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MONOGRAPH

Warning, Warning: Warnings Required Under Illinois Products Liability Law
THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
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President’s Message

By: Steven M. Puiszis
Hinshaw & Culbertson LLP
Chicago

What makes an association great? Is it a hardworking Executive Director? Is it a Board of Directors committed to improving services to its members? Is it timely publications that bring new developments in the law to the attention of its members? Certainly, all of these are important ingredients of a successful association. However, the key to excellence is found in you, our members.

You are what make the IDC a great organization. The IDC is merely a reflection of you. You and only you can make it the premier state defense bar in the country.

All of us are busy trying to raise our families, develop new lines of business and meet real or perceived target billable-hour requirements. So why add one more item to an already full plate? The answer lies in your commitment to excellence. None of us went to law school so that we could become mediocre lawyers.

Becoming active in an IDC committee or writing articles for the IDC Quarterly or one of our newsletters enhances your reputation among your peers. An added benefit is the ability to at least partially fulfill your CLE requirements. Many of our substantive law committees are discussing new developments at their periodic luncheon meetings. Our Executive Director has advised the Chairs of our committees about the steps that need to be taken to obtain CLE credit for those activities. CLE credit can be obtained for the articles you write for the IDC Quarterly or a committee newsletter. The ability to obtain CLE credit is a strong incentive to become active in the IDC. But that is not the only reason to become active.

Over the years, through my activities with the IDC, I have met a number of attorneys around the State whom I now consider friends. Certainly, don’t overlook that benefit of becoming active in the IDC.

One of the committees that you may want to consider joining is our Committee on Judicial Independence. It is a new committee that is in the process of finishing its mission statement and organizational structure. One of the goals of the committee is to improve the process of judicial evaluations in Illinois. At our next meeting, we will be discussing a survey that we will send to the judges before whom we practice, in the hopes of gaining their input into how the judicial evaluation process in Illinois can be improved. The committee also will work towards supporting full funding of court systems throughout Illinois, which is a real problem in a number of smaller communities around the State. The committee also is developing a protocol for identifying unwarranted attacks on the judiciary and a protocol for responding to such attacks.

Maintaining the independence of the judiciary is vital to our system of justice. The goals of our Committee on Judicial Independence are ambitious ones. The committee has the opportunity to make a real difference on issues of importance not only to our members and to our clients, but also to the system itself. As defense lawyers, our only agenda is fairness to all involved in the civil justice system. As defense lawyers, we are uniquely situated to make a difference. The IDC and our Committee on Judicial Independence are now taking their initial steps in that process. I urge you to consider joining that committee or one of our other committees.

Taking on an additional responsibility with an already crowded schedule requires courage and a commitment to excellence. However, if you are willing to take that step, together we can make a difference in Illinois, and we can turn a great organization into the premier defense bar group in the country.

Thomas Aquinas once observed: “The test of the artist does not lie in the will with which he goes to work, but in the excellence of the work he produces.” Becoming active in the IDC not only will help you to achieve excellence in your area of practice, it also will help us to build an organization of enduring excellence.
Editor’s Notes

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

This edition of the IDC Quarterly contains its usual excellent columns on various areas of interest to the defense practitioner and also includes a variety of updates on new case law and recent trends. In addition to outstanding legal analysis, the Quarterly has become a premier legal publication because it has traditionally focused on “cutting edge” legal issues and subjects which are important to our membership and the judiciary. As we continually strive to improve the Quarterly, it occasionally becomes necessary for the Quarterly to evolve so that it reflects emerging legal issues and other significant topics. Accordingly, the Editorial Board is proud to announce the addition of two new regular columns which are making their debut in this edition of the Quarterly. I would like to introduce Peter Jennetten as the author of the new e-discovery column and Margaret Foster as the author of our new column on diversity. I think that you will find these columns to be timely, interesting, and very helpful in your daily practice.

On August 23, 2006, the First District Appellate Court in Ready v. United/Goedecke Services, Inc., issued a significant decision relating to joint and several liability under 735 ILCS 5/2-1117. In Ready, the court held that a defendant who settled with a plaintiff prior to trial must appear on the verdict form so as not to affect the rights of the non-settling defendants. The Ready court observed that the purpose of Section 2-1117 is to hold minimally culpable defendants minimally responsible. Stacy Fulco’s column on recent decisions contains a detailed discussion of the Ready decision and the unsettled state of the law on this issue. Jim Ozog’s product liability column addresses the Fourth District Appellate Court’s decision in Nolan v. Weil-McLain, which held that in an asbestos case the trial court should exclude evidence of the plaintiff’s exposure to asbestos which was manufactured by settling or dismissed defendants. In other words, in situations where the plaintiff’s exposure to the defendant’s product was extremely minimal, the defendant would be prevented from introducing evidence that the majority of plaintiff’s asbestos exposure was caused by products manufactured by settling or dismissed defendants. As Jim notes in his column, it is difficult to reconcile the Fourth District’s decision in Nolan with the First District’s decision in Ready discussed above. Petitions for leave to appeal to the Illinois Supreme court have been filed in both cases, and it will be important to monitor whether the Illinois Supreme Court ultimately addresses this inconsistency.

The Monograph was authored by Robert Pisani, Margaret Foster, and David Richards, on the topic of warnings required under Illinois products liability law. It provides a comprehensive analysis of current law and recent trends in this arena, along with creative and practical advice for defending failure to warn claims. The feature article on the Illinois construction statute of repose was authored by Jennifer Groszek and Patrick Stufflebeam, and contains a thorough review of recent Illinois case law regarding the application of the statute of repose in cases involving construction activities. Tracy Stevenson’s article on recent trends in mold litigation contains a thoughtful and informative analysis of a variety of recent developments in this area, including class actions, scientific issues, and medical defenses.

The Quarterly will continue to be an outstanding legal publication only with the input, effort, and contributions of the IDC membership. As noted by IDC President Steve Puiszis in the President’s Message, writing articles for the Quarterly not only enhances your reputation among your peers but also allows you to at least partially fulfill your CLE requirements. CLE credit can be obtained for the articles you write for the Quarterly. As such, I welcome all members to get involved and become a part of this publication. If there are any topics which interest you that you would like to write about, please do not hesitate to contact me or any member of the Editorial Board.

Last, but certainly not least, Bill Tribler’s “annual baseball column” is a must read—even if you are a Cub fan! Have a wonderful holiday and a happy new year.

By:  Joseph G. Feehan
Heyl, Royster, Voelker & Allen
Peoria
A party’s protection under § 13-214(b) is determined by inquiring whether the product at issue constitutes an improvement to real property, and if so, whether the party falls within the activities enumerated in the statute. Krueger v. A.P. Green Refractories Co., 283 Ill. App. 3d 300, 669 N.E.2d 947 (3rd Dist. 1996); citing Adcock v. Montgomery Elevator Co., 274 Ill. App. 3d 519, 654 N.E.2d 631 (1st Dist. 1995).

What Constitutes An Improvement To Real Property?

Whether an item constitutes an improvement to real property is a question of law. The resolution of this question, though, is grounded in fact. St. Louis v. Rockwell Graphic Systems, Inc., 151 Ill. App. 3d 1, 605 N.E.2d 555 (1992) vacated on other grounds. Relevant criteria for determining what constitutes an “improvement to real property” include: whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced. Id. at 4-5.

In St. Louis, The Illinois Supreme Court cited the definition of “improvement” in Black’s Law Dictionary:

A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

About the Authors

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Id. at 4, citing Black’s Law Dictionary 682 (5th ed. 1979). The court stated that “improvement to real property” is not the same as “fixture” but that the identity of an improvement might not be separate from the overall system or building in which it is located. St. Louis, 151 Ill. 2d at 4.

Illinois courts focus their analysis on the entire construction project or system rather than on a single component of the system. Id., Cross v. Ainsworth Seed Co., 199 Ill. App. 3d 910, 557 N.E.2d 906 (4th Dist. 1990); Kleist v. Metrick Electric Co., 212 Ill. App. 3d 738, 571 N.E.2d 819, 821-22 (1st Dist. 1991). The issue is whether a component of a system which is definitely an improvement to real property is an improvement to real property itself. Kleist, at 821-822. To artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property. Id. Thus, if a component is an essential or integral part of the improvement to which it belongs, then it is itself an improvement to real property. Id.

Falling Within The Activities Enumerated By The Statute

If an item is an improvement, the court must then determine whether the defendant’s activities fall within the statute. Wright v. The Board of Education of the City of Chicago, 335 Ill. App. 3d 948, 781 N.E.2d 386 (1st Dist 2002). The Illinois Supreme Court has held that the construction statute of repose “protects, on its face, anyone who engages in the enumerated activities,” noting that mere labels are not dispositive. People ex rel. Skinner v. Hellmuth, 114 Ill. 2d 252, 261, 500 N.E.2d 34, 37 (1986). See Risch v. Krez, 287 Ill. App. 3d 194, 197, 678 N.E.2d 44, 46 (1st Dist. 1997); Adcock v. Montgomery Elevator Co., 274 Ill. App. 3d 519, 654 N.E.2d 631 (1st Dist. 1995) (holding the plain language of the statute shows that a person is protected not based upon his profession, but upon his performance of any of the activities enumerated therein. “Mere labels are not dispositive.”). Section 13-214 (b) requires that the claiming party participate in the design, planning, supervision, observation, or management of construction, or construction of an improvement. Wright at 391.

While the statute clearly protects construction designers and installers, a unique situation arises when a defendant both manufactures and installs a product. Risch, 287 Ill. App. 3d at 197, 678 N.E.2d at 46. In Illinois, a manufacturer is not protected under the construction statute of repose “unless the manufacturer can demonstrate its role in the construction extended beyond furnishing standard products generally available to the public.” Id. Were this not so, a manufacturer’s exposure to liability for a defective product would rest solely on the fortuity of its incorporation in an “improvement to real property” or some form of personalty. People v. Asbestosspray Corp., 247 Ill. App. 3d 258, 616 N.E.2d 652, 658 (4th Dist. 1993).

Landowner Status

The current version of the construction statute of repose contains no express provisions excluding any group based upon its status. See Wright v. Board Educ. of City Chicago, 335 Ill. App. 3d 948, 781 N.E.2d 386, 392 (1st Dist. 2002). However, §13-214 does not apply to actions against landowners where the underlying claim is based on the defendant’s status as a landowner, and not on an act or omission in the design, planning, supervision, observation or management of construction or construction of an improvement to real property, as laid out in the statute. Lombard v. Chicago Housing Authority, 221 Ill. App. 3d 730, 587 N.E.2d 485 (1st Dist. 1991).

Claims against property owners generally center on the negligent failure to correct a defective improvement to real property. A non-owner designer would be protected from all defective design claims whereas an owner, who properly maintains the property, could be held liable for the same design defect. Wright, 781 N.E.2d at 391-92. Illinois courts generally take one of two approaches in determining the applicability of the construction statute of repose in these situations. Id.

The first approach is exemplified by O’Brien v. City of Chicago, 285 Ill. App. 3d 864, 674 N.E.2d 927, 933 (1st Dist. 1996), in which the court held that an action concerning either the initial construction or an improvement as defined by the statute must be initiated within the 10-year statutory period or it is time barred. In O’Brien, the city engineered the reconstruction of the roadway, which in turn improved the road. Id. The O’Brien court held that municipal defendants may invoke §13-214(b) as a defense if they participated in some way in the construction of the property at issue and are not being sued simply as owners of property. Id. In contrast, other courts have ruled that if a property owner is in a position to correct a design defect, the protection of §13-214(b) is unavailable. See Wright, 781 N.E.2d at 392; MBA Enterprises, Inc. v. Northern Ill. Gas Co., 307 Ill. App. 3d 849, 852 (3rd Dist. 1999). In MBA, a hotel was damaged in a gas explosion. Id. The hotel operator sued the gas utility provider that designed and installed the gas piping system. Id. The MBA court declined to follow the O’Brien decision and held that there is an ongoing duty of care to operate and

(Continued on next page)
The MBA court held that the statute of repose only bars claims involving the installation and construction of the improvement, but does not bar an action based on negligence that arises after the construction or installation of an improvement. *Id.*

The MBA court agreed that the statute of repose barred any claims against the gas company for negligent installation or construction of the piping system. *See MBA Enterprises,* 717 N.E.2d at 852. However, the plaintiff’s claims based on the theory that the gas company had an “ongoing duty of care to operate and maintain the gas system in a safe manner” were not barred by §13-214. *Id.* In support of this ongoing duty, the Third District cited the supreme court’s opinion in *Metz v. Central Illinois Electric & Gas Co.* for the proposition that “those who furnish gas must exercise a degree of care commensurate to the danger of supplying gas.” *See id., citing Metz,* 32 Ill. 2d 446, 207 N.E.2d 305 (1965). Therefore, the Third District in *MBA Enterprises* did not hold that the gas company had an ongoing duty of care to correct any construction or installation defect simply because it owned the piping system. *See MBA Enterprises* at 852. Instead, the duty in *MBA Enterprises* arose because the defendant had a duty to operate that gas system in a safe manner. *See id.*

Thus, in an *MBA*-based approach, a landowner can be held liable for a breach of the ongoing duty of care. *Wright,* 781 N.E.2d at 392. The approach taken in *O’Brien* draws no distinction based upon the status of the party attempting to assert the defense of the construction statute of repose. *Id.*

**Conclusion**

The Illinois Construction Statute of Repose can be a powerful tool in defending cases involving construction activities. In determining whether the Construction Statute of Repose applies, clearly identify the work that is an improvement to real property and your client’s role in the activity involved in the underlying claim. Regardless of the client’s status, their activities must fall within those enumerated in the statute to be afforded protection.

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*In determining whether the Construction Statute of Repose applies, clearly identify the work that is an improvement to real property and your client’s role in the activity involved in the underlying claim.*
Appellate Practice Corner

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

Fall 2006 Supreme Court Rule Amendments Affecting Appellate Briefs and Motions

On May 24, 2006, the Illinois Supreme Court entered an administrative order amending six Supreme Court Rules governing appeals to the Illinois Supreme Court, in particular the filing of appellate briefs and motions. Effective September 1, 2006, these rules now govern our preparation of appellate briefs and motions before the appellate and supreme courts. This article provides a short explanation of each modification and also discusses two recent appellate decisions, one affecting preparation of a bystanders’ report and the other agreements to extend the filing date for posttrial motions. Modifications and amendments to other rules, most notably Supreme Court Rules 305, 306, 306A, 315, and 317, can be found in prior issues of the IDC Quarterly.

Supreme Court Rule 341 – Appellate Briefs

The most significant change affects Rule 341, which sets forth the requirements for filing an appellate brief. According to Rule 341(a), briefs are to be produced in “clear, black print on white, opaque, unglazed paper, 8½ by 11 inches, and paginated.” Only one side of the paper may be used and the text must be double-spaced, including quotations. This latter requirement certainly affects the overall page length of your document and is not necessarily aesthetically pleasing. Headings, however, may be single-spaced. Margins must be at least 1½ inch on the left side and 1 inch on the other three sides. Briefs shall be safely and securely bound on the left side in a manner that does not obscure the text. Footnotes are still discouraged, and where used, must comply with both the font and spacing rules.

Recognizing the modern practice of law, documents may be produced by a word-processing system, typewritten, or commercially printed, and reproduced by any process that provides clear copies consistent with the requirements of Rule 341. Typeface or “font” must be 12-point or larger and condensed type is prohibited. The court also notes that carbon copies (which hopefully no one uses today) are not permitted.

Rule 341(b) sets out the page length requirements. The brief of appellant and brief of appellee, excluding only those matters required by Rule 342(a) to be appended thereto, “shall each be limited to 50 pages, and the reply brief to 20 pages.” Cross-appellants and cross-appellees are each allowed an additional 30 pages, and the cross-appellant’s reply brief is limited to a maximum of 20 pages. In the Illinois Supreme Court, briefs of the appellant and appellee in capital cases shall each be limited to 75 pages and the reply brief limited to 27 pages.

Should a party desire additional pages, Rule 341(b)(2) states emphatically that such motions “are not favored” and adds that a motion for additional pages “shall be filed not less than 10 days before the brief is due or not less than 5 days before a reply brief is due and shall state the excess number of pages requested and the specific grounds establishing the necessity for excess pages.” The motion shall be supported by affidavit or verification by certification under Section 1-109 of the Code of Civil Procedure of the attorney or unrepresented party, the latter a new requirement, and “[a]ny affidavit shall be sworn to before a person who has authority under the law to administer oaths.”

Perhaps the most significant requirement, and one seemingly adopted from Seventh Circuit practice, is that of Rule 341(c), which requires a certificate of compliance. According to subsection (c), the attorney or unrepresented party shall submit with the brief his or her signed certification that the brief complies with the form and length requirements of Rule 341.

(Continued on next page)

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 Council.
Appellate Practice (Continued)

paragraphs (a) and (b) as follows:

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is ___ pages.

The certification should be placed inside the brief on a separate page after the conclusion and before the proof of service.

Section (d) states the requirements for covers, and is essentially unchanged with the exception that the name of the administrative agency must be included on administrative law cases, as well as the names and addresses of the party’s law firms. The color requirements for the particular briefs did not change in substance, but can now be found in the latter part of Rule 341(d).

Rule 341(e) outlines the numbers of copies and appears to track the former Rule 344. Rule 341(f) addresses references to parties and encourages using the names as in the trial court, e.g., plaintiff and defendant, or by their actual names, and omitting the words “appellant and appellee and petitioner and respondent.” The former language concerning appeals under the Mental Health and Developmental Disabilities Code is modified as follows:

In all appeals involving juveniles filed from proceedings under the Juvenile Court Act or the Adoption Act, and in all appeals under the Mental Health and Developmental Disabilities Code, [FN1] the Mental Health and Developmental Disabilities Confidentiality Act, [FN2] or from actions for collection of fees for mental health services, the respective juvenile or recipient of mental-health services shall be identified by first name and last initial or by initials only.

The preferred method is the first name and last initial. The alternative method of initials only is to be used when, due to an unusual first name or spelling, the preferred method would create a substantial risk of revealing the individual’s identity. The name of the involved juvenile or recipient of services shall not appear in the brief.

Finally, a new provision, Rule 341(l), provides for filing at the request of a court or judge a copy of the document in electronic format. In that event, “[i]n addition to the number of copies required to be filed and served in accordance with this rule, the brief may be furnished on any removable media, such as floppy disk or CD-ROM, acceptable to the clerk of the reviewing court in Adobe Acrobat and served on each party to the appeal.” The electronic document may, but need not, contain the required appendix.

The Illinois Supreme Court directed the reviewing courts “to the extent practicable, to refuse to file any brief that does not comply with the rules of [the Supreme Court] specifying, inter alia, the form and length of a brief on appeal.” See M.R. 20959, May 24, 2006.

Rule 367 – Petitions for Rehearing

The Court further modified Rule 367, which governs Petitions for Rehearing. In Rule 367(a), a petition is now limited to 27 pages, regardless of whether it is printed or not, and must be supported by a certificate of compliance in accordance with Rule 341(c). The form, cover, and service of the petition for rehearing is to conform to the requirements of Rule 341.

Minor Changes

Supreme Court Rule 343(c) was modified to permit a party seeking an extension of time to support that request by either an affidavit, as was the former practice, or by “verification or certification under section 1-109 of the Code of Civil Procedure.” The requirement of good cause remains. A similar modification surfaced in Rule 361(f), with the added language, “[a]ny affidavit shall be sworn to before a person who has authority under the law to administer oaths.” Moreover, former Rule 344, which governed the number of copies, service, and form and method of reproduction, was simply repealed and the bulk of its former requirements written into amended Rule 341.

Supreme Court Rule 612

Supreme Court Rule 612, which applies some of the civil appellate rules to criminal appellate practice, was likewise modified to create continuity. Specifically, the former Rule 612(l), referencing Rule 344, is eliminated and the remaining subsections are relettered accordingly.

Recent Appellate Case Construing Rule 323

Of interest is a recent decision by the Appellate Court of Illinois, Second District, construing Rule 323 and the use of a bystanders’ report. According to Rule 342(c), when no verbatim transcript is available, a party can prepare a proposed report of proceedings from the best available sources, including recollection. The party that has prepared the proposed report
must then serve it on the other parties, and they may in turn prepare proposed amendments or an alternative report. The circuit court then reviews the submissions and certifies the report to the extent that it finds the report accurate.

