course of" employment if the employee voluntarily and in an unexpected manner exposed himself or herself to a risk outside any reasonable exercise of his or her duties. However, even if the injury resulted from an unreasonable or unnecessary risk, the injury might still be held to have occurred in the course of employment if the employer has knowledge of or acquiesced in the practice or custom. In order to meet the "arising out of" requirement, the employee must show that his work was a causative factor of his injury. As an example, if an employee steps outside to get some fresh air after working in a hot and stuffy work environment, courts have held that the employee has met the burden of proving causation. Recent Commission decisions have applied the personal comfort doctrine, even where the injury occurred during a company picnic, because the company picnic took place over an extended lunch break.

Civil Rights Update

By Bradford B. Ingram and John Heil, Jr.
Heyl, Royster, Voelker & Allen
Peoria

Rule 41(a) Voluntary Dismissal in Federal Court Takes Effect Immediately Upon Filing, Not When Docketed

On November 5, 2007, the United States Court of Appeals for the Seventh Circuit decided *Jenkins v. Village of Maywood*, 506 F.3d 622 (7th Cir. 2007), a case that should put all federal court practitioners on notice. Although state law may govern applicable limitations and tolling periods, the Federal Rules of Civil Procedure dictate *when* and *how* a voluntary dismissal takes place. In the case of a voluntary dismissal through a stipulation between the parties, the dismissal occurs the moment the plaintiff's counsel files the signed instrument with the court clerk. A plaintiff intent on refiling a suit may run afoul of the statute of limitations if he

About the Authors

Bradford B. Ingram is a partner with *Heyl, Royster, Voelker & Allen*. His practice concentrates on the defense of civil rights and municipal entities and the defense of employers in all types of discrimination claims. He is a frequent speaker before local and national bar associations and industry groups.

John Heil Jr. is an of-counsel attorney with *Heyl, Royster, Voelker & Allen*. He joined the firm in November 2007 after serving eleven years an Assistant State's Attorney in Cook County, Illinois. He received his J.D. from Chicago-Kent College of Law in 1996 and his B.S. from Bradley University in 1993. His practice includes the defense of civil rights actions, municipal liability, and general negligence matters.

believes he has one year from the court's docketing of an order acknowledging the dismissal. Under Fed. R. Civ. P. 41(a), such a court order is merely superfluous, and the plaintiff may find himself barred from re-filing his claim.

Facts

The plaintiff in *Jenkins* brought suit in the District Court for the Northern District of Illinois against the Village of Maywood and several of its employees, asserting claims under both 42 U.S.C. § 1983 and Title VII. *Jenkins*, 506 F.3d at 622 (The Title VII claim was dismissed as untimely by the district court on July 18, 2005 and the plaintiff did not appeal that dismissal. *Id.* at 623, n.1.) On March 9, 2004, the parties entered into a joint stipulation for voluntary dismissal of the action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii). *Id*. The stipulation was tendered to the clerk and file stamped that day. *Id*. at 623. Six days later, on March 15, 2004, an order dismissing the case without prejudice was entered on the court's docket. *Id*. at 624.

Exactly one year later, on March 15, 2005, the plaintiff refiled a nearly identical suit in the same forum against the same defendants. *Id*. at 624. The defendants moved for summary judgment, claiming that the plaintiff had failed to bring the second action within the one-year tolling provision in Illinois law. *Id.* at 622. The district court considered the issue in detail. The court observed that because 42 U.S.C. § 1983 contains neither its own statute of limitations nor tolling rules, both are borrowed from the state in which the civil rights action is filed. In Illinois, the applicable statute of limitations is two years. *Id*. at 623. Illinois' tolling provision, 735 ILCS 5/13-217, allows a plaintiff to re-file a case within one year of its voluntary dismissal, or within the remaining period of limitations, whichever time period is greater. *Jenkins*, 506 F.3d at 623. In *Jenkins*, the greater of the two periods was one year. The central question facing the district court, therefore, was whether the one-year tolling period commenced on the date the stipulation was filed (March 9, 2004) or the date the court entered its order of dismissal (March 15, 2004).

State Versus Federal Law

Familiarity with Illinois' Code of Civil Procedure would naturally lead many attorneys to conclude that March 15, 2004 began the Section 13-217 tolling period. After all, the statutory section that governs voluntary dismissals in Illinois plainly states that such dismissals are "by order filed in the cause." 735 ILCS 5/2-1009(a). The plaintiff made this argument to the district court, which acknowledged that in Illinois, voluntary dismissals are not effective until the clerk enters the order into the court docket. *Jenkins*, 506 F.3d at 623. The defendants prevailed in their motion, however, by pointing to the Federal Rules. *Id*. Specifically, Rule 41(a) states that "an action may be dismissed by the plaintiff without order of court * * * by filing a stipulation of dismissal signed by all parties who have appeared in the action." *Id*. The district court ruled that "filing" meant the moment in which the signed stipulation was delivered to the clerk. *Id*. What happened afterwards was immaterial under Rule 41(a). The district court accordingly found the plaintiff's second suit to be untimely, and granted the defendants' motion for summary judgment. *Id*.

Seventh Circuit's Affirmance

On appeal, the plaintiff again argued that his second complaint was not tardy because under Illinois law an action is not actually "dismissed" until the court enters an order to that effect into the record. *Id*. at 623. The Seventh Circuit wasted little time dispensing with his argument, writing:

> If the case had been dismissed under 735 ILCS 5/2-1009, Jenkins might be correct * * *. But the case was in federal court, not state court, and the Federal Rules of Civil Procedure apply in federal court. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature[.]"). Although we borrow the statute of limitations and coordinate tolling rules from Illinois, federal procedural rules govern the determination of when the action was voluntarily dismissed.

Id. at 624. After all, the court reasoned, "a rule governing dismissal is not a coordinate tolling rule." *Id.* Because the plaintiff's March 15, 2005 refiling was six days late, the Seventh Circuit affirmed summary judgment in favor of the defendants. *Id.* at 625.

Conclusion

The answer, therefore, was found in Rule 1, which long ago established that the Federal Rules govern all civil lawsuits filed in federal court. The plaintiff's action was a federal case on the call of a federal judge. The plaintiff's decision to obtain a stipulation from the defendants and voluntarily dismiss the suit did nothing to suddenly implicate state law. Illinois' tolling statute only came into play after the plaintiff had already dismissed his federal action pursuant to the Federal Rules. Although it may serve as a wake-up call for plaintiffs' counsel, this decision should certainly remain in the consciousness of any defense attorney facing the refiling of a § 1983 complaint in federal court.

Supreme Court Watch

By: Beth A. Bauer
Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC
Edwardsville

On September 26, 2007, the Illinois Supreme Court allowed the following Petitions for Leave to Appeal in the following civil cases of general interest:

Does Illinois Recognize a Duty of Care Between a Physician and a Patient's Family Members?

Tedrick v. Community Resource Center, Inc., Gen. Nos. 104861 and 104876, Fifth District 5-06-0065

The plaintiffs filed a twenty-count complaint for wrongful death and survival against ten healthcare providers. The complaint alleged that the decedent's husband had killed her. Purportedly the defendants negligently provided the husband with psychiatric care between May 13, 2003, and June 6, 2003. According to the complaint, the husband had paranoid delusions that his wife was committing adultery and trying to poison him and he had thoughts of killing his wife. Further, the complaint alleged that the husband had made threats to kill his wife. The plaintiffs pleaded that the defendants owed a duty to warn the decedent of the threat posed by the husband based on the fact that the defendants had treated the husband and knew that the decedent was his wife.

The defendants moved to dismiss the complaint pursuant to Section 735 ILCS 5/2-615, arguing that they owed no duty to the husband because under Illinois law, healthcare professionals do not owe a duty to a third party in the absence of a physician-patient relationship or a recognized special relationship. The trial court granted the motions to dismiss, finding that the complaint failed to allege a recognized duty.

The Illinois Appellate Court Fifth District reversed, holding that the defendants had voluntarily assumed a duty to protect the decedent and warn her of the violent propensities of her husband. The court further held that the relationship between husband and wife was comparable to the special relationship found in *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (a child could maintain an action against a hospital and physician for injuries sustained as a result of a negligent transfusion of Rh positive blood into her Rh negative mother, even though the transfusion occurred years before the child was born). As such, the appellate court found that the complaint set forth sufficient facts to establish a cause of action.

The defendants sought leave to appeal to the Illinois Supreme Court, contending that the appellate court's expansion of the *Renslow* concept of transferred negligence is inconsistent with *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987) and *Renslow*, 367 N.E.2d 1250. According to the defendants, these decisions unequivocally hold that a healthcare provider owes no duty to a third party absent a direct physician-patient relationship or a special relationship between the patient and the plaintiff. Further, the defendants cite *Doe v. McKay*, 183 Ill. 2d 272, 700 N.E.2d 1018 (1998) and *Estate of Johnson v. Condell Mem'l Hosp.*, 119 Ill. 2d 496, 520 N.E.2d 37 (1988) for the proposition that the court had declined to expand the *Renslow* definition of "special relationship" beyond that of mother and child. The defendants also cite prior appellate court decisions, which refused to expand the *Renslow* concept of transferred negligence beyond its context. *See Heigert v. Riedel*, 206 Ill. App. 3d 556, 565 N.E.2d 60 (5th Dist. 1990) and *Britton v. Soltes*, 205 Ill. App. 3d 943, 563 N.E.2d 910 (1st Dist. 1990).

Additionally, the defendants argue that finding a duty arises from a voluntary undertaking is contrary to the decisions upon which the Fifth District relied. Generally, there is no duty to protect someone from the criminal acts of another. *Estate of Johnson, supra*. The defendants argue that both of the cases upon which the appellate court relied in citing the voluntary undertaking doctrine hold that the duty assumed under this doctrine is strictly limited to the extent of the undertaking. *Pippin v. Chicago Housing Auth.*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979); *Siklas v. Ecker Center for Mental Health*, 248 Ill. App. 3d 124, 617 N.E.2d 507 (2nd Dist. 1993).

About the Author

Beth A. Bauer concentrates her practice in the area of appellate practice at *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLP* in Edwardsville. She graduated *cum laude* from St. Louis University School of Law in 2000 and received her B.A. with honors from Washington University in 1997. Ms. Bauer is a member of the Illinois and Missouri State Bar Associations and National Christian Legal Society.

According to the defendants, the complaint alleges that the defendants undertook to render medical treatment to the husband and not to his wife. Therefore, the voluntary undertaking doctrine has no application here.

Finally, the defendants argue that the opinion of the Fifth District makes the defendants, healthcare providers, the guarantors of the safety of the family members of the patient, which is a vast and unwarranted expansion of the law.

Should the Risk-Utility Test Be Used for Design Defect Cases Involving Complex Products?

***Mikolajczyk v. Ford Motor Co.*, Gen. No. 104983, First District 1-05-3133**

The decedent was killed when a Cadillac struck his 1996 Ford Escort, which was stopped at a red light. The plaintiff sued the defendant for strict product liability based on the front seat design of the Escort. According to the defendant, the plaintiff attempted to establish that the risks of a yielding seat outweigh its utility, and an available alternative design would have prevented the death of the decedent. Further, the defendant contends that the plaintiff introduced no evidence about what consumers expect in car seat design and that the plaintiff objected successfully to the admission of evidence about consumer expectations. The defendant also focused exclusively on proving that the utility of a yielding seat outweighed its risks, and that no feasible design could have prevented the death of the decedent.

The defendant states that the jury received the Illinois Pattern Instructions (IPI) on strict liability. The IPI is based on the consumer expectations test found in Section 402A of the 1965 Restatement (Second) of Torts, despite the defendant's objection that the IPI instruction is inapplicable in a case involving the design of a complex product. The jury was not told to balance the risks and benefits of the seat design or to consider the feasibility of alternative designs. Ultimately, the jury awarded the plaintiff $27 million.

The Illinois Appellate Court First District affirmed the trial court's use of the consumer expectations jury instructions. It held that Illinois law, including the Supreme Court's recent *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 828 N.E.2d 1128 (2005) and *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 864 N.E.2d 249 (2007) decisions, allows the plaintiff to choose to proceed under either the consumer expectations test or the risk-utility test.

The defendant urges the Illinois Supreme Court to review this case to decide what legal standard governs a claim that a defendant is strictly liable for defectively designing a complex product used in circumstances beyond the experience of ordinary consumers. The defendant asserts that the Illinois Supreme Court decisions of *Blue* and *Calles* signal the evolution of Illinois law toward using the modern risk-utility test for design defect claims, which has been codified in the Restatement (Third) of Torts.

The Illinois Appellate Court First District affirmed the trial court's use of the consumer expectations jury instructions.

Additionally, the defendant argues that the decision of the First District should be reversed because the jury instructions did not match any of the evidence introduced in the case. According to the defendant, the opinion of the appellate court altered the long-standing rule in Illinois that a jury must be instructed on theories supported by the evidence.

Is a Local Public Entity Absolutely Immune from a Retaliatory Discharge Claim?

***Smith v. Waukegan Park Dist.*, Gen. No. 104960, Second District 2-05-0628**

The plaintiff sued the defendant for retaliatory discharge, alleging that his employment was terminated after he exercised his rights under the Illinois Workers' Compensation Act. The defendant moved to dismiss the complaint pursuant to 735 ILCS 5/2-619(a)(9), arguing that as a local public entity, it was absolutely immune from suit for retaliatory discharge under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act). (745 ILCS 10/1-101, *et. seq.*) The trial court dismissed the complaint with prejudice.

The Illinois Appellate Court Second District affirmed the dismissal. It held that the defendant was absolutely immune under Section 2-109 of the Tort Immunity Act, which provides immunity "for an injury resulting from an act or omis-

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Supreme Court Watch *(Continued)*

sion of its employee where the employee is not liable." The appellate court found that the plaintiff's supervisor was not liable under Section 2-201 of the Tort Immunity Act because he had performed a discretionary act and made a policy determination in terminating the plaintiff.

On appeal to the Illinois Supreme Court, the plaintiff argues that the Second District's opinion conflicts with *Boyles v. Greater Peoria Mass Transit Dist.*, 113 Ill. 2d 545, 499 N.E.2d 435 (1986). According to the plaintiff, the *Boyles* case allows an employee to bring an action for retaliatory discharge against a local public entity.

Further, the plaintiff contends that the Second District's opinion fails to ascertain and to give effect to the will of the legislature. The plaintiff reasoned that because the legislature did not amend the Tort Immunity Act after the *Boyles* decision by specifically finding that a local public entity could be sued for retaliatory discharge, the legislature must intend that such a cause of action to be valid. As such, the opinion of the Second District that the defendant was absolutely immune is contrary to legislative intent.

Finally, the plaintiff argues that the opinion of the Second District creates an irreconcilable conflict with the First District regarding the scope of the tort of retaliatory discharge. The plaintiff argues that in *Cross v. City of Chicago*, 352 Ill. App. 3d 1, 815 N.E.2d 956 (1st Dist. 2004), the court held that a local public entity is immune to claims for retaliatory discharge only when the suit arises from the discretionary acts of employees, meaning that some retaliatory discharge cases against local public entities were legitimate. Consequently, the Second District's opinion finding absolute immunity for the defendant conflicts with the First District's finding in *Cross.*

May an Insurer Recoup Defense Costs Without Policy Language that Allows for Restitution?

***Steadfast Ins. Co. v. Caremark RX, Inc.*, Gen. No. 104906, First District 1-06-1221**

The insured was named in two underlying federal lawsuits and tendered its defense to the insurer. The insurer denied that it owed the insured a duty to defend and filed a declaratory judgment action seeking an order consistent with its coverage opinion. The circuit court granted the insured's cross-motion for summary judgment, finding that the insurer owed the insured a duty to defend. The appellate court, however, eventually reversed that order finding no duty to defend.

Thereafter, the insurer sought to recover its defense costs paid to the insured in defending the underlying lawsuits, which the circuit court denied. Again, the appellate court reversed the order of the circuit court that had denied the insured's motion for leave to file an amended complaint seeking restitution and remanded the case for further proceedings.

Particularly, the insured seeks protection of the rights of an insured who may have conducted the defense of an underlying lawsuit differently if it had notice that an insurer would be allowed to recoup the defense fees paid on the behalf of the insured.

The insured seeks review in the Illinois Supreme Court, arguing that the First District's opinion conflicts with *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 828 N.E.2d 1092 (2005). According to the insured, the *General Agents* court held that an insurer may not recover its defense costs if a court later finds the insurer owes no duty to defend absent an express provision to that effect in the insurance contract between the parties. Here, no such provision existed in the policy. Further, the insured argues that the decision of the First District provides unfair leverage to insurers and encourages insurers to deny a claim and file a declaratory judgment action rather than defending a case under a reservation of rights declaration.

The insured also urges supreme court review to protect the public policy principles behind its decision in *General Agent*. Particularly, the insured seeks protection of the rights of an insured who may have conducted the defense of an underlying lawsuit differently if it had notice that an insurer would be allowed to recoup the defense fees paid on the behalf of the insured.

Medical Malpractice

By: *Edward J. Aucoin, Jr.*
Pretzel & Stouffer, Chartered
Chicago

Tort Reform Comes Under Attack in *Lebron v. Gottlieb*

Less than 27 months after the Illinois General Assembly's most recent attempt at Tort Reform, Public Act 94-677, went into effect, it has been deemed unconstitutional by an Illinois trial court. On November 13, 2007, the Honorable Diane Joan Larsen of the Circuit Court of Cook County entered an order granting partial judgment ("order") in favor of the plaintiffs in the case, *Abigail Lebron v. Gottlieb Memorial Hospital*. The *Lebron* case was consolidated with two other cases in the Circuit Court of Cook County, both of which also had motions challenging the constitutionality of Public Act 94-677: *Alexander v. Nacopoulos*, and *Zago v. Resurrection Medical Center.*

The entry of the court's order was the first step in the concerted, and well-funded, effort by the Illinois plaintiff's bar to overturn this version of Tort Reform. This was despite how narrow that reform was aimed and regardless of the fact that a majority of the public supported the measures through their representatives in Springfield. Plaintiffs' counsel in *Lebron* is being assisted by the Center for Constitutional Litigation, P.C., which has helped challenge Tort Reform measures in Utah, Alaska, Florida and Arkansas. All indications are that the defendants will appeal this matter directly to the Illinois Supreme Court. In the interim, a review of Judge Larsen's order gives us a preview of the arguments to be presented before that court.

After some initial disclosures as to the procedural history of the matter and an assertion of proper jurisdiction, ripeness and standing, the court directly addressed the plaintiffs' motion for partial judgment as to Count V of their complaint, which sought a declaratory judgment that Public Act 94-677 was unconstitutional. While the parties' motions and supporting memoranda of law addressed all the Tort Reform provisions, the court only analyzed one provision in its ruling, the amended 735 ILCS 5/2-1706.5, which caps non-economic damages in medical malpractice cases. Finding Section 2-1706.5 unconstitutional, the court did not analyze the remaining provisions separately. Rather, because of the "inseverability provision at § 995 of the Act," the court "invalidate[d] the Act in its entirety." Order, slip op. at 7. As such, this article will only discuss the court's analysis of Section 2-1706.5.

In their memorandum, the plaintiffs argued that Section 2-1706.5's cap on non-economic damages invades exclusive and inherent judicial authority by enacting a legislative remittitur, thus violating the separation of powers doctrine. They further argued that 2-1706.5 is an impermissible form of special legislation and violates the right to a trial by jury, due process, equal protection, and the right to a remedy. In support of their arguments, the plaintiffs cited the case which found the General Assembly's previous attempt at Tort Reform unconstitutional, *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), and a second Illinois Supreme Court case that dealt with the issue of special legislation, *Wright v. Central DuPage Hospital Association*, 63 Ill. 2d 313 (1976).

In response, the defendants argued that the Illinois Supreme Court's holdings in *Wright* and *Best* should not be applied to the current version of 2-1706.5, and therefore, 2-1706.5 is constitutional because it adopts reasonable limits on non-economic damages in malpractice cases, which numerous studies considered by the Illinois General Assembly have demonstrated are effective in reducing insurance premiums.

In beginning her analysis, Judge Larsen borrowed language from the *Best* decision, and recognized that "[t]he problems addressed in the briefs and in oral arguments in the case at bar represent some of the most critical concerns which confront our society today." Order, slip op. at 6; see also *Best*, 179 Ill. 2d at 471. The court's reliance on the *Best* decision

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About the Author

Edward J. Aucoin, Jr. is an associate in the Chicago firm of *Pretzel & Stouffer, Chartered.* He has over nine years of experience in medical malpractice defense, commercial litigation, and contract litigation practice. Mr. Aucoin's substantial client base includes private hospitals and medical practice groups, physicians and other medical professionals, and national commercial corporations. He has extensive experience in preparing complex litigation for trial, and has second-chaired medical malpractice trials in Cook County and DuPage County. Mr. Aucoin received his B.A. from Loyola University of New Orleans and his J.D. from Loyola University of New Orleans School of Law. He is also a member of the IDC.

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became more pronounced thereafter, with Judge Larsen explaining that she must "faithfully adhere to our system of jurisprudence based on stare decisis." Order, slip op. at 8.

The court failed to address Justice Miller's and Justice Bilandic's statements in their dissent and special concurrence in *Best*, that the majority's discussion of separation of powers was *dicta*. *Best*, 179 Ill.2d at 481. If Justices Miller and Bilandic were correct that the separation of powers discussion was *dicta*, the court in *Lebron* would have to make an initial determination of whether the *Best* majority's discussion of separation of powers has any precedential effect, and therefore, whether stare decisis indeed applies in this matter. Even though the court acknowledged the impropriety of advisory opinions, it nevertheless failed to address either Justice Miller's or Justice Bilandic's statements regarding *dicta* in the order.

In rejecting the defendants' arguments and finding Section 2-1706.5 unconstitutional, Judge Larsen stated that "[I]t is the judgment of this court that the holding of the Illinois Supreme Court [in *Best*]—that a compensatory damage cap applicable in all cases violates separation of powers—is no less applicable to the present case simply because the cap at issue applies only in medical malpractice cases." Order, slip op. at 8. The court further found that "[t]he Supreme Court has determined that a cap on non-economic damages applicable in all cases operates as a legislative remittitur which 'disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action.'" Order, slip op. at 8, citing *Best*, 179 Ill. 2d at 414.

Finally, Judge Larsen found "no principled reason set forth that a cap on non-economic damages applicable only in medical malpractice cases should not be considered a legislative remittitur given the Supreme Court's holding in *Best*." Order, slip op. at 9. In so stating, Judge Larsen obviously embraced the Supreme Court's conclusion in *Best*, "that sec. 2-1115.1 [the previous legislative attempt at a cap on non-economic damages] invades the power of the judiciary to limit excessive awards of damages. *Best*, 179 Ill.2d at 415.

Just as obvious is the fact that the court rejected Judge Miller's argument from his dissent in *Best*, where he stated:

> "[T]he challenged provision does not represent a finding about the evidence of any particular case, and it does not detract from the power of a court to reduce an award of damages in appropriate circumstances. Remittitur pertains to judges and juries, not the legislature; by characterizing the cap on damages as a remittitur, the majority is simply erecting and demolishing a strawman." *Best*, 179 Ill.2d at 481.

While we wait for the Illinois Supreme Court to either affirm or reverse Judge Larsen's order, we are left with the issue of how proceed at trial regardless of the court's final determination of the constitutionality of Public Act 94-677. One area to focus attention is on using the court's language from *Best* to address excessive verdicts. In *Best*, the Illinois Supreme Court concluded that "[t]he courts are constitutionally empowered, and indeed obligated, to reduce excessive verdicts where appropriate in light of the evidence adduced in a particular case." *Id.* at 415.

Non-economic damages by their nature have no good economic measure, and therefore are often the result of irrational decision making by juries.

In reality, defense counsel are probably not requesting remittitur for reducing excessive verdicts as often as possible. Non-economic damages by their nature have no good economic measure, and therefore are often the result of irrational decision making by juries. Therefore, defense counsel should argue that the court must use its rational discretion to determine whether the verdict is excessive and whether remittitur, a mechanism that the supreme court has so vigorously reserved for the judiciary, should be applied. Perhaps then we may discover whether the judiciary is willing to apply remittitur to awards of non-economic damages that it is so reticent to allow the legislature to mandate.

Appellate Practice Corner

By: *Brad A. Elward*
Heyl, Royster, Voelker & Allen
Peoria

Supreme Court Rule 306(a) Interlocutory Appeals Are Not Tolled By the Filing of a Motion for Reconsideration

A recent 2007 decision of the Illinois Appellate Court Second District, highlights two procedural matters affecting appellate practice. In *CE Design, LTD, v. Mortgage Exchange, Inc.*, 375 Ill. App. 3d 379, 872 N.E.2d 1056 (2nd Dist. 2007), the appellate court reiterated the rule that a motion to reconsider does not extend or toll the time for filing a Rule 306(a) petition for leave to appeal. Moreover, the court held that service by facsimile of a motion to dismiss an appeal, even without the recipient's consent, did not warrant striking the motion, because the recipient received and responded to the motion and failed to show any prejudice.

In *CE Design*, the plaintiffs filed a class action complaint alleging unsolicited advertising in violation of Illinois and federal laws, and subsequently filed for class certification. On October 13, 2006, the circuit court denied the plaintiffs' certification motion, finding that the class did not share common issues and that the class action mechanism was not the appropriate method for adjudication of the controversy. The plaintiffs moved to reconsider on November 13, 2006, which was denied on February 22, 2007. On March 26, 2007, the plaintiffs filed a Rule 306(a) petition for leave to appeal the circuit court's denial of their motion for class certification. A few weeks later, the defendant moved to dismiss the appeal for lack of jurisdiction.

Concerning the procedural issue of service, the plaintiffs contended that the motion to dismiss should be stricken because they had not been properly served. The plaintiffs cited Supreme Court Rule 11(b)(4), which states that a party may be served via facsimile machine only where that party has so consented. 145 Ill. 2d R. 11(b)(4). The plaintiffs contended that they had not consented to fax service, and therefore, the motion was improper. The appellate court rejected the plaintiffs' position, noting that it is not reversible error where the opposing attorney who actually receives the document was nevertheless permitted to respond to the motion. *See In re M.G.*, 301 Ill. App. 3d 401, 412, 703 N.E.2d 594 (1st Dist. 1998); *Curtis v. Pekin Ins. Co.*, 105 Ill. App. 3d 561, 566, 434 N.E.2d 555 (4th Dist. 1982). Moreover, the court observed that cases have condoned a lack of strict compliance with procedural Supreme Court rules where the alleged violations do not interfere with or preclude review. Here, there was no prejudice to the plaintiffs, as they indeed filed a response to the motion.

Concerning the tolling issue, the court held that the 30-day requirement of Supreme Court Rule 306(c) is jurisdictional and there is no provision that allows a motion to reconsider an interlocutory order to extend the time for filing a petition for leave to appeal. According to the court, Illinois courts have consistently held that motions to reconsider directed towards interlocutory orders identified by certain subsections of Rule 306(a) do not toll the running of the 30-day filing period. *In re Leonard R.*, 351 Ill. App. 3d 172, 174, 813 N.E.2d 1054 (1st Dist. 2004) (considering subsection (a)(5)); *Law Officers of Jeffery M. Leving, Ltd. v. Cotting*, 345 Ill. App. 3d 495, 499, 801 N.E.2d 6 (1st Dist. 2003) (considering subsection (a)(4)); *National Seal Co. v. Greenblatt*, 321 Ill. App. 3d 306, 308, 748 N.E.2d 333 (2nd Dist. 2001) (considering subsection (a)(4)); and *Odom v. Bowman*, 159 Ill. App. 3d 568, 570, 511 N.E.2d 1265 (5th Dist. 1987) (considering what is now subsection (a)(1)).

Of interest, the plaintiffs argued that no case had specifically addressed whether the denial of a motion for reconsideration of class certification is appealable under Rule 306(a)(8), which subsection is worded differently than subsections (a)(2) and (a)(4), which referred specifically to an order granting or denying a particular motion. The court ob-

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About the Author

Brad A. Elward is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*. He practices in the area of appellate law, with a sub-concentration in workers' compensation appeals and asbestos-related appeals. He received his undergraduate degree from the University of Illinois, Champaign-Urbana, in 1986 and his law degree from Southern Illinois University School of Law in 1989. Mr. Elward is a member of the Illinois Appellate Lawyers Association, the Illinois State, Peoria County, and American Bar Associations, and a member of the ISBA Workers' Compensation Section Counsel.

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served, "the timeliness requirement in subsection (c) of Rule 306 applies in the same way to all petitions filed pursuant to all subsections of Rule 306(a) except subsection (a)(5), which is governed by subsection (b)." Thus, "if a motion to reconsider will not toll the running of the 30-day deadline for petitions filed pursuant to Rules 306(a)(2) and (a)(4), then a motion to reconsider will not toll the running of the deadline for a petition filed pursuant to Rule 306(a)(8)."

The 30-day requirement of Supreme Court Rule 306(c) is jurisdictional and there is no provision that allows a motion to reconsider an interlocutory order to extend the time for filing a petition for leave to appeal.

The plaintiffs further argued that the motion to reconsider was in fact a new motion for class certification, which under *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 236, 492 N.E.2d 1327 (1986), would restart the clock as far as filing a Rule 306(a) petition. In *Kemner*, the court found that the motion to reconsider was actually a new original motion to dismiss under *forum non conveniens*, and permitted the Rule 306(a) petition to proceed. Here, the court rejected any comparison to *Kemner*, noting that the motion to reconsider did not raise any new facts or change in the law, but simply attempted to point out to the circuit court why it had erred in interpreting existing authorities.

CE Designs is important because it reminds us that the best course of action following the entry of any qualifying order under rule 306(a) is to simply file the petition for leave to appeal. While this case concerns the denial of class certification, the general principles pronounced impact all Rule 306(a) interlocutory appeals, in particular those based on the doctrine of *forum non conveniens*. If a motion to reconsider is desired, one must file and obtain ruling on it prior to the expiration of the 30-day period, or face waiver of the right to file a petition. Moreover, if one wants to call the motion a "new motion", label it as such and be sure to include the new facts that were not available at the time of the original motion, or reference new law that has changed since the original order or hearing.

Health Law

By: Roger R. Clayton and Jesse A. Placher
Heyl, Royster, Voelker & Allen
Peoria

Res Ipsa Loquitur Theory Survives Dismissal in Hospital Fire

On October 3, 1998, paramedics responded to a call regarding Almon Heastie. He was found intoxicated in a residential driveway and was transported to the emergency room of the Columbia Olympia Fields Osteopathic Hospital and Medical Center ("the Hospital"). Medical personnel determined Heastie did not require immediate medical intervention. However, because Heastie was yelling and combative, the Hospital's emergency room charge nurse believed he was an immediate threat to harm himself or others. In accordance

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker and Allen* where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the IDC, the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, a board member of the Illinois Association of Healthcare Attorneys, and the current president of the Illinois Society of Healthcare Risk Management.

Jesse A. Placher is a 2007 Fall Associate in the Peoria office of *Heyl, Royster, Voelker & Allen*. He received his undergraduate degree from the University of Virginia in 2004 and law degree from Southern Illinois University in 2007. During law school, he was a member of the SIU Trial Team and was awarded the Order of the Barristers in 2007. Following graduation, he joined the firm's Peoria office in August 2007.

with the Hospital's policies, Heastie was restrained on a cart and moved to an area of the Hospital away from other patients. *Heastie v. Roberts*, No. 102428, 2007 WL 3227199, *1 (Ill. November 1, 2007).

The Hospital's regular seclusion room for these situations was already in use, so Heastie was taken to the ER's cast room. Although Hospital policy required the staff to search Heastie for contraband, no search was done. Approximately 90 minutes later, the heat alarm in the cast room activated the ER's fire alarm. Heastie was found on fire, still secured to the cart by restraints. He was transported by helicopter to Loyola University Medical Center. *Heastie*, 2007 WL 3227199 at *2. Heastie suffered third degree burns to several portions of his body and required extensive debridement, grafting, multiple surgeries, and the amputation of his right thumb and some of his fingertips. He remained on a respirator and unconscious for weeks after the accident. *Id.* at *3.

Heastie brought a three-count negligence action. Count III asserted a negligence claim based on the doctrine of *res ipsa loquitur*, which was dismissed by the circuit court. *Id.* at *4. The appellate court reversed and remanded for a new trial, holding that Heastie had satisfied the elements of the doctrine. *Id.* at *6. The defendants' petition for leave to appeal to the Illinois Supreme Court was allowed. *Id.* at *7.

The supreme court recognized that to establish a claim under the *res ipsa loquitur* doctrine, Heastie must plead and prove that he was injured: (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control. *Id.* at *8, citing *Gatlin v. Ruder*, 137 Ill. 2d 284, 295, 560 N.E.2d 586 (1990). When addressing the second element, the key question was whether the probable cause of Heastie's injury was one which the defendants were under a duty to Heastie to anticipate or guard against. *Heastie*, 2007 WL 3227199 at *8. Finally, the court recognized that Illinois law no longer required Heastie to plead and prove freedom from contributory negligence under the doctrine of *res ipsa loquitur*. *Id.*

With regard to the first element, Heastie alleged that he was restrained and left alone in a hospital emergency room only to be exposed to an ignition source that set him on fire. The court reasoned that if a person catches fire, there must be some external source of negligence. Consequently, Heastie had sufficiently alleged the first element of the doctrine. *Id.* at *8.

With regard to the second element, although the source of ignition was never ascertained, Heastie alleged he was put in the cast room by the defendants, the room was owned and maintained by the Hospital, and his condition was monitored and controlled exclusively by the defendants. Therefore, the cause of the fire appears to have been under the defendants' exclusive control. The court noted that Heastie need not show that his injuries were more likely caused by one of the defendants, nor must he eliminate all causes of his injuries other than the negligence of the defendants. *Id.* at *9, citing *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 822-23, 789 N.E.2d 394 (1st Dist. 2003). Rather, while Illinois law normally requires the injury to be traced to a specific cause for which the defendant is responsible, it also authorizes the use of the *res ipsa* doctrine where it can be shown that the defendants were responsible for all reasonable causes of the accident, which is precisely what Heastie had alleged. *Heastie*, 2007 WL 3227199 at *12. The court thus held that Heastie had sufficiently alleged the second element of the *res ipsa loquitur* doctrine. *Id.* at *9.

In opposition, the defendants cited to *Dyback v. Weber*, 114 Ill. 2d 232, 242-43, 500 N.E.2d 8 (1986), and *Bernardi v. Chicago Steel Container Corp.*, 187 Ill. App. 3d 1010, 1013, 543 N.E.2d 1004 (1st Dist. 1989). In these decisions, the applicability of the *res ipsa loquitur* doctrine was rejected under circumstances where the origin of the fire was uncertain. The court distinguished those decisions because they did not turn on the sufficiency of the pleadings. Additionally, the court noted that the evidence in those cases supported plausible explanations for the fire other than the defendants' negligence. *Heastie*, 2007 WL 3227199 at *9.

Additionally, the defendants argued that Heastie could not invoke *res ipsa loquitur* because he failed to provide expert testimony to support the proposition that hospital patients in his situation do not ordinarily catch fire absent some form of negligence. *Id.* The court rejected this argument noting that Illinois law does not require expert testimony in every *res ipsa* case. Specifically, Illinois trial courts are authorized to rely upon either "the common knowledge of laymen, if it determines that to be adequate" or upon expert medical testimony. *Id.* at *11, citing 735 ILCS 5/2-1113 (West 2004).

Ultimately, the supreme court affirmed the appellate court's holding that the circuit court erred in dismissing count III of Heastie's complaint on the pleadings. The court held that Heastie stated a claim for negligence under the doctrine of *res ipsa loquitur*, and Heastie's claim did not require expert testimony. The cause was remanded to the circuit court for a new trial, with instructions. All justices weighing in the decision concurred in the judgment and opinion.

Recent Decisions

*By: Stacy Dolan Fulco**
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

NEGLIGENT SPOLIATION

Expiration of Underlying Statute of Limitation Precludes Negligent Spoliation Claim

In *Babich v. River Oaks Toyota*, No. 1-05-3728, 2007 WL 3332709 (Ill.App. 1st Dist. Nov. 8, 2007), the plaintiff sued River Oaks Toyota and Flair Design sounding in products liability and alleging injury after falling out of a chair at the dealership. *Babich*, 2007 WL 3332709 at *1. The plaintiff also filed a count for negligent spoliation against the dealership, alleging that the dealership disposed of the chair that injured the plaintiff. The circuit court granted summary judgment on the products liability count due to the expiration of the statute of limitation for products liability. The circuit court then dismissed the plaintiff's negligent spoliation claim, finding that since the plaintiff could not proceed with the product liability action, the negligent spoliation action must fail. *Id*. at *2.

On appeal, the appellate court first noted that the products liability statute, 735 ILCS 5/13-213(b), provides that a products liability claim must be brought within 12 years after the date of first sale, delivery or lease, or within 10 years after the first sale, lease or delivery to the initial user, consumer or other nonseller. If both time limitations apply, the statute provides that the shorter limitation controls. *Id.* at *2, 735 ILCS 5/13-213(b) (West 2002). The appellate court affirmed the trial court's finding that the testimony, affidavits, and depositions established that the statute of limitations had expired. *Id*. at *4.

The court next considered whether the plaintiff's negligent spoliation claim was also barred. The appellate court referenced *Boyd v. Travelers*, 166 Ill.2d 188 (1995), which held that a negligent spoliation claim could be brought under existing negligence law. As such, spoliation is not an independent cause of action, but a derivative action that arises out of other causes of action. *Id.* at *5.

Given this, the appellate court reasoned that once the limitations period had expired for the products liability action, the plaintiff could not proceed with a negligent spoliation action because it was a derivative action subject to the same limitations period as the products liability action. Thus, once the products liability action expired, there was no pending action into which the allegedly spoiled evidence could be introduced as evidence. As such, the appellate court affirmed the circuit court's dismissal. *Id*. at *5.

SETTLEMENT

Worker's Compensation Lien Must Be Explicitly Waived or Statutory Right to Recover Prevails

In *Burgess v. Brooks*, No. 5-06-0273, 2007 WL 3276103 (Ill.App. 5th Dist. Nov. 5, 2007), the plaintiff, an on duty Illinois Secretary of State Police officer, was rear-ended by a car driven by defendant Brooks. The plaintiff filed a worker's compensation claim against the State of Illinois, his employer. The Illinois Industrial Commission approved a settlement agreement, which specifically included the language that the settlement "is a compromise settlement of a disputed claim." Each party waived the right to reopen the claim pursuant to any section of the Worker's Compensation Act. *Burgess*, 2007 WL 3276103 at *1. The claim settled for $19,138.48.