In *People v. Majka*, 365 Ill. App. 3d 362, 849 N.E.2d 428 (2nd Dist. 2006), the appellate court found that once a party chooses to submit a proposed report, both parties bear responsibility for the report’s accuracy. “In order for a report to have any value, we must assume that the court or an opposing party will correct any misleading omission in a proposed report. An omission is misleading if it would tend to counter the effect of something included in the report. It is not misleading if it is simply an area on which the report does not touch.” The court found that despite the burden on the appellant to provide a record complete enough for review, the appellee cannot force the appellant to provide an exhaustive record by speculating that a partial record is misleading.” Rather, the appellee has the burden of “proving a record that shows that there is substance to its speculations.”

**Recent Appellate Decision Addressing Posttrial Motions**

The Appellate Court of Illinois, Second District, recently held that an agreement between counsel to extend the time for filing a posttrial motion could not serve to extend the 30-day period nor could it constitute waiver or revestiture. In *Lowenthal v. McDonald*, No. 2-05-0161, 2006 WL 2663798 (2d Dist., September 14, 2006), the parties had agreed that the plaintiff could obtain another extension of time within which to file her posttrial motion. On the day the motion was due per a prior extension, the plaintiff faxed to the trial court a second motion for extension, which included the stipulation of the defense counsel. The following day, the trial court issued an order finding that the plaintiff had failed to follow local motion rules and thus, the motion was not timely and did not extend the time for filing the posttrial motion. Two weeks later, the trial court entered a further order extending the time to file the posttrial motion, effectively granting the plaintiff’s requested relief. The court rejected the defendant’s argument that the trial court lacked jurisdiction because no order had been signed within the time allowed under section 2-1202. The court went on to hear the posttrial motion and an appeal ensued.

The appellate court reversed and dismissed the appeal, finding that section 2-1202 required that the motion for extension of time be filed and ruled upon within the 30-day period, or within other time allotted by the trial court. The court rejected the plaintiff’s argument that the defendant had waived the timeliness requirement, finding that subject matter jurisdiction cannot be waived and cannot be obtained through consent of the parties.

**Endnote**

1 Supreme Court Rules 315, 317 are discussed in 16:2:57; Supreme Court Rule 305 is discussed in 14:3:62; and Supreme Court Rules 306 and 306A are discussed in 14:1:48.
Property Insurance

By: Tracy E. Stevenson
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Update on the Mold Issues
In Property Cases

From the number of lawsuits in courts throughout the United States, it appears that mold is a growing concern among homeowners and insurers as well as their respective attorneys. Whether there is truly growth in this area of the law may require a statistician’s analysis. However, the impact of the issue on insurers and homeowners alike continues to be of import to many. This column previously highlighted some of the issues involved in the litigation of mold cases. As “mold litigation” remains in the forefront of the law, at least to insurers and property owners, a re-cap status of the law is now warranted. This article incorporates a brief summary of cases which identify continuing plaintiff and defense litigation trends.

Class Certification for Plaintiffs Damaged by Mold

While not necessarily a new issue, of import is the continued trend of proposing class action claims for mold damage in property damage and personal injury actions. In 2001, the plaintiffs in Caliper, et al. v. Maskell Corporation, Court No. 01 L 232, Illinois Circuit – St. Clair County, Belleville, IL, filed a complaint (which was ultimately voluntarily dismissed by the plaintiffs in October 2004) alleging that wood sealants were insufficient to prevent mold and mildew growth and caused property damage to a variety of products, including decks and porches. The wood sealants in question were manufactured by Behr Process Corporation and a class was proposed to include all purchasers of those products from Home Depot, nationwide.

The plaintiffs, in seeking class certification, did not allege any personal injury but sought compensation for the restoration or replacement of wood surfaces or a refund of the purchase price. The plaintiffs further conceded that the class relief would not exceed $75,000 per member. Yet, the plaintiffs sought a nationwide certification, alleging that the sale of the wood products was a nationwide issue.

Defendant Behr contested the class certification, asserting that each claim from a nationwide pool of plaintiffs would prove impossible to be determined by a single jury. Behr asserted that for each claim, the jury must assess product performance in order to determine issues of causation and if necessary, damages. Behr also objected to national class certification because of the wide discrepancies in weather, temperature, installation and other issues unique to each plaintiff, making the pleading requirements impossible.

Similar cases and claims for class action certification are pending in other states including Louisiana, Washington and California. Without a doubt, class action verdicts tend to multiply awards many times over, even in situations where property claim damages are not extraordinary. The courts remain divided on these nationwide certification issues. As above, many cases are dismissed pursuant to settlement or the request for certification is dropped, but the threat of class certification may often inflate settlement values.

Mold Exclusions

Formerly, before the burgeoning of claims based upon mold, insurance policies failed to specifically include or exclude recovery related to “mold.” In the recent past, insurers have circumvented coverage for mold claims by specifically adding mold exclusions to many of their policies, especially in the south and west. As policy language changes, so do theories behind recovery. Claimants holding policies with mold exclusions are looking to their water seepage or flood coverage to obtain coverage for mold damages. In general, claimants attempt to circumvent the exclusion by claiming that if the water damage is a covered loss then all losses caused by the water damage would also be covered.

About the Author

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An example of the care that needs to be used in the claims processing stage of suit can be seen in the 2001 Arizona circuit court case of Daniel Hatley v. Century National Insurance Company, Court No. CV 2000-006713. That case was presented to the jury after an insurer denied the claim based upon the mold exclusion. The initial complaint alleged property damage and personal injury, but the personal injury claim was defeated on a motion for summary judgment. The case was tendered to the jury on counts of breach of contract and bad faith. The bad faith claim stemmed from Century National’s failure to thoroughly review the exact policy held by the claimants and Century’s reliance upon its “general” policy provisions. The evidence demonstrated that Century denied the claim based upon its standard issue policies, but the policy in question did not contain the standardized mold exclusion. The jury deliberated a mere five hours before they awarded $244,000 in compensatory damages to the plaintiff and $4,000,000 against the insurance company in punitive damages purportedly for an improper denial of coverage. Clearly, the jury showed its dissatisfaction with the insurer’s failure to properly review its own policy by awarding more than 16 times the actual property damages for bad faith.

Similarly, in Mazza et al v Schurtz, et al, trial court no. 00AS04795, Calif. Super., Sacramento California, a jury addressed a mold case brought by apartment residents against the building’s owner. In that action, a resident alleged that the family noticed water in various areas of the building leaking through vents in the master bathroom and kitchen. Plaintiffs attributed both leaks to other units in the building and/or an outdoor sprinkler system hitting the exterior wood siding of the building. Mold grew in the apartment unit, causing the residents to be hospitalized with breathing problems, severe headaches and gastrointestinal disorders. The mold ultimately discovered within the apartment included stachybotrys, penicillium and aspergillus.

A primary issue in the case was whether the defendants had proper notice of the leaks and their cause. The jury, following a three week trial, found that the defendant-owners were negligent, the defendants breached the lease including the implied warranty of habitability, and that the defendants’ acts constituted a nuisance and caused a constructive eviction of the plaintiffs. After deliberating for six hours, the jury awarded the family approximately $2.7 million in damages for economic and non-economic losses.

While both of these cases were circuit court cases and do not have the precedential value of an appellate ruling, each case demonstrates that million dollar verdicts are not unusual in mold claims.

A Recognized Legal Theory With A New Application

Increasingly, actions against sellers of real estate, including residential homes, are being filed alleging failure to disclose known water leakage, accumulation or dampness on the real estate residential claims forms. When buyers discover mold after the purchase, they sue the sellers for improperly disclosing these defects. In an attempt to stop the trend, insurers and builders/contractors included limitations on liability into their contracts. Thus, the sellers of real estate or property gained contractual defenses from these claims or, at a minimum, were able to cap damages.

Of course, every proactive measure provokes a reactive measure from opposing counsel or insurers. Plaintiffs’ attorneys have countered contractual defenses with claims of tort violations to circumvent the contractual caps. Here, the economic loss doctrine aids defendants. The doctrine has been used to distinguish between tort and contract claims and mandates that claims for economic loss or expectations be brought only as contract claims.

The court in Redarowicz v. Ohlendorf, 92 Ill.2d 771, 441 N.E.2d 324 (Ill. 1982), specifically addressed the economic loss doctrine distinctions. In that case, the plaintiff purchased a home from the defendant builder. Ultimately, the chimney and a brick wall began to creep away from the rest of the home. The basement wall cracked and water leaked into the basement and into the roof area around the chimney.

The Illinois Supreme Court was specifically asked to determine whether the losses resulting from faulty construction were recoverable in tort or contract. The court answered, “…to recover in negligence, there must be a showing of harm above and beyond disappointed expectations. The buyer’s right to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.” Id. at 177, 441 N.E.2d at 327. Such cases cannot be brought in tort because as a building is assembled and ultimately results in leaks from the building materials including interior water or mold damage, these materials become an integral part of the building itself and, there can be no allegations of damage to other property, thus fitting directly within the economic loss rule relative to property damage claims. The economic loss doctrine is certainly not new, but its application, as recognized as early as 1982 prior to the rise in mold litigation cases, should not be overlooked, especially when the contractual obligation to pay is contained within the plain language of the contract or policy at issue.

(Continued on next page)
Property Insurance (Continued)

Medical Defenses

The plaintiff’s bar must also recognize that while pleading a case for personal injuries relating to mold is not difficult, the burden of proof in exacting a direct correlation between the mold which may exist in the home and a physical injury or illness may be difficult. As defense attorneys address these actions, they must always be aware that mere allegations of causation do not constitute proximate cause. Often a scientist, not a medical doctor, is retained to prove that a specific type of mold caused the disease or illness. The U.S. District Court for the Central District of Illinois in Glass v Crimmins Transfer Co., 299 F. Supp. 878, 889 (2004), reiterated that although a toxicologist or scientist is qualified to discuss toxic mold, such an individual cannot establish medical causation. Thus, plaintiffs must either retain a medical expert or use treating physicians to prove causation. If a physician is not properly disclosed, a motion for summary judgment on the issue of causation may be granted.

Conclusion

Around the country, plaintiffs’ attorneys are developing creative ways to bring suits yielding million dollar judgments against insurance companies and their insureds. Importantly, new defense theories are being adopted in an attempt to pay what is owed, but to prevent unnecessarily high verdicts. With the variety of cases seeking damages allegedly attributable to mold, insurers and their counsel must be aware of the pitfalls in mold litigation, including potential for class actions. Counsel must also remember the defenses to mold litigation such as the economic loss doctrine and the proper use of medical experts to defeat causation arguments. While losses attributable to mold cases can run into the millions, defenses exist which can limit jury verdicts or settlements. Litigation costs may be high, but defending these actions may potentially curb the upward trend of mold litigation. As such, strong defense strategies may be the wave of the future.

Legal Ethics

By: Michael J. Progar
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A Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation

In recent years, alternative dispute resolution has played an increasing role in litigation. The number of trial verdicts has been in steady decline and the overwhelming majority of cases are now resolved by settlement. Given the increasing importance of negotiations in the dispute resolution process, a lawyer may wonder how that process squares with the lawyer’s ethical obligation to be truthful in his or her statements.

The negotiation process, however, is not limited to the litigation arena. Few transactions could be accomplished without some negotiation taking place along the way. Perhaps for these reasons, the American Bar Association Standing Committee on Ethics and Professional Responsibility recently addressed a lawyer’s obligation to be truthful when making statements on behalf of a client during negotiations.

In Formal Opinion 06-439, the Committee concluded that statements made by the lawyer regarding the party’s goals for the negotiation, or of the party’s willingness to compromise, can be considered to be negotiation “puffing,” and do not constitute false statements of material fact within the meaning of the Model Rules of Professional Conduct. The issues discussed in Formal Opinion 06-439 relate to Model Rule 4.1(a), which states, in pertinent part: “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.”

Illinois Rule of Professional Conduct 4.1(a), which was adopted in 1990, is based on Model Rule 4.1(a), and differs from it only slightly. In addition to the use of slightly different language in the preamble, RPC 4.1(a) also prohibits statements of material fact or law that the lawyer “reasonably should know” are false.

In the negotiation process, a party or its attorney may emphasize or even exaggerate the strengths, while minimizing the weaknesses, of its position in relation to the facts or the
law. A party may also be less than completely candid about its willingness to concede certain points or to compromise particular issues.

Since Rule 4.1(a) prohibits only a “false statement of material fact or law,” an ambiguity becomes apparent when considering what, in the context of negotiation, constitutes a fact. An analogy may be drawn from the realm of commercial transactions, in which certain statements made during the course of selling goods or services are viewed as “puffing.” The purchaser would not be generally be expected to rely on such statements, which may be considered to be no more than hyperbole or a reflection of the speaker’s state of mind.

Similarly, in the realm of negotiation, such statements may be characterized as “posturing,” and an expected part of the negotiation process. A party to the negotiation would not be expected to justifiably rely on such statements. Rule 4.1 does not prohibit false statements that concern immaterial matters or that relate to neither fact nor law.

Although the Committee had not previously considered this specific issue, it had addressed other issues concerning the candor required of a lawyer during the negotiation process. The Committee had generally concluded that although the lawyer may not make false statements or affirmative representations, there is no obligation to disclose specific information, except to the extent that the failure to do so might constitute an implicit misrepresentation.

Comment [2] to Model Rule 4.1 provides some further explanation, noting that whether a particular statement should be regarded as a statement of fact may depend on the circumstances under which it is made. In the context of the conventions of negotiation, certain types of statements would not reasonably be considered to be statements of material fact. Comment [2] specifically refers to estimates of price or value, and comments regarding a party’s intentions, as examples of such statements that would not be considered statements of material facts.

The Committee also concluded that the same standards that apply to lawyers involved in negotiations must necessarily apply in the context of a caucused mediation. In a caucused mediation, the mediator may commence the mediation with a joint session that includes all of the participants. After that, however, the mediator typically meets with the parties privately, and discloses to the other side only such information as is agreed to by each party.

Although Formal Opinion 06-439 is not binding on Illinois attorneys, it is instructive due to the substantial similarity of the Model Rule that it addresses and Illinois RPC 4.1. In summary, in the context of negotiations, including those that occur in the context of a mediation, a lawyer may not make a false statement of material fact or law. The prohibition against false statements applies equally in all situations.

Statements regarding a party’s goals for a negotiation or mediation, the party’s willingness to compromise, and statements that may fairly be characterized as “puffing” or “posturing,” are not ordinarily considered false statements of material fact.

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E-Discovery

By: Peter R. Jennetten
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Risks and Opportunities

This new column will explore the risks and opportunities in the production of electronic information. The volume of electronic information available can be a gold mine. There are the obvious sources: emails, word processing documents and spreadsheets. There are metadata embedded in your electronic documents, cookies for your browser, and deleted files that can be recovered by computer technicians. Beyond your desktop, data miners are aggregating information about you, security cameras are watching you, and there may be a black box in your car (65% of new cars sold in 2004 have them). New smartphones, Treos and Blackberries are a potential source of information. This mass of information can leave you searching for a needle in a haystack. Amendments to the Federal Rules of Civil Procedure, effective December 1, make the discovery of electronic information a mandatory topic of Rule 26(f) conferences and outline directions for the production of information. The Illinois circuit courts are expected to implement similar rules. We can no longer put off the subject of electronic discovery.

The Background Cases


Laura Zubulake sued her former employer, UBS Warburg, for gender discrimination and retaliation. She sought discovery of “[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff.” The request defined “document” to include “without limitation, electronic or computerized data compilations.” Zubulake I at 312. To comply with SEC regulations, UBS maintained extensive backups of emails. Id. at 313-14. Initial discovery made clear that many relevant emails were deleted and existed only on the backup tapes. Id. at 312-13.

The court found that Zubulake was entitled to discover the emails and then evaluated which party should bear the cost of producing them. Judge Scheindlin first noted that the responding party ordinarily bears the cost of producing responsive material. Id. at 317. “[C]ost shifting should be considered only when electronic discovery imposes an ‘undue burden or expense’ on the responding party.” Id. at 318. The court found that cost shifting should not be considered for active electronic documents or offline storage. It could, however, be considered for electronic information that is not readily available such as backup tapes and erased, damaged, or fragmented data. Judge Scheindlin set forth seven factors for evaluating cost-shifting in descending order of importance:

1) The extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 5) the relative ability of each party to control costs and its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits to the parties of obtaining the information.

Id. at 322.

UBS was ordered to produce all email from its active servers or optical discs at its own expense. It was also ordered to restore and produce emails from five of the ninety-four backup tapes. Id. at 324. Based upon production from the five representative tapes, UBS asked the Court to shift the esti-

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mated cost of restoring and searching the remaining backup tapes ($165,954.67) and the related attorney and paralegal costs ($107,694.72) to Zubulake. Zubulake III at 283. Using the seven factor test, the court shifted one-fourth of the cost of restoring and searching the tapes to Zubulake. The court refused to shift any of the attorney and paralegal costs, finding that these were ordinary expenses of production.

Additional discovery revealed that UBS had destroyed some emails and backups. Zubulake sought sanctions for spoliation including reconsideration of the cost-shifting and an adverse inference instruction. Zubulake IV at 215-16. The court rejected those requests, but ordered UBS to bear the cost of additional depositions pertaining to the destruction of the emails. Id. at 222. Further depositions revealed that UBS destroyed or failed to produce additional email. Zubulake V 426-30.

Judge Scheindlin chastised UBS’s attorneys. It was not enough for the attorneys to orally instruct UBS employees to preserve email. Rather, “[c]ounsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.” Id. at 432. The court instructed:

*First, counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated. Second, counsel should communicate directly with the “key players” in the litigation. Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Id. at 433-34.*

UBS failed to preserve and produce emails despite the instructions given by their attorneys. UBS willfully destroyed some email containing relevant information. Id. at 436. Judge Scheindlin ordered UBS to bear the cost of any additional depositions and the cost of the motion. Id. at 437. He also ordered that an adverse inference instruction be read to the jury. The jury awarded Laura Zubulake $29,200,000.

Another entity, Morgan Stanley, also encountered trouble with electronic documents in Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045 XXOCAI, 2005 WL 679071 (Fla.Cir.Ct. March 1, 2005). CPH agreed to sell its subsidiary, Coleman, Inc. to Sunbeam in return for Sunbeam stock. CPH sued Morgan Stanley, alleging that it knew of a fraudulent scheme at Sunbeam. CPH sought discovery of pertinent emails. Morgan Stanley failed to produce them, despite a court order. Further, it destroyed emails despite SEC regulations requiring preservation of emails for two years. Morgan Stanley falsely certified that it complied with the requests and failed to withdraw its certification when it became clear that it was false. The court held that the lost emails were “critical to CPH’s ability to make out its prima facie case.” *Id.* at *6. As a sanction, the court read the jury a statement of facts regarding the emails and shifted the burden of proof from CPH to defendant, Morgan Stanley. CPH won a $1.45 billion dollar verdict against Morgan Stanley.

**Amendments to the Federal Rules**

Effective December 1, 2006 are several amendments to the Federal Rules of Civil Procedure pertaining to discovery of electronic documents. The old rules referred to “documents” and “data compilations.” See, e.g., Fed. R. Civ. P. 26(a)(1) (b). They did not specifically refer to electronic documents, though such documents were generally presumed to be discoverable. The revised rules specifically mention “electronically stored information.” Fed. R. Civ. P. 16, 26, 34, 37, 45. Consistent with the rulings in *Zubulake*, the amendments to the rules will create a two-tiered system for production. Readily available information must be produced, but relatively inaccessible information has greater protection from discovery.

Rule 16 is amended to explicitly provide that the court’s scheduling order may make “provisions for disclosure or discovery of electronically stored information.” Discovery of electronic information becomes a mandatory topic for the parties’ scheduling conference. Pursuant to Rule 26(f), “the parties must... confer to... develop a proposed discovery plan that indicates the parties’ views and proposals concerning: ... (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced...” Thus, the attorney must discuss with the client the existence, retrieval, and preservation of electronic information before the discovery conference. Misrepresentations at the Rule 16 conference regarding the electronic information stored by the client or its ability to retrieve that information could have severe consequences. *Zubulake* and *Coleman* make clear that counsel must thoroughly understand the nature and availability of the client’s electronic information.