After the settlement, the plaintiff filed suit against defendant Brooks in circuit court alleging negligence. The State filed a petition to intervene pursuant to Section 5(b) of the Worker's Compensation Act, seeking to preserve its lien and right to reimbursement for amounts paid in the settlement. *Id*. At arbitration, the plaintiff was awarded $19,000. The plaintiff then filed a motion to determine the State's lien pursuant to Section 5(b). The plaintiff alleged that the waiver language in the settlement agreement prevented the State from reopening the claim under any section of the Worker's Com-

About the Author

Stacy Dolan Fulco is a partner at the Chicago law firm of *Cremer, Kopon, Shaughnessy & Spina, LLC*. She practices primarily in the areas of premises liability, products liability and wrongful death defense. She received her undergraduate degree at Illinois State University and her J.D./M.B.A. degree from DePaul University. She is a member of the IDC.

* The author acknowledges the assistance of **Katherine K. Haussermann** in the preparation of this article.

pensation Act. The State argued that it had not waived its lien. *Id*.

The appellate court considered the matter on a supervisory order from the Illinois Supreme Court. Specifically, the Illinois Supreme Court directed the Illinois Appellate Court Fifth District to vacate its previous decision in *Burgess v. Brooks* and reconsider the case in light of the Illinois Supreme Court's decision in *Gallagher v. Lenart*, 226 Ill.2d 208 (2007).

The State argued on appeal that the language only referred to the plaintiff's claim for benefits and did not apply to the State's independent statutory right to assert a lien. *Burgess*, 2007 WL 3276103 at *2. The appellate court specifically considered whether the settlement agreement waived the State's lien. *Id*.

In the Fifth District's previous *Burgess* opinion, the appellate court analyzed the *Borrowman v. Prastein*, 356 Ill.App.3d 546 (4th Dist. 2005), decision. In *Borrowman*, the Fourth District held that when an employer knew of the employee's third party action against a negligent third party but failed to expressly reserve its right to assert a lien against the proceeds of such third party action, it had waived its statutory lien by failing to reserve it in the settlement. *Burgess*, 2007 WL 3276103 at *2.

Subsequent to the Fourth District's decision in *Borrowman*, the Illinois Supreme Court issued its opinion in *Gallagher v. Lenart. Burgess*, 2007 WL 3276103 at *3. In *Gallagher*, the court held that general language of waiver or release is insufficient to waive an employer's worker's compensation lien in a settlement agreement. Rather, the wavier of a worker's compensation lien must be explicitly stated. *Id*. The supreme court's decision in *Gallagher* explicitly overruled *Borrowman*. *Id.*

Applying the Illinois Supreme Court's decision in *Gallagher* to the *Burgess* settlement agreement, the Fifth District found that the general waiver language in the settlement agreement, which failed to explicitly waive a lien pursuant to Section 5(b) of the Worker's Compensation Act, was insufficient to waive of the State's worker's compensation lien. Thus, the appellate court reversed the circuit court's decision, finding in favor of the State. *Id.*

Worker's Compensation Lien Cannot be Resolved Without Consent of Lienholder

In *Smith v. Louis Joliet Shoppingtown LP*, No. 1-06-2988, 2007 WL 3244120 (Ill.App. 1st Dist. Oct. 30, 2007), the plaintiff filed a personal injury case against Louis Joliet Shoppingtown after slipping and falling on Shoppingtown's premises while working for the U.S. Postal Service. The insurance carrier for the plaintiff's employer, Liberty Mutual, intervened individually and as subrogee of the employer. On appeal, the intervenor alleged that the circuit court improperly adjudicated the worker's compensation lien to an amount less than the plaintiff's recovery. *Id.*

The plaintiff received worker's compensation benefits in the amount of $143,000. *Smith*, 2007 WL 3244120 at *1. All parties attended a settlement conference with the circuit court judge. The defendant offered $110,000 to settle all claims. *Id.* The circuit court recommended that the intervenor (Liberty Mutual) settle its lien for $25,000. Liberty Mutual rejected that suggestion and counter-offered to settle the lien for $50,000. The court then recommended Liberty Mutual settle for $25,000 with costs or $30,000 without costs as settlement of its lien. *Id*. The adjustor for Liberty Mutual communicated the court's suggestion to its client but the client did not immediately respond. *Id.*

Without any response from Liberty Mutual's client, the plaintiff and defendant then negotiated a settlement in the amount of $110,000 and the court adjudicated the lien to $30,000, without the presence of Liberty Mutual's counsel. *Id*. Liberty Mutual's counsel then filed a motion to vacate the court's order, alleging that the court had violated section 5(b) of the Worker's Compensation Act, which requires that the lienholder provide the court with written consent of the settlement agreement. Liberty Mutual alleged that because it was not present when the lien was adjudicated, it did not provide consent. *Id*. The circuit court rejected the motion to vacate, finding that Liberty Mutual was estopped from objecting or had waived its right to object because the court and at least one other attorney believed that counsel for Liberty Mutual had left the building.

On appeal, the court looked to the language of Section 5(b), which grants the employer a statutory lien on any recovery the employee may receive from a third party equal to the amount of worker's compensation benefits paid or owed to the employee. *Id*. at *2, 820 ILCS 305/5(b) (West 2004). The appellate court opined that there were two purposes to Section 5(b) of the Act. First, the section is intended to compensate the employee but protect the employer by allowing the employee and employer to attempt recovery from the true tortfaesor. Second, the section prevents double recovery by the employee and is designed to allow the employee to keep only that amount of money that exceeds the worker's compensation benefits. *Smith*, 2007 WL 3244120 at *2. Further, if the amount of recovery exceeds the third party recovery, then the employer is entitled to the entire recovery, less fees

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and costs. *Id.*

Section 5(b) further provides that a release or settlement of the claim for damages is invalid without the written consent of the employer and employee. However, consent of the employer is not necessary if the court order fully indemnifies or protects the employer. *Id*. at *3, 820 ILCS 305/5(b) (West 2004).

Section 5(b) further provides that a release or settlement of the claim for damages is invalid without the written consent of the employer and employee.

The appellate court found that intervenor Liberty Mutual did not consent to the circuit court's recommendations to take less than the statutory amount. Further, the appellate court found that the statutory lien was not protected by the court order. The appellate court also did not believe that Liberty Mutual should have been estopped from objecting to the court order, as found by the circuit court. The appellate court found that the absence of counsel for Liberty Mutual during the later part of the settlement discussions could not be construed as voluntary conduct or intentional relinquishment of a known right. *Id*. at *3.

As such, the appellate court reversed the circuit court's decision and ordered payment to intervenor Liberty Mutual in accordance with Section 5(b) of the Worker's Compensation Act. *Id*.

SUMMARY JUDGMENT

Building Manager Had No Duty to Remove Natural Accumulation Outside Elevators

In *Janine Judge-Zeit v. General Parking Corporation*, No. 1-06-0181 2007 WL 2791696, (Ill.App. 1st Dist. September 26, 2007), the plaintiff filed a lawsuit alleging physical injury after slipping and falling outside of an elevator bank in a parking garage. On the day of her incident, the plaintiff, an employee of the University of Chicago Hospitals, parked her vehicle in a University of Chicago lot that was operated by InterPark. As the plaintiff was walking towards her vehicle on a level that was exposed to the elements, she slipped and fell approximately four feet away from two posts near the elevator bank. At her deposition, the plaintiff testified that she fell on an unplowed portion of the garage. *Id*. at *2.

The defendant InterPark had a contractual relationship with the University of Chicago to operate and manage the parking facility. The contract did not require InterPark to be responsible for snow removal, although it was a reimbursable operating expense. InterPark subcontracted with Rick's Automotive for the snow removal at the parking facility. The plaintiff alleged that InterPark failed to remove an accumulation of snow, allowed an unnatural accumulation of snow to be present, and was otherwise negligent in maintaining and inspecting the parking garage. *Id*. at *2.

InterPark moved for summary judgment, arguing that it had no contractual duty to remove snow. Further, InterPark argued that Illinois common law did not impose an affirmative duty on InterPark under Illinois common law simply because InterPark had a snow removal agreement with Rick's Automotive. *Id.* at *4-5. The circuit court agreed. *Id*.

The appellate court upheld the circuit court's decision, finding that the Illinois common law duty imposed upon InterPark in this situation is the duty to maintain a safe egress for invitees even with the natural accumulation of snow and ice. *Id*. at *4. Specifically, the appellate court continued, the duty is to "properly illuminate the egress and repair or give notice of known dangerous conditions on the property." The appellate court found that under Illinois common law, the property owner does not have a duty to plow snow as argued by the plaintiff. *Id.*

Further, the appellate court noted that absent a specific contractual undertaking, the property owner had no common law duty to plow the parking facility to remove an accumulation of ice. *Id.* at *5. The appellate court found that neither the contract between InterPark and University of Chicago nor the contract between InterPark and Rick's Automotive imposed a duty upon InterPark to remove snow from the facility. Finally, the appellate court also rejected the plaintiff's argument that the plowing by Rick's Automotive was undertaken negligently, finding that the plaintiff's allegations were unsupported by the evidence. *Id*. at *6-7. As such, the appellate court upheld the circuit court's summary judgment in favor of InterPark. *Id*. at *8.

Insurance Law

By: Gregory G. Vacala and Allison H. McJunkin
Rusin Maciorowski & Friedman
Chicago

Employers Liability and Insurance Coverage in the Construction Industry

Recent decisions of the Illinois Supreme Court have addressed the availability of insurance coverage for certain contractual risk transfers, particularly, whether coverage is available for the risk transferred b**y** general contractors to their subcontractors and the subcontractor's insurance carriers for on-the-job injuries to the subcontractor's employees. The most recent case, *Virginia Surety v. Northern Insurance Co.*, 224 Ill. 2d 550, 571, 866 N.E.2d 149 (2007), however, has also left an area of uncertainty that should be of particular concern to subcontractors and their employer's liability (EL) carriers. Is the risk transferred covered by insurance? In the wake of *Virginia Surety,* insurance carriers and subcontractors alike should review the language of their policies to confirm that coverage comports with expectations.

The facts in *Virginia Surety* are typical in the construction industry. DeGraf, the subcontractor, entered into an agreement with Capital, the general contractor, that required DeGraf to "indemnify and hold harmless" Capital "to the fullest extent permitted by law" from claims for bodily injury to one of DeGraf's employees caused "in whole or in part by its own negligence." A DeGraf employee was injured on the job site and sued Capital. Capital filed a third party complaint for contribution against DeGraf, which DeGraf in turn tendered to Northern, its commercial general liability (CGL) carrier and to *Virginia Surety*, its employer liability (EL) carrier.

In Illinois, the type of indemnification Capital required of its subcontractor, DeGraf, is a typical risk transfer in the construction industry and is commonly referred to as a "*Braye* waiver of the *Kotecki* cap." In *Kotecki v. Cyclops Welding*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991), the Illinois Supreme Court established that an employer's maximum exposure in a contribution action is limited to the amount of its workers' compensation liability (statutory indemnity and medical payments). In the wake of *Kotecki*, an employer's liability in a contribution action was deemed to be capped at its liability under the Illinois Workers' Compensation Act. This means that the maximum amount of contribution a general contractor could obtain from a subcontractor for suits brought against the general contractor by the subcontractor's employee is limited to the amount of the subcontractor's liability to its employee in workers compensation payments.

In *Braye v. Archer Daniels-Midland Company,* 175 Ill. 2d 201, 676 N.E.2d 1295 (1997), the Illinois Supreme Court, however, held that an employer could voluntarily waive its *Kotecki* cap through the execution of an agreement or contract. The effect of an employer waiving its "*Kotecki* cap" is that if an employee of the subcontractor sues the general contractor, then the general contractor can sue the subcontractor for non-capped contribution. Absent the subcontractor's agreement to waive its *Kotecki* cap, the general contractor would be liable to the employee for the difference between the amount of the employer's assessed contribution and the employer's workers' compensation liability payments as a joint tortfeasor. For this reason, many general contractors require subcontractors seeking to obtain work to waive their *Kotecki* cap.

Typically, the subcontractor's EL policy provides coverage up to the subcontractor's liability under the Workers' Compensation Act. However, where the subcontractor has waived

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About the Authors

Gregory G. Vacala is a managing partner in the civil litigation department at *Rusin Maciorowski & Friedman*. Greg has a concentration in complex and catastrophic civil transportation and construction litigation and insurance coverage. His emphasis on self insured and insurance issues includes all aspects of insurance defense and coverage, as well as analysis and simultaneous defense of employment related torts. After earning his Bachelor of Science degree in Accounting from DePaul University in 1980, Greg continued on at DePaul University to earn his Juris Doctor in 1983.

Allison H. McJunkin is an associate with *Rusin Maciorowksi & Friedman* where she concentrates her practice in complex civil litigation, insurance defense, and labor and employment defense. Allison earned her B.S from Vanderbilt University, cum laude, in 1999, and her J.D. from Washington and Lee University School of Law in 2004. She completed study abroad work at the London School of Economics.

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its *Kotecki* cap, it becomes potentially liable for damages in excess of its Workers' Compensation liability. Consequently, as the court in *Virginia Surety* court pointed out, questions persist regarding whether the subcontractor, its EL or its CGL insurer is liable for the difference between the subcontractor's liability under the Workers' Compensation Act and the liability assessed against the subcontractor for contribution to the general contractor.

The question before the court, therefore, was whether the agreement between DeGraf and Capital constituted a covered "insured contract."

The issue before the court in *Virginia Surety* was whether DeGraf's policy with Northern, its CGL carrier, would provide coverage to DeGraf for any liability in excess of DeGraf's liability under the worker's compensation incurred as a result of DeGraf's agreement with Capital. The court did not, however, consider the coverage obligations of *Virginia Surety*, DeGraf's EL Carrier.

The insurance contract between DeGraf and Northern included a standard employer's liability exclusion. However, Northern's policy also had an exception to that exclusion which covered bodily injury to an employee assumed under an "insured contract." The policy defined "insured contract" as "that part of any other contract pertaining to [DeGraf's] business under which [DeGraf] assumes the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." The policy defined "tort liability" as "liability that would be imposed by law in the absence of any contract or agreement."

The question before the court, therefore, was whether the agreement between DeGraf and Capital constituted a covered "insured contract." In other words, the court had to determine whether DeGraf, by agreeing to waive its right to limit its liability to Capital to its liability under the Contribution Act and to allow Capital to seek full reimbursement in contribution, assumed the "tort liability" of Capital. In its opinion, the *Virginia Surety* court analyzed prior Illinois cases that interpreted similar agreements between general contractors and subcontractors and the coverage obligations of the CGL and EL carriers for such agreements.

In *Christy-Foltz v. Safety Mutual Ins. Co.*, 309 Ill. App. 3d 686, 722 N.E.2d 1206 (4th Dist. 2000), the court considered the coverage obligations of the subcontractor's EL policy. The court determined that in agreeing to waive its *Kotecki* cap, the subcontractor/employer "voluntarily assumed liability" for its pro rata share of damages in contribution in excess of its liability under the Workers' Compensation Act. Further, the court concluded that there was no coverage under the subcontractor's EL policy for damages incurred as a result of the subcontractor's *Kotecki* waiver because any such damages would constitute a "loss" voluntarily assumed under the terms of the policy. *Christy-Foltz, 309 Ill. App. 3d at 693*.

The exclusionary provision in the EL policy stated, in pertinent part: "In no event shall the CORPORATION [the EL Carrier] be liable for any loss or claim expenses voluntarily assumed by the EMPLOYER under any contract or agreement, express or implied * * *."

Section (E)(1) of the policy defined the term "loss" as follows:

> "Loss" - shall mean actual payments made by the EMPLOYER to employees and their dependents in satisfaction of (a) statutory benefits, (b) settlements of suits and claims, and (c) awards and judgments.

Applying the terms of the insurance policy, the *Christy-Foltz* court held that a *Kotecki* waiver was a loss that was voluntarily assumed by the insured and was therefore excluded from coverage pursuant to the exclusionary provision in the EL policy. Id.

Thereafter, the Illinois Appellate Court Second District, in *Michael Nicholas vs. Royal Insurance*, 321 Ill. App. 3d 909, 748 N.E.2d 786 (2nd Dist. 2001), and *West Bend Mutual Insurance Company v. Mulligan Masonry*, 337 Ill. App. 3d 698, 786 N.E.2d 1078 (2nd Dist. 2003) considered the coverage obligations under a CGL policy for a *Kotecki* waiver. The language contained in the CGL policies at issue in *Michael Nicholas* and *West Bend* was identical to the CGL policy under review in *Virginia Surety.*

In both *Michael Nicholas* and *West Bend*, the subcontractors argued that their agreement to waive their *Kotecki* cap constituted an "insured contract" within the meaning of the CGL policy. The CGL carriers argued that pursuant to *Hankins vs. Pekin Insurance Co*. 305 Ill. App. 3d 1088, 713 N.E.2d 1244 (5th Dist. 1999), the term "tort liability" in the policy's definition of "insured contract" meant "negligence liability." In *Hankins*, the court construed the coverage obligations of the CGL for an indemnity provision in the non-construction setting. In that case, a cartage operator (Hankins)

entered into an agreement with a motor freight carrier (Rudolf) which stipulated that Hankins would indemnify the carrier for all claims caused by Hankins' own acts or omissions. *Hankins*, 305 Ill. App. 3d at 1089. The *Hankins* court held that an "insured contract" is one in which one of the contracting parties agrees to assume someone else's tort liability, that is, someone else's liability for their own negligence. *Id.* at 1093. Relying on *Hankins*, the CGL carriers in *West Bend* and *Michael Nicholas* argued that because DeGraf, in waiving its *Kotecki* cap, was only agreeing to be held liable for unlimited contribution and was not accepting the "tort liability of another party," the policy's definition of insured contract was not met.

In *Michael Nicholas*, however, the court determined that the language in the exception was ambiguous because nothing in the policy definition stated that "tort liability" must be equated with "negligence liability." *Michael Nicholas, 321 Ill. App. 3d at 914*. Both the *Michael Nicholas* and *West Bend* courts acknowledged that the subcontractor was not indemnifying the general contractor for the general's own negligence. *Id.*; *West Bend*, 337 Ill. App. 3d at 706. The *West Bend* court explained, however, that as a joint tortfeasor, the general contractor could be held jointly and severally liable for all of the employee's damages. Such joint and several liability was the general contractor's joint tort liability even though a portion could have been attributable to the subcontractor's own negligence. *West Bend*, 337 Ill. App. 3d at 698.

Both *Michael Nicholas* and *West Bend* determined that by agreeing to waive its *Kotecki* protection, the subcontractor agreed to assume the "tort liability" that would otherwise potentially be imposed on the general contractor by law as a joint tortfeasor. *Id.*; *Michael Nicholas*, 321 Ill. App. 3d at 914. The *West Bend* court stated, "[i]ndemnification clauses like the ones at issue [in the construction industry] are intended to shift the tort liability that would otherwise be imposed on [the general contractor]." *West Bend*, 337 Ill. App. 3d at 706. Accordingly, both courts in *Michael Nicholas* and *West Bend* concluded that a *Kotecki* waiver constituted an "insured contract" under the terms of the CGL policy and, therefore, held that the CGL carrier was liable to its insured for damages resulting from a *Kotecki* waiver.

The *West Bend* court also examined the EL policy and determined that the EL policy excluded "liability assumed under a contract." *Id.* at 707. Citing *Christy-Foltz*, the court determined that the exclusion in the EL policy was triggered when the insured waived its Kotecki cap. *Id.* The language of the EL policy was not cited in the court's opinion.

In *Virginia Surety*, however, the court rejected the analysis in *West Bend* and *Michael Nicholas* and determined that there was no coverage under the terms of the CGL policy for a *Kotecki* waiver. The court determined that a *Kotecki* waiver was not an "assumption of liability." *Virginia Surety*, 224 Ill. 2d at 550. In the court's view, "the waiver of the *Kotecki* cap does not shift liability." *Id.* at 568. The *Virginia Surety* court agreed with the court in *Hankins* finding that the "tort liability" must mean "negligence liability." *Id*. at 565. The court determined that DeGraf's agreement with Capital only obligated DeGraf to indemnify Capital for DeGraf's own negligence. *Id*. Therefore, the court held that the "insured contract" provision in the CGL policy that required DeGraf "to assume tort liability of another party" was not triggered, and the CGL was not obligated to defend or indemnify its insured. *Id.*

Virginia Surety *stands for the proposition that CGL carriers with policy language similar to the language in that case are not liable to their insured for any damages incurred as a result of a* Kotecki *waiver.*

Virginia Surety stands for the proposition that CGL carriers with policy language similar to the language in that case are not liable to their insured for any damages incurred as a result of a *Kotecki* waiver. However, while the court did not construe the coverage obligations of the EL for a *Kotecki* waiver, the court's interpretation of a nature of a *Kotecki* waiver could put insureds and EL carriers at risk.

The *Virginia Surety* court held "to the extent that Michael Nicholas, West Bend, and Christy-Foltz would hold otherwise, they are overruled." *Id.* at 570. Since *Michael Nicholas* and *West Bend* reached the exact opposite conclusion of the court in *Virginia Surety*, the impact of *Virginia Surety* on those cases is clear. But the impact on the *Christy-Foltz* decision – and on insurers – requires more careful analysis to determine the extent to which *Christy-Foltz* is contrary to *Virginia Surety*, as well as the extent to which it is still good law.

In reaching its decision, the court stated, "[f]urther, we reject the *Virginia Surety's*, as well as the *Christy-Foltz*, *Michael Nicholas*, and *West Bend* courts' assertion that the

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Insurance Law *(Continued)*

employer somehow assumes the joint and several liability of the third party non employer." *Id.* at 569. Put simply, the *Virginia Surety* court disagreed with the assertion in those cases that a *Kotecki* waiver is an assumption of liability.

> Accepting that *Virginia Surety* is contrary to *Christy-Foltz* to the extent that *Christy-Foltz* determined that a *Kotecki* waiver was an assumption of liability, the result in *Christy-Foltz* is still the same: there is no coverage under the EL policy to its insured for damages incurred as a result of its insured's *Kotecki* waiver because any such damages would constitute a "loss" under the terms of the exclusionary provision in the policy. *Christy-Foltz, Inc. v. Safety Mut. Cas. Corp., 309 Ill. App. 3d 686, 693 (Ill. App. Ct. 2000).* As previously noted, the EL policy at issue excluded any "loss" voluntarily assumed by the employer.

Applying the terms of the insurance policy, the *Christy-Foltz* court held that a *Kotecki* waiver was a loss that was voluntarily assumed by the insured and was therefore excluded from coverage pursuant to the exclusionary provision in the EL policy. This is different than the language in the CGL policies construed in *West Bend* and *Michael Nicholas*, which considered whether the insured had assumed a "liability." The court's determination that there was no coverage under the EL policy for a *Kotecki* waiver was dictated by the language in the exclusionary provision of the EL policy irrespective of the court's interpretation of the nature of a *Kotecki* waiver. Therefore, post *Virginia Surety* it appears that *Christy-Foltz* is still good law.

Since *Christy-Foltz* was decided in 2000, many have interpreted it to mean that there is no coverage under the EL policy for damages incurred by the insured as a result of a *Kotecki* waiver. Neither *Virginia Surety* nor subsequent case law has addressed the impact of its decision on the coverage obligations of the EL carrier. It appears, however, that post *Virginia Surety*, EL carriers may become liable to their insureds as a result of a *Kotecki* waiver depending on the language used in the exclusionary provision of the EL policy.

It is important to note that the exclusionary provision contained in the EL policy under review in *Christy-Foltz* was not a standard ISO policy. Further, in *Christy-Foltz*, the insured argued "that the nature of the liability imposed remains contributory in nature, rather than contractual * * * as such, coverage for all contribution liability is provided under the policy at issue, notwithstanding its agreement to waive the protections of the Compensation Act (Ill. Rev. Stat. 1991, ch. 48, pars. 138.1 to 138.30 (now 820 ILCS 305/1 et seq. (West 1998)) as dictated in *Kotecki*." *Id*. The EL carrier argued, however, that that the language of the insurance policy, rather than the nature of the potential liability, dictates the scope of coverage. The court agreed.

The court concluded that the "clear and commonsense meaning" of the exclusionary provision in the EL intended to exclude from coverage any loss "voluntarily assumed" by the insured. The policy definition of "loss" specifically encompassed the kind of payments the insured would have made as a result of a *Kotecki* waiver. The policy does not make any reference to a *Kotecki* waiver as an assumption of liability.

Many of the Standard ISO Employer Liability Policies May Expose the EL Carrier to Liability for an Insured's *Kotecki* Waiver

In contrast, the exclusionary provision contained in many of the standard ISO EL policies excludes coverage to an insured for the assumption of a "liability assumed under a contract."

As explained above, *Virginia Surety* specifically held that a *Kotecki* waiver is *not an assumption of a liability.* Accordingly, in the wake of *Virginia Surety*, EL carriers which use the standard ISO policy language are likely at a substantial risk of exposure for any damages incurred by its insured as a result of a *Kotecki* waiver because a *Kotecki* waiver does not constitute an assumption of liability pursuant to the terms of the EL policy.

The significance of the court's decision in *Virginia Surety* is twofold. First, the CGL policy the court construed was a standard ISO CGL policy. Therefore, under Illinois law, the CGL insurer will generally not be liable to its insured for any damages in excess of the insured's workers' compensation liability. The decision stands for the premise that the CGL insurers (for the most part) are not obligated to defend and indemnify an insured. Second, while the court did not expressly construe the coverage obligations of the EL under the terms of the policy for a *Kotecki* waiver, the court's decision could place some EL carriers at risk to exposure for damages in excess of its insured's *Kotecki* cap.

In the aftermath of *Virginia Surety,* EL carriers should recognize their potential exposure and should review and revise their policies if and as appropriate to unambiguously exclude coverage beyond the benefits provided for under Illinois workers' compensation law, notwithstanding the existence of a *Kotecki* waiver between their insured and a general contractor.

Commercial Law

By: James K. Borcia
Tressler, Soderstrom, Maloney & Priess, LLP
Chicago

Michael Jordan a Winner in a Different Court

Jordan v. Knafel, 2007 WL 437563 (Ill.App. 1 Dist. December 12, 2007, corrected December 13, 2007)

The Illinois Appellate Court First District recently affirmed summary judgment in favor of Michael Jordan in his legal battle against Karla Knafel. Jordan filed suit against Knafel claiming that she was attempting to extort $5 million from him by threatening to expose publicly their relationship. Knafel filed a counterclaim against Jordan for breach of contract for Jordan's alleged breach of an agreement to pay her $5 million when he retired from basketball in exchange for her agreement not to file a paternity suit against him and to keep confidential their romantic involvement.

The circuit court granted Jordan's motion for summary judgment, finding that the alleged settlement agreement was unenforceable because it would have been either fraudulently induced by Knafel's false statement to Jordan that "she was pregnant with his child" or based on a mutual mistake of fact as to the paternity of her unborn child. *Jordan v. Knafel*, 2007 WL 437563, at *4.

Knafel appealed, contending that the trial court erred in granting Jordan's summary judgment motion. She claimed that: (1) material issues of fact remained regarding the validity of the paternity tests; (2) material issues of fact remained on the elements of good faith, intent, materiality and reliance in connection with Jordan's defenses; (3) there was no evidence to substantiate the extortion claim, because there was no evidence that she ever threatened Jordan; and (4) the circuit court abused its discretion in denying her motion to compel Jordan's deposition and the production of certain documents. *Id.*

The appellate court affirmed the circuit court's ruling. The court first rejected Knafel's assertion that there was a disputed issue of fact regarding Jordan's paternity. Knafel had refused to depose the doctor who performed the paternity tests that showed that Jordan was not the father of Knafel's child. The court accepted the doctor's affidavit and the attached test results as valid evidence in support of Jordan's summary judgment motion. The court rejected Knafel's assertion that the test results were inadmissible hearsay because the doctor did not claim to do the testing himself. The court found that the doctor, as an expert witness, could rely upon otherwise inadmissible facts to support his opinion that Jordan was not the father of Knafel's child. The court further found that Knafel's arguments regarding the chain of custody and authenticity were mere speculation and unsupported by any evidence suggesting the tests were actually tainted or contaminated. *Id.* at *4-5.

The court noted that fraud in inducement of a contract is a defense that renders a contract voidable at the election of the injured party.

The court next rejected Knafel's argument that Jordan's actual paternity was irrelevant to the enforceability of the settlement agreement as long as she had a good faith belief at the time of contracting that she was pregnant with Jordan's child. Jordan argued that Knafel's statement that she was pregnant with his child was a fraudulent misrepresentation as a matter of law, which made the contract voidable, permitting rescission. The court noted that fraud in inducement of a contract is a defense that renders a contract voidable at the election of the injured party. In order for a representation to con-

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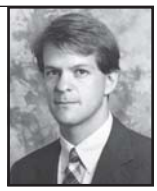
About the Author



James K. Borcia is a partner with the Chicago firm of *Tressler, Soderstrom, Maloney & Priess,* and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

Commercial Law *(Continued)*

stitute fraud that will permit a court to set aside a contract, the party seeking such relief must establish that the representation was: (1) one of material fact; (2) made for the purpose of inducing the other party to act; (3) known by the maker to be false, or not actually believed to be true by him on reasonable grounds, but reasonably believed to be true by the other party; and (4) relied upon by the other party to his detriment. *Id.* at *5.

The court held that for the statement to be material, the representation need not have been the paramount or decisive inducement, so long as it was a substantial factor.

The court rejected Knafel's assertion that there was genuine issue of fact as to whether her representation to Jordan that she was pregnant with his child was material to the alleged settlement agreement and induced Jordan to act. The court held that for the statement to be material, the representation need not have been the paramount or decisive inducement, so long as it was a substantial factor. The court found that Knafel's own allegations established that the paternity was material to the alleged settlement agreement and was made for the purpose of inducing Jordan to act. *Id.* at *6. Knafel alleged that when she told Jordan she was pregnant with his child Jordan, "became worried" and they "discussed possible resolutions of their dilemma." She also alleged that it was not until after she told Jordan of her pregnancy that Jordan said he was troubled by the prospect of destruction of his public image and he agreed to the settlement. Thus, the court found that by Knafel's own account, her statement to Jordan that he was the father of her child was indeed material and a substantial factor inducing Jordan to act. Otherwise, her agreement not to file a maternity claim would have been a mere pretense to extort money. Without a good faith basis, the agreement would have lacked the necessary consideration for their bargain. Thus, Jordan's paternity must have been material to a good faith settlement of her paternity claim. *Id.*

Next, the court agreed with Jordan that Knafel's representation to him with certainty that she was pregnant with his child was fraudulent. In making this finding, the court relied upon Section 162(1) of the Restatement of Contracts. This finding was based upon Knafel's knowledge of her uncertainty regarding the paternity at the time of contract formation, which satisfied the knowledge element of fraudulent misrepresentation. The court relied upon the fact that despite Knafel's assertion that she told Jordan that she was having sexual relations with someone other than Jordan, she failed to advise him that she had sex with another partner around the time of conception, and instead she told him with certainty that she was pregnant with his child. She knew that she did not have the basis that she stated or implied for that categorical representation at the time, thus making it fraudulent. Also, her failure to disclose the information when she alone had access to the information was found to have amounted to a failure to act in good faith and in accordance with reasonable standards of fair dealing. *Id.* at *6-7.

The court further rejected Knafel's argument that there was a question of fact regarding Jordan's reliance on her statement. The court held that when the representations were made with regard to a material matter, in the absence of evidence showing the contrary, it would be presumed that the representations were relied upon. The court found that based upon Knafel's own allegations, Jordan must have relied upon the representation or the settlement agreement was otherwise untenable. *Id.* at *7-8.

Alternatively, the court found that even if Knafel's representation was not fraudulent and was made in good faith, her representation regarding paternity was ultimately mistaken, as Jordan was not the father of the child. Thus, the doctrine of mutual mistake barred her claim. The court found that Jordan had no duty to attempt to verify independently the information Knafel provided, especially where the ascertainment of the truth of the matter was more readily available to Knafel than to Jordan. *Id.* at *8-9.

Finally, the court rejected the Knafel's argument that the trial court improperly denied her attempts to depose Jordan and obtain documents from him. The court found that discovery was not necessary because the dispositive matters were demonstrated by Knafel's own verified pleadings. *Id.* at *9.

E-Discovery

By: Peter R. Jennetten
Quinn, Johnston, Henderson & Pretorius
Peoria

From E-Discovery to E-Evidence: *Lorraine v. Markel American Ins. Co.*

It is one thing to obtain a mountain of electronically stored information (ESI) from an opponent in discovery. It is another to get it admitted into evidence. Chief United States Magistrate Judge Paul W. Grimm of the District of Maryland provided an outline of the issues in *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007). The lengthy opinion is a compendium of issues and case law addressing the admissibility of ESI.

Lorraine involved petitions to enforce an arbitration award arising out of an insurance coverage dispute over lightning damage to a yacht. The parties filed cross-motions for summary judgment supported, in part, by e-mails pertaining to the negotiation of the arbitration agreement. The court began by noting that there were five areas of evidence law to consider:

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 * * * (2) * * * is it authentic as required by Rule 901(a) * * * (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception * * * (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content * * * and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403. *Lorriane,* 241 F.R.D. at 538.

Relevance and the Rule 403 balancing do not differ materially from other forms of evidence, but ESI raises unique issues with respect to the other factors.

Authentication

The *Lorraine* court noted that a party "need only make a prima facie showing that [the exhibit] is what he or she claims it to be." *Id*. at 542. This concept is governed by Rules 901-902. The most common method of authenticating ESI is by testimony from a witness with knowledge of the exhibit. Fed. R. Civ. P. 901(b)(1); *Lorraine*, 241 F.R.D. at 545. This does not need to be the person who generated the ESI. Other methods of authentication may be particularly useful for ESI.

Some exhibits, such as e-mail, can be authenticated by comparing the questioned document to one known to be authentic. The comparison can be made by expert testimony or by the trier of fact. Using this method, ESI is authenticated by its "distinctive characteristics, taken in conjunction with circumstances." Fed. R. Civ. P. 901(b)(3). Judge Grimm noted that this has been applied in a variety of cases to authenticate e-mail, website content and text messages. *Lorraine,* 241 F.R.D. at 546 (citations omitted). Applications include "authenticating an exhibit by showing that it came from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him, or authenticating by content and circumstances indicating it was in reply to a duly authenticated document." *Id*. (punctuation omitted). This also could include authentication by the use of digital "hash marks" or by examination of the exhibit's metadata. *Id.* at 546-47.

Public records or reports comprising ESI can be easily authenticated pursuant to Fed. R. Civ. P. 901(b)(7). This could apply to a variety of records including "tax returns, weather bureau records, military records, social security records, INS records, VA records, official records from federal, state and local agencies, judicial records, correctional records, law enforcement records * * *." *Lorraine,* 241 F.R.D. at 548.

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About the Author

Peter R. Jennetten is a partner with Quinn, Johnston, Henderson and Pretorius in Peoria. His practice includes civil rights, municipal liability, and general negligence. He can be reached via email at pjennetten@qjhp.com.

E-Discovery *(Continued)*

The "proponent of the evidence need only show that the office from which the records were taken is the legal custodian of the records." *Id.* (*citing* Weinstein's Federal Evidence §901.10(2)). ESI generated by computers can also be authenticated under Rule 901(9), which requires evidence "describing a process or system used to produce a result and showing that" it does so accurately. *Lorraine*, 241 F.R.D. at 549.

Because computer-generated information is not an assertion or conduct "of a person," it cannot be subject to the hearsay rule.

Some ESI will be self-authenticating pursuant to Fed. R. Evid. 902. There are 12 categories within this rule, including "official publications * * * purporting to be issued by public authority." Fed. R. Evid. 902(5). For example, printouts from the Census Bureau website have been authenticated this way. *Lorraine*, 241 F.R.D. at 551 (citing case). Before the exhibit is admitted, the proponent may need to show that it is also a "public record" to avoid application of the hearsay rule. *Id*.

Pursuant to Rule 902(7), some ESI may be self-authenticated by "[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." Judge Grimm suggested that business e-mails showing the origin of the e-mail and identifying the sending company may be self-authenticating under this rule. *Id.* at 551-52, 554. Rule 902(11) is particularly helpful, as it parallels the business records exception to the hearsay rule (Fed. R. Evid. 803(6)). The downside is that notice must be given to all adverse parties in advance of submission. Fed. R. Evid. 803(6).

Judge Grimm also pointed out that the 10 methods of authentication provided in Rule 901(b) are illustrative, not exhaustive. The courts have found creative ways to authenticate ESI. For example, "documents provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic." *Lorraine*, 241 F.R.D. at 552 (citations omitted). Keep in mind that this establishes only the authenticity of the ESI, not admissibility. In another case, the contents of a website at various points in time were authenticated by a third-party, who used its "wayback machine" to verify the contents and provided an affidavit authenticating the records. *Id.* at 553.

Hearsay

The rule against hearsay provides another potential bar to the admission of ESI. Computer-generated information is not subject to the hearsay rule. The federal hearsay rules apply only to "statements," which are defined as "(1) an oral or written assertion or (2) nonverbal conduct *of a person* * * *." Fed. R. Evid. 801(a), (c) (emphasis added). Because computer-generated information is not an assertion or conduct "of a person," it cannot be subject to the hearsay rule. *Lorraine*, 241 F.R.D. at 564-65. An example of this is the report generated by the fax machine when a fax is sent, indicating the sender, time sent, and number of pages. As long as the validity of the process is proven (e.g. proof that the clock was set properly and the fax machine was operating correctly), the evidence is authenticated under Rule 901(9) and is not subject to a hearsay objection. The Illinois Supreme Court similarly found that telephone traps or tracings recorded by computer were not hearsay. *People v. Holowko*, 109 Ill. 2d 187, 486 N.E.2d 877 (1985).

Electronic records such as e-mail, chat, and word processing documents may contain hearsay. The application of exceptions to the hearsay rule is generally straightforward (or as straightforward as for any other evidence). One fertile area of discussion has been whether e-mails constitute "business records" to satisfy that exception to the hearsay rule. Fed. R. Civ. P. 803(6). Courts have issued varying opinions in that regard. *See, Lorraine* 241 F.R.D. at 572-74.

Original Writing Rule

An original or duplicate of a writing is required to prove its content. Fed. R. Evid. 1001-1003. "Writings" includes any "electronic recording or other form of data compilation." Fed. R. Evid. 1001(1). "The 'original' of information stored in a computer is the readable display of the information on the computer screen, the hard drive or other source where it is stored, as well as any printout or output that may be read, so long as it accurately reflects the data." *Lorraine*, 241 F.R.D. at 577-78 (*citing* Rule 1001(3)). This defines the "original" of an electronic document very broadly and, by implication, expands the universe of "duplicates." For example, chat room text that was copied and pasted into a word processor was still considered an original record.

There are also several exceptions to the rule, which allow secondary evidence, including where the original is lost or destroyed. Fed. R. Civ. P. 1004. Given the ease with which ESI can be lost or destroyed, this is a particularly relevant exception. As Judge Grimm noted, these rules apply only where the proponent of the evidence seeks to prove the content of the record. *Id.* (*citing* Rule 1002). He found that the contents of the e-mails regarding the arbitration agreement were at issue in that case and chided counsel for failing to address the original writing rule in their proof or briefs.