Rule 26(a) now requires that a party produce in its initial disclosure “all documents, electronically stored information, and tangible things... that the disclosing party may use to support its claims or defenses, unless solely for impeachment.” Fed. R. Civ. P. 26(a)(1)(B). Electronic information may be subpoenaed pursuant to Rule 45. Parties can request electronic information pursuant to Rule 34. When responding to a request for production, responsive information must be “translated, if necessary, by the respondent into reasonably

(Continued on next page)
E-Discovery (Continued)

usable form.” Fed. R. Civ. P. 34(a). Sending bulk data in a form that is inaccessible to the recipient will not satisfy the rule. The request for production of electronic information “may specify the form or forms in which electronically stored information is to be produced.” Fed. R. Civ. P. 34(b). If the request does not specify the form of the response or the responding party objects to the form sought, “the responding party must state the form or forms it intends to use.” Rule 45 contains similar requirements for subpoenas. The rules provide a default standard for production in Fed. R. Civ. P. 34(b):

Unless the parties otherwise agree, or the court otherwise orders:

(i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

To protect the responding party from unduly burdensome or costly productions, the rules limit the obligation to produce information. Rule 37 has been modified to provide that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.” Echoing the opinions in Zubulake, Rule 26 limits the obligation to provide information that is not reasonably accessible:

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. Fed. R. Civ. P. 26(b)(2)(B).

The volume of information that can be generated and produced electronically increases the risk that privileged documents will be inadvertently produced. Rule 26(f)(4) makes the assertion of privileges a mandatory topic for discovery conferences. If the parties reach an agreement regarding privileges, the court may include the parties’ agreement in the scheduling order. Fed. R. Civ. P. 16(b)(6). The rules also give parties the opportunity to take back privileged documents after production:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. FRCP 26(b)(5)(B).

India Brewing, Inc. v. Miller Brewing Co.

Some recent cases may alleviate concerns caused by Zubulake and Coleman. In India Brewing, Inc. v. Miller Brewing Co., 237 F.R.D. 190 (E.D. Wis. 2006), two brewers filed claims and counterclaims alleging breach of contract, fraudulent inducement, and negligent misrepresentation. IBI sent Miller a letter at the outset of the litigation instructing Miller to preserve all electronic information pertaining to IBI or the allegations in the case. IBI thereafter issued discovery requests seeking “documents” without requesting a specific form of production. Miller produced printed paper copies of numerous electronic documents. IBI then demanded production of the documents in electronic form and demanded production of detailed information regarding Miller’s computer systems. The court rejected IBI’s request. Citing its own prior decision in N. Crossarm Co. v. Chem. Specialties, Inc., No. 03-C-414-C, 2004 WL 635606, at *1 (W.D.Wis. Mar.3, 2004), the court held:

To the extent that the documents IBI sought in its requests are kept in hard copy in the usual course of business, IBI is not entitled to any other format. To the extent that those documents kept in electronic form have been printed out and organized and labeled to
correspond with the document request, again IBI is not entitled to any other format. [I]f a party produces its electronic information in a hard copy format that mimics the manner in which that information is stored electronically, then that party has not disobeyed Rule 34. *India Brewing*, 237 F.R.D. at 194.

Although the decision was rendered before the amended rules took effect, it seems consistent with the new rules. Because IBI did not request a specific form for Miller’s response, Miller was entitled to choose the form. Amended Rule 34 does require that the responding party state the form it intends to use, but otherwise only requires that the information be produced in a “reasonably usable form.” The paper printouts of the electronic documents were “reasonably usable” and therefore satisfied the rule. Because Miller produced all of the responsive documents in hard copy, the court found discovery of information regarding Miller’s computer system irrelevant.

**Conclusion**

In many ways the amendments to the rules are not a substantial change. The rules have always allowed broad discovery and electronic information was presumed to be discoverable. The greatest change is that the rules force counsel to confront e-discovery issues at the outset of the litigation. The discovery of electronic information is a potential minefield of risks for litigants and attorneys, but it is also an opportunity. The volume of information available may make it easier to substantiate some claims or defenses. The ability to search and organize information in electronic form can speed investigations. If you are searching for a needle in a haystack, it is much faster to have a computer do the searching.

This will no doubt be a fertile area of litigation in the coming months and years. I invite anyone to share your e-discovery stories, cases, questions and advice with me. I will make every effort to turn them into informative columns.
Workers’ Compensation Report

By: Kevin J. Luther
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Employer Entitled to Section 5 Workers’ Compensation Lien — Borrowman Rejected

In a previous IDC Quarterly issue, the appellate court opinion of Borrowman v. Prastein, 356 Ill. App. 3d 546, 826 N.E.2d 600 (2000), was reported. In Borrowman, the employer settled its workers’ compensation claim, but in doing so it did not specifically use language in the workers’ compensation settlement contract stating that it was preserving and not waiving its Section 5(b) lien that would attach to any third-party recovery. The plaintiff and defendants in Borrowman argued that by not specifically preserving the Section 5 workers’ compensation lien in the Lump Sum Settlement Contract, the employer waived its lien. The Third Appellate District agreed. As a result of the Borrowman decision, workers’ compensation practitioners have been specifically preserving their Section 5(b) lien in settlement contracts that are presented to the Workers’ Compensation Commission.

Most commentators, as well as trial courts, have suggested that the Borrowman decision was incorrect. In Gallagher v. Lenhart, 2006 Ill. App. LEXIS 783 (1st Dist. Aug. 30, 2006), the First District has specifically rejected the holding in Borrowman.

In Gallagher, the genesis of the plaintiff’s injury was an industrial accident that gave rise to a compensable workers’ compensation claim. Following the accident, a workers’ compensation claim was filed, and it was eventually settled for the sum of $150,000. The settlement contract in the workers’ compensation claim did not specifically state that the employer was preserving its Section 5(b) lien against any third-party recovery. The injured employee also had pending a personal injury action against certain defendants, and those defendants, following the workers’ compensation settlement, filed a third-party contribution action against the employer.

During the pendency of the lawsuit, the defendants filed a motion to adjudicate any third-party claims and to issue a settlement draft. Citing the Borrowman decision, the defendants argued that in the settlement of the workers’ compensation claim, the employer waived its workers’ compensation lien. The employer filed a petition to intervene, which was granted by the trial court. The trial court granted the defendants’ motion to adjudicate any third-party liens and it found that the employer did not have a lien pursuant to Borrowman.

The First District in Gallagher conducted a detailed discussion of Borrowman. In doing so, the First District held that the Borrowman decision was unsupported by case law, was contrary to several principles behind the Workers’ Compensation Act, and was also at odds with general contract law. The First District emphasized that waiver is the voluntary and intentional relinquishment of a known right by conduct inconsistent with an intent to enforce that right. The absence of any reference to an employer’s lien in a workers’ compensation settlement, without more, cannot constitute such a voluntary and intentional relinquishment of that Section 5(b) right. The First District rejected Borrowman and declined to follow it.

The Gallagher decision is a welcome decision by workers’ compensation practitioners. However, because there is a split between appellate districts on this particular issue, it is recommended that all workers’ compensation settlements contain specific language preserving the employer’s Section 5(b) lien.

Multiple Post-Judgment 19(h) Petitions Can be Filed in Certain Circumstances

Section 19(h) of the Workers’ Compensation Act provides that an award may be reviewed by the Workers’ Compensation Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended, as long as the 19(h) petition is filed within 30 months after the award. See 820 ILCS 305, 19(h). The appellate court recently

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entertained a question as to whether or not it is possible to file multiple 19(h) petitions.

In Kenneth W. Behe v. Industrial Comm'n, No. 2-05-0813 WC, 2006 WL 1382058 (2nd Dist., May 5, 2006), the petitioner filed a 19(h) petition within 30 months after a workers’ compensation decision. After hearing evidence on the petitioner’s 19(h) petition, the Workers’ Compensation Commission denied that 19(h) petition. Within 30 months after the Workers’ Compensation Commission’s denial of that first 19(h) decision, the attorney for the petitioner filed a second 19(h) petition arguing that the disability had increased.

The appellate court determined that when a 19(h) petition is filed within 30 months of a final award of the Workers’ Compensation Commission, and that 19(h) petition results in a change of the award, a party has an additional 30 months from the date of that 19(h) award in which to file another 19(h) petition. The Workers’ Compensation Commission will retain jurisdiction for 30 months after each 19(h) decision that results in a change in the amount of disability awarded. Because, however, in Behe, the first 19(h) petition resulted in no change in the award, neither party would have the opportunity to file another 19(h) petition within the 30-month period after the denial of the first 19(h) petition. To hold otherwise, the court felt that claimants and employers could simply file successive 19(h) petitions regardless of their merit and, in essence, extend the 19(h) period beyond 30 months to an indefinite period of time.

In conclusion, if there has been a 19(h) award that either increases or decreases the prior award, then the Workers’ Compensation Commission does retain jurisdiction for another 30 months. If another 19(h) petition results in an award that changes the prior award, then the 30-month limitation period runs again.

The First District emphasized that waiver is the voluntary and intentional relinquishment of a known right by conduct inconsistent with an intent to enforce that right.
Recent Decisions

By: Stacy Dolan Fulco*
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VERDICT FORM
Settling Defendants Must Appear on
Verdict Form Under Former 2-1117

In Ready v. United/Goedecke Services, Inc., No. 1-04-1762, 2006 WL 2434935 (Ill. App. Ct. 1st Dist., Aug. 23, 2006) the appellate court considered whether a defendant who settled with a plaintiff prior to trial was a “defendant sued by the plaintiff” under the pre-2003 amendment version of Section 2-1117 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1117 (West 2002).

The plaintiff, Terry Ready, was the special administrator of the estate of Michael P. Ready. The decedent was employed by Midwest Generation, L.L.C. as a mechanic on a pipe-refitting project at a factory in Joliet, Illinois. On December 23, 1999, the decedent was struck and killed by a beam that fell from temporary scaffolding at the work site. The plaintiff alleged causes of action against the general contractor, BMW Contractors, the scaffolding contractor, United/Goedecke Services, and the decedent’s employer, Midwest. Ready, 2006 WL 2434935 at *1.

Section 2-1117 currently provides that “all defendants found liable are jointly and severally liable for plaintiff’s past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendant except the plaintiff’s employer, shall be severally liable for all other damages.” 735 ILCS 5/2-1117, Ready, 2006 WL 2434935 at *2. In 2003, Section 2-1117 was amended. Prior to the amendment, the current phrase “any third party defendant except the plaintiff’s employer” read “any third party defendant who could have been sued by the plaintiff.” 735 ILCS 5/2-1117.

Prior to trial, the plaintiff settled her claims against the general contractor BMW Contractors and the decedent’s employer, Midwest. The remaining defendant at trial was the scaffolding contractor, United. Ready, 2006 WL 2434935 at *1. The trial court determined that under Section 2-1117, the settling defendants should be excluded from the jury verdict form. At the close of the trial, the jury found in favor of the plaintiff and found the contributory negligence of the decedent was 35%. The trial court also allowed a set off of the settlement amounts paid by the settling defendants prior to trial. Ready, 2006 WL 2434935 at *1.

On appeal the defendant argued that the trial court erred when it excluded the settling defendants from the jury verdict form and challenged the trial court’s ruling in favor of the plaintiff’s motion in limine barring the introduction of evidence of the settling defendants’ negligence or culpability in the decedent’s death during the trial. Ready, 2006 WL 2434935 at *1. The plaintiff argued that the 2003 amended version of 2-1117 applied and the settling defendants were properly excluded from the verdict form. Ready, 2006 WL 2434935 at *2.

The court first analyzed whether the pre or post amendment version of Section 2-1117 applied. The defendant argued that the 2003 amendment altered a substantive right and could be applied prospectively only. The plaintiff asserted that the amended version did not alter a vested right and should be applied retroactively. Ready, 2006 WL 2434935 at *2. The appellate court considered the public policy arguments in favor of applying the amended version prospectively or retroactively. The appellate court noted that when an amendment to legislation is silent as to whether it should be applied prospectively or retroactively, a court can look to whether the amendment changes a substantive or procedural right to determine the appropriate application. Ready, 2006 WL 2434935 at *3. The court noted that generally, statutory amendments that relate to substantive rights had to be applied prospectively only, as opposed to amendments that affected remedies or procedural rights, which can be applied retroactively. Citing Harranz v.

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Snyder III, 283 Ill. App. 3d 254, 259, 669 N.E.2d 911 (2nd Dist. 1996). The court noted that generally, the prospective application of new laws is preferred because retroactive application denies parties advance notice of the new law. However, the court stated that this presumption was rebuttable and the language of the act itself or the necessary implication of the act could indicate the legislature desired a retroactive rather than prospective application. Harraz, 283 Ill. App. 3d at 259, 669 N.E.2d 911, Ready, 2006 WL 2434925 at *2.

The court noted that unlike the pre-amendment version of Section 2-1117, the 2003 amendment itself was silent as to whether it should receive a prospective or retrospective application. Ready, 2006 WL 2434925 at *3. The court determined that the amendment’s exclusion of the employer from the verdict form was a substantive rather than procedural change and therefore should be applied prospectively. Ready, 2006 WL 2434925 at *3. The court therefore determined that the pre-2003 amendment version of Section 2-1117 should be applied to this matter.

The court then analyzed whether the pre-amendment version of Section 2-1117 required settling defendants to appear on the jury verdict form. The plaintiff argued that the pre-amendment version prohibited any settling defendants from appearing on the jury verdict form because after they settled they were no longer “defendants sued by the plaintiff.” The defendant argued that settling defendants should appear on the jury verdict form because their settlement did not change their status as “defendants sued by the plaintiff.”

Both plaintiff and defendants argued that the Illinois Supreme Court’s decision in Lannom v. Kosco supported their respective interpretations of “defendants sued by the plaintiff.” 158 Ill. 2d 535, 634 N.E.2d 1097 (1994); Ready, 2006 WL 2434925 at *4. In Lannom, the Illinois Supreme Court affirmed a trial court’s dismissal of a third party defendant who settled with a plaintiff prior to trial and was subsequently excluded from the jury verdict form. Lannom, 158 Ill. 2d 535, 634 N.E.2d 1097. The court noted that Section 2-1117 had been subject to different interpretations by the Illinois appellate courts and the Seventh Circuit. The Appellate Court of Illinois, Fifth District, in Blake v. Hy Ho Restaurant, 273 Ill. App. 3d 372, 652 N.E.2d 807 (5th Dist. 1995), and the Seventh Circuit in Freislinger v. Emro Propane Co., 99 F.3d 1412 (7th Cir. 1996), concluded that settling defendants should not appear on the jury verdict form while the Appellate Court of Illinois, Fourth District, in Skaggs v. Senior Services of Central Illinois, Inc., 355 Ill. App. 3d 1120, 823 N.E.2d 1021 (4th Dist. 2005), determined the settling defendants should appear on the form.

In Ready, the appellate court agreed with the Skaggs interpretation and found the remaining defendants contemplated by Section 2-1117 referred to all defendants, including settling defendants. Ready, 2006 WL 2434925 at *4. The appellate court determined that this interpretation most closely matched the intention of 2-1117, which was to allow “minimally culpable defendants be held minimally responsible.” Ready, 2006 WL 2434925 at *5. The appellate court reasoned that settling defendants must appear on the verdict form so they do not affect a non-settling defendant’s rights under Section 2-1117. The appellate court declined to follow Blake and Freislinger. As such, the appellate court reversed the trial court and ordered that the settling defendants were improperly excluded from the jury verdict form by the circuit court. Ready, 2006 WL 2434925 at *5.

The defendant also argued that the trial court erred in barring evidence of culpability or fault against the settling defendants during trial. The appellate court concluded that because the settling defendants should have been included on the jury verdict form, relevant evidence of their culpability would also be admissible at the new trial. Ready, 2006 WL 2434925 at *6.

The appellate court finally noted that the defendant had waived its right to challenge the amount of damages awarded by the jury because the defendants’ appellate brief did not specifically argue that the damage award was improper. As such, the appellate court ordered a new trial on the issue of liability and the apportionment of damages only. The court found that the pre-amendment version of 2-1117 applied and required the settling defendants to appear on the jury verdict form at the new trial. Ready, 2006 WL 2434925 at *7.

**DUTY**

**Plaintiff’s Complaint Sufficient to Allege Restaurant Owes Duty of Care to Invitee Where Car Crashed Through Wall**

In Marshall v. Burger King Corporation, No. 100372, 2006 WL 1703488 (Ill. S.Ct., June 22, 2006) the decedent, Detroy Marshall, III, was killed after a car driven by defendant, Pamela Fritz, crashed through the wall of a Burger King restaurant and struck him. The decedent’s estate filed suit against defendants Burger King and the franchisee, Davekiz, Inc., alleging they failed to exercise due care in the design, construction and maintenance of the restaurant in part by

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The plaintiff alleged that the defendants directed and controlled the construction and layout of the building’s design and material specifications and the defendants’ failure to exercise reasonable care in the design, construction and maintenance of the restaurant was the proximate cause of the decedent’s injuries. Specifically, the plaintiff alleged that the defendants’ failure to place vertical pillars or poles in the sidewalk near the entrance of the restaurant was improper when the restaurant was in such close proximity to the parking lot and the building owner knew or should have known that vehicles could drive onto the sidewalk or into the building. Id. at *6.

The defendants filed a motion to dismiss and alleged they owed no duty to the plaintiff under the circumstances. The

The plaintiff argued that an injury such as the incident at issue was reasonably foreseeable due to the construction of the restaurant and the lack of protective poles or other devices surrounding the restaurant considering the restaurant’s close proximity to a heavily trafficked area. Id. at *8.

On appeal, the Illinois Supreme Court considered only whether the plaintiff had sufficiently alleged that the defendants, as owners and operators of a restaurant open to the public, owed a duty of reasonable care to the plaintiff. Id. at 9. The court first outlined the four factors considered when determining whether a plaintiff and defendant stand in such a relationship to one another that the law imposes an obligation of reasonable conduct upon the defendant for the plaintiff’s benefit. Citing, Happel v. Wal-Mart Stores, 199 Ill. 2d 179, 766 N.E.2d 1118 (2002). A court must consider “(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant” in determining whether a duty exists. Citing, City of Chicago v. Beretta, U.S.A., 213 Ill. 2d at 291, 821 N.E.2d 1099 (2004). The Illinois Supreme Court determined the appellate court had ruled the plaintiff alleged a duty existed without referencing these four factors but focused only the relationship between the plaintiff and defendant. Marshall, 2006 WL 1703488 at *11.

The Illinois Supreme Court evaluated the four factors and determined that the special relationship between the defendants as business invitees and the plaintiff as an invitee gave rise to a duty of reasonable care in the instant case. Id. at 11. First, the court noted that the Illinois Supreme Court had adopted the general rule outlined in Restatement of Torts § 314A which provides that certain relationships may give rise
to a duty to protect another person against the unreasonable risk of harm, including the relationship between a possessor of land who holds it open to the public and the member of the public who enters in response to the invitation. Restatement (Second) of Torts, § 314A (1965); Marshall, 2006 WL 1703488 at *11.

Specifically, the court noted that when a possessor of land extends to the public an invitation to enter the property, it is reasonable to expect that not all people who enter will behave appropriately. If an invitee is injured as a result, the invitor may be exposed to liability for the injury if reasonable precautions were not taken. Citing Hills v. Bridgeview Little League Ass’n, 195 Ill. 2d 210, 745 N.E.2d 1166 (2000). The court noted that this duty to exercise reasonable care to protect an invitee from harm included a duty to protect an invitee from negligent harmful acts. Marshall, 2006 WL 1703488 at *12.

As such, the court concluded that the plaintiff had alleged sufficient facts in his complaint to establish a duty of care owed to the decedent by the defendants. Id. at *12.

The court next addressed the four factors comprising the public policy consideration of the duty analysis. First, the court addressed the reasonable foreseeability of the incident at issue. The court noted that only the general character of the harm, rather than the exact incident, need be reasonably foreseeable. The court determined that given the number of automobiles, parking lots and roadways, it was reasonably foreseeable that invitees such as the decedent could be placed at risk due to automobile related incidents. Second, the court determined that the likelihood of injury arising out of those types of incidents would be quite high. Finally, the court found the final factors, the burden of businesses to guard against such accidents and the consequences of placing such a burden on the defendant, were not of the magnitude as to relieve the defendants from a duty of reasonable care in this case. Id. at *13.

The court also rejected the plaintiff’s argument that Comment f of Section 344 of the Restatement of Torts supported a determination that the defendant did not owe a duty. Generally, Comment f of Section 344 discusses when a possessor of land is under a duty to take reasonable precautions against acts by third parties when the possessor of land has prior knowledge of similar incidents. Restatement (Second) Torts § 344 (1965). Applying the comment to the facts of the case, the court determined that a business owner’s lack of knowledge of the same type of prior incident did not preclude the imposition of a duty in this case. Marshall, 2006 WL 1703488 at *15.

The Illinois Supreme Court emphasized that although its decision found that the plaintiff sufficiently alleged the existence of a duty, it was making no comment as to whether the defendants had or had not breached any duty toward the plaintiff. Id. at *13. The court cautioned that the ruling did not stand for the proposition that restaurants had a duty to prevent incidents involving runaway vehicles; rather, the issue was whether the defendants breached a duty of reasonable care in this particular circumstance. Id. at *14.

Employer Owes No Duty to Employee During Commute Home After Shift

In Behrens v. Harrah’s Illinois Corporation, 852 N.E.2d 553, 304 Ill.Dec. 303 (3rd Dist. 2006), the plaintiff, Barbara Behrens, was injured in a single car accident after driving home from her employment at Harrah’s Casino in Joliet. The plaintiff had worked overtime for three days prior to the day of her incident. Behrens, 852 N.E.2d at 554. Prior to the plaintiff’s incident, Harrah’s implemented a new policy requiring employees and managers in the plaintiff’s department to work overtime when other employees did not appear for their shifts or were ill. The plaintiff alleged that as a result of the overtime required under this new policy, she fell asleep behind the wheel while driving home. Id. at 554-555. The plaintiff alleged Harrah’s was negligent because it failed to monitor the physical condition of its employees before they left work, overworked the salaried employees and improperly staffed the plaintiff’s department. The defendant filed a motion to dismiss, arguing that an employer owed no duty to a plaintiff under Illinois law to safeguard employees during their travel to and from work. The circuit court granted the defendant’s motion. The plaintiff appealed. Id. at 554.

The appellate court dismissed the plaintiff’s assertions that Illinois law and various Illinois statutes created a duty on behalf of an employer to ensure that an employee drove home safely after leaving work. The plaintiff alleged that it was reasonably foreseeable that requiring an employee such as the plaintiff to work overtime hours over a period of days would result in the employee being so fatigued that the trip home would ultimately result in a car accident. The court analyzed the four policy factors to consider in determining whether a duty exists: the reasonable foreseeability of the injury, the likelihood of the injury, the burden of guarding against the injury, and the consequences of placing that burden on the defendant. The court then determined the factors fell in favor of the defendant. Citing Gouge v. Central Illinois Public Service, 144 Ill. 2d 535, 582 N.E.2d 108 (1991). The appellate court noted that foreseeability alone was insufficient to create a duty. Citing Ward v. Kmart, 136 Ill. 2d 132, 554 N.E.2d (Continued on next page)
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223 (1990). The appellate court found that the individual who could best avoid driving home if they were too fatigued was the employee herself. Additionally, the court indicated that it had found no legal authority that allowed employers to stop employees from leaving work when their shifts ended. Behrens, 852 N.E.2d at 556-557.

The appellate court also rejected the plaintiff’s argument that she had a right to sue under the remedy and justice provision of the Illinois Constitution. The court noted that Article 1, Section 12 of the Illinois Constitution of 1970 expressed her way home instead of only injuring herself, the third party would have had a cause of action against the plaintiff’s employer. Id. The court cited Brewster v. Rush-Presbyterian-St. Luke’s Medical Center, 361 Ill. App. 3d 32, 836 N.E.2d 635 (1st Dist. 2005), for the proposition that an employer of an excessively fatigued driver caused by employment-related sleep deprivation was not liable to third parties for the conduct of off-duty employees. As such, the appellate court affirmed the circuit court’s dismissal of the plaintiff’s complaint. Behrens, 852 N.E.2d at 558.

MANDATORY ARBITRATION

Tardiness at Hearing Not Failure to be Present or Participate in Good Faith

In Nix v. Whitehead, No. 1-05-1412, 2006 WL 2547336 (Ill. App. 1st Dist., Sept. 5, 2006), the Appellate Court of Illinois, First District, heard the appeal of a circuit court’s decision to bar the rejection of an arbitration award. The plaintiff, Michelle Nix, filed a lawsuit arising out of an automobile accident involving defendants Whitehead and White. The plaintiff was a passenger in White’s vehicle at the time of the incident. The trial court assigned the case to mandatory arbitration. Prior to the arbitration hearing, the plaintiff timely served a Rule 90(c) package on both defendants. Nix, 2006 WL 2547336 at *1.

The arbitration hearing was scheduled for 8:30 a.m. The plaintiff and her counsel arrived at the room of the arbitration hearing at 8:47 a.m. The plaintiff alleged that she left her house at 7:35 a.m. but due to heavier than normal traffic did not reach the arbitration center until 8:40 a.m. The visitor’s pass indicated that the plaintiff checked into the center at 8:45 a.m. The plaintiff’s attorney and the plaintiff provided affidavits stating they arrived at the hearing room at 8:47 a.m. When they arrived at the hearing room, the arbitrators informed the plaintiff’s attorney that the plaintiff had arrived too late to present her case. The arbitrators entered an award in favor of defendant White. Id. at *1-2.

The plaintiff filed a timely rejection of the arbitration award. In a motion to bar the plaintiff’s rejection of the award, the defendant alleged that the plaintiff had not participated in good faith in the arbitration under Illinois Supreme Court Rule 91 and by failing to do so waived her right to reject the award. The trial court granted the defendant’s motion and found that the plaintiff lacked standing to reject the award. The trial court did not expressly find that the plaintiff failed to participate in good faith. The plaintiff appealed. Id. at *2.

Article 1, Section 12 of the Illinois Constitution states: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly.”

a philosophy but did not provide a mandate for any certain remedies. Citing Segers v. Industrial Comm’n, 191 Ill. 2d 421, 732 N.E.2d 488 (2000). Article 1, Section 12 of the Illinois Constitution states: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly.” Ill. Const. 1970, art. I, § 12. The court noted that this “injuries and wrongs” portion of the clause must be read in the conjunctive. As such, because the court found the employer did not have a duty to the plaintiff, there could therefore be no “wrong.” Behrens, 852 N.E.2d at 558.

Finally, the court rejected the plaintiff’s allegation that her claim should stand because if she had struck a third party on her way home instead of only injuring herself, the third party would have had a cause of action against the plaintiff’s employer. Id. The court cited Brewster v. Rush-Presbyterian-St. Luke’s Medical Center, 361 Ill. App. 3d 32, 836 N.E.2d 635 (1st Dist. 2005), for the proposition that an employer of an excessively fatigued driver caused by employment-related sleep deprivation was not liable to third parties for the conduct of off-duty employees. As such, the appellate court affirmed the circuit court’s dismissal of the plaintiff’s complaint. Behrens, 852 N.E.2d at 558.
Illinois Supreme Court Rule 91(a) provides that a failure to be present at an arbitration hearing results in waiver of the right to reject the award. Illinois Supreme Court Rule 91(b) provides that individuals shall participate in the hearing in good faith. The appellate court determined that tardiness by a few minutes was not a failure to participate in good faith as contemplated by the rule. The court looked to the ordinary meaning of presence to conclude that the plaintiff was present at the hearing, as she was inside the building, and that being tardy by several minutes was not a failure to be present for purposes of Rule 91(a). The court also noted that the fifteen minute grace period was not a requirement, but rather a guideline from the Arbitration Reference Manual. Citing Zietara v. DaimlerChrysler, 361 Ill. App. 3d 819, 838 N.E.2d 76 (1st Dist. 2005), Nix, 2006 WL 2547336 at *5.

The court also determined that the plaintiff’s conduct was not a failure to participate in good faith as contemplated by Rule 91(b). The court noted that the standard for a failure to participate was a “deliberate and pronounced disregard” for the proceedings. Citing State Farm Ins. Co. v. Kazakova, 299 Ill. App.2d 1028, 1034, 702 N.E.2d 254 (1st Dist. 1998). The court found that the plaintiff’s conduct did not rise to the level contemplated by the rule. The court also noted that one of the co-defendants was similarly tardy to the hearing and the court determined that it was inappropriate to only impose sanctions upon the plaintiff. The appellate court reversed the circuit court’s decision and remanded the matter for a new arbitration hearing. Nix, 2006 WL 2547336 at *7.

SUBJECT MATTER JURISDICTION

Agreement Between Parties for Extension of Time Did Not Extend Jurisdiction of Court


During a telephone conversation on October 1, 2004 between the plaintiff and defense counsel, defense counsel indicated it did not object to the plaintiff’s second motion for an additional extension of time to file a posttrial motion. On October 4, 2004, the plaintiff faxed a second motion for an extension of time to the trial court. On October 5, 2004, the trial court entered an order stating that the motion faxed by the plaintiff was not a motion the court could “act upon” as it did not comply with local rules and was not filed with the clerk. The trial court also found the plaintiff’s reason for the extension, to comply with other deadlines in federal court matters, was insufficient. Id.

On October 13, 2004, the trial court entered the plaintiff’s second motion for an extension of time and set a hearing on the motion for October 28, 2004. At this hearing, the defendant argued that because the plaintiff did not obtain a timely extension, the court lacked jurisdiction. The trial court granted the plaintiff’s motion and allowed the plaintiff until November 25, 2004 to file a posttrial motion. Id. However, the plaintiff did not file her posttrial motion until November 29, 2004. On January 20, 2005 the trial court denied the plaintiff’s posttrial motion. The plaintiff appealed. Id.

On appeal, the defendant argued that the plaintiff failed to obtain an order for a second extension in a timely fashion and as such the court lacked jurisdiction at the October 28, 2004 hearing. The appellate court noted that Section 2-1202(c) of the Illinois Code of Civil Procedure requires posttrial motions to be filed within 30 days after the entry of a judgment. Further, if an additional extension is requested, the order setting the additional extension must be entered within the 30 day period. 735 ILCS 5/2-1202(c) (West 2004), Lowenthal, 2006 WL 2663798 at *2. The appellate court noted that if the 30 day period expires without any additional orders entered, the court loses jurisdiction over the matter. Id.

The plaintiff argued that the trial court had authority under principles of equity to extend the deadline for filing because the defendant did not object to her filing for an additional extension during their October 1, 2004 conversation. Id. at *3. The court noted that only one case potentially supported the plaintiff’s allegation that an agreement between the parties can extend the time for filing posttrial motions. Citing Krotke v. Chicago, Rock Island & Pacific R.R., 26 Ill. App. 3d 493, 327 N.E.2d 212 (1st Dist. 1974) (involving a signed, written stipulation between the parties). The court distinguished the Krotke case factually and also found the Krotke decision to be in conflict with the revestment doctrine, which allows parties to revest a court with personal and subject matter jurisdiction “if the parties actively participate in proceedings without objection and the proceedings are inconsistent with the merits of the prior judgment.” Citing People v. Kaeding, 98 Ill. 2d (Continued on next page)

However, the appellate court noted that the Illinois Supreme Court has found that parties may not waive the lack of subject matter jurisdiction and the lack of subject matter jurisdiction may not be cured through consent of the parties. Citing People v. Flowers, 208 Ill. 2d 291, 802 N.E.2d 1174 (2003). The appellate court determined the trial court lost jurisdiction after the plaintiff’s allotted time to file a posttrial motion or obtain an extension expired on October 4, 2004, and the oral agreement did not fulfill the requirements of the revestment doctrine. Lowenthal, 2006 WL 2663798 at *4.

**Lawsuit Against Starbucks Store Located on University Campus Was Properly Brought in Circuit Court, Rather than Court of Claims**

On December 3, 2003, Molly Alter purchased a cup of coffee from a Starbucks store located on the campus of Southern Illinois University Edwardsville. As she was holding the cup, the lid popped off and the cup collapsed in on itself, causing hot coffee to burn both her hands. Alter sued Starbucks Corporation alleging that as a result of the accident, she was forced to take “incompletes” in three of classes and that the resulting inability to use her hands in the metalsmith program put her graduate assistantship in jeopardy and diminished her future earnings capacity.

The University and Starbucks had entered into a Master Licensing Agreement, which governed their relationship. The Agreement provided in pertinent part:

“Responsibility for Starbucks Store. The parties acknowledge that University has sole responsibility for the maintenance, construction, design, employees, and operation of the Starbucks Store. As such, any claim, liability[,] or demand of any kind or nature, including, without limitation, any settlement offer or court verdict, arising from or relating to the maintenance, construction, design, employees, or operation of the Starbucks Store shall be the sole responsibility of University, and University shall pay for any and all liabilities or damages Starbucks may incur, including reasonable attorneys’ fees, as a result of claims, demands, costs, or judgments of any kind or nature, by anyone whomever, arising out of or otherwise connected with the maintenance, construction, design, employees, or operation of the Starbucks Store, except to the extent such liability or damage is due to the negligence or fault of Starbucks (it being acknowledged and agreed to by the parties that any claims related to the temperature of coffee beverages sold at the Starbucks Store shall not be attributable to the negligence or fault of Starbucks).

University shall immediately undertake the defense of any legal action against or involving Starbucks, at University’s sole expense, and shall retain reputable, competent[,] and experienced counsel reasonably acceptable to Starbucks to represent the interests of Starbucks. * * * Starbucks shall have the right to obtain separate counsel, at Starbucks[’] expense, and to participate in the defense, compromise[,] or settlement of the action. * * * In the event of a legal action against Starbucks, University shall not settle any legal action without the specific prior written consent of Starbucks, which may be granted or withheld in its sole and absolute discretion.”

Starbucks moved to dismiss Ms. Alter’s complaint based on this provision. Starbucks argued that under the provision, the University had the sole responsibility for the operation of the store and was, therefore, responsible for all claims relating to the store’s operation. As a result, Starbucks argued that the complaint was actually one against the State of Illinois that could only be brought in the Court of Claims. The trial court agreed and dismissed the case. Ms. Alter appealed.

The Court of Claims Act (705 ILCS 505/1 et seq. (West 2002)) establishes the Court of Claims and gives it jurisdiction to hear certain matters, including: “All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, * * * provided[ ] that an award for damages in a case sounding in tort * * * shall not exceed the sum of $100,000 to or for the benefit of any claimant.” 705 ILCS 505/8(d) (West 2002). Determining whether an action is actually directed against the State depends not upon the formal designation of the parties but rather upon an analysis of two factors: (1) the issues involved; and (2) the relief sought.

Based on these principles, the appellate court reversed the trial court’s decision and held that the action was properly brought in the circuit court and not the Court of Claims. The court reasoned that Starbucks had a duty to provide structurally sound cups, to properly place the lids on the cups, and to serve coffee at a reasonable temperature. The Court found that this duty is no different from the duty Starbucks owes to any of its patrons in locations other than the store located on
the University’s campus. The mere fact that the coffee was sold from a store located on State property rather than private property should not protect Starbucks from liability if the plaintiff can show that Starbucks breached its duty.

The court also held that the provision at issue was an indemnity agreement and, therefore, did not transform all lawsuits filed against the store into lawsuits against the State. The court pointed to the fact the provision specifically gave Starbucks the right to obtain separate counsel and to participate in the defense of any lawsuit; and denied the State the right to settle any claim without the prior consent of Starbucks. The provision was not intended to make the University liable for all matters arising out of its operation of the store. As a result, the court found that Starbucks could not escape liability merely because the University voluntarily entered into a contract to reimburse and/or indemnify Starbucks in connection with actions that may be brought against the store. *Alter v. Starbucks Corporation*, No. 5-05-0244, 2006 WL 2947542 (5th Dist., October 10, 2006).

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Popp v. O'Neil, 313 Ill. App. 3d 638, 642 (2d Dist. 2000), quoting Restatement (Second) of Torts § 586 (1977). The doctrine of absolute privilege has evolved to bar various causes of action, for various public policy reasons. However, no Illinois appellate court has applied the privilege where an action of fraud has been brought against an attorney by a non-client. The development of the doctrine, however, suggests that should such a case present to an Illinois Appellate Court, the Court would likely apply the privilege, based upon a body of case law which has, since the privilege’s inception, continued to expand its application.

Although various Illinois cases cite the Restatement as their source for the privilege, other Illinois cases make clear that the privilege is rooted in English law from the late 18th century. As pointed out by the Illinois Supreme Court in Strauss v. Meyer, 48 Ill. 385 (1868), the doctrine of privilege for statements made during litigation was employed by the English jurist William Murray, First Earl of Mansfield.

It has been the long and well recognized rule of the law, that proceedings in the regular course of justice are privileged. In the case of Cutler v. Dickson, 4 Coke, 14, it was held that no allegation contained in articles of the peace exhibited to justices, is actionable, it being a proceeding in the course of justice. Nor will any other proceeding in the regular course of justice, make it libelous. 2 Inst. 228; Lake v. King, 1 Saunders’ R. 132, note 1; and in Astley v. Younge, 2 Burr. 807, Lord MANSFIELD announced and applied the same rule. ... And it is not material whether the charge be true or false, or whether it be sufficient to effect its object or not; if it be made in the due course of a legal or judicial proceeding, it is privileged, and can not be the foundation of an action for defamation.

48 Ill. at 385. Based in part upon precedent from Lord Mansfield, the Illinois Supreme Court in Strauss applied the privilege and upheld the dismissal of the case before it, which alleged libel during a judicial proceeding. 48 Ill. at 385.

In 1897 the Supreme Court of Illinois cited the Strauss case favorably in applying the doctrine in McDavitt v. Boyer, 169 Ill. 475, 48 N.E. 317 (1897). There, the Court explained that the privilege is absolute where made by the attorney representing a party in litigation. “Whatever is said or written in a legal proceeding, pertinent and material to the matter in controversy, is privileged; and no action can be maintained upon it.” McDavitt, 169 Ill. at 475, citing Strauss, 48 Ill. at 385; Spaid v. Barrett, 57 Ill. 289 (1870). In addition, the Supreme Court further defined the privilege.

What counsel says in the argument of a case is absolutely privileged when it is connected with, and pertinent to, the inquiry involved in the suit. Counsel cannot be sued for defamatory statements made in the trial of a cause before a court of competent jurisdiction. The same privilege is extended to a party who acts as his own counsel, and manages his own case before a judicial tribunal. ...The same privilege extends to a party to a suit in a court of justice when he is not acting as his own counsel. He is not liable to be sued for slander.

Adnan A. Arain

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for any statement which he may make in good faith in relation to the matter there pending.

169 Ill. at 475 (text omitted)\(^1\).

The First District case of \textit{Dean} \textit{v. Kirkland}, 301 Ill. App. 495, 23 N.E.2d 180 (1st Dist. 1939) relied in part upon the \textit{McDavitt} case, 169 Ill. at 475, holding that the privilege should be applied not only to statements during court proceedings and in written filings, but also to discussions between opposing counsels. In holding as such, the \textit{Dean} case explicitly cited public policy as one basis for its opinion.

Discussions between attorneys representing opposing parties should not be discouraged. Such discussions have a tendency to limit the issues or to settle the litigation, thereby saving the time of the court. ... It would be contrary to public policy to penalize attorneys by making them respond in damages under the circumstances disclosed by the complaint.

301 Ill. App. at 510.

The 1972 First District case of \textit{Macie} \textit{v. Clark Equipment Co.}, 8 Ill. App. 3d 613, 290 N.E.2d 912 (1st Dist. 1972), provides ample demonstration as to how the doctrine continued to develop in Illinois jurisprudence.

It is well settled in our law that pertinent or relevant statements, written or oral, made in a judicial proceeding are absolutely privileged. The question of pertinency or relevancy is one of law for the court, one that can be decided by a motion to dismiss. ... The requirement that statements made in a judicial proceeding be pertinent or relevant is not applied in a strict sense. When it is applied and questions are raised, all doubts are resolved in favor of relevancy or pertinency. Although a party may not introduce into a judicial proceeding inflammatory matters entirely unrelated to the litigation, he is not answerable for those volunteered or included in his pleadings if they have any bearing on the subject at issue.

8 Ill. App. 3d at 615-616 (citations omitted). Thus, the court in \textit{Macie} ruled that statements made by a party during a federal patent infringement action were pertinent and relevant, and therefore absolutely privileged. 8 Ill. App. 3d at 613.