Conclusion

Because counsel on both sides failed to authenticate the ESI or address other evidentiary issues, including hearsay, the original writing rule, and Rule 403, the judge dismissed both motions for summary judgment. This column provides only a brief overview of Judge Grimm's opinion, which was itself a concise overview of the issues raised in attempting to admit ESI in evidence. Undoubtedly, some courts will take a different view of some of the issues raised by Judge Grimm, but the opinion identifies many of the issues to be addressed, which is half the battle.

Product Liability

*By: James W. Ozog**
Wiedner & McAuliffe, Ltd.
Chicago

Product Liability and Conflict of Laws: *Redux*

In a recent opinion, the Illinois Supreme Court overturned an Illinois Appellate Court First District decision that could have had dire economic consequences for current and future product manufacturers and sellers located in Illinois. *Townsend v. Sears, Roebuck & Co.*, No. 103858, 2007 WL 4200826 (Ill. November 29, 2007). If the supreme court in *Townsend* had failed to reassert the use of traditional presumptive rules in choice-of-law analysis, Illinois businesses might have been besieged by out-of-state plaintiffs seeking application of more liberal Illinois law on product liability and damages. (For further discussion on the Illinois Appellate Court First District holding in *Townsend*, see "Product Liability," *IDC Quarterly*, Vol. 17, No. 1 (2007)).

The case examined whether Illinois or Michigan law would govern certain substantive issues in a product liability and negligence action, where the injury occurred in Michi-

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About the Author

James W. Ozog is a partner in the Chicago firm of *Wiedner & McAuliffe, Ltd.* He received his undergraduate degree from Northwestern University and law degree from Washington University in 1977. Mr. Ozog concentrates his practice in product liability defense matters and commercial litigation. In addition to his Illinois defense practice, he is National Trial Counsel for several product manufacturers. He has appeared as lead defense counsel in over twenty states and tried cases to verdict in seven states besides Illinois. He also represents clients on a regular basis in matters before the United States Consumer Products Safety Commission. He is a member of the American Bar Association, DRI, IDC and the Propane Gas Defense Association.

*We wish to thank **Jacob A. Ramer** of *Wiedner & McAuliffe, Ltd.* for his capable assistance as the co-author of this article.

Product Liability *(Continued)*

gan, the product was manufactured in South Carolina, the defendant was a New York corporation domiciled in Illinois, and the conduct complained of occurred in Illinois. The parties agreed there were three conflicts with respect to Michigan and Illinois law: liability, compensatory damages, and punitive damages. On interlocutory appeal, the appellate court held that Illinois law applied to all of the issues. *Townsend v. Sears, Roebuck & Co.*, 368 Ill.App.3d 902, 858 N.E.2d 552 (1st Dist. 2006).

Seizing the opportunity to revisit choice-of-law analysis, the supreme court thoroughly analyzed the history and progression of the field.

In their suit against Sears, the plaintiffs, Michelle Townsend and her 3-year old son Jacob, alleged strict product liability and negligence premised on defective design and a failure to warn relating to a "no-mow-in-reverse" (NMIR) feature on a riding lawn tractor. While on the mower, Jacob's father ran over Jacob's leg while backing up, causing severe injuries. His father had purchased the tractor from a Sears store in Michigan.

Overview of the Second Restatement of Conflict of Laws

Seizing the opportunity to revisit choice-of-law analysis, the supreme court thoroughly analyzed the history and progression of the field. The court acknowledged that it had not recently extensively addressed choice-of-law issues arising from the Second Restatement of Conflict of Laws. Because the analysis of the appellate court lacked proper structure and accuracy, the supreme court set out to provide clarity in what had become an uncertain area of law.

The court noted that any choice-of-law analysis must begin with isolating the issue and defining the conflict. *Morris B. Chapman & Assoc., Ltd. v. Kitzman*, 307 Ill.App.3d 99, 716 N.E.2d 271 (5th Dist. 1999); *Kramer v. Weedhopper of Utah, Inc.*, 204 Ill.App.3d 469, 562 N.E.2d 271 (1st Dist. 1990). The traditional method for determining the proper law to apply relied on *lex loci delicti*, i.e., the law of the place of the wrong. Courts were to apply this rigid maxim regardless of the amount and nature of contacts with either forum. *See* Restatement (First) of Conflict of Laws §§ 377, 378 (1934). Most states eventually abandoned this approach due to harsh and unjust results. Beginning in 1953, the American Law Institute began an ambitious project and eventually produced the Second Restatement of Conflict of Laws in 1971. Many considered the Second Restatement to be a whole new beast in the conflict-of-laws world, rather than simply a rehashing of old concepts.

In *Townsend*, the supreme court unpacked the methodology of the Second Restatement into three "principal features:" 1) the policies of Section 6; 2) the concept of the "most significant relationship;" and 3) the "connecting factors" in Section 145(2). *Townsend*, 2007 WL 4200826, at *5.

Section 6 has been referred to as the "cornerstone" of the Second Restatement. *Id.*, at *6 (quoting Scoles, Conflict of Laws § 2.14, at 59). It provides that a state should first follow its own statutory directive on choice of law. Where there is no statute, however, the factors relevant to determining which state's law to apply include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971).

The "most significant relationship" concept is also fundamental to achieving the most just result in a choice-of-law analysis. Instead of simply going down the list and placing checkmarks next to each of the applicable contacts, the "most significant relationship" allows a court to evaluate those contacts in a non-arbitrary manner and considers the particular principles invoked. "While section 6 enunciates the guiding principles of the choice-of-law process, the most significant-relationship-formula describes the *objective* of that process: to apply the law of the state that, with regard to the particular issue, has the most significant relationship with the parties and the dispute." *Townsend*, 2007 WL 4200826, at *6 (quoting Scoles, Conflict of Laws § 2.14, at 61).

The third distinct concept critical to a choice-of-law analysis is Section 145(2), which provides that the following

contacts should be considered when applying the principles of Section 6: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) of Conflict of Laws § 145(2). Each of the contacts is to be considered "according to their relative importance with respect to the particular issue." *Id.*

Presumptive Rules Make a Comeback

After highlighting what is considered the three key features of the Second Restatement, the court began its most significant discussion of the opinion, relating to the use of presumptive rules in choice of law. Although the Second Restatement revolutionized choice-of-law analysis, it did not completely abandon presumptive rules relating to, for example, different torts. According to the court, not only were courts and counselors overemphasizing the general provisions of the Second Restatement, but they were also underemphasizing the specific presumptive rules, thus leading to malformed decisions. Prior doctrines were not to be completely discarded.

The plaintiffs contended that the supreme court had never expressly authorized presumptive rules in choice-of-law determinations in personal injury cases. As evidence of its earlier acceptance and application of presumptive rules in such situations, the court cited *Ingersoll*, which held that "the local law of the State where the injury occurred should determine the rights and liabilities of the parties, unless Illinois has a *more* significant relationship with the occurrence and with the parties." *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970) (emphasis in original). When the court rejected the plaintiffs' first argument, the plaintiff alternatively asserted that whatever presumption existed in the present case was "easily overcome" by any contact with another state. *Townsend*, 2007 WL 4200826, at *8. The court rejected this argument as well. The court stated that presumptions "may be overcome only by showing a *more* or *greater* significant relationship to another state." *Id.*, at *8 (emphasis in original).

The court's reaffirmation of its adoption of the Second Restatement allowed the court to lay the groundwork for reasserting the preeminence of presumptive rules. In recent years appellate courts had not used these presumptive rules, but it was not because the Second Restatement did not provide for them. The rules were always there—they were just not being applied.

Before a court can go into the particulars of the Second Restatement, then, it must first consider the applicable presumptive rule. The second step tests that rule against the interplay between Sections 6 and 145(2).

For the presumptive rule in personal injury actions, the court looked to Section 146 of the Second Restatement, which provides that "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a *more significant relationship* under the principles stated in section 6 to the occurrence and the parties, in which event the local law of the other state will be applied." Restatement (Second) of Conflict of Laws §146 (emphasis added). Section 146 is the "starting point" for choice-of-law analysis in actions for personal injury. *Malena v. Mariott International, Inc.*, 264 Neb. 759, 651 N.W.2d 850 (2002); *accord McKinnon v. F.H. Morgan & Co.*, 170 Vt. 422, 750 A.2d 1026 (2000); *Morgan v. Biro Mfg Co.*, 15 Ohio St.3d 339, 474 N.E.2d 286 (1984). Even though it cited Section 146, the Illinois Appellate Court First District had afforded it "insufficient consideration." *Townsend*, 2007 WL 4200826 at *9.

The court then applied the facts of the present case to Section 146. The plaintiffs were residents of Michigan; the injury occurred in Michigan; and plaintiffs alleged that the tortious conduct occurred in Illinois. Comments to Section 146 raise such instances where the injury and conduct occur in different states, noting that the law of the state of injury is presumably the law that should be applied. "The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those *relatively rare* situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 146, Comment *c*, at 430-31 (emphasis in *Townsend*). As a result of the injury taking place in Michigan, there was a "strong presumption" that Michigan law applied "unless plaintiffs [could] demonstrate that Michigan bears little relation to the occurrence and the parties, or put another way, that Illinois has a more significant relationship to the occurrence and the parties with respect to a particular issue." *Townsend*, 2007 WL 4200826 at *10.

After completing the first step of identifying the presumptive rule and applying it to the facts of the case, the court turned to step two in order to determine the state with the most significant relationship. Due to disparate Illinois court opinions concerning the relationship between Sections 6 and 145, the supreme court attempted to provide its own roadmap. In prior decisions, the court had first identified the contacts listed in Section 145(2) and then applied the relevant general

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Product Liability *(Continued)*

principles of Section 6 to each of those contacts. *See, e.g.*, *Esser v. McIntrye*, 169 Ill. 2d 292, 661 N.E.2d 1138 (1996); *Nelson v. Hix*, 122 Ill. 2d 343, 522 N.E.2d 1214 (1988). Sensing potential confusion and unnecessary legal nitpicking, the court shied away from sending down a "what comes first" holding with respect to Sections 6 and 145(2). Instead, it stated that in most cases it would not matter if the analysis first began with Section 145(2) or first looked to the Section 6 general principles. What must not be done is simply "counting contacts." *Townsend*, 2007 WL 4200826 at *11. Instead, there should be a deeper examination of the nature of each contact.

The court first assessed how the facts matched up with the four contacts in Section 145(2). The first contact—the place where the injury occurred—pointed solely to Michigan. The court determined that the second contact—the place where the conduct causing the injury occurred—was evenly divided between the two states. The plaintiffs argued that the design of the NMIR feature and business decisions relating to the feature occurred in Illinois. Sears argued that the contributorily negligent acts of the plaintiffs occurred in Michigan. Rather than delving deeper into this contact, the court simply considered the second contact to be evenly split.

The third contact—the domicile, residence, nationality, place of incorporation and place of business of the parties—also was a wash. The plaintiffs were domiciled and resided in Michigan and Sears was headquartered in Illinois. The fourth contact—the place where the relationship between the parties is centered—fell in favor of Michigan. The relationship arose from the purchase of a product in Michigan from a local Sears store doing business in Michigan.

Two of the contacts, therefore, pointed towards the application of Michigan law, whereas the other two contacts did not lend themselves to the law of one state over the other. But because the court should not simply "count contacts," the court closely examined those contacts within the context of the general principles of Section 6.

Rather than addressing all seven general principles and applying each of them to each contact, the court invoked the principles most relevant to personal injury actions, excluding the protection of justified expectations; the certainty, predictability, and uniformity of result; the needs of the interstate system; and the ease in the application of the law to be applied. The court focused on three principles: 1) the relevant policies of the forum; 2) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; and 3) the basic policies underlying the particular field of law.

In Deference to Michigan Law

With a newly-clarified analytical structure now intact, the court then discussed the three conflicts at hand: liability, compensatory damages, and punitive damages. Each of the issues was to be considered on a stand-alone basis. The process of "depecage," as provided in the Second Restatement, separates a case into distinct issues to which choice-of-law analysis is individually applied. Choice-of-law analysis is not an all-or-nothing situation. Certain issues may receive one state's substantive law whereas other issues may fall under another state's purview. The process, then, must be followed for each conflict of law.

The court held there was no infringement into the separation of powers under Illinois law because the court would simply be applying a constitutional law of Michigan to a Michigan resident.

On the issue of liability, where Illinois has a strict liability standard and Michigan has a negligence standard for product liability actions based on defective design, the court disagreed with the appellate court's characterization of the policy interests inherent in Michigan's standard of liability. The appellate court considered the strict liability standard to be "pro-consumer" and "pro-corporate regulation," whereas Michigan's negligence standard was "producer protective." *Townsend*, 2007 WL 4200826 at *13. The supreme court found this inaccurate. The court noted that the Supreme Court of Michigan considers the negligence standard to be "*pro*-consumer" because it rewards careful manufacturers by providing incentives to design safe products. Even though Illinois may have an interest in regulating culpable conduct within its borders, the choice-of-law analysis cannot be compromised. Both Michigan and Illinois have an interest in compensating their injured residents, but choice-of-law rules must still apply. Therefore, Illinois law does not trump that of Michigan under these circumstances, especially given the undervaluing of the interests of Michigan in having its own law applied.

With respect to compensatory damages for non-economic damages, the supreme court again disagreed with the appellate court. The appellate court asserted that the issue invoked a separation of powers, arising from the statutory cap in Michigan that would need to be applied in Illinois where such caps were held to be unconstitutional. An Illinois court would then have its hands tied on compensatory damages—due to Michigan's legislature—even though the Supreme Court of Illinois had declared such laws to be unconstitutional. This argument also failed. The court held there was no infringement into the separation of powers under Illinois law because the court would simply be applying a constitutional law of Michigan to a Michigan resident.

Lastly, the court considered punitive damages in product liability actions. The appellate court noted that the allowance of punitive damages by Illinois was designed to regulate corporations while the disallowance by Michigan was designed to protect corporations. After the plaintiff had been made whole (through non-punitive damages), Michigan had no further interest. Illinois, however, still had an interest in regulating adverse corporate behavior. The supreme court did not agree with that analysis. In reaching its decision the court once again relied on Section 146 and its presumptive rule. The appellate court had overemphasized the perceived interests held by both Michigan and Illinois while undervaluing the presumptive rule. Without much elaboration, the court held that the interest of Illinois did not outweigh that of Michigan. Therefore, the presumptive rule prevailed and Michigan law should apply.

Knowing that even its own framework might be misrepresented, the court ended the opinion with a clear-cut rule. It essentially stated that choice-of-law analysis in tort cases must first look to the applicable presumptive rules. Second, a court "must test this presumptive choice against the principles embodied in section 6 in light of the relevant contacts identified by the general tort principle in section 145." *Townsend*, 2007 WL 4200826 at *15. The court concluded: "[t]he presumptive choice controls unless overridden by section 145 analysis." *Id.* at *15.

Conclusion

Recognizing the potential for serious economic fallout if Illinois became a haven for out-of-state product liability plaintiffs, the supreme court wisely stepped back and reasserted traditional choice-of-law rules. Not only did the court protect the economic interests of Illinois (without sacrificing or prejudicing the interests of Illinois citizens and residents), it also clarified the application of choice-of-law principles to product liability cases.

Evidence and Practice Tips

By: Joseph G. Feehan
Heyl, Royster, Voelker & Allen
Peoria

Illinois Appellate Court Third District Holds that Collateral Source Rule Prohibits Evidence that Medical Bills Were Paid by Medicare

In *Nickon v. City of Princeton*, No. 3-06-0952, 2007 WL 3171759 (Ill. App. 3rd Dist. October 24, 2007), the plaintiff filed a negligence action against the City of Princeton (the City) for injuries he sustained when he tripped and fell on a depression in a sidewalk maintained by the City. During trial, the plaintiff introduced evidence of medical bills totaling $119,723.11. The City attempted to introduce evidence which established that the medical care providers accepted a total payment of only $34,888.61 from Medicare in full satisfaction of the medical bills. However, the trial court prohibited the defendant from introducing any evidence that demonstrated that Medicare paid a reduced amount to fully satisfy the medical bills. The trial court reasoned that the collateral source rule prohibited introduction of the Medicare payments into evidence. The trial court also found that the Illinois Supreme Court's decision in *Arthur v. Catour*, 216 Ill. 2d 72,

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About the Author

Joseph G. Feehan is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*, where he concentrates his practice in commercial litigation, products liability and personal injury defense. He received his B.S. from Illinois State University and his J.D. (*Cum Laude*) from the Northern Illinois University College of Law. Mr. Feehan is a member of the ISBA Tort Law Section Council and is also a member of the Peoria County, Illinois State and American Bar Associations. He can be contacted at jfeehan@hrva.com

Evidence and Practice Tips *(Continued)*

833 N.E.2d 847 (2005), prohibited the City from introducing evidence that the medical providers accepted significantly reduced amounts to satisfy their bills.

At trial, the jury rendered a verdict in favor of the plaintiff in the amount of $170,800, which included past medical expenses of $119,000. Following the jury verdict, the City filed a post-trial motion, which requested a set-off or reduction of the verdict to reflect the amount actually paid by Medicare to satisfy the medical bills. The trial court denied the City's motion and it appealed.

The trial court stated, "if the only reason such a witness would offer [reduced fees] vis-a-vis a patient over 65 is because Medicare pays a discounted amount, then that's off-limits."

The *Nickon* court began its analysis by reviewing the Illinois Supreme Court's decision in *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 392 N.E.2d 1 (1979). In *Peterson*, the medical provider was the philanthropical Shriner's Hospital, which provides medical care for children free of charge. The plaintiff in *Peterson* received over $100,000 worth of free medical care but was prohibited from seeking recovery of these bills at trial. The *Nickon* court analyzed the *Peterson* decision and held that it does not apply to bills paid by Medicare because the providers *expected* to be paid at the time that the services were rendered. The *Nickon* court stated:

> To determine whether the *Peterson* exception applies, we must examine whether the medical service provider in this case intended to grant the patient gratuitous services regardless of the source of payment. If, as in *Peterson*, the medical provider intended not to charge the patient for services or a portion of those services, the payment is not a collateral source payment. However, if the medical provider accepted a reduced payment from a third party which the medical provider otherwise would not have granted to the patient without the involvement of the third party, the payment is a collateral source payment.
>
> To interpret *Peterson* any other way lends itself to endless analysis of the minute differences in each case related to the relationship between payor and patient, depending on whether Medicare or Medicaid paid for services, and whether the insurance company was paid by the injured person or someone else, such as patient's husband in *Arthur*. These considerations create a plethora of possibilities to tantalize the most skillful advocates and curious legal scholars, but this type of complexity is not necessary. *Nickon*, 2007 WL 3171759 at *4.

The *Nickon* court concluded that the *Lou Bachrodt* decision created a "single exception to the collateral source rule" and that this exception "dictates collateral sources should not include services provided by charitable providers without charge, i.e., without generating an initial bill." *Id.* at *3.

The *Nickon* court then conducted a thorough discussion of the *Arthur v. Catour* decision and concluded that the relevant inquiry is the amount of the initial bill—not whether the provider was paid in full. The *Nickon* court stated:

> By focusing on the amount initially billed, the *Arthur* court's decision recognizes a practical reality. That is, if a government agency or insurance company does not pay the patient's bill at the reduced rate offered to the third party payor, liability for the amount initially billed falls squarely on the patient's financial shoulders. This liability is not relieved until payment is received from any source, thereby triggering the collateral source rule.
>
> The Supreme Court's answer to the evidentiary question in *Arthur* preempts the endless discussion of distinguishing details concerning who pays medical charges on behalf of an injured party. The practical answer to the collateral source question is easily applied without reference to the source of payment. Pursuant to *Arthur*, simply give the jury the initial bill and move on with the evidence. *Id*. at *3-4.

The City of Princeton also argued that the trial court erred by refusing to allow a witness to testify that the reduced charges (pursuant to Medicare regulations) were fair and reasonable for persons 65 years of age or older. Defendant ar-

gued that evidence of the reduced charges was relevant to the reasonableness of the initial medical bills. The Illinois Appellate Court Third District rejected the defendant's argument and affirmed the trial court's decision to prohibit such testimony, stating:

> However, the trial court quickly pinpointed the flaw in this proposition. The trial court stated, "if the only reason such a witness would offer [reduced fees] vis-a-vis a patient over 65 is because Medicare pays a discounted amount, then that's off-limits."
>
> The trial court correctly recognized defendant offered this evidence to introduce the collateral source payment to the jury through the backdoor. The tactic was contrary to the purpose of the collateral source rule and was properly rejected by the court before the trial began. Furthermore, we note the record does not establish defendant had such a witness available to testify. An offer of proof was not tendered either during trial or at the motion hearing. Accordingly, the court did not err in rejecting defendant's challenge based on "reasonableness" of the charges to Medicare. *Id*. at *5.

The *Nickon* court's analysis provides another reminder of the importance of making an offer of proof either at the pre-trial motion stage or at trial. Although it appears doubtful that an offer of proof would have changed the result here, it would have provided the trial court and appellate court with a better understanding of the nature of the testimony to be provided regarding billing procedures for patients with Medicare coverage.

The *Nickon* court recognized that its decision conflicts with the Illinois Appellate Court Fourth District's decision in *Wills v. Foster*, 372 Ill. App. 3d 670, 867 N.E.2d 1223 (4th Dist. 2007), which held that evidence of Medicare and Medicaid payments are admissible because they are exceptions to the collateral source rule. The *Nickon* court noted that the Illinois Supreme Court has accepted a Petition for Leave to Appeal in *Wills* and that the Supreme Court's decision "will provide further guidance on the issue." *Nickon*, 2007 WL 3171759 at *8. (It should be noted that on November 28, 2007, the defendant in *Nickon* filed a Petition for Leave to Appeal to the Illinois Supreme Court. To date, the Supreme Court has not ruled on the Petition.)

Municipal Law

By: Thomas G. DiCianni and Lucy B. Bednarek
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
Chicago

Illinois Student Records – To Keep or Not To Keep?

State and federal law imposes stringent regulations on the maintenance and confidentiality of school records. These restrictions create significant potential for school district liability, and challenges for attorneys defending school districts in lawsuits whenever students are involved. The Illinois Student Records Act (105 ILCS 10/1 *et seq.*), and provisions of the Illinois Administrative Code (Ill. Admin. Code, Tit. 23, §275.10), provide detailed requirements about which student records to keep and for how long, and their confidentiality. The federal Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232, *et. seq.*) provides similar restrictions. Some records need only be kept for one year, while others must be kept for as long as 60 years. Failure to comply with the strict requirements imposed by these laws exposes school districts to a statutory cause of action for injunctive relief, monetary damages and attorney's fees.

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About the Authors

Thomas G. DiCianni is a partner in the law firm of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.* He concentrates his practice in general litigation, defense of government entities and public officials, municipal law, and the representation of governmental self-insurance pools.

Lucy B. Bednarek is an associate in the law firm of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.* She concentrates her practice in general litigation, defense of government entities and public officials, municipal law, and the representation of governmental self-insurance pools.

Municipal Law *(Continued)*

Permanent Student Records

Student records are classified as either "temporary" or "permanent," which determines the length of time a school district must retain the records. Permanent records must be retained for 60 years after the student has transferred, graduated or withdrawn from the school. 105 ILCS 10/4(e). The Illinois Student Records Act sets out only a bare-bones definition of what must be kept in a student's "permanent" record, requiring retention of "the minimum personal information necessary to a school in the education of the student." This may include the "student's name, birth date, address, grades and grade level, parents' names and addresses," and attendance records, and such other entries as the Illinois State Board of Education (ISBE) may require or authorize. 105 ILCS 10/2(e).

The ISBE requires a student's permanent record to contain:

1. basic identifying information, including the student's name and address, birth date and place, and gender, and the names and addresses of the student's parents;
2. the academic transcript, including grades, class rank, graduation date, grade level achieved and scores on college entrance examinations;
3. the student's attendance record;
4. accident reports and health records;
5. a record of release of permanent record information (as required by 105 ILCS 10/6(c)) to other school districts where the student enrolled; and
6. scores on all state assessment tests administered in high school.

23 Ill. Admin. Code, Tit. 375.10. The ISBE requirements also state that the permanent record may contain honors and awards the student received and information concerning the student's participation in school-sponsored activities or athletics.

In sum, a school district must keep a student's basic identifying information, academic transcript, attendance record, accident reports and health reports, the record of any release of the permanent school record, and scores received on state assessment tests administered in high school, and may keep a record of a student's honors and awards and extra-curricular activities, all for a minimum of 60 years. A school district may not place any other information in a student's permanent record.

Temporary Student Records

A 2000 amendment to the Illinois Student Records Act changed the definition of a "temporary record" and the length of time the record must be retained. 105 ILCS 10/4(f). Before January 1, 2000, temporary records could be destroyed at any time if they were no longer useful, but could be kept no longer than five years after the student transferred, graduated or withdrew from the school. After the amendment the major part of the student temporary record must be retained for at least five years after the student has transferred, graduated or withdrawn from the school. 105 ILCS 10/4(f).

A major component of student records regulation is to protect the student's privacy and the confidentiality of the student's records.

Under the Student Records Act, a student temporary record includes all information contained in a school student record not in the permanent record, and may include family background information, intelligence test scores, aptitude test scores, psychological and personality test results, teacher evaluations and other information of clear relevance to the education of the student. The Student Records Act also includes within the student temporary record "all information regarding serious disciplinary infractions that resulted in expulsion, suspension, or the imposition of punishment or sanction." 105 ILCS 10/2(f). The 2000 amendment confines a "serious disciplinary infraction" to one resulting from drugs, weapons or infliction of bodily harm.

As with the permanent records the ISBE has expanded what constitutes a temporary record. ISBE regulations mandate that the student temporary record include:

1. a record of release of student temporary records to other schools where a student has enrolled or intends to enroll;
2. scores received on state assessment tests administered in elementary school (kindergarten through grade 8); and
3. Certain student information released under the Abused and Neglected Child Reporting Act.

Ill. Admin. Code, Tit. 23 §375.10.

ISBE regulations also provide that a student temporary record may contain:

1. family background information;
2. intelligence test scores, group and individual;
3. aptitude test scores;
4. reports of psychological evaluations, including information on intelligence, personality and academic information obtained through test administration, observation or interviews;
5. elementary and secondary achievement level test results;
6. participation in extracurricular activities, including any offices held in school-sponsored clubs or organizations;
7. honors and awards received;
8. teacher anecdotal records;
9. other disciplinary information;
10. special education files, including reports of the multi-disciplinary staffing on which placement or nonplacement is based, and records and tapes relating to special education placement hearings and appeals;
11. verified reports or information from non-educational persons, agencies or organizations; and
12. other relevant verified information.

A student's scores on elementary school state assessment tests, a record of any release of temporary records, information regarding serious infractions and information provided under the Abused and Neglected Child Reporting Act must be kept by the school district for at least five years after the student transfers, graduates or withdraws from the school. Any other information in the temporary record may be destroyed after the end of each school year.

Confidentiality of Records

A major component of student records regulation is to protect the student's privacy and the confidentiality of the student's records. Access to student records is allowed only in the following circumstances:

1. a parent or a person designated as a representative by the parent may inspect and copy all student records, unless prohibited by an order of protection;
2. the student may inspect and copy his or her permanent record;
3. employees and officials of the school district or the ISBE may inspect and copy student records in the educational interests of the student;
4. the record custodian of another school district where the student has enrolled or intends to enroll may request and receive student records;
5. persons performing research or statistical analysis may review student records, so long as no individual could be identified from the information released and the person conducting the research agrees to comply with the confidentiality requirements of the statute;
6. pursuant to a court order, with sufficient notice to the student's parents;
7. juvenile authorities may receive records for limited purposes related to the discharge of their official duties;
8. in connection with an emergency when the information is necessary to protect the health or safety of the student or another person;
9. to a person with a dated written consent of the student's parent;
10. to various governmental or social service agencies under limited circumstances set out in the statute.

Attorneys who have defended school districts through insurance policies or self-insurance pools are likely to have come across districts who have refused, on the advice of the school board's regular counsel, to turn over student records to defense counsel without a court order, for fear of violating the statute, even where defense counsel was defending the district in a case filed on behalf of the student. That position would create the uncomfortable posture of defense counsel having to seek a court order, with notice to the plaintiff, to obtain records from his own client. Fortunately, that practice has waned as courts have recognized that this overly cautious approach is impractical and beyond what is contemplated by the Student Records Act. *See, e.g., Ibata v. Board of Education of Edwardsville Comm. Unit S.D. No. 7*, 365 Ill. App. 3d 1056, 851 N.E.2d 658 (5th Dist. 2006).

Liability Under the Act

The Student Records Act allows for injunctive relief to a person who has been aggrieved by any violation of the statute, and damages for any person injured "by a willful or negligent violation" of the Act. The statute also allows for recovery of attorney's fees by any person aggrieved by a violation of the Act. For a wrongful release of a student record or information contained in it, one could contemplate that the plaintiff might claim damages for emotional distress, embarrassment or humiliation or economic loss resulting from the wrongful release of the information. In one such case that the

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Municipal Law *(Continued)*

authors of this article defended, a plaintiff's claim for emotional distress resulting from the school district's failure to preserve school records, as required by the Student Records Act, withstood a dispositive motion and remained an issue at trial.

One area for further research is the extent to which a school district or school official enjoys tort immunity for violations of the Student Records Act.

One area for further research is the extent to which a school district or school official enjoys tort immunity for violations of the Student Records Act. In *Albers v. Breen*, 346 Ill. App. 3d 799, 806 N.E.2d 667 (4th Dist. 2004), the court found that a school district and school principal were immune from liability under the discretionary immunity provided by the Illinois Tort Immunity Act, 745 ILCS 10/2-201, for the principal's release of information protected under the Illinois Mental Health and Developmental Disabilities Confidentiality Act. 740 ILCS 110/1, *et seq.* Whether that immunity would apply equally to a claim for violation of the Student Records Act has not been decided.

Conclusion

Although compelling arguments can be made to extend protection under the Tort Immunity Act to violations of the Student Records Act, the safer approach is to understand and comply with the Act's requirements, both its maintenance and record preservation mandates and its limitations on release of such information.

Amicus Committee Report

By: Michael L. Resis
SmithAmundsen LLC
Chicago

Since the last Amicus Committee report, the Illinois Supreme Court accepted the defendants' petition for leave to appeal in *Mikolajczyk v. Ford Motor Co.*, Doc. No. 104983. That case will revisit the consumer expectations and risk utility tests that have been used in determining when a product is unreasonably dangerous. In that case, the widow of a driver who died when his vehicle was struck from behind brought a wrongful death action asserting a defective design claim against the manufacturers of the car's seat. The jury returned a verdict on which the trial court entered judgment in the plaintiff's favor for $2 million for loss of money, goods and services and $25 million for loss of society. The appellate court (374 Ill. App. 3d 646, 870 N.E.2d 885 (1st Dist. 2007)), affirmed in part and reversed in part, holding that the plaintiff was entitled to proceed under the consumer expectations test and was not also required to pursue her design defect claim under the risk utility test. The court also held that the $25 million loss of society award exceeded all reasonable compensation and granted the defendants a *remittitur*, within certain parameters, to be determined on remand.

Jeffrey S. Hebrank and **Misty L. Wuebbels** of *Hepler, Broom, MacDonald, Hebrank, True & Noce L.L.C.* are to be commended for filing the IDC amicus brief in support of the defendants.

About the Author

Michael L. Resis is a founding partner and chairman of *SmithAmundsen*'s appellate department. He concentrates his practice in the areas of appeals, insurance coverage and toxic, environmental and mass torts. He has practiced law in Chicago for 20 years and handled more than 400 appeals. Mr. Resis has represented government, business and professional organizations as *amicus curiae* before the Illinois Supreme Court and the Illinois Appellate Court. He received his B.A. degree, *magna cum laude,* from the University of Illinois at Champaign-Urbana in 1978, and a J.D. degree from the University of Illinois at Champaign-Urbana in 1981. Mr. Resis currently serves on the Board of Directors for the IDC.

In *Willis v. Foster*, Doc. No. 104538, the Illinois Supreme Court will address the issue of whether a plaintiff is entitled to recover the medical expenses billed or only the amounts actually paid by Medicare and Medicaid. In *Willis*, the appellate court (374 Ill. App. 3d 670, 867 N.E.2d 1223 (4th Dist. 2007)), held that the plaintiff was limited to the amounts paid by Medicare and Medicaid and that the benefits paid or payable were not subject to the collateral source rule and *Arthur v. Catour*, 216 Ill. 2d 72, 833 N.E.2d 847 (2005).

David B. Mueller of *Cassiday and Mueller* is to be commended for filing the IDC amicus brief in support of the defendant.

While our committee cannot prepare an amicus brief in every case in which we are asked, we encourage your participation in making the views of our members known to the reviewing courts on the legal issues that affect us. We need your input and your support. If you are interested in writing an amicus brief or submitting a case for review by the committee, please contact any of us.

As a reminder for future submissions, the Amicus Committee members are:

Committee Chairman
Michael L. Resis
SmithAmundsen, LLC
(312) 894-3249
mresis@salawus.com

First Judicial District
John J. Piegore
Sanchez & Daniels
333 W. Wacker Drive, Suite 500
Chicago, Illinois 60606
(312) 641-1555

Second Judicial District
James L. DeAno
DeAno & Scarry
2100 Manchester Road, Suite 101A
Wheaton, Illinois 60187
(312) 690-2800

Third Judicial District
Karen L. Kendall
Heyl, Royster, Voelker & Allen
124 SW Adams Street, Suite 600
Peoria, Illinois 61602
(309) 676-0400

Fourth Judicial District
Robert W. Neirynck
Costigan & Wolrab, P.C.
308 E. Washington Street, P.O. Box 3127
Bloomington, Illinois 61701
(309) 828-4310

Fifth Judicial District
Stephen C. Mudge
Reed, Armstrong, Gorman, Coffey, Thompson, Gilbert & Mudge
101 N. Main Street, P.O. Box 368
Edwardsville, Illinois 62025-0368
(618) 656-0257

Feature Article

By: Donald G. Peterson
Hughes Socol Piers Resnick & Dym, Ltd.
Chicago

Judicial Estoppel Based on a Judicial Admission Should be Decided on a Dispositive Motion

What is judicial estoppel? Judicial estoppel is a lawsuit terminator. It is the box of no escape for a cause of action or defense inside it. Unwittingly, a party can build its own judicial estoppel box. Trapped inside, the cause of action or defense is extinguished.

In cases of judicial estoppel, when properly applied, equities and interests of the parties are not weighed. Judicial estoppel is applied and it is ultimately reviewed in the exercise of judicial discretion. Case law may confuse judicial estoppel with other estoppel from which there is an escape. That escape can occur in cases of collateral and equitable estoppel, when the equities and rights are weighed. Judicial estoppel serves the integrity of the judicial process, not the equities and rights of the parties.

Unfortunately, judicial estoppel is not always applied consistently in case law. For example, the Workers' Compensation Act's Section 5 exclusive remedy defense has not always prevailed, even though judicial estoppel was pleaded against a plaintiff, who applied for and received workers' compensation benefits from the defendant.

Judicial Estoppel is Distinct from Other Estoppel

At its heart, the doctrine of judicial estoppel prevents chameleonic litigants from shifting positions to suit the exigencies of the moment. *Ceres Terminals v. Chicago City Bank and Trust Co.*, 259 Ill. App. 3d 836, 635 N.E.2d 485 (1st Dist. 1994), quoting *Cashmore v. Builders Square, Inc.*, 211 Ill. App. 3d 13, 18, 569 N.E.2d 1353 (2nd Dist. 1991). Judicial estoppel prohibits parties from "blowing hot and cold." *Finley v. Kesling*, 105 Ill. App. 3d 1, 9, 433 N.E.2d 1112, 1118 (1st Dist. 1982). Judicial estoppel promotes truth and protects judicial integrity by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647, 650 (1st Dist., 1996); *Ceres Terminals,* 259 Ill. App. 3d at 857; *Cashmore*, 211 Ill. App. 3d at 18.

Finding judicial estoppel did apply, the court in *Dailey v. Smith*, 292 Ill. App. 3d 22, at 29, 684 N.E.2d 991 (1st Dist. 1997), cites a 1986 Comment that presents a multi-state perspective of judicial estoppel. *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244 (Spring 1986). The 1986 Comment analyzes judicial estoppel and distinguishes it from both collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated, and equitable estoppel, which assures fairness between the parties. Comment, 80 Nw. U.L.Rev 1244, 1248-9. This 1986 Comment also is cited and discussed in a leading Illinois case, *Ceres Terminals*, 259 Ill. App. 3d at 851 (finding judicial estoppel not to apply).

The *Dailey* case, having cited the 1986 Comment, *supra*, is in turn cited in a 1998 Comment. *Civil Procedure Intent and the Application of Judicial Estoppel*, 22 Am. J. Trial Advoc. 481, 485-6 (Fall 1998). The 1998 Comment concludes that Illinois, in the application of judicial estoppel, is categorized as a jurisdiction which considers the good faith or non-fraudulent intentions of the litigant. That characterization, if correct, says that Illinois judicial estoppel policy is to protect the integrity of the court, since it does not suggest that equity between parties is to be weighed.

Judicial estoppel is distinct from collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated and from equitable estoppel, which is to assure fairness between the parties. Comment 80 Nw. U. L.Rev. 1244, 1248-9. The difficulty courts have in applying judicial estoppel is evinced by the annotations on judicial estoppel in the citing references from *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990). Westlaw had 768 citing refer-

(Continued on next page)

About the Author

Donald G. Peterson, a partner in *Hughes Socol Piers Resnick & Dym, Ltd.*, represents design professionals, lawyers and accountants. He has appeared and argued civil cases before both the U.S. Supreme Court and the Illinois Supreme Court and before state and federal appellate courts. He served the Illinois Supreme Court for 9 years upon its appointment to the Court's Rules Committee. He has over 100 jury verdicts and a depth of civil trial experience in state and federal courts. He has served on the Board of the Association of Illinois Defense Trial Counsel. He is the former Editor-in-Chief of the Illinois Bar Journal and also of the Trial Briefs Newsletter and is published on legal professional liability by the Chicago Bar Association, 20-JUL CBA Rec. 38 (2006, Westlaw).

ences as of mid-2007 from *Matter of Cassidy*, including a number of journal articles. Both the 80 *Nw. U. L. Rev*. Comment and *Matter of Cassidy* provide valuable insight into the policy reason for a judicial estoppel doctrine. A more patent recognition of that policy, the vindication of the integrity of the judicial process, might bring more consistency to the application of judicial estoppel and also less confusion with equitable and collateral estoppel.