In 1986, two Illinois cases specifically held that the privilege shall apply to statements by counsel even where malice was found. \textit{See Starnes v. International Harvester Co.}, 141 Ill. App. 3d 652, 490 N.E.2d 1062 (4th Dist. 1986); \textit{Defend v. Lascelles}, 149 Ill. App. 3d 630, 500 N.E.2d 712 (4th Dist. 1986). Explicitly relying upon these cases, the Seventh Circuit Court of Appeals, held that the privilege extended not only to communications but to actual deeds as well. \textit{Scheib v. Grant}, 22 F.3d 149 (7th Cir. 1994). In \textit{Scheib}, an attorney had violated federal wiretapping laws by assisting his client in recording and disclosing the conversations of the client’s minor son with the client’s estranged wife. The Seventh Circuit stated that the truth-seeking function of the court would be furthered “if attorneys do not fear civil or criminal liability as the consequence of misjudging the legality of disclosing particular information.” 22 F.3d at 156.

As of 1997, the privilege was further expanded to include information related to preparing for litigation. “The absolute privilege protects anything said or written in a legal proceeding. ... Out-of-court communications between attorneys are protected, as well as communications between attorneys and their clients.” \textit{Libco Corp. v. Adams}, 100 Ill. App. 3d at 316-317, citing \textit{Dean v. Kirkland}, 301 Ill. App. 495, 23 N.E.2d 180, (1st Dist. 1939).
Absolute Privilege (Continued)
communications between an attorney and his former client after the termination of litigation. In *Golden v. Mullen*, 295 Ill. App. 3d 865, 693 N.E.2d 385 (1st Dist. 1997), the First District held that the privilege applied to correspondence from the attorney to his former client which began one month after the final order of dismissal was entered, despite the fact that the representation had technically ended. The privilege also covered correspondence sent from the attorney to the former client two months later. Once again, the court based its holding upon public policy:

The privilege is predicated on the tenet that although defendant’s conduct is otherwise actionable, because he is acting in furtherance of some interest of social importance, the communication is protected and no liability will attach, even at the expense of uncompensated harm to the plaintiff’s reputation. We believe that the same public policy considerations that protect an attorney’s statements made to his or her client during the course of a legal proceeding necessarily protect post-litigation communications of the type at issue here. We believe, as the circuit court did, that there is a “tremendous public interest” in protecting and facilitating this type of open communication and commentary. Accordingly, we hold that the absolute privilege which attaches to defamatory statements made by an attorney incidental to a pending legal proceeding also applies to post-litigation defamatory statements made by an attorney to the client he or she represented in such a proceeding.

295 Ill. App. 3d at 870-871.

In 1998, the federal district court for the Northern District of Illinois, applying Illinois law, again expanded the privilege when it held that the privilege protected intentional misrepresentations made by counsel to opposing counsel to induce settlement. *Zanders v. Jones*, 680 F.Supp. 1236 (1988). There, the court stated,

notwithstanding the prohibitions on conduct by lawyers involving dishonesty, fraud, deceit or misrepresentation contained in the Disciplinary Rules of the Illinois Code of Professional Responsibility, the Illinois courts have consistently applied the privilege to false statements made by lawyers no less than to false statements made by others in the course of legal proceedings.

680 F.Supp. at 1238.

As of 2000, the privilege has been extended to out-of-court communications between an attorney and a potential client during preliminary consultation. *Popp v. O’Neil*, 313 Ill. App. 3d 638, 730 N.E.2d 506 (2nd Dist. 2000). In 2003, the First District applied the privilege to attorneys’ statements about adverse counsel, which were published to a bankruptcy trustee. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 788 N.E.2d 740 (1st Dist. 2003). In the *Edelman* case, the First District once again relied upon public policy in its holding, stating that “the trustee’s duty to assemble the bankruptcy estate requires an unimpeded reception of information.” 338 Ill. App. 3d at 166.

The proposition of absolute immunity has been applied throughout a number of jurisdictions outside Illinois, to a variety of torts. “The courts have emphasized that the same compelling public policy considerations that favor the ‘defamation’ privilege are equally applicable to any other tort theory predicated on the same alleged wrongful acts or statements.” Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 21.8 (2006 ed.). This phenomenon has led to the notion that the privilege’s application is relatively widespread.

This liberal application of the privilege is illustrated by a diverse catalog of alleged torts where remedies were barred by the so-called defamation privilege. The privilege has been applied to claims of abuse of process, intentional infliction of emotional distress, interference with contractual or advantageous business relationships, wrongful solicitation, fraud or deceit, perjury, negligent misrepresentation, invasion of privacy, disparagement (slander) of title, civil conspiracy, and even statutory causes of action. Similarly, the form of remedy sought does not alter this conclusion.

Id. (footnotes omitted).²

The causes to which the privilege has been applied, as referenced by Mallen and Smith, are all intentional torts. However, claims of “fraud and deceit” perhaps best encapsulate the issues surrounding application of the privilege to an intentional tort. Applying the privilege to a case of fraud and deceit would allow an attorney to avoid personal liability for unknowingly misleading non-clients. As cited in § 21.8, the following California and South Dakota decisions support this view: *Edwards v. Centex Real Estate Corp.*, 53 Cal.App.4th 15, 61 Cal.Rptr.2d 518 (1st Dist. 1997); *Janklow v. Keller*, 90 S.D. 322, 241 N.W.2d 364 (1976); *Pettitt v. Levy*, 28 Cal. App.3d 484, 488, 104 Cal.Rptr. 650, 652 (1972); *Kachig v. Boothe*, 22 Cal.App.3d 626, 99 Cal.Rptr. 393 (4th Dist. 1971). However, jurisdictions apply the privilege to varying degrees. See *Rady v. Lutz*, 150 Wis.2d 643, 444 N.W.2d 58 (Ct.App. Wis.); *American Family Mutual Ins. Co. v. Edgar*, No. 92-CV-
Likewise, the U.S. Supreme Court in
would not be able to perform their function properly.

consideration that if prosecutors faced personal liability they
supra of civil litigation, as well. In
prosecutors and judges may apply to attorneys in the context
liability for acts undertaken as judge.

held that judges are likewise absolutely immune from civil
Fisher
386552 (N.D. Ill. July 2, 1996). Furthermore, in
Buckley v. County of DuPage
424 U.S. 409, 96 S. Ct. 984 (1976), a state prosecutor acting within
prosecution shall be absolutely immune from civil suit.

implied that judges and prosecutors are entitled to immunity from
court. The public trust of the pros
judgment both in deciding which suits to bring and in
civil liability for acts undertaken as judge.

The policy considerations of extending immunities to
prosecutors and judges may apply to attorneys in the context
of civil litigation, as well. In Buckley v. County of DuPage,
supra, the court explicitly based its holding upon the policy
consideration that if prosecutors faced personal liability they
would not be able to perform their function properly. Id. at

Likewise, the U.S. Supreme Court in Imbler, supra, stated
that the threat of civil suits:

would undermine performance of [a prosecutor’s] duties ... A prosecutor is duty bound to exercise his best
judgment both in deciding which suits to bring and in
conducting them in court. The public trust of the pros-
cure of civil suits could be expected with some frequency, for a
defendant will often transform his resentment at being
prosecuted into the ascription of improper and malicious
actions to the State’s advocate.

the United States Supreme Court’s decision was based in part
upon the policy consideration that every case could set off a
cycle of endless litigation in which judge after judge is sued
on the basis of the judge’s decision in the original, underlying
case. 80 U.S. at 349.

The policy considerations underlying these applications of
the privilege also serve to protect an attorney from personal
liability from the simplest type of representation, such as a
standard transmittal letter, where an attorney merely transmits
information from his client, such as a signed document. As in
the Buckley case, practicing civil attorneys would be unable to
perform their tasks for fear of facing personal liability if the
privilege is not applied. As stated in the Dean case, “It would
be contrary to public policy to penalize attorneys by making
them respond in damages” under such circumstances, 301 Ill.
App. at 510; this would produce a situation aptly described
by the Imbler court, “Such suits could be expected with some
frequency”. 424 U.S. at 425. This would contravene the “tre-
mendous public interest” referenced in Golden v. Mullen, 295
Ill. App. 3d at 871, of having attorneys available to represent
clients in the judicial system.

Just as the various Illinois holdings expand the parameters
of the privilege to suit their needs where appropriate, Illinois
law addresses at least two aspects of the public policy consid-
ergations regarding charging an adversary’s counsel for fraud.
In this context, the privilege may eventually be applied as a
matter of first impression, as no Illinois appellate court has
yet ruled on the issue.

First, there is the public policy in favor of allowing attor-
eys to exercise their good faith in providing legal services
in a judicial proceeding. Thus, in the context of perjury, the
Illinois Supreme Court has stated that “defense counsel should
have discretion to make a good-faith determination whether
particular proposed witnesses for the defendant would testify
untruthfully.” People v. Bartee, 208 Ill. App. 3d 105, 107-
108, 566 N.E.2d 855, 857 (2nd Dist. 1991), quoting People
v. Flores, 128 Ill. 2d 66, 538 N.E.2d 481 (1989). The Flores
court “granted great discretion to defense counsel in deter-
imining whether the testimony would be truthful. There is no
indication that our supreme court requires a demonstrable
‘firm factual basis’ for counsel’s belief.” 208 Ill. App. 3d at
108. Thus, the privilege may apply to charges of fraud against
adverse counsel who in good faith forward or repeat informa-

The second policy consideration already addressed in dicta
is that Illinois courts are extremely hesitant to even entertain
does of action for fraud against an adversary’s counsel.

(Continued on next page)
Absolute Privilege (Continued)

The decision to accuse an opposing party or its counsel of perpetrating a fraud on the court is a momentous one. When the decision is made to go forward on such a charge, one would hope that the charging party was solidly armed with competent, clear, and convincing evidence supporting his theory. ... Here, we are particularly disturbed that Alvey’s counsel chose to accuse a fellow officer of the court of [such] an offense.

Kim v. Alvey, Inc., 322 Ill. App. 3d at 673-674 (citations omitted). Furthermore, Illinois courts have declared it “improper” for an attorney to even remark that his adversary is using trickery, misrepresentations, perjury or fraud during litigation. People v. Wilson, 257 Ill. App. 3d at 670, 693, 628 N.E.2d 472, 490 (1st Dist. 1993).

Thus while the counsel of a plaintiff’s adversary has never been held liable for fraud by an Illinois court in a published appellate opinion, cases for other intentional torts against an adversary’s clients have been rightfully dismissed. See Schott v. Glover, 109 Ill. App. 3d at 230 (addressing tortious interference with a contractual relationship); Doyle v. Shlensky, 120 Ill. App. 3d at 807, 812, 458 N.E.2d 1120, 1125 (1st Dist. 1983) (addressing malicious prosecution).

One must also consider the fact that the attorneys in such instances would typically disseminate allegedly fraudulent information from their clients to non-clients in their representative capacity, i.e., on behalf of their client. Where the information is relayed from client to counsel to adverse counsel to the detriment of some other party, the party may then have recourse against the represented client, and not the attorney who simply relayed the information in good faith. Thus, the client would then be able to maintain a separate cause of action against the attorney, if appropriate.

Absolute privilege under these circumstances serves the policy considerations described above, as the nature of court proceedings is fundamentally adversarial. Again, although there is no Illinois published opinion directly supporting this notion, the idea is not foreign to Illinois case law. In the context of adversarial parties to a divorce, the Illinois Supreme Court has stated, “To conclude that an attorney representing one of the spouses also owes a legal duty to the children of the two litigants would clearly create conflict-of-interest situations.” Pelham v. Griesheimer, 92 Ill. 2d at 23, 440 N.E.2d 96 (1982); see also Doyle v. Shlensky, 120 Ill. App. 3d at 807; see also Kim v. Alvey, Inc., 322 Ill. App. 3d at 657, 749 N.E.2d 368 (1st Dist. 2001), as discussed above.

Such an extension of liability clearly was not contemplated by Pelham. Because no attorney-client relation-

ship existed between plaintiff and either of the attorney defendants and no duty is owed to plaintiff under Pelham, Count II [the Count against opposing counsel] fails to state a cause of action against defendant attorneys.

Doyle, 120 Ill. App. 3d at 812.

The fluidity of the doctrine of absolute privilege, its evolution and the public policy reasons underlying its application, may eventually cause appellate courts in Illinois to apply the privilege to the context of fraud and deceit. At stake is the ability of the civil attorney in an Illinois proceeding to zealously and in good faith serve his client’s interests. This includes the ability to, in good faith, repeat or disseminate information that comes from the client. Where an attorney does so in his or her representative capacity, he should be shielded by an absolute privilege against personal liability to non-clients. This is the optimal solution, and would ultimately allow the judicial system to function as an efficient and smooth-running machine, whereby information is freely exchanged and disseminated by and among attorneys in their representational capacities, and whereby information can be processed by the recipient, whether this be a trier of fact, a potential party to litigation or the public. For Illinois appellate courts to rule otherwise would be to muzzle good faith exchanges of information and expose every attorney to potential liability for merely repeating or transmitting, in good faith, the information provided to him by his clients.

Footnotes

1 The good faith standard would be controlled by Illinois Supreme Court Rule 137 and attendant case law, along with multiple Rules of Professional Conduct, most notably Rules 1.2(d), 1.2(f)(1), 1.2(f)(2), 1.2(g), 3.1, 3.3(a)(1), 3.3(c), 3.4(a)(2), 4.1 and 8.4.

2 The prospect of an absolute privilege against statutory causes of action is somewhat more complicated than the application of the absolute privilege to “fraud and deceit” claims generally. RICO actions and actions in other prosecutorial contexts would present difficulties where an absolute privilege is concerned.
Civil Rights Update

By Maureen R. De Armond
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Valentine v. City of Chicago: The Seventh Circuit Finds Plenty of Questions of Material Fact to Prevent Summary Judgment in Sexual Harassment Case

The United States Court of Appeals for the Seventh Circuit decided Valentine v. City of Chicago, 452 F.3d 670 (7th Cir. 2006) in July 2006. Donna Valentine, a female employee working for the Chicago Department of Transportation (“CDOT”), appealed from the district court’s grant of summary judgment in favor of the City and three individuals, John Tominello, Mike DiTusa, and Joseph Senese.

The Seventh Circuit addressed at length the following issues: (1) whether the supervisor was put on notice that Valentine was being harassed because of his prior awareness that Valentine’s male co-worker Tominello had been accused of sexually harassing other female co-workers at other City worksites; (2) whether the City was on notice of sexual harassment; (3) whether Valentine reasonably believed that co-worker DiTusa was the appropriate person to contact with sexual harassment complaints; (4) whether Valentine’s complaint to her purported supervisor put that supervisor on notice of sexual harassment; (5) whether Tominello’s actions were sufficiently severe and pervasive to constitute (objectively or subjectively) hostile work environment sexual harassment; (6) whether Valentine’s co-workers acted under color of state law; and (7) whether the municipality had a custom or widespread practice of condoning sexual harassment.

In its thorough and lengthy analysis, the Seventh Circuit reversed all but two of the lower court’s rulings; finding questions of material fact prevented summary judgment in favor of defendants.

I. Factual Background

Valentine worked for CDOT as a truck driver and was assigned to the Bosworth Yard (“the Yard”) location from 1998 until November 2002. She was one of only a few women who worked at this location. During this time, Valentine regarded defendant DiTusa as her supervisor at the Yard. Also during this time, defendant Senese held the title of Acting General Foreman of CDOT; his office was across town.

Defendant Tominello was transferred to the Yard in March 2002. Valentine alleges that Tominello had a history of sexually harassing female co-workers and that he had been transferred to the Yard from another assignment because a female co-worker there had complained that Tominello was sexually harassing her. Id., at 674-75.

Valentine alleged that Tominello began harassing her as soon as he began working at the Yard. Tominello allegedly commented on Valentine’s physical appearance and clothing, asked her out to dinner, told her to leave her fiancé for him, made crude and sexual comments and hand gestures, and caressed her arm or shoulder. Valentine maintained that she told Tominello several times a week to leave her alone and that she was not interested in him. She also complained to DiTusa about the harassment approximately 10 times. DiTusa purportedly told Valentine that he would address the problem.

In September 2002, the “cookie incident” took place in a trailer housing DiTusa’s office and a break room. DiTusa was present, as were several of Valentine’s co-workers. Tominello took a cookie in his hand and made a jerking motion as if he was masturbating and then threw the cookie on Valentine’s lap. Valentine became angry and yelled at Tominello. Tominello in turn threatened to file a violence in the workplace complaint against her. At the end of her shift that day, Valentine returned

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Civil Rights (Continued)

Citing Parkins v. Civil Constructors of Ill., Inc. 163 F.3d 1027, 1032 (7th Cir.1998))

According to the district court, Valentine failed to prove the fourth element of her claim—a basis for employer liability. The district court found that Valentine did not put the City on notice until she called Senese after the “cookie incident.” Once on notice, the district court found that the City responded quickly and appropriately to Valentine’s complaint.

After a detailed and careful analysis of Valentine’s Title VII claims against Senese and DiTusa, the court found that Valentine had failed to state a claim against Senese, but had properly done so as to DiTusa and the City. Id.

A. Affirming Summary Judgment as to Senese’s Actions

The court agreed with the trial court that Senese had responded properly to Valentine’s complaint about Tominello by transferring him to a different yard the day after Valentine complained to him about the “cookie incident.” There was no evidence that Senese was aware of Valentine’s problems with Tominello prior to her call to him.

The court was not persuaded by Valentine’s argument that Senese was on notice of Tominello’s harassment of her simply because Senese was aware that Tominello had sexually harassed other woman at other worksites in the past. Id., at 676.

B. Questions of Material Fact Prevented Summary Judgment as to DiTusa’s Actions

1. The Power to Transfer Employees Creates Question of Material Fact as to DiTusa’s Role as Supervisor

The Seventh Circuit took issue with the district court’s finding that Valentine’s complaints of sexual harassment to DiTusa were insufficient to put the City on notice because DiTusa was not Valentine’s supervisor for the purposes of Title VII. The lower court based this holding on the grounds that DiTusa: (1) did not receive any more pay than the other motor truck drivers; (2) did not have authority to hire employees; (3) did not have authority to terminate, promote, or demote employees; (4) did not “evaluate Plaintiff’s work performance in any way;” (5) occasionally drove trucks on assignments himself; and (6) did not have authority to transfer employees out of CDOT.

II. Summary Judgment Improper as to Valentine’s Title VII Hostile Work Environment Claim

To establish a *prima facie* case of hostile environment sexual harassment under Title VII, Valentine must show that: (1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the harassment was based on sex; (3) the sexual harassment had the effect of unreasonably interfering with the plaintiff’s work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (4) there is a basis for employer liability. Id., at 677 (citing Parkins v. Civil Constructors of Ill., Inc. 163 F.3d 1027, 1032 (7th Cir.1998)).
The district court based this sixth reason on Valentine’s deposition testimony, wherein she testified that she had no basis other than her own personal belief that DiTusa had the power to transfer employees to other yards. The Seventh Circuit found this to be an erroneous conclusion and agreed with Valentine that there was a material question of fact as to whether DiTusa was her supervisor. The court pointed to DiTusa’s title as “Lot Supervisor,” DiTusa’s own belief that he was a supervisor, and a Rule 56.1(a)(3) admission that he had the power to transfer employees between the various yards within CDOT.

Citing Parkins v. Civil Constructors of Ill., Inc, 163 F.3d at 1034, the Seventh Circuit concluded that Valentine had presented sufficient evidence that DiTusa had the ability to transfer employees and this ability affected the terms and conditions of employment. Hence, there was a question of material fact as to whether DiTusa was Valentine’s supervisor. The court found unpersuasive the City’s alternative argument that even if DiTusa did have the power to transfer employees, this “marginal discretion” over Valentine’s work was insufficient to impute Title VII liability to the City. Id., at 678-79.

2. City’s Written Policy Directed Valentine to Complaint About Sexual Harassment to Supervisor

In its discussion of the City’s policy on reporting sexual harassment, the Valentine court found that a reasonable juror could find Valentine reasonably believed DiTusa was the appropriate person to whom she should direct complaints of sexual harassment. This belief was reasonable, in part, because when Valentine complained to DiTusa about Tominello, DiTusa said he would take care of the problem. Additionally, Senese worked on the other side of the City and had no day-to-day contact with Valentine. Perhaps most importantly, the City’s own written policy on reporting sexual harassment stated that employees could contact SHO directly or bring complaints directly to a supervisor. Id., at 679-80.

3. Valentine’s Complaints About Tominello’s Conduct Were Sufficient to Put Employer on Notice

The district court passed on the issue of whether the nature of Valentine’s complaints were sufficient to put her employer on notice that Tominello was sexually harassing her because it found that DiTusa was not one of Valentine’s supervisors. The Seventh Circuit quickly found that Valentine’s various complaints to DiTusa, especially those referencing unwanted touching, were sufficient notice of sexual harassment. Id., at 680. But see Zimmerman v. Cook County Sheriff’s Dep’t, 96 F.3d 1017 (7th Cir.1996) (finding that a complaint by a female employee to her supervisor that she was afraid of a male co-employee’s “political clout” was not sufficient to put the employer on notice that she was being sexually harassed by the co-employee); see also Adusumilli v. City of Chicago, 164 F.3d 353 (7th Cir.1998) (finding complaints by female employee to lack severity to constitute actionable harassment, where complaints found to be no more than teasing about waving at squad cars, ambiguous comments about bananas, rubber bands, and low-neck tops, staring and attempts to make eye contact, and four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks).

C. Questions of Material Fact Exist as to (Objectively and Subjectively) Hostile Work Environment Claim

Because the district court found that Valentine did not properly notify the City of her harassment, that court did not consider whether Tominello’s actions were sufficiently severe to create a hostile work environment. The Seventh Circuit found they were.

After noting that there is no bright-line test for determining when a workplace becomes objectively hostile, the court listed a number of factors courts must consider: 

. . . including the frequency and severity of conduct, whether it is threatening and/or humiliating or merely offensive, and whether the harassment unreasonably interferes with an employee’s work. . . In the case of discriminatory statements, [the court] must [also] assess the frequency of their use, as well as whether the remarks were stated directly to the plaintiff or whether the plaintiff heard them secondhand.

Id., at 681 (citing Wynniger v. New Venture Gear, Inc., 361 F.3d 965, 975-76 (7th Cir.2004) and Dandy v. United Parcel Serv., Inc., 388 F.3d 263, 271 (7th Cir.2004)) (internal citations omitted). The Seventh Circuit found that Valentine’s detailed and voluminous allegations regarding Tominello’s conduct supported her Title VII claim against the City that she was subjected to severe and pervasive sexual harassment constituting an objectively hostile workplace.

The court also found that Valentine had presented sufficient evidence to establish a subjectively hostile workplace. The court found that Tominello’s relentless harassment and Valentine’s alleged emotional trauma supported this theory. However, the court did not provide any type of guidance for determining when a workplace is subjectively hostile (as distinguished from an objectively hostile one). The court also failed to cite any case law upon which it relied in finding the evidence supported plaintiff’s subjectively hostile workplace

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theory. Id., at 681-82. Compare with Whittaker v. Northern Illinois University, 424 F.3d 640 (7th Cir.2005) (finding that a male supervisor who invited a female employee on two occasions to join him on his boat for “a weekend of drinking and other things” and made sexual comments to co-workers outside of the plaintiff’s presence had not created a hostile work environment); see also Racicot v. Wal-Mart Stores, Inc., 414 F.3d 675 (7th Cir.2005) (finding that a co-worker who used vulgar language in front of plaintiff, occasionally cursed and yelled at her, and made isolated comments about older women in the workplace did not create a hostile work environment).

III. Summary Judgment Improper as to Valentine’s Equal Protection Claim Against DiTusa

Before discussing Valentine’s sexual harassment claims brought under the equal protection clause, the Seventh Circuit reiterated the constitutional significance of such claims:

Sexual harassment by a state employer constitutes sex discrimination in violation of the equal protection clause [citation omitted] . . . Creating abusive conditions for female employees and not for male employees is discrimination. Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women. Such unjustified unequal treatment is exactly the type of behavior prohibited by the equal protection clause.

Id., at 682 (quoting Bohen v. City of East Chi., 799 F.2d 1180, 1185 (7th Cir.1986) (emphasis added).

The district court had found that neither Senese nor DiTusa acted under the color of state law because neither was Valentine’s supervisor for §1983 purposes. The Seventh Circuit disagreed with this reasoning and reversed.

A. No Evidence Senese Condoned Harassment

In discussing the claims directed against Senese, that lower court found that even if Senese was a supervisor, he appropriately responded to Valentine’s complaints. The Valentine court found that there was a material question of fact as to whether Senese acted under color of state law. There was no factual dispute that Senese was a supervisor of various CDOT yards or that he had the power to transfer employees, which he did to Tominello after Valentine reported the “cookie incident.” There was also no dispute that Senese had transferred Tominello to the Yard, after receiving complaints from female co-workers at Tominello’s prior worksite assignment or that Senese had been disciplined by SHO for failing to report to SHO Tominello’s behavior at that assignment. Id., at 682-83.

However, the Seventh Circuit found no evidence to support the argument that Senese intentionally discriminated against Valentine. There was no evidence Senese ever intended to harass Valentine, condoned Tominello’s harassment of her, or turned a blind eye to Valentine’s complaints. The court noted that Senese may have acted negligently (presumably in failing to report Tominello’s prior misconduct to SHO and by addressing the prior complaint of misconduct by simply reassigning Tominello to a new worksite), but there was no evidence Senese actually predicted that Tominello would harass Valentine when he began working at the Yard. Id., at 683-84.

B. Question of Material Fact Existed As to DiTusa’s Actions and Intent

In reviewing the lower court’s finding that DiTusa was not a supervisor for §1983 purposes, the Seventh Circuit employed the same reasoning as it had during its Title VII discussion, finding that, given his job title and power to transfer employees, a material fact existed as to whether DiTusa was a supervisor.
THE IDC MONOGRAPH:

Warning, Warning:
Warnings Required Under Illinois Products Liability Law

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I. INTRODUCTION

Anyone who buys a product, whether it is a consumer in the grocery store, home repair center or big box retailer, or a company purchasing machinery or raw materials from its suppliers, cannot help but notice the volume of information regarding product safety or related issues. Almost anything that can be purchased in the United States contains some form of warnings, whether it is information contained in an instruction manual, material safety data sheets, mailings from the supplier or even decals or placards on the product itself. Warnings have become a ubiquitous part of our society. In fact, instruction manuals are now so thick with warnings and related information that many products now come with abbreviated manuals or “Getting Started” type manuals. This appears to be a concession that few customers are willing to read all the information made available to the customer.

Most people over the age of 40 can remember clearly a time when there were few, if any, warnings about the potential dangerous propensities of a given product, its constituents or how it operated. Product liability law has had a substantial influence on society and its product suppliers, resulting in the near overload of information regarding safety and the like.

The purpose of this Monograph is to provide the defense practitioner with an overview of product liability law relating to the warnings requirement and some examples from the hundreds of scenarios discussed in the case law. The Monograph provides some insights as to when warnings are or are not required under the law and, if they are required, what they need to say. It also provides a discussion of the available defenses to a product liability claim alleging a failure to warn.

II. THE WARNINGS REQUIREMENT – A LOOK AT ILLINOIS SUPREME COURT DECISIONS

Any discussion of Illinois product liability law must begin with the Illinois Supreme Court decision in Suvada v. White Motor Company1. Suvada is the Illinois Supreme Court case which adopted strict liability in tort for products. Prior to that time, lack of privity of contract was a defense in a tort action by an injured user against the ultimate manufacturer or seller of a product.

In Suvada the court looked to public policy to reach its decision to impose liability based on strict liability and negligence in products other than food. The main policy reason was the court’s belief that product manufacturers invite the use of their products by way of advertising or packaging, thus representing to the public that the products are safe and suitable for use. The net result was that the court adopted §402A of the Restatement of Torts (Second).2

Predictably, the defendant in that case argued that the imposition of strict liability would require it to be, in effect, a guarantor that no one would be injured from the use of its product, which was a brake system incorporated into a vehicle. The court stated something that has been repeated in hundreds of cases since Suvada: that strict liability does not make the product supplier an absolute insurer and that plaintiffs must still prove that their injury or damage resulted from a condition of the product, that the condition made the product unreasonably dangerous and that the condition existed at the time the product left the manufacturer’s control.3

Suvada did not involve warnings per se. Instead, it was the precursor of an ever burgeoning number of cases and claims regarding allegedly defective products, in both the consumer and industrial contexts. As some people probably believed at the time, Suvada provided a limitless potential for lawsuits, litigation expense and liability.

Ten years after Suvada, the supreme court decided Lawson v. G.D. Searle & Co4. Lawson involved the death of a woman which allegedly resulted from the use of a contraceptive drug

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called Enovid. After a long trial, a verdict was rendered in favor of the defendant. The plaintiff appealed and the appellate court reversed. Then the supreme court reversed the appellate court.

Significantly, the court in *Lawson* was reviewing a case in which the jury verdict was in favor of the defendant drug manufacturer. The court noted that the warning issue was raised because one of the jury instructions stated: “A product faultlessly made may be deemed to be unreasonably dangerous if it is not safe for such a use that is to be expected to be made of it and no warning is given.”

The court recognized that there was conflicting evidence elicited at trial regarding the potential for Enovid to cause the injury which ultimately resulted in the decedent’s death. Although seeming to limit its observations to medications in this pharmaceutical case, nevertheless, the court looked to Comment k of §402A of Restatement (Second) of Torts. That comment pertains to unavoidably unsafe products. By doing so the court implicitly recognized that a product which was potentially unsafe for its intended and ordinary use could avoid a finding that it was unreasonably dangerous if the supplier had warned about the danger.

In this instance the court referred to a letter sent by the defendant drug supplier to physicians about Enovid. Citing the letter, the court recognized that by rendering a defense verdict the jury could have determined that a proper warning of the potential risks from using the drug was given. Interestingly, the court did not focus on the reality that this communication was not directed to the ultimate user but instead was provided to the prescribing physician.

Later, in another case involving prescription medications, the supreme court addressed another significant issue, which, up to that point, had not been considered by the court. The issue focused on the extent to which the product supplier’s knowledge of a potentially dangerous propensity of the product impacted on its duty to warn of that propensity. In other words, did the product’s supplier have to actually know of the danger before being held liable for not warning about the danger at issue?

The case was *Woodill v. Parke Davis & Co*⁶. In that case the parents of a minor sued a drug manufacturer for injuries suffered by the child during the birth process. The plaintiffs attributed the injuries to Pitocin, a medication that had been administered to the mother to induce uterine contractions. Information disseminated by the defendant to physicians did not contraindicate the use of Pitocin to induce uterine contractions. The plaintiffs’ complaint alleged that the defendant’s failure to warn physicians of the danger of using Pitocin while the fetus was in high station rendered the drug “not reasonably safe.” The plaintiffs did not allege that the defendant knew or should have known of this unique danger.⁷ The trial court dismissed the complaint and the plaintiffs appealed.

The supreme court in *Woodill* began its discussion with its

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**The court suggested that other courts found a failure to warn theory in strict liability to be distinguishable from a failure to warn theory in a negligence case based on the fact that the focus is on the warning itself rather than the conduct of the defendant.**

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to be distinguishable from a failure to warn theory in a negligence case based on the fact that the focus is on the warning itself rather than the conduct of the defendant.

The court supported its conclusion by holding out the reasonableness standard as one which was objective. Liability was not to be based on whether a particular defendant was reasonable under the circumstances. Instead, the question was whether it was reasonable for a given manufacturing defendant to have supplied a warning and whether that warning was adequate under the circumstances.

The court concluded that a requirement that a plaintiff plead and prove that a defendant knew or should have known of the dangerous propensity that caused the injury and, despite this, failed to warn was a reasonable requirement. This requirement focuses on the nature of the product and the adequacy of the warning rather than the defendant’s conduct. The court articulated the rule as follows:

The inquiry becomes whether the manufacturer, because of the “present state of human knowledge” (Restatement (Second) of Torts, sec. 402A, comment k (1965)), knew or should have known of the danger presented by the use or consumption of a product. Once it is established that knowledge existed in the industry of the dangerous propensity of the manufacturer’s product, then the plaintiff must establish that the defendant did not warn, in an adequate manner, of the danger. 9

The court’s conclusion in Woodill was critical for the court to avoid doing what it said in Suvada it would not do, which was to make the defendant manufacturer the virtual insurer of the product. Additionally, while the knowledge requirement may not necessarily create a negligence standard in a direct sense, it does enable the defendant to focus on conduct within the industry of which it is a part. The Woodill court’s decision, at least in the context of a warnings claim, helps to avoid a tunnel vision approach that can exist in a strict liability case where the focus is supposed to be upon the product itself, and not much more.

Another area where the supreme court has somewhat limited a strict form of strict liability in the context of warnings relates to foreseeability of use. In Winnett v. Winnett, 10 a minor was injured when she placed her hand on a moving conveyor belt of a forage wagon being operated on her grandfather’s farm. The plaintiff sued the manufacturer of the forage wagon alleging, among other things, that the device was being used for its intended purpose and was unreasonably dangerous due to the absence of rearview mirrors and warning signs. The defendant moved to dismiss based on the lack of foreseeability of the injury. The trial court granted the motion. The appellate court reversed and the appeal to the supreme court ensued.

Ultimately the Illinois Supreme Court reversed the appellate court, and affirmed the dismissal of the count against the manufacturer. The court suggested that the issue was not simply whether the use of the forage wagon by the minor was foreseeable. Instead, the court found that the threshold issue was whether the injured party was entitled to the protections of strict liability. Thus, the issue was whether the conduct of the individual injured by the purportedly defective product may be reasonably foreseen in situations where the product was being used for the intended purpose or a reasonably foreseeable purpose. 11

The court found that to avoid such a foreseeability requirement would make manufacturers and suppliers virtual insurers, a position it rejected in Suvada. Ultimately the court provided the following test:

Whether the plaintiff here is an individual who is entitled to the protections afforded by the concepts of strict tort liability depends upon whether it can be fairly said that her conduct in placing her fingers in the moving screen or belt of the forage wagon was reasonably foreseeable. A foreseeability test, however, is not intended to bring within the scope of the defendant’s liability every injury that might possibly occur. “In a sense, in retrospect almost nothing is entirely unforeseeable.” [citation omitted] Foreseeability means that which is Objectively reasonable to expect, not merely what might conceivably occur. 12

The court went on to find that the issue of foreseeability was typically a jury question. Nevertheless, the court found that the case involving this child was such that, as a matter of law, there could be no foreseeability and affirmed the dismissal. The court noted that it simply did not believe this occurrence was objectively reasonable for the manufacturer to expect.

Another limitation relating to the warnings issue arose in Hunt v. Blasius. 13 The facts of Hunt are pretty straightforward. The plaintiffs were occupants of a car that left the paved portion of the highway and collided with an exit signpost. The plaintiffs sued the defendant that designed, constructed and installed the post. The plaintiffs asserted theories of negligence and strict liability alleging defects such as a failure to use a “break-away” design for the post and installing it too close to the road. The trial court dismissed the complaint and the plaintiffs appealed.

The supreme court disposed of the negligence claim based on the fact that the defendant followed the plans and speci-
fications provided by the State of Illinois. With regard to the strict liability claim, the court looked to the plaintiffs’ claims as effectively alleging that the steel and concrete design of the exit signpost was defective because it was not reasonably safe in case a car crashed into it. A break-away design was posited as an alternative because, the plaintiffs argued it was reasonably foreseeable that cars would leave the road and crash into road signs and their supports.

In rejecting the claim, the court found that, in the context of products liability, if the injuries occur as a result of inherent properties of the product obvious to all who come into contact with that product, there is no liability. The court held that injuries must derive from a specific defect in the product, a defect which subjects those exposed to it to an unreasonable risk of harm. The court found that the plaintiffs failed to allege a defect in the signpost itself, and on that basis affirmed the dismissal of the complaint. In Hunt the product did what it was supposed to do, hold up a road sign. Hunt is the basis for what has been characterized by later decisions as the open and obvious exception to liability in the warning context.

By 1980 the Illinois Supreme Court had occasion to discuss the factors to be used in determining whether a warning, if required, is adequate. In Palmer v. Evco Distributing Corporation, the court addressed a case in which an eleven year old boy was injured while assisting his father with a borrowed bulk fertilizer spreader, resulting in the amputation of his leg. The evidence at trial was that children customarily rode on fertilizer spreaders and other farm vehicles, and that the defendant was aware of this fact. The case was tried and a verdict rendered in favor of the plaintiff.

The defendant appealed and argued that the spreader was not being used in a foreseeable fashion by the boy, that the product was not unreasonably dangerous as designed, that a warning label on the spreader was adequate and that the label’s presence meant the spreader was not being used by the plaintiff as intended. The defects the plaintiff alleged included a lack of instructions located on the machine itself describing appropriate procedures to eliminate lumps of fertilizer forming in the machine and a lack of adequate warnings regarding the hazards of the agitator. It was the presence of such lumps, and the minor plaintiff’s efforts to eliminate the lumps, that gave rise to the injury here.

In affirming the verdict for the plaintiff, the court discussed the various defects, in particular, whether the use of a sharp toothed agitator without a guard or other safety device made the bulk fertilizer spreader unreasonably dangerous. The defendant argued that the warning placed at the front of the spreader, near the operator’s controls, negated such a finding. This gave the court an opportunity to address the issue of adequacy of warnings.

The court found that in strict liability cases, warnings either shifted the risk of injury to the user or reduced it. Products which are unavoidably unsafe require a warning to inform users that harm could result from the product. If the warning is adequate, consumers using the product are deemed to proceed at their own risk. Adequate warnings are deemed to function as a means to reduce the probability of harm from a design which is otherwise unreasonably dangerous. The court stated that the adequacy of warnings is typically a jury question.

The court looked to other cases to provide guidance as to whether a warning is adequate or not. The factors considered include: whether the warning specifies the risk presented by the product, whether the warning is inconsistent with how the product is to be used, whether the warning provides the reason for the warning, or whether the warning reaches foreseeable users. In this case the court noted that the plaintiff’s expert testified that the specific hazard at issue was the agitator and the warning did not mention it. The court also observed that the design of the spreader itself was inconsistent with the warning because the warning was small in size compared to the size of the spreader and its physical placement could be deemed insufficient to warn foreseeable users such as the plaintiff. As a result of this analysis, the court found the warning to be inadequate.

More recently, the supreme court has discussed the open and obvious exception in Sollami v. Eaton. The Sollami case involved a child who was a neighborhood friend of a family that owned a trampoline located in the back yard. The parents were not home. The children decided to do “rocket jumps.” The children jumped simultaneously on the perimeter of the trampoline mat while one jumped in the center such that one child in the center of the trampoline would be propelled higher than the others. When the family purchased the trampoline some home assembly was required. It was assembled in accordance with the instructions provided by the manufacturer, including the placement of warning decals. Although an instruction placard was affixed to the frame at the time the trampoline was assembled, it apparently came loose months before the accident, and was never reattached.

As a result of being injured, the minor plaintiff sued the trampoline manufacturer alleging, among other things, a failure to warn that only one person should use the trampoline at a time. The manufacturer moved for summary judgment asserting that the danger of jumping on a trampoline was open and obvious, and should have been appreciated by the minor plaintiff, a 15-year old person. The trial court granted the motion for summary judgment and the appellate court

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reversed. The appellate court focused on the instructions and warnings given in the literature supplied with the trampoline and concluded that such extensive instructions and warnings demonstrated knowledge on the manufacturer’s part superior to that of purchasers and users. The court held that the manufacturer had a duty to warn because of its superior knowledge of the hazards and risks associated with the use of the trampoline. The notion that the open and obvious danger precluded liability appears to have mattered little to the appellate court.

In reversing the appellate court, the supreme court provided an excellent summary of case law relating to warnings generally, and the open and obvious exception in particular. The court noted that a product supplier has a duty to warn when the product has dangerous propensities, when there is unequal knowledge with respect to the risk of harm and the manufacturer possessed such knowledge and knew or should have known that harm may occur without a warning. However, the court also noted that no duty to warn exists when the danger is apparent or open and obvious to users. The court held that the duty to warn is to be determined by an objective analysis focusing on the awareness of an ordinary person. Whether the duty exists is a question of law.