Judicial estoppel applies when: (1) the party being estopped has taken two positions; (2) the positions have been in separate judicial or quasi-judicial administrative proceedings; (3) the party intended the trier of fact to accept the truth of the facts in support of the position; (4) the party succeeded in asserting the first position and received some benefit from it; and (5) the two positions are inconsistent. *People v. Coffin*, 305 Ill. App. 3d 595, 598, 712 N.E.2d 909, 911 (1st Dist. 1999); *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971, 982-4, 483 N.E.2d 924, 934-5 (1st Dist. 1983).

Collateral estoppel, sometimes described as issue preclusion, is an equitable doctrine that precludes a party from relitigating an issue decided in a prior proceeding. *Herzog v. Lexington Township*, 167 Ill.2d 288, 295, 212, 657 N.E.2d 926 (1995); *Kessinger v. Grefco, Inc.*, 173 Ill.2d 447, 672 N.E.2d 1149 (1996). Collateral estoppel requires: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final determination on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Herzog*, 167 Ill.2d at 295.

Equitable estoppel may arise without the estopped party intending to relinquish a right. *Vaughn v. Speaker***,** 126 Ill. 2d 150, 533 N.E.2d 885 (1988). Equitable estoppel can arise from conduct, such as misrepresentation of an intent to settle, *Griffin v. Willoughby*, 369 Ill. App. 3d 405, 867 N.E.2d 1007 (4th Dist. 2006), or of the existence of agency. *Oliveira-Brooks v. Re/Max Intern., Inc.***,** 372 Ill. App. 3d 127, 865 N.E.2d 252 (1st Dist. 2007). Prejudice to the other party is one of the essential elements of equitable estoppel. Waiver, from which it is distinguished, does not imply the party asserting it has been misled to his detriment. *Vaughn***,** 126 Ill. 2d at 161-162.

Equitable estoppel first requires misrepresentation or concealment of material fact. Second, the estopped party must have knowledge that the representation was untrue. Third, the truth of the representation must be unknown to the party claiming estoppel. Fourth, the party estopped must intend or expect that his representation will be acted upon. Fifth, the party claiming estoppel must in good faith reasonably rely upon the misrepresentation and not be improvident in the reliance. Sixth, the party claiming estoppel would be prejudiced, if the estopped party is permitted to deny the truth of his misrepresentation. *Vaughn***,** 126 Ill.2d at 162-163.

The purpose of judicial estoppel is to protect the integrity of the judicial process and is distinct from equitable estoppel, which is to protect the litigants.

The purpose of judicial estoppel is to protect the integrity of the judicial process and is distinct from equitable estoppel, which is to protect the litigants. *Bidani v. Lewis*, 285 Ill. App. 3d at 550, 675 N.E.2d at 651 (1st Dist. 1996). Judicial estoppel also is distinct from equitable estoppel and from collateral estoppel, since judicial estoppel has no requirement of privity. 1986 Comment, 80 *Nw. U. L. Rev*. 1224, 1250; *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 510, 445 N.E.2d 506, 508 (4th Dist. 1983). This conclusion is consistent with the judicial integrity policy of judicial estoppel.

Judicial estoppel is equally applicable when the prior proceeding was a quasi-judicial, administrative proceeding. *Coe*, 112 Ill. App. 3d at 510. Judicial estoppel applies whether or not the party prevails in the earlier proceeding, so long as it receives some benefit from taking the contrary position, *Giannini*, 136 Ill. App. 3d at 982-4, or whether or not a judgment was entered, *Kale v. Obuchowski*, 985 F.2d 360, 362 (7th Cir. 1993) (ruling that a settlement which represents capitulation means that the party has prevailed).

Since judicial estoppel is applied to preclude a later contradictory position without the court examining the truth of either the prior or later statement, judicial estoppel eliminates the trial court's role as a fact finder. *Bidani*, 285 Ill. App. 3d at 550. It follows that the exercise of discretion in applying judicial estoppel should be a question of law, decided by dispositive motion.

(Continued on next page)

Judicial Estoppel *(Continued)*

Judicial Estoppel Raises a Dispositive Issue of Law

A question of the integrity of the judicial process should be decided as a matter of law and not by a fact finder. Judicial estoppel has been raised by various dispositive motions, such as motions for dismissal under Section 2-619 (735 ILCS 5/2-619), and motions for summary judgment.

When two, contradictory judicial admissions both trigger judicial estoppel, one judicial admission may trump the other. *Moy v. Ng*, 371 Ill. App. 3d 957, 864 N.E.2d 752 (1st Dist. 2007) (affirming the denial both of summary judgment and judgment on the pleadings). In *Moy*, the plaintiffs brought suit against an attorney who had agreed to serve as an escrowee for the plaintiffs and the contractor the plaintiffs had hired to work on their building. They alleged that the attorney had breached her fiduciary duty owed to them by improperly disbursing funds from the escrow account without verifying that the work had been done under the contract and that distribution was proper. In disciplinary proceedings resulting from the matter, the attorney had entered into a consent decree, and had submitted an affidavit in which she agreed that: she had served as an escrowee for the insurance proceeds to be used to restore the plaintiffs' building; she accepted a deposit of the funds; she distributed some of the funds to the contractors who repaired the building; and she had used $38,800 of the funds for her personal use and had deposited another $34,000 to her personal checking account. *Moy*, 371 Ill. App. 3d at 961.

At the same time, the plaintiffs failed to properly respond to requests to admit, which resulted in the judicial admission that, among other things, the defendant never had any agreements with the plaintiffs, and that all of the monies deposited were properly distributed. *Id.* Since these admissions contradicted the attorney's statements in connection with the consent decree, the question became whether "the plaintiffs' judicial admissions may be overborne by the application of the doctrine of judicial estoppel." *Id.* at 962.

The *Moy* court affirmed the application of judicial estoppel against the defendant lawyer. By virtue of her ARDC judicial admissions, the lawyer was judicially estopped to use Moy's failure to respond to her requests to admit. The requests, if admitted, would establish the lawyer *properly* disbursed Moy's insurance funds. The court ruled that the use by the lawyer of Moy's admitted facts was barred by the lawyer's ARDC admissions. The court explained that the use of judicial estoppel did not serve to contradict the facts established by the plaintiffs' admissions, but it barred the defendant from using those facts to prevail in the case. *Id*. at 963.

In the case of another dispositive motion, JNOV was affirmed on the basis of judicial estoppel. *Dailey v. Smith*, 292 Ill. App. 3d 22, 684 N.E.2d 991 (1st Dist. 1997) (affirming the exercise of discretion in applying judicial estoppel). In *Dailey*, the plaintiff was found judicially estopped from making claims that he had not disclosed in his earlier bankruptcy petition. The judicial admission was by conduct, not words.

Judicial estoppel has been applied for a dispositive summary judgment motion and reviewed on the standard of sound exercise of discretion. *Barrack Ferranzano Kirschbaum Perleman and Nagelman v. Lofreddi*, 342 Ill. App. 3d 453, 459, 795 N.E.2d 775, 784 (1st Dist. 2003) (application of judicial estoppel was affirmed to bar the client's defense to the lawyer's claim for fees).

Judicial Estoppel is Applied to Judicial Admissions

Judicial admission is applied to intentional self-contradiction that is being used to obtain unfair advantage. *Moy*, 371 Ill. App. 3d 957*; Barack Ferrazzano*, 342 Ill.App.3d at 465; *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953). Judicial estoppel prevents litigants from "playing fast and loose with the courts." *Scarano*, 203 F.2d at 513.

Judicial estoppel is not limited to fact questions. *Matter of Cassidy*, 892 F.2d at 641-2. In *Matter of Cassidy*, the court observed a trend away from strict limitation of the doctrine to positions on matters of fact. But more recently, judicial estoppel was viewed not to apply to purely legal positions. *Cress v. Recreation Services*, 341 Ill. App. 3d 149,795 N.E.2d 817,840-1 (2nd Dist. 2003) (finding an ERISA claim a legal position, not a fact position which would bar the plaintiff's contract and tort claims).

Judicial estoppel is flexible and not reducible to a pat formula. *Ceres Terminals*, 259 Ill. App. 3d at 850 (affirming the exercise of judicial discretion in not applying judicial estoppel). Similarly, Judge Flaum stated, "It may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts." *Matter of Cassidy*, 892 F.2d at 641-2. Judicial estoppel is not reducible to a formula for the "same reasons that the courts are cautious in attempting to exactly define fraud – the fear that unscrupulous persons may use strictures on use of the doctrine to subvert the purposes of the rule." *Id.*

A judicial admission requires a record that clearly reflects that the party intended the truth of his position be accepted. *Coe*, 112 Ill. App. 3d at 510. Examining the party's intent carries out the policy for judicial estoppel without un-

duly restricting it. *Id.* at 510; see also, *Barack Ferrazzano,* 342 Ill. App. 3d 465.

The client's law firm in *Barack* triggered judicial estoppel by its earlier use of its fee agreement to support the client's fee statement submitted for the client's benefit in a non-judicial proceeding. The *Barack* court decided, when a subsequent attorney fee dispute arose, that the client was judicially estopped to deny the terms of the fee agreement. The court did not wish to "encourage or condone mendacity or disingenuousness in submitting fee petitions by officers of the court to a tribunal of justice, whether under oath, or not." *Barrack,* 342 Ill. App. 3d 453 at 465 (affirming summary judgment based on judicial estoppel).

When fact and law issues are not the same in the prior and subsequent proceedings, judicial estoppel should not apply. *Boelkes v. Harlem Consolidate School Dist.122,* 363 Ill. App. 3d 561, 842 N.E.2d 790 (2nd Dist. 2006). Judicial estoppel did not apply in *Boelkes,* since plaintiff's rate of pay stated in her employment contract and her average weekly wage stated in the workers' compensation settlement contract for workers' compensation benefits procedurally were not the same issue. *Boelkes,* 363 Ill. App. 3d at 554. Similarly, the Illinois Appellate Court Second District declined to apply judicial estoppel in a later Jones Act proceeding, since the issue of coverage for an engineer on a casino riverboat under the Workers' Compensation Act is procedurally different than under the Jones Act. *Grobe v. Hollywood Casino-Aurora Inc.,* 325 Ill. App. 3d 710, 719, 759 N.E.2d 154 (2nd Dist. 2001).

Using a party's own judicial admission to dispense with the need to prove a fact is not a proper use of judicial admission. *Feret v. Schillerstrom,* 363 Ill. App. 3d 534, 844 N.E.2d 447 (2nd Dist. 2006) (reversed on appeal). Judicial admission was turned on its head by a trial court in *Feret* in dismissing a law suit as moot, after defendant's lawyer admitted that the subject of the litigation, a 2003 Board resolution, had been abandoned. Resisting dismissal of his suit, plaintiff disputed the assertion that DuPage County's resolution, which plaintiff wished to litigate, had been abandoned. *Feret,* 363 Ill. App. 3d 534.

A party cannot be allowed to affirm the contrary is true, after affirming a fact under oath. *Ceres Terminals,* 259 Ill. App. 3d at 854; *Finley v. Kesling,* 105 Ill. App. 3d 1, 9, 433 N.E.2d 1112 (1st Dist. 1982). Judicial estoppel can even apply in instances where the party is not under oath. *Coe,* 112 Ill. App.3d at 510. A party with earlier success in the prior proceeding is judicially estopped from harming the court's integrity by later self-contradicting conduct. *Id.* at 509.

"It would be totally illogical to allow parties to take one position in an agency proceeding and then allow them to take an inconsistent position in subsequent court proceedings, simply because the first position was not taken under formal oath." *Id.* at 510-11. This statement evinces the policy of judicial estoppel to be the integrity of the judicial process. *Department of Transportation v. Coe* reversed the Civil Service Commission and found a formal oath was not required for a judicial admission. *Id.* at 510.

While finding that a notary seal might not be needed for judicial admission, the *Ceres Terminals* court was "not yet" willing to abandon the formal oath requirement for judicial estoppel and held that the oath should remain at least an "element" to consider for judicial estoppel. *Ceres Terminals,* 256 Ill. App. 3d 836. If the party against whom estoppel is to apply did not have prior success, the sanctity-of-oath policy may be reason enough to apply judicial estoppel. Comment, 80 *Nw. U. L. Rev*. 1244, 1253. Under the sanctity-of-oath policy, the party cannot be permitted to state a fact that is not true and contradict his early sworn testimony, stating the fact was true. *Finley,* 105 Ill. App. 3d at 9.

A Workers Compensation Applicant Should be Judicially Estopped From Filing a Lawsuit Against the Respondent

Applying for and accepting workers' compensation benefits judicially estops a plaintiff's claim without finding the plaintiff was an employee of the defendant. *Wren v Reddick Community Fire Protection District,* 337 Ill. App. 3d 262, 267, 785 N.E.2d 1052, 1057 (3rd Dist. 2003). Two cases, *Gray v. National Restoration,* 354 Ill. App. 3d 345, 820 N.E.2d 943 (1st Dist, 2004, a death case, and *Townsend v. Fassbinder,* 372 Ill. App. 3d 890, 866 N.E.2d 631 (2nd Dist. 2007), a catastrophic injury case, have majority opinions that disregard *Wren* and refuse to apply judicial estoppel.

The dissents in both in *Gray* and in *Townsend* argued that judicial estoppel should have barred the plaintiffs' personal injury claims against their own "employer." The plaintiffs in *Gray* and *Townsend* were applicants for and recipients of workers' compensation benefits from the defendants. Section 5 of the Workers' Compensation Act gives the employer the exclusive remedy defense to lawsuits as the *quid pro quo* for no-fault workers compensation liability.

The majority in *Gray* acknowledged the conduct of applying for and accepting workers' compensation benefits should trigger judicial estoppel and the Section 5 defense and conceded that a party should be prevented from taking inconsistent positions that harm judicial integrity. However, the *Gray* majority applied the *Laffoon* doctrine to reject judicial estoppel for Section 2-619 dismissals. The *Laffoon* doc-

(Continued on next page)

Judicial Estoppel *(Continued)*

trine forecloses the Section 5 defense to a general contractor, whose subcontractor is the plaintiff's employer. *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 359 N.E.2d 125 (1976). The earlier conduct as a judicial admission of plaintiff Gray did not make Gray an "employee" for the Section 5 defense. *Gray*, 354 Ill. App. 3d 345

Laffoon is judicial "gloss" applied to Section 5. Since the obligation under the Workers' Compensation Act to pay benefits can be placed on the general contractor in addition to the "immediate employer," who is a subcontractor, *Laffoon* forecloses the Section 5 defense for a general contractor, notwithstanding payment by the general of benefits to the plaintiff.

The *Gray* majority reasoned that the plaintiff "in this situation" is not judicially estopped to sue that party from whom he is receiving workers' compensation. Justice Reid for the majority said, "Gray is not judicially estopped from maintaining this cause of action against National Restoration because it is allowed by the provisions of the Act." *Gray*, 354 Ill. App. 3d at 356. *Gray* holds that under the Act, the employer was liable to the plaintiff for the injuries, "regardless of the stance that Gray took in those proceeding." *Id.* at 356.

The *Gray* dissent would find *Laffoon* inapposite and judicial estoppel a bar to the suit. *Townsend*, like *Gray*, used *Laffoon* to avoid judicial estoppel. The *Townsend* dissent by Justice Kapala, like the *Gray* dissent by Justice Campbell, would find the *Laffoon* doctrine inapposite. Justice Kapala would have applied judicial estoppel, following the precedent of *Wren*, 337 Ill. App. 3d at 267, to hold, without making the plaintiff an employee of the defendant, that the plaintiff's personal injury claim is judicially estopped.

The *Townsend* majority, in affirming the denial of JNOV, implicitly misapplied judicial estoppel. The *Townsend* majority, by weighing equities, confused judicial estoppel with collateral or equitable estoppel. An equity maxim, "clean hands," negated plaintiff's judicial admission.

Conclusion

Judicial estoppel, when applicable, should be dispositive in all cases, irrespective of equities and rights. If it is to vindicate the integrity of the judicial process, judicial estoppel cannot weigh equities. Not all estoppel will be dispositive. Collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated, and equitable estoppel, which is to assure fairness between the parties, may not be dispositive, since equities and rights must be weighed.

The Defense Philosophy

By: Willis R. Tribler
Tribler Orpett & Meyer, P.C.
Chicago

Remembering Our Founders

"Those who cannot remember the past are condemned to repeat it." George Santayana

Francis D. Morrissey died in Chicago on October 11, 2007. He is justifiably remembered as the leading appellate lawyer at Baker & McKenzie and later as the founder of the Morrissey Scholars, a group at the John Marshall Law School that studies, discusses, and writes about legal ethics. His obituaries did not mention that he was one of the 11 founders of the Illinois Association of Defense Trial Counsel.

With Mr. Morrissey's passing, a majority of the men who met at the Chicago Bar Association on March 4, 1965, are dead. Therefore, this is a good time to remember what they did for the organization.

Although it sounds like an urban legend, it is absolutely true that the Defense Tactics Seminar, or "spring seminar," predated the formation of the IDC. I was a second-year associate at Heyl Royster Voelker & Allen in Peoria when Bill Voelker suggested that as many of us as possible should attend "a seminar that some of the defense guys in Chicago are holding in November." That was not an invitation that a young associate was likely to turn down, and so I was present at the Pick-Congress on November 14, 1964, for what everyone assumed would be a one-time event.

About the Author

Willis R. Tribler is a director of the firm of *Tribler Orpett & Meyer, P.C.* in Chicago. He is a graduate of Bradley University and the University of Illinois College of Law, and served as President of the IDC in 1984-1985.

Not so. The first seminar drew 700 people who were willing to fork over $15 for a seminar, lunch and a cocktail party. That caused Royce Rowe and others to realize that there were a lot of lawyers who wanted to hear the defense perspective on litigation. The March 1965 organizational meeting followed.

It was a much simpler time. Most insurance litigation arose out of automobile accidents or an occasional slip-and-fall. The explosion in areas such as products liability and professional malpractice was on the horizon but had yet to arrive. In addition to an original goal of promoting auto safety, later removed from the bylaws, the founders planned to organize the defense bar, disseminate information to judges and present defense viewpoints in the state legislature. Committees were formed to implement these goals. As a result of these efforts, the IDC was ready for the litigation explosion.

The first bomb went off in 1965, when the Illinois Appellate Court Third District ruled that insurance carriers were required to produce their files to the other side in cases where the same carrier insured both parties. The defense bar felt that this was bad enough and was very surprised when the Illinois Supreme Court expanded this rule to include all cases. *Monier v. Chamberlain*, 35 Ill.2d 351, 221 N.E.2d 410 (1966). This caused the IDC to file its first-ever amicus brief, written by Frank Morrissey, in support of a motion to reconsider. That effort failed, as did an attempt to prevent the adoption of Supreme Court Rule 201(b), which codified *Monier.* In the end, the IDC lost the battle but won the war. It showed itself to be a worthy advocate for the defense cause and became a respected participant in shaping the law of Illinois.

Frank Morrissey also was the father of the *IDC Quarterly*. In May 1965, he suggested that the IDC publish a learned quarterly journal with scholarly articles by law school professors. He had to wait until 1990, but it finally happened. Although the *IDC Quarterly* carries precious few articles written by law school professors, it has definitely turned into a successful scholarly publication, and also provides practical advice to trial lawyers.

This sad loss to the defense bar and the legal profession presents a good time to reflect on the fact that the *IDC Quarterly* that you are reading and the IDC that exists today started 43 years ago with 11 imaginative people in a meeting room at the CBA. They did a great job and deserve our thanks. Therefore, this is a good time to remember the following individuals for their important contribution to the IDC: Frank Morrissey, Royce Rowe, Irving Swenson, Vincent Vaccarello, Henry Marquard, Stephen Milwid, Albert Manion, Tom Yates, Bert Thompson, John Moelmann and Jim Baylor.