The plaintiff in Sollami argued that the open and obvious risk doctrine had been inconsistently applied and suggested it be abandoned, providing a variety of examples in the case law regarding trampolines. Ultimately, the court decided that it is well settled law that manufacturers have no duty to warn of inherent properties of products obvious to all who come in contact with the product and the law should not change.

In deciding Sollami the court made reference to the appellate court’s analysis which had used the fact that instructions and warnings were provided with the trampoline to conclude that the risk of injury associated with the trampoline was not obvious and appreciated by foreseeable users and to show unequal knowledge, thus creating a duty to warn. The supreme court found that such analysis simply bootstrapped a duty to warn, and failed to focus on the initial question of whether the risk of harm was apparent to foreseeable users, regardless of the differential in knowledge between the manufacturer and the end user.

In concluding that the risk of harm was obvious, even to a minor, the court noted that the act of rocket jumping was designed to propel one jumper higher than the others. The court noted that once a person was propelled higher than normal, contact with the trampoline when coming down from a greater height would cause more impact than would otherwise occur. The court found that the danger of falling from a height had previously been determined by the courts to be open and obvious to any child old enough to be allowed away from home. The court also found that it would be apparent to anyone that the trampoline mat would react differently if more than one jumper was jumping on it at any one time. The court felt that an objective analysis demonstrated that a reasonable 15-year-old would appreciate the danger of jumping on the trampoline in the way this plaintiff jumped.

One thing of significance is that the court’s opinion does not address whether the minor plaintiff in Sollami had ever used a trampoline before. The court’s focus on an objective standard indicates that the plaintiff’s individual state of knowledge may have no bearing on whether the risk at issue is open and obvious.

Finally, one of the most recent Illinois Supreme Court cases addressing the issue of warnings is Blue v. Environmental Engineering, Inc. Blue involved a plaintiff who was injured when he stuck his foot into an industrial trash compactor owned by his employer, in an attempt to release some refuse that was stuck. Although when suit was filed, the plaintiff sued the compactor supplier under both strict liability and negligence, the case went to trial only on the negligence theory. At trial, the defendant manufacturer submitted a special interrogatory asking if the risk of injury by sticking a foot into a moving compactor was open and obvious. The jury answered “yes” but returned a general verdict for the plaintiff. The trial court found the verdict for the defendant to be inconsistent with the answer to the special interrogatory and entered judgment for the defendant. It is important to recognize that a lack of warnings was not the only defect alleged in the case.

Among the issues decided on appeal by the Illinois Supreme Court in Blue was whether the risk-utility test applies to negligence cases in a product liability context. The court decided it does not. In analyzing the issue, the court recognized that warnings-related defects are a type of design defect as distinguished from a manufacturing defect. The court noted that a manufacturing defect is the kind of defect best addressed by §402A of Restatement (Second) of Torts. In fact, the Blue opinion stated that the risk-utility test was promulgated as an alternative to the consumer-expectation test articulated by §402A for use in strict liability cases for this reason. The court also recognized that it was really not until the early 1970s that inadequate instructions and warnings began to be recognized as a design defect, a movement that began after it decided Suvada.

The court also found that the American Law Institute saw the inadequacy of §402A to address defective design and inadequate instruction and warning claims as distinguished from manufacturing defect claims, when it promulgated the Restatement (Third) of Torts: Products Liability. (A more thorough...
discussion of the Restatement’s treatment of warning claims appears below). The court recognized that, historically, in a typical products liability case, the negligence theory focuses on the conduct of the parties and the notion of fault; while “strict” liability purports to focus on the product itself, leaving conduct aside. Significantly, the supreme court observed that in the context of warning related defects, even under a strict liability theory, little practical difference existed between it and a general negligence theory. This observation was significant when compared to other Illinois Supreme Court and appellate court decisions regarding warnings related claims where such a distinction had been maintained, particularly given the approach used in §2 of the Restatement (Third) of Torts, upon which the court looked favorably.

Once the court set the groundwork, it began to address the warnings issue in the context of other purported design defects. It reiterated the longstanding rule that no duty to warn exists in a products liability case where the danger was apparent or open and obvious. The court observed that when the risk was obvious or generally known, the persons to whom a warning was directed already should have been aware of the danger and in that context a warning would not provide any effective, additional measure of safety. The court also observed that warnings that deal with obvious or generally known risks may be ignored by users and thus diminish the significance of warnings about non-obvious or generally unknown risks.

The defendant argued in Blue that the answer to the special interrogatory regarding the open and obvious nature of the danger controlled over the verdict and that it should result in a finding of non-liability. The supreme court disagreed, and found that the open and obvious nature of a potentially dangerous condition was not a per se bar to recovery so long as the defective design allegations were predicated on more than a failure to warn theory. For this reason the court found the special interrogatory should not have been given.

The supreme court in Blue appears to recognize that the differences between a failure to warn claim in the context of strict liability and a failure to warn claim in the context of negligence are minimal. Given the reasonableness component contained in §2 of the Restatement (Third) of Torts: Products Liability, which was cited with approval in Blue, a defendant should be permitted to proffer evidence to demonstrate the reasonableness of its conduct relating to warnings.

With guidance from the Illinois Supreme Court, the trial and appellate courts have been left to grapple with the myriad of issues that can arise in product liability cases. As discussed below, there are a number of defenses available to manufacturer and/or product supplier defendants. Clearly, the approach that will have the greatest likelihood of success is one that is focused on avoiding the duty to warn in the first instance. Otherwise, when left with the question whether your client’s warnings were adequate as provided, you most likely will end up with a question of fact and ultimately a trial.

III. POTENTIAL DEFENSES TO WARNINGS CLAIMS

There are a number of potential defenses available in cases involving claims of lack of warnings or inadequate warnings. Below is a non-exhaustive list of a few such defenses and defense strategies.

A. Open and obvious defects and known risks.

As the supreme court cases discussed above suggest, the best defense to a warnings claim is the argument that there is no duty at all because the danger is open and obvious. The existence of a duty is an issue of law for the court. If the defendant can overcome the imposition of duty, summary judgment becomes a more realistic prospect. The case law is replete with various cases and scenarios dealing with this aspect of the failure to warn issue.

One early case of interest, decided after Suvada, is the Illinois Supreme Court opinion in Fanning v. LeMay. In Fanning, as a result of a slip and fall accident in a laundromat, the plaintiff sued the property owner and manufacturer of the shoes she was wearing. The plaintiff charged that the shoes were not safe for use in walking on wet tile floors and that the manufacturer was negligent for using materials to make the sole of the shoes which it knew were not safe when used on a wet floor. The defendant successfully moved to dismiss, arguing that the shoes were not defective.

In affirming the dismissal and rejecting the plaintiff’s claim, the supreme court observed that regular shoes could hardly be characterized as dangerous or defective except to the extent that almost all shoes become slippery when wet. The court observed that injuries sustained as a result of the common propensity of a product does not make them dangerous in the sense that term is used for purposes of strict tort liability. The court went on to say that common articles, such as shoes, do not need to be accident proof and that manufacturers do not need to warn and protect against such mishaps. The court found that the plaintiff, as any other consumer, must be charged with the knowledge that shoes may be slippery when wet.

Similarly, in Genaust v. Illinois Power Company, the plaintiff, a contractor, was electrocuted when installing an antenna for a customer. Although the antenna did not actually

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touch a power line, it came close enough so that electricity arced from the power line to the antenna and traveled into the metal tower that the plaintiff was installing, resulting in electrocution. Among the defendants sued were the tower and antenna manufacturers. The plaintiff claimed that the products were unreasonably dangerous due to a lack of warning relating to the potential danger associated with electrical arcing if the products were brought in close proximity to electrical wires.  

In rejecting the plaintiff’s claims and affirming their dismissal by the trial court, the court stated that whether a duty to warn exists is a question of law for the court, a question that focuses on the issue of foreseeability. The court found it was approach should be used by the courts when addressing this issue. Although, unfortunately, not all courts have looked at these types of situations in that way, thankfully some have. In Huff v. Elmhurst-Chicago Stone Co., a concrete crew laborer sued a supplier of wet concrete after being burned while spreading liquid concrete supplied by the defendant. The plaintiff asserted both negligence and strict liability theories. The plaintiff claimed the defendant failed to furnish adequate warnings related to the caustic nature of the wet concrete. The case went to trial and a directed verdict was entered in favor of the defendant. On appeal, the plaintiff argued error due to the trial court’s finding that there was no duty to warn under either theory of recovery, because of the fact that wet concrete is commonly known to be caustic. 

At the trial in Huff, the plaintiff offered to produce evidence that the concrete at issue was unusually caustic. The evidence was based on expert testimony and the plaintiff’s own testimony that he had performed concrete work for 18 years, had been in contact with wet concrete throughout that time, and had never been burned prior to the date of the incident. There also was evidence at trial that it was common knowledge within the construction industry that wet concrete can cause burns to the skin and, for that reason, concrete workers including the plaintiff normally wore protective clothing. The plaintiff in Huff wore protective clothing. In addition while the delivery trucks had no warning signs or labels, the delivery tickets supplied by the defendant did contain a warning suggesting that skin contact with wet concrete be avoided. However, plaintiff had not seen the delivery ticket. 

The appellate court affirmed the directed verdict. It concluded that the caustic properties of wet concrete were matters of common knowledge, and that its propensity to burn upon prolonged contact was also well established. The appellate court further found that wet concrete was safe when proper precautions were taken to avoid exposure. Significantly, the court rejected the plaintiff’s argument that there was something unusual about the particular batch of concrete to which he was exposed on the date of the incident, noting that he claimed to have been exposed previously without injury. The court found that there was sufficient similarity between incidents in the past and the subject incident.

The court also rejected the argument that a warning was required. The court noted that a warning had been given, albeit not directly to the plaintiff. It was enough for the court that the plaintiff testified that he was already aware that exposure to wet concrete could burn him. The court found that the legal requirement for a warning is to apprise persons of dangers of which they have insufficient knowledge to enable them to take protective measures. Because the dangers were

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**The court found that the legal requirement for a warning is to apprise persons of dangers of which they have insufficient knowledge to enable them to take protective measures.**

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not objectively reasonable for these defendants to expect a person to be injured in the way this plaintiff was injured. The plaintiff admitted that the danger of electricity was common knowledge as was the fact that metal conducted electricity. On that basis, the court found it was not objectively reasonable to expect such a person to attempt to install a metal tower and antenna so close to electrical wires. 

The court seemed to be suggesting that the risk of injury was so great that it simply was not objectively reasonable for the defendants to expect that anyone would do what the plaintiff did. The court cited to its opinion in Fanning and acknowledged that the radio tower and antenna were not articles as ordinary as shoes; nevertheless, the court believed that the propensity of metal to conduct electricity was well known and common and that the danger was open and obvious. Therefore, there was no duty to warn. The tenor of the supreme court’s opinions in Fanning and Genaust was that a common sense
already generally known, and because the plaintiff had actual knowledge of them, there was no need to warn. Thus there was no duty to warn.\footnote{34}

In \textit{Jackson v. Reliable Paste & Chemical Company},\footnote{35} the plaintiffs were injured as a result of an explosion of shellac solvent used by one of the plaintiffs to cut glass. The solvent was spread on the glass and then lit on fire. The purpose of the burning solvent was to soften the glass for cutting. The plaintiffs’ employer purchased the solvent from a hardware store which in turn had purchased it from Reliable. Reliable manufactured the solvent from methanol which it purchased in bulk from two of the other defendants in the case. The plaintiffs sued the solvent supplier, Reliable, asserting theories of negligence and strict liability. The plaintiffs claimed that the solvent did not contain adequate warnings and instructions. In turn, the solvent manufacturer brought an indemnity claim against its bulk suppliers for failing to warn it about the explosive and flammable propensities of the raw ingredients in the solvent, in particular, methanol.

The methanol suppliers moved for summary judgment as to the cross claims, contending they did not owe a duty to warn Reliable, the solvent manufacturer, of the flammable propensities of the methanol because Reliable was already aware of those propensities and was responsible for the packaging and proper labeling of the solvent. The suppliers noted that the methanol was delivered to the solvent manufacturer in tanker trucks, and pumped into underground storage tanks using safety precautions to eliminate the potential for static electricity or sparks. Reliable formulated and packaged the solvent in a building with special wiring to avoid sparks. The solvent manufacturer’s president had actual knowledge of the flammable and explosive nature of the raw materials and personally designed the warning labels for Reliable’s solvent cans based on his own knowledge of chemistry and in reliance on various guidelines and regulations.\footnote{36}

The appellate court affirmed the grant of summary judgment in favor of the bulk suppliers. The court found there was no duty to warn about the raw material as the solvent manufacturer had actual knowledge of its dangerous propensities. The court described the abundant record demonstrating actual knowledge on the part of the solvent manufacturer about the raw material’s highly combustible characteristics. As much as the solvent manufacturer attempted to focus on the contents of warnings and the like, the appellate court looked to its state of knowledge to obviate any duty to warn.\footnote{37}

Another example of a warnings case is in \textit{Miller v. Dvornik}.\footnote{38} In that case the plaintiff was injured as a result of a motorcycle accident. Among the defendants was the motorcycle manufacturer as well as the dealer who sold the motorcycle to the plaintiff. The dealer’s motion to dismiss the strict liability and negligence claims against it was granted.

The evidence showed that the motorcycle in \textit{Miller} was not equipped with safety crash bars, an optional feature the plaintiff had declined to purchase. The dealer moved to dismiss the strict liability claim based on §2-621 of the Illinois Code of Civil Procedure, and the negligence count based on §2-615 of the Illinois Code of Civil Procedure. In defending against those motions, the plaintiff alleged that the dealer had actual knowledge of various defects and failed to warn about them. After the trial court dismissed the plaintiff’s claims against the dealer, the plaintiff appealed.\footnote{39}

On appeal the plaintiff argued that he was an inexperienced, 19 year old motorcycle rider at the time he purchased the motorcycle and that he was simply unaware of the dangers of riding it without the optional crash bars. The court noted that the fact that a motorcycle can crash and that the motorcycle operator could be thrown from the motorcycle was something well known and an inherent risk of operating a motorcycle. There was no allegation that the motorcycle itself malfunctioned or even that the installation of crash bars would have prevented the injuries. Because the court found the risks to be obvious, there was no duty to warn, notwithstanding the fact that the availability of the crash bars was within the knowledge of the supplier but not the plaintiff. This perceived disparity of knowledge of the risks and dangers was not enough to create a duty to warn.\footnote{40}

In \textit{Bates v. Richland Sales Corp.},\footnote{41} the plaintiff’s decedent was killed when he was crushed against building supports while operating a front-end loader. The representative of the decedent’s estate brought negligence and strict liability claims against the entity that sold the front-end loader to the decedent’s employer. The employer was a fertilizer and grain dealer who owned and used grain storage buildings. To keep the grain from bellying out of the walls, the buildings were reinforced with thick steel rods. The buildings were small. When the employer purchased the front-end loader from the seller, a demonstration took place so that the employer could be certain that the front-end loader would fit inside the building.

When sold, the front-end loader had a roll bar installed. There was evidence that the seller had an informal, internal policy that it would not sell to anyone who voiced a desire to remove the roll bar. Nevertheless, after the sale, the roll bar was removed to make the front-end loader more maneuverable in the grain storage buildings. Apparently, there was testimony at trial from the decedent’s co-workers that they all believed the roll bar was there solely to protect against a

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The decedent was killed as a result of operating the front-end loader to drag pipes backwards into the grain storage building. While performing this activity, the decedent backed up against one of the support rods in the building crushing him against the steering wheel. It was uncontested that, had the roll bar been present, the crushing incident would not have occurred. The defendant’s motion to dismiss the complaint was granted. The trial court found that the supplier had no duty to modify the roll bar to make it less easy to be removed and no duty to warn despite the fact that the supplier knew the front-end loader would be used in a building with a low ceiling. The trial court found that being crushed against a low hanging internal structure of the building was an open and obvious danger given the fact the roll bar was removed.

In discussing the warnings issue and, in particular, whether the supplier had a duty to warn the employer about the danger of operating the front-end loader without a roll bar, the appellate court affirmed the trial court and agreed that the crushing danger was open and obvious. The court in Bates discussed the supreme court’s decision in Sollami, noting that unequal knowledge was one of the key concerns underlying the issue of whether a duty to warn existed. The plaintiff’s primary argument was that an ordinary person would think a roll bar was for protection against a roll-over incident, not for protection against backing into a low hanging object.

The appellate court in Bates decided the plaintiff’s focus on the lack of roll bar was wrong. The real focus should have been on the loader’s propensity to crush human anatomy under the scenario presented. The court found that an objective, ordinary person would know that without some sturdy intervening structure to keep the driver separated from the support pole, the horse power of the front-end loader engine was sufficient to crush the driver against the support pole.

It should not be a surprise that conditions considered by many observers to be open and obvious defects, risks or dangers have not always been deemed to be open and obvious by the courts. In many cases involving what appears to be an open and obvious risk, the courts have found a duty to warn exists. One of these cases is Soto v. E.W. Bliss Division of Gulf & Western Manufacturing Co.

In Soto, the plaintiff’s hand was injured when it was crushed by the ram of a punch press the plaintiff was attempting to clean. The press was such that after the stop button was pushed, the fly wheel would continue to rotate while coasting to a stop. Unfortunately, during the coasting period, the press could be tripped and would operate. There were no warning signs on the press. The plaintiff testified that he thought the press would completely stop if he pressed the stop button. In order to clean the press, the plaintiff removed a guard. While he was beginning to clean the press, the guard fell, striking him. The plaintiff was startled and stepped back. In doing so, he stepped on the foot pedal and the ram of the press came down on his hand.

The plaintiff sued the press manufacturer alleging a failure to warn about the fact that the press could operate even after the stop button was pressed. An interlock device was available which would have prevented activating the press once the stop button was pushed. The manufacturer was aware that, so long as the flywheel was still moving, the press could continue to operate notwithstanding the stop button being pushed. The verdict was for the plaintiff, and the defendant appealed.

On appeal the defendant press manufacturer argued that, as a matter of law, it had no duty to warn that the press could still operate after the stop button was pushed. The defendant argued that the risks and dangerous propensity of the press to crush body parts were open and obvious. The defendant asserted that while the fly wheel was coasting to a stop, the press made the same noise as when it was activated (i.e., before the stopped button was pressed). The appellate court rejected this argument. The court found that if the noises were the same, the fact that the press could continue to operate even after the stop button had been pushed made the risk and danger even less obvious. On that basis, the court affirmed the verdict and found a duty to warn existed.

In Hayes v. Kay Chemical Company, a restaurant worker suffered chemical burns after wiping her body with a towel saturated with a chemical grill cleaner. The plaintiff had not saturated the towel with the grill cleaner; a co-worker had. Thus the plaintiff was unaware that the towel was wet with the grill cleaner, rather than water. The cleaner was odorless and colorless. The plaintiff brought an action against the cleaner supplier under strict liability and negligence, alleging a failure to warn against soaking a cloth with the grill cleaner. The cleaner supplier moved to dismiss, and the motion was granted. The defendant argued that the plaintiff was not the user of the cleaning product and that it had no duty to warn anyone coming into incidental contact with the product after it had been removed from its original container.

In finding a duty to warn in this instance, the appellate court acknowledged that foreseeability was the linchpin to its decision. Thus, the fact that the plaintiff herself was not the person who saturated the cloth with cleaner, or even used it as intended, was unimportant. Because the defendant admitted that the grill cleaner was caustic and dangerous and thus, according to the court, it was aware the cleaner could cause harm. Therefore, the court found a duty to warn existed. The
court believed the plaintiff’s use of the towel to wipe her hands was a foreseeable use.

The court also addressed the defendant’s contention that because the plaintiff had not handled the container, a warning label would not have affected the plaintiff’s behavior. The defendant characterized this as a duty it could not possibly fulfill as it would require a warning beyond what was on the package. The court declined to address this contention in a direct way. Instead it said that it was not prepared to say that the manufacturer’s duty to warn did not extend beyond labeling and packaging. The court suggested that perhaps the odorless colorless liquid should have been colored or provided a distinct odor.49

In Carrizales v. Rheem Manufacturing Company, Inc.,50 the plaintiff was injured when his gasoline soaked clothing was ignited by the flame of a gas-fired water heater manufactured by the defendant. The plaintiff brought an action asserting both negligence and strict liability against the water heater manufacturer and alleged several defects, including a lack of warning regarding the need to avoid bringing gasoline vapors in close contact with the gas-fired water heater.

The water heater was installed in a bathroom at the plaintiff’s employer’s automobile repair garage. The plaintiff accidentally splashed gasoline onto his body, including his face. He went immediately to the washroom to clean, and upon entry burst into flames. The defendant moved for and received summary judgment. The plaintiff appealed, arguing that there was not only a duty to warn initially with regard to avoiding close contact between gasoline vapors and the water heater but also a continuing, post-sale duty to warn.51

The appellate court in Carrizales reversed. The court provided a very long discussion regarding the various warnings related issues raised by the parties. The court stated that the duty to warn of a particular hazard would be present only when there was unequal knowledge between the manufacturer and users, either actual or constructive, and when the defendant knew or should have known that the injury could occur without the warning.

In the trial court, the defendant had argued that the danger of gasoline vapors being ignited by a flame was open and obvious. During argument on the summary judgment motion, the trial court took judicial notice of several facts, including that gasoline vapors can ignite, that gasoline vapors travel in air, and that fuel-energized devices such as the gas-fired water heater use air to sustain themselves. On appeal, the plaintiff argued that at least some of these facts, in particular the latter, were not matters of which judicial notice could be taken. The appellate court agreed.

The appellate court observed that it would not be clear to most persons that this particular water heater was gas-fired as it was very similar in appearance to electric water heaters. The fact that the plaintiff did not know that this water heater was gas-fired, in conjunction with the trial court’s erroneous judicial notice as to the nature of the water heater’s air source, led the appellate court to find that the danger in this instance was not open and obvious.52

Once the court found the danger at issue was not open and obvious, it examined the duty to warn. Noting that the key inquiry was foreseeability, the court agreed with the plaintiff’s argument. It found that, while the sequence of events which led to injury in this instance may not have been foreseeable, it was foreseeable that gasoline vapors could be ignited by a pilot light when close enough to the water heater. The court made this finding notwithstanding the defense argument that while warnings may be an effective deterrent in a situation involving gasoline storage and other flammable liquids, warnings would not have worked in this case because the plaintiff would not have had the opportunity to heed the warnings, due to the immediate need to wash the gasoline off his face. The court rejected this argument by concluding that if the plaintiff had been exposed to a warning each day he passed by the water heater, somehow his behavior in this emergent instance would have been different.

The defendant also contended that the water heater itself was not unreasonably dangerous. Nevertheless, due to a disparity in relative knowledge and awareness of the risk associated with gasoline vapor and an open flame as an ignition source, the Carrizales court effectively found a duty to warn without a finding that the water heater was unreasonably dangerous. While acknowledging that the precise sequence of events may not have been foreseeable, the court found that the injuries were. In effect, the court found that the sequence of events itself was irrelevant. Because the defendant knew the risk of burn injuries was a foreseeable risk given that pilot lights can ignite gasoline vapors, it did not matter to the court whether the precise manner in which those injuries occurred was foreseeable.53

One good thing the court did in Carrizales was to examine the issue of whether there was a continuing, post-sale, duty to warn. The court observed that Illinois courts had been reluctant to impose a duty to warn beyond the time the product left the control of the manufacturer. The court found it was reasonable public policy not to impose a continuing post-sale duty to warn against a hazard discovered after the time the product left the manufacturer’s control. Although acknowledging that other states had imposed such a duty, the court declined to do so under the facts of this case. The court recognized that

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placing a continuing duty on manufacturers could discourage manufacturers from developing safer products as technology to reduce hazards typically evolves over time.54

It is difficult to discern any type of trend or firm guidance from the cases relating to whether a defect is so open and obvious that no duty to warn exists. The courts appear to take each situation separately, and analyze it based on its own unique facts and circumstances. Nevertheless, it appears that to avoid a duty to warn based on the obvious nature of the hazard, the hazard or risk must be so clear and obvious that hardly any person could deny its existence. Particularly after Carrizales, it does not seem to matter that the precise scenario for injury was unforeseeable.

B. Exceptions to the duty to directly warn end users.

As indicated above, there are a number of exceptions to the requirement that warnings be directed to the end user. One exception is called the learned intermediary exception, which typically is applicable in the context of suits involving prescription medications. The Illinois Supreme Court adopted the learned intermediary exception in Kirk v. Michael Reese Hospital and Medical Center,55 a case with some unusual facts.

In Kirk the plaintiff was a passenger in a car driven by a person who had been a psychiatric patient at Michael Reese Hospital. The patient had received prescriptions for various medications. After discharge from the hospital, the patient had an alcoholic drink before driving the car in which the plaintiff was a passenger. The car struck a tree and the plaintiff was injured. The plaintiff sued the hospital and physicians alleging that they negligently failed to adequately warn the patient about the tendency of the medications to diminish the patient’s mental abilities.

The plaintiff also sued the drug manufacturers on a strict liability theory, alleging that the manufacturers failed to adequately warn of the dangerous propensities of the drugs, particularly that the physical and mental abilities of the user would be diminished. The drug companies moved to dismiss for failure to state a cause of action. The motion was granted. The appellate court reversed, finding that each of the defendants, including the drug manufacturers, had a duty to adequately warn the patient directly of the potential adverse affects of the medications.

As is so often the case, the court began its discussion by laying out the general rule first announced in Suvada56 that a manufacturer of an unreasonably dangerous product would be liable and then recognizing that prescription drugs could be deemed unreasonably dangerous due to the absence of adequate warnings. The plaintiff argued that in the context of prescription drugs, the duty to warn is owed to the public generally and that it is not enough to simply warn the prescribing physicians.

The Kirk court noted that there had been prior Illinois appellate court decisions that had adopted the learned intermediary doctrine.57 But the supreme court had not directly addressed the issue in the past. The supreme court started its analysis with the general rule that manufacturers of prescription drugs have a duty to warn the prescribing physicians of the known dangerous propensities of medications, leaving it to physicians to use their medical judgment in terms of what information should be conveyed to the patient.58 In discussing the rationale for this rule the court looked to an 11th Circuit Court of Appeals case, Stone v. Smith, Kline & French Laboratories.59

The Stone court noted that the limited obligation to advise only the prescribing physician of potential dangers, instead of foreseeable ultimate users, was the result of the complexities associated with prescription medications and the intervening role of the medical professional. The court believed that it was medical professionals who were best placed to account for this unique situation. Physicians were trained to know of the propensities of drugs as well as the unique susceptibilities of the patient, while tasked with the responsibility of weighing the benefits of using any such medications against potential dangers. In that sense, the prescribing physician acted as a “learned intermediary” between the drug manufacturers and the ultimate users.

The court recognized that there is a standard methodology used in the industry for communicating information regarding prescription medications to physicians; and that there is a need for physicians to use medical judgment to decide what information should be communicated to the patient based on their unique experiences. Agreeing with Stone, the Illinois Supreme Court adopted the learned intermediary doctrine in Kirk.60

After doing so, the supreme court examined the plaintiff’s argument that the medications were unreasonably dangerous because the warnings given to the physicians were inadequate. Under the unique circumstances involved in this case, the court characterized plaintiff’s effort as attempting to put “the cart before the horse.”61

Note that the plaintiff in Kirk was not the patient for whom the drugs had been prescribed. The plaintiff was a passenger in a car driven by the patient. The court found that the primary inquiry was whether the plaintiff was a person entitled to the protections afforded by the concepts of strict liability. The court held that whether strict liability in tort applied to any particular conduct was a function of whether the conduct was reasonably foreseeable. The court concluded that the drug manufacturers should not be held to have reasonably foreseen
that medications would be dispensed by physicians without the warnings the drug companies gave, followed by the patient drinking alcohol, driving a car and losing control of the car.

Subsequent to Kirk, the Second District Appellate Court had an opportunity to address the learned intermediary doctrine in the context of a negligence claim involving a pharmacy. In Leesley v. West, the plaintiff sued her physician, a pharmacy, and the drug maker for damages resulting from bleeding caused by the use of a prescription medication. The plaintiff asserted both negligence and strict liability theories against the drug maker and the pharmacist. The plaintiff argued that liability attached because there was no direct warning to the plaintiff by either the drug maker or the pharmacy. The trial court dismissed these counts and an appeal was taken by way of certified questions.

On appeal, both the drug manufacturer and the pharmacy asserted the applicability of the learned intermediary doctrine. After the questions were certified, but before the appellate court rendered its opinion, the supreme court decided Kirk. Relying on Kirk, the appellate court in Leesley found that the question concerning the dismissal of the strict tort liability claims as to the drug maker effectively had already been determined by the Kirk decision. However, the court addressed the negligence claims.

The appellate court found that there was no reason to not apply the learned intermediary exception to a negligence claim. Interestingly, and somewhat foreshadowing the supreme court’s decision in Blue, the Leesley court looked to Restatement (Second) of Torts, §388, which addressed a product supplier’s negligent failure to warn. The court observed that the issue in the context of warnings was not whether there was negligence in the manufacturing process, but instead in the decision to warn. This led the Leesley court to find that the manufacturer’s duty would be the same under either a negligence theory or a strict liability theory. Of course, the significance is that in a negligence claim, the conduct of the parties is relevant, and the analysis does not involve a focus on the product and whether it was unreasonably dangerous.

After finding no reason to differentiate between negligence and strict liability theories in applying the learned intermediary doctrine, the appellate court then addressed the issue of the pharmacist’s duty. The court observed that previously no Illinois court had addressed the issue of whether there should be a difference in the duty to warn between a drug manufacturer and a pharmacist. Given its prior conclusion that when a manufacturer has given the required warnings to the prescribing physician the drug is not an unreasonably dangerous product, the court found that it would be anomalous to find that the same medication somehow became unreasonably dangerous when it reached the possession of the pharmacist despite no changes in packaging or the drug itself. Thus, regardless of the theory of recovery, the Second District Appellate Court found no independent duty of pharmacists to warn their customers.

However, pharmacies are not always able to use the learned intermediary doctrine to obviate a duty to warn the ultimate user, its direct customer. In Happel v. Wal-Mart Stores, Inc., the plaintiff sued her pharmacy, Wal-Mart, after having an adverse reaction from taking a prescription pain medication. Significantly, the plaintiff had been to the Wal-Mart store a number of times to have other prescriptions filled, and had provided information regarding her drug allergies to the Wal-Mart pharmacist at Wal-Mart’s request. The prescribed medication was contraindicated for persons who had the type of drug allergies the plaintiff had. There was evidence that Wal-Mart pharmacies sought information about customer drug allergies and that this information was kept in an accessible database to alert the pharmacist to any potential negative interactions. In this instance, despite this information being available, the prescription was filled. Although there were directions on the bottle of pills the plaintiff received from the pharmacy, there were no warnings about contraindications. The plaintiff took the medicine and became ill.

The plaintiff filed suit, and Wal-Mart moved for summary judgment asserting, among other things, the learned intermediary doctrine. Summary judgment was granted to Wal-Mart and the plaintiff appealed. The case eventually made its way to the Illinois Supreme Court. The supreme court reversed the summary judgment. In so doing, the supreme court examined the rationale for the Second District Appellate Court’s decision in Leesley, and found important distinctions.

One of the concerns expressed by the Leesley court, and others, was that the imposition of a duty to warn on the part of a pharmacist would put the pharmacist in the middle of the doctor-patient relationship without having the physician’s knowledge of the patient. In Happel, the supreme court acknowledged the validity of that concern but found both that Wal-Mart had actual knowledge of the plaintiff’s drug allergy and that the prescribed medication was contraindicated for persons such as the plaintiff. Given the circumstances, the supreme court found that imposing a duty to warn of this particular type of contraindication would not place a burden on the pharmacist to know the customer’s condition and monitor his or her drug use. The court suggested that the duty could have been fulfilled by notifying the treating physician who prescribed the medication or notifying the plaintiff.

As a result, the court found the scope of protection provided to pharmacists by the learned intermediary doctrine was lim-

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The jury found that the court accepted as true the plaintiff's evidence that the defendant had tested its product components were sensitizers. After a verdict in favor of the plaintiff, the trial court denied the defendant's motion for judgment NOV, and the defendant appealed.

In Presbrey, plaintiff sued Gillette due to injuries purportedly related to the use of an antiperspirant. The plaintiff alleged that the defendant failed to sufficiently test the product and warn of its inherent dangers. Evidence at trial revealed that the plaintiff reacted to minute-sized particles released from the aerosol spray resulting in a systemic antibody reaction. The evidence revealed that the defendant had tested its product which revealed no reaction similar to that which the plaintiff suffered. Nevertheless, during the time the product was being developed, complaints were made to the FDA regarding similar products, although the defendant had received only one complaint. The FDA research did not find that the product components were sensitizers. After a verdict in favor of the plaintiff, the trial court denied the defendant's motion for judgment NOV, and the defendant appealed.

In finding no duty to warn, the court noted that other jurisdictions had found that the unusual susceptibility of a consumer was recognized as a complete defense where the manufacturer was unaware, and had no reason to know, that very few users of the product might be injured. The court's conclusion was that if a product did not threaten severe harm to the ordinary consumer, it was reasonably fit for the purpose for which it was sold, i.e., it was not unreasonably dangerous. The court concluded in this way regardless of the plaintiff's theory of recovery. A manufacturer in such an instance has no duty to warn of a risk that is remotely possible to an unknown few persons. This conclusion was reached despite the fact that the court accepted as true the plaintiff's evidence that the plaintiff was injured as a result of the use of the antiperspirant. Once the defendant demonstrates that the product's ingredients are not known sensitizers or irritants, the jury will not be allowed to infer that the product will injure most persons or normal persons.

Thus, even where a person is genuinely injured by the use of a product so long as the defendant can demonstrate that it was unaware that the general population would not suffer an injury of the type the plaintiff claims and that plaintiff's injury is idiosyncratic, the defendant should be able to successfully argue the product is not unreasonably dangerous. Thus a warning regarding the potential for an idiosyncratic reaction need not be provided.

Lastly, in the context of industrial products, a defendant can attempt to use a sophisticated user defense or a bulk supplier defense. These strategies focus on the notion that the plaintiff's employer is best positioned to protect workers against risks and dangers known to industry. So long as the supplier warns its customers, e.g. the plaintiff’s employer, there either is no duty to warn the end user or any such duty is discharged. A more thorough discussion of these defenses was the subject of a recent IDC Quarterly Monograph, and to which the reader is referred for a more detailed analysis and discussion of relevant cases.

C. Federal Preemption.

The availability of the defense of federal preemption of state law related to warnings claims should be considered in all cases involving products liability, and particularly in cases involving products subject to significant federal regulation. A previous IDC Quarterly Monograph explored the scope of federal preemption and analyzed case law under specific federal statutes and regulations frequently cited in preemption cases. This section provides a short discussion of federal preemption in failure-to-warn cases.

The authority for federal preemption arises from the Supremacy Clause of the United States Constitution. The key inquiry in any preemption analysis is the intent of Congress. Case law reveals three circumstances under which federal law may preempt state law: (1) where a federal statute explicitly preempts state law (express preemption); (2) where there is a conflict between federal and state law (implied conflict preemption); and (3) where a comprehensive federal regulatory scheme is enacted, thereby removing the field from state regulation (implied field preemption).

Consideration of the availability of a federal preemption defense requires a careful analysis of the specific federal statute in issue. Furthermore, federal regulations promulgated pursuant to statutory authorization may preempt state statutory, regulatory or common law. When presented with a federal preemption argument, the court will consider the specific “language of the statute, the statutory framework
surrounding it, the structure and purpose of the statute as a whole, and ‘the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law.’”

The Illinois Supreme Court analyzed the impact of the express preemption provision of the Federal Hazardous Substances Act (FHSA) in Busch v. Graphic Color Corporation. In Busch the plaintiff alleged that the manufacturer of a paint stripper product failed to warn of the danger of death by asphyxiation, resulting in the death of her decedent from exposure to paint stripper fumes. The court reviewed federal case law on the preemptive scope of the FHSA, as well as the preemptive provision of the Act. This review revealed that “Congress intended to preempt all nonidentical state laws proposing cautionary labeling requirement addressing the same risk of illness or injury as the FHSA.” Further, the court found that this preemption extended to common law failure to warn claims seeking to impose requirements for labeling which are different from the federal law requirements.

The Busch court relied upon the U.S. Supreme Court’s decision in Cipollone v. Liggett Group, Inc. In Cipollone, the Court analyzed an amendment to the Cigarette Labeling and Advertising Act which barred the imposition of any state law requirement or prohibition regarding health warnings on cigarette packaging. A plurality of the Court determined that Congress’ express prohibition of state regulation evidenced an intent to bar common law tort claims. Applying this analysis to the FHSA, the Illinois Supreme Court determined that the FHSA’s express bar to state imposition of cautionary labeling requirements for substances governed by the labeling requirements of the FHSA extended to bar common law failure-to-warn claims that seek to impose different labeling requirements than those mandated by federal law.

Similarly, failure to warn claims for products regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) have also been deemed preempted. In Traube v. Freund, the plaintiff alleged that his lake was contaminated by pesticide run off from an adjacent farm, which resulted in the death of thousands of bluegill fish. The plaintiff sued the adjacent farmers, on whose property the pesticide was applied, as well as the manufacturer of the pesticide. The plaintiff sought recovery from the manufacturer for nuisance and for ultrahazardous activity. The trial court determined that these claims were preempted by FIFRA.

The appellate court noted that FIFRA “expressly preempts any state-law claim that directly or indirectly challenges the adequacy of the warnings or other information on a pesticide’s approved product label.” Further, the preemptive effect was not dependent upon the specific name the plaintiff applied to the cause of action. As the plaintiff’s nuisance and ultrahazardous activity claims represented an attack on the adequacy of the label, these state law claims were preemted.

The U.S. Supreme Court case, Bates v. Dow Agro Sciences, has led to significant speculation concerning the scope of preemption under FIFRA and under statutes such as the FHSA, which contain similar, express preemption provisions. Bates was a suit brought by peanut farmers who claimed that their crops were damaged by use of a herbicide. The plaintiffs asserted that the approved labels failed to warn that alkaline soil conditions would result in stunted crop growth.

The Supreme Court in Bates considered the express preemption provision of FIFRA, which prohibits states from imposing labeling or packaging requirements “in addition to or different from” the requirements under FIFRA. The Court held that preemption, therefore, applies only to state requirements, including enactments, rules and common law duties, which set out labeling requirements different from FIFRA’s. Thus, claims for defective design, defective manufacture, negligent testing and breach of warranty are not preempted; as such claims do not involve a mandate of a particular form of

In rejecting the defendant’s preemption argument, the court noted that federal law provided only minimum standards for labeling of pharmaceuticals and that the manufacturers were specifically encouraged, pursuant to the regulations, to strengthen warnings without prior approval of the regulatory agency.

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label or packaging. Further, requirements for labeling which are equivalent to, or consistent with, the labeling requirements under FIFRA are also not preempted. This “parallel requirements” test requires an analysis and comparison of the state and FIFRA requirements to determine if the state action is preempted.

Osman v. Ford Motor Company provides an example of implied preemption pursuant to a federal regulation. In that case the plaintiff’s decedent was ejected from the driver’s seat of a vehicle in a rollover accident. The vehicle was equipped with a manual lap belt, which the driver was not wearing at the time of the accident, and a passive shoulder restraint system. The plaintiff alleged that the manufacturer failed to provide adequate warnings of the risk of injury associated with the use of the passive restraint system without the use of the manual lap belt.

The appellate court found that the plaintiff’s strict liability and negligence claims were preempted. The federal regulatory scheme then in effect provided vehicle manufacturers with restraint options. The court noted that the Federal Motor Vehicle Safety Standard selected by the manufacturer allowed the use of the shoulder restraint without the use of a lap belt. The defendant therefore could not be required to warn of the danger of the failure to use a lap belt when no lap belt was required by the federal standard. Thus, the claim was impliedly preempted, because allowing it to proceed would frustrate Congressional intent.

Verb v. Motorola addressed federal preemption pursuant to the authority of the Federal Communications Commission (FCC) and the Food and Drug Administration (FDA). The plaintiffs were users of cellular telephones who alleged that the manufacturers failed to warn of the potential that cellular phones were unsafe. The appellate court noted that the responsibility of the FCC did not include public safety, and therefore Congress had not precluded state law action on this safety issue.

However, the court further noted