The IDC is proud to welcome the following members to the association:

Thomas George Drennan
Tressler, Soderstrom, Maloney & Priess, LLP, Chicago
- Sponsored by: Durga Bharam

Caesar Kinnier Lastimosa
Sedgwick, Detert, Moran & Arnold LLP, Chicago

Jennifer A. Latimer
SmithAmundsen LLC, Chicago
- Sponsored by: Glen Amundsen

Anthony L. Martin
Sandberg, Phoenix & von Gontard, P.C., St. Louis
- Sponsored by: Mary Anne Mellow

Tanya Ellen Ortega
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Diane Marie Reinsch
Lane & Waterman LLP, Rock Island
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Matthew Jay Weiss
Cremer, Kopon, Shaughnessy & Spina, LLC, Chicago
- Sponsored by: John Lynch

Brent M. Wills
SmithAmundsen LLC, Chicago
- Sponsored by: Glen Amundsen

Neil G. Wolf
SmithAmundsen LLC, Chicago
- Sponsored by: Glen Amundsen

Notice of Election

In accordance with the By-Laws of the Illinois Association of Defense Trial Counsel, an election must be held to fill the vacancies of the following six (6) directors whose terms expire June, 2008.

The following six Directors' terms will expire at the Annual Meeting, June, 2008:

Durga Bharam, Tressler, *Soderstrom, Maloney & Priess, LLP*
C. Wm. Busse, Jr., *Busse, Busse & Grasse, P.C.*
Patrick Dowd, *Dowd & Dowd, Ltd.*
Barbara Fritsche, *Rammelkamp Bradney*
Kevin Luther, *Heyl, Royster, Voelker & Allen*
Aleen Tiffany, *Aleen R. Tiffany, P.C.*

Recommendations for nominations of six (6) persons to be elected to the Board of Directors are now being solicited from the general membership.

The filing of a nominating petition for election as a director shall consist of:

1. The nominating petition. Each individual nominated must be supported by the signatures of three (3) members in good standing.
2. A statement by that member of his ***availability and commitment to serve actively*** on the board.
3. A black and white head and shoulders picture (jpg format, preferred).
4. A biography.
5. A statement of no more than 200 words on why you think you should be elected to the Board of Directors.

A sample copy of the nominating petition and commitment to serve statement are included for your reference.

Nominations shall be mailed to the attention of Anne Oldenburg, IDC Secretary/Treasurer at Alholm, Monahan, Klauke, Hay & Oldenburg, LLC, 221 N. LaSalle St., #450, Chicago IL 60601, and **must be accompanied with the five items listed above.** All candidates will be featured with their biography, statement of candidacy and picture in the next issue of the ***IDC Quarterly***, and this same feature will be mailed to the membership with the ballots if more than six petitions are received.

All nominating petitions must arrive at the IDC office no later than Monday, **March 3, 2008**.

All candidates who have filed a complete nominating petition are eligible to receive a diskette with the IDC membership addresses, sorted alphabetically, by zip code or by firm, upon request.

Statement of Availability and Commitment Sample

I, _____, hereby declare that I am a member in good standing of the Illinois Association of Defense Trial Counsel and I do hereby warrant and affirm my ability and commitment to serve actively on the Board of Directors of the Illinois Association of Defense Trial Counsel.

Dated this _____ day of _____, 2008.

_____
Signature

Nominating Petition Sample

We, the undersigned, hereby declare that we are members in good standing of the Illinois Association of Defense Trial Counsel.

We, the undersigned, further nominate (name of person) of (firm name, address, city, state, zip code) for the position of Director of the Illinois Association of Defense Trial Counsel.

John Doe (signature)

Jane Doe (signature)

Jack Doe (signature)

Dated this _____ day of _____, 2008.

Special Thanks...

The IDC offered two Basic Skills Seminars in October and an Employment Law Seminar in November. We would like to thank the following individuals for lending their time and talents as speakers.

Springfield & Chicago Basic Skills Seminar Speakers

Glen Amundsen – *SmithAmundsen LLC*
Mary F. Andreoni – *ARDC*
Robert Bradney – *Rammelkamp Bradney*
Michael Bruck – *Williams, Montgomery & John, Ltd.*
Robert Marc Chemers, Esq. – *Pretzel & Stouffer, Chartered*
Sara Cook – *McKenna Storer*
Daniel K. Cray – *Cray Huber Horstman Heil & VanAusdal LLC*
Dave Ganfield – *Ryan, Ryan & Landa*
Adrian Harless – *Heyl, Royster, Voelker & Allen*
Stephen J. Heine – *Heyl, Royster, Voelker & Allen*
Lori Iwan – *The Iwan Law Firm, LLC*
Richard T. Kaczkowski, S.E., P.E. – *Packer Engineering*
Stephen R. Kaufman – *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC*
Nicholas Kourvetaris – *SmithAmundsen LLC*
Paul R. Lynch – *Craig & Craig*
Hon. Mary McDade – *Illinois Appellate Judge, Third District*
R. Mark Mifflin – *Giffin, Winning, Cohen & Bodewes, P.C.*
Janine Mitchell, J.D., ARe – *Illinois Risk Management Services*
William F. Moran, III – *Stratton, Giganti, Stone & Kopec*
Bradley C. Nahrstadt – *Williams Montgomery & John Ltd.*
Martin O'Hara – *Quinlan & Carroll, Ltd.*
Donald J. O'Meara, Jr. – *Pretzel & Stouffer, Chartered*
Jean Prendergast – *Crisham & Kubes, Ltd.*
Greg Ray – *Craig & Craig*
James L. Reed – *Loyola University Health Systems, Loyola University Medical Center*
Russell Reed – *Hinshaw & Culbertson, LLP*
John Robertson – *Stoerzbach, Robertson, Wilcox & Alcorn, P.C.*
Anne B. Schmidt – *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC*
Bruce H. Schoumacher – *Querrey & Harrow*
W. Mark Sickles – *McKenna Storer*
Patrick Stufflebeam – *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC*
Aleen Tiffany – *Aleen R. Tiffany, P.C.*
Stephen S. Weiss – *Tribler Orpett & Meyer, P.C.*
Eugena Whitson-Owen – *Moore, Strickland & Whitson-Owen*

Employment Law Seminar Speakers & Planning Committee

Durga Bharam – *Tressler, Soderstrom, Maloney & Priess, LLP*
Judge John W. Darrah – *U.S. District Court - Northern District of Illinois, Eastern Division*
Terry Fox – *McKenna Storer*
Jill M. Leibold, Ph.D. – *Litigation Insights*
Eric Sowers – *Sowers & Wolf, LLC*
Thomas Scott Stewart – *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC*
Edwin Sullivan – *Seyfarth Shaw LLP*

Young Lawyers Report

By: Jennifer B. Groszek
Gunty & McCarthy
Chicago

The Young Lawyers Division wrapped up 2007 with its fall school supply and clothing drive and holiday toy drive. The school drive included five schools across Illinois. Donations included numerous boxes of school supplies, coats, scarves, hats and gloves. The YLD thanks everyone who made donations to the drive. School officials were very appreciative and the children were very excited to receive much need winter gear! The YLD specially thanks IDC Board Member, Howard Jump of Jump & Associates and Adam Smith, an associate at Cremer, Kopon, Shaughnessy & Spina, LLC, for providing generous donations of clothes and school supplies.

Nicole Milos, YLD Committee member and attorney with Cremer, Kopon, Shaughnessy & Spina, LLC headed up the YLD toy drive in December. Nicole collected toys for Old Saint Mary's Church located in the south loop of Chicago for less fortunate families. Collected items included monetary donations to purchase toys and four bags of toys. In the end, the YLD donated ten bags full of toys! St. Mary's Church was very appreciative and the children surely had a brighter holiday with toys including: Transformers, books, My Little Pony dolls, Dora the Explorer toys and Hello Kitty dolls. The YLD appreciates all donations and looks forward to this service project again next year.

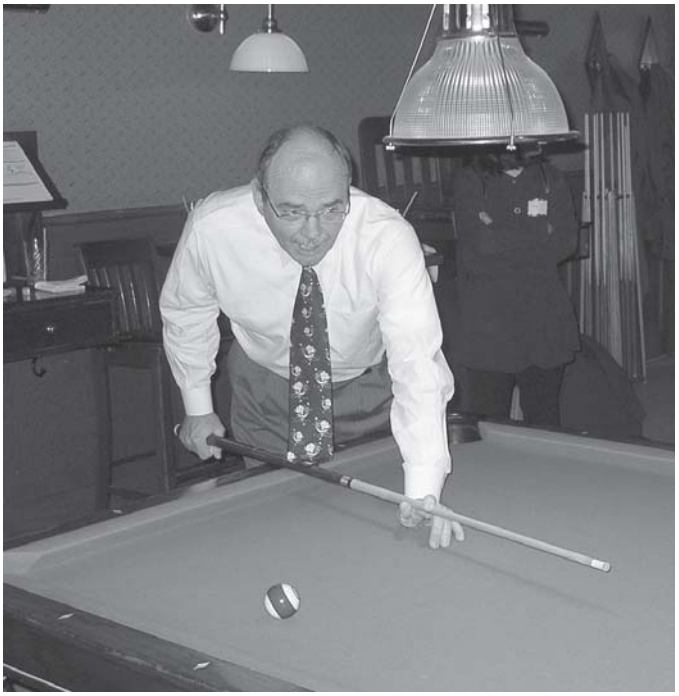
The YLD's last substantive meeting took place on October 26, 2007. Eugena Whitson-Owen, a partner with Smith Amundsen, spoke on Rule 216 Requests to Admit and the latest case law. The YLD will continue to offer its committee members monthly meetings with speakers throughout 2008.

The IDC-YLD again competed against the ISBA-YLD in the 2nd Blood Drive Competition on January 25, 2008. Last year the IDC-YLD won the blood drive competition with

Photos from YLD annual holiday party at Dave & Busters.

About the Author

Jennifer Groszek is an attorney with the Law offices of *Gunty & McCarthy* in Chicago. She is the Chair of the IDC-Young Lawyers Division and is a member of the CBA, ISBA, NAWL, Bar Association of Metropolitan St. Louis and DRI. Jennifer received her B.A. in 1999 from the University of Wisconsin-Stevens Point and J.D. in Dec. of 2001 from Valparaiso University School of Law. Jennifer is licensed in Illinois & Missouri.



the most donors, taking the title as "the biggest blood suckers!" The Blood Drive Competition took place at Hinshaw Culbertson in Chicago. Check back next quarter in this column for the results.

Our next meeting will take place at McKenna Storer in Chicago on February 21, 2008 at noon. One of the firm's appellate attorneys will speak on appellate practice. Lunch will be provided. We will again be applying for CLE credits for this meeting. Please RSVP to Jennifer Groszek at the e-mail address below if you would like to attend.

If you are interested in joining the YLD Committee, hosting a meeting or would like to volunteer to speak at one of the YLD Committee meetings, please contact Jennifer Groszek at **Jennifer.groszek@guntymccarthy.com**.

Nicole Milos with donations for the YLD toy drive.

Association News

IDC Logo Updated

Though the IDC has been known by a number of names in its 40+ years in existence, the logo we have used — an outline of the state with the letters IDC in the middle — has not been updated since at least 1968. That changed in December when the IDC logo was retired and replaced by the one shown below.

ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

This new logo will be utilized in a new membership marketing campaign and all IDC publications. You may have even noticed the change already in the logo when you recently received your Spring Seminar Brochure mailing.

We look forward to using this updated logo in our publications and would like to offer special thanks to **Barbara Fritsche** of Rammelkamp Bradney, **John Lynch** of Cremer, Kopon, Shaughnessy & Spina, LLC and the IDC Executive Committee, for their work on this logo update. We sincerely appreciate their time and involvement.

Forty-Fourth Annual

SPRING DEFENSE TACTICS SEMINAR

Friday, March 14, 2008

Standard Club of Chicago
320 South Plymouth Court
Chicago

Presented by the
Illinois Association
of Defense
Trial Counsel

Topics to Be Presented

- Taking The Offensive: Effective Use Of Admissions In Building Your Defense
- Use Of Accident Reconstruction In Defending Your Case
- Accident Reconstruction: The Expert Perspective
- Insurance Coverage: A Primer For Defense Counsel
- Mediation: How To Make If Effective For Your Client
- Don't Get Stuck With The Bill: A Primer For Defense Counsel On Handling Liens
- A View From The Bench – Summary Judgment
- Ethics Presentation (Specific Topic To Be Determined)
- Apportionment Of Fault: The Current State Of 2-1117

2007-2008 President
Jeffrey S. Hebrank
Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC

2008 Spring Seminar Committee Chairman
Scott D. Stephenson
Litchfield Cavo, LLP

(Continued on next page)

Forty-Fourth Annual

SPRING DEFENSE TACTICS SEMINAR

Friday, March 14, 2008

Registration

	Through March 14
IDC Members	$250
Non-Members	$385
Judges	$25

Registration for this event includes seminar materials, access to our Exhibit Hall, refreshment breaks, lunch, and great networking opportunities.

Refund Policy

Refunds will be made according to the following schedule:

50% Refund Through February 15
No Refund February 15 – March 14

Substitutions for your registration may be made. However, only one copy of seminar materials will be offered per registration. Please submit substitution information in advance of the seminar.

Please complete this registration form and return it as soon as possible to:

ILLINOIS Association of DEFENSE TRIAL COUNSEL

PO Box 3144
Springfield, IL 62708-3144

Questions?

Phone: 800-232-0169
Fax: 217-585-0886
Email: idcoffice@insightbb.com

Attendee _____ Member ID_____

Badge Name _____

Firm_____

Address_____

City _____ State _____ Zip _____

Direct Line _____

Firm Line _____

Fax Line_____

Email _____

Bar Number: IL: _____ MO: _____

IN: _____ WI: _____

Special Dietary/Accessibility Needs _____

_____

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Illinois Association of Defense Trial Counsel

MEMBERSHIP APPLICATION

Individuals seeking membership in the Illinois Association of Defense Trial Counsel must meet the following qualifications: Any person (A) who is a member in good standing of the Bar of the State of Illinois, and; (B) who is engaged actively in the practice of law, either privately or on behalf of his/her corporate or governmental employer, and; (C) who is of high professional standing; (D) who devotes a substantial portion of his or her professional practice to the representation of business, corporate, governmental, insurance, professional or individual civil litigants involving tort, contract, insurance, employment, municipal or business matters, and does not, for the most part, represent plaintiffs in personal injury litigation, or; (E) any person who is currently enrolled in an ABA accredited law school; who will support the purpose of the organization, and; who desires to receive the benefits of law student membership shall be eligible to apply for membership in this association.

MEMBERSHIP DUES	<3 Years In Practice	3-5 Years In Practice	5-10 Years In Practice	10+ Years In Practice
Attorneys	$100	$135	$195	$225
Governmental Attorneys	$75	$100	$160	$190
Law Students	$20			

APPLICANT INFORMATION – ATTORNEYS & GOVERNMENT ATTORNEYS

First _____ Middle _____ Last _____ Suffix _____ Designation _____

Firm or Government Agency _____

Address _____

City _____ State _____ Zip _____ County _____

Firm or Agency Line _____ Direct Line _____ Fax Line _____

Email _____ Website _____

Principal Area of Practice _____ # of Attorneys in Firm _____

Admitted to the Bar in the State of _____ Year _____ Bar # _____

IDC Sponsor Name and Firm _____

APPLICANT INFORMATION – LAW STUDENTS

First _____ Middle _____ Last _____ Suffix _____ Designation _____

Law School _____

Address _____

City _____ State _____ Zip _____ Anticipated Graduation Date _____

BIOGRAPHICAL INFORMATION

IDC is committed to the principle of diversity in its membership and leadership. Accordingly applicants are invited to indicate which one of the following may best describe them:

Race _____ Gender _____ Birth Date _____

Home Address _____ City _____ State _____ Zip _____

In addition to joining the IDC, you can take advantage of the DRI Free SLDPO Membership Promotion! As a new member of IDC and if you've never been a member of DRI, you qualify for a 1 year free DRI Membership. If you are interested please mark the box below and we will copy this application and send it to DRI. Also, if you have been admitted to the bar 5 years or less, you will also qualify to receive a Young Lawyer Certificate which allows you one complimentary admission to a DRI Seminar of your choice.

❍ Yes, I am interested in the DRI Free SLDO Membership!

(Application continued on next page)

Illinois Association of Defense Trial Counsel

COMMITTEE INVOLVEMENT

All Substantive Law Committees are open to any IDC member, and the IDC Board of Directors strongly believes that all members should participate in at least one of these committees. Event and Administrative Committees are generally small committees and usually are appointed by the Board of Directors. If you are particularly interested in one of these smaller committees, please indicate such on this form. Your name will be sent to the committee chair and your interest will be noted on your membership file. The *IDC Quarterly* is always interested in new authors for columns or articles. Please contact the IDC office or the Editor in Chief if you are interested in working with this group.

SUBSTANTIVE LAW COMMITTEES

Committees are to meet regularly, and at the Spring Defense Tactics Seminar; Each committee is responsible for writing one Monograph for the IDC Quarterly, and to submit other articles, as warranted; Committees are to keep abreast of current legislation and to work with the IDC Legislative Committee; To be a resource for seminar committees for speakers and subjects; To conduct, as a committee project, a break-out session at the Fall Conference, and; If and when certain issues arise that would warrant a specific "topical" seminar, the committee should with board concurrence, produce such a seminar.

Please select below the committees to which you would like to apply for membership:

- ❍ Civil Practice & Procedure
- ❍ Commercial Litigation
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Medical Liability
- ❍ Municipal Law
- ❍ Products Liability
- ❍ Professional Liability
- ❍ Workers' Compensation

EVENT COMMITTEES

- ❍ Spring Defense Tactics Seminar
- ❍ Trial Academy
- ❍ Fall Conference

ADMINISTRATIVE COMMITTEES

- ❍ Amicus / Appellate Law
- ❍ Diversity
- ❍ *IDC Quarterly*
- ❍ Committee on Judicial Independence
- ❍ Legislative
- ❍ Membership
- ❍ Young Lawyers

MEMBERSHIP COMMITMENT

By providing a fax number and email address you are agreeing to receive faxes and emails from the association that may be of a commercial nature. I certify that I am actively engaged in the practice of law, that at the present time a substantial portion of my litigation practice in personal injury and similar matters is devoted to the defense or that I am currently enrolled in an ABA accredited law school.

Signed By: _____ Date _____

❍ Enclosed is my check for $ _____ ❍ Please charge my credit card in the amount of $ _____

Credit Card # _____ Exp. Date ____ / ____ Card Security Code ____ ____ ____

Name as it appears on the Card: _____

Billing Address _____

City, State, Zip Code _____

Thank you for your interest in joining the Illinois Association of Defense Trial Counsel. Your application will be presented to the Board of Directors for approval at their next regular meeting. Until that time, you have any questions, please contact the IDC office at:

Illinois Association of Defense Trial Counsel
PO Box 3144 • Springfield, IL 62708-3144
P: 800-232-0169 • F: 217-585-0886 • E: idcoffice@insightbb.com • W: www.iadtc.org

ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

2008

CALENDAR
of Events

- **March 14, 2008**
  Spring Defense Tactics Seminar
  Standard Club of Chicago • Chicago, IL

- **April 4, 2008**
  Women in the Courtroom
  University Club • Chicago, IL

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
LAW • EQUITY • JUSTICE

Illinois Association of Defense Trial Counsel
P.O. Box 3144
Springfield, IL 62708-3144

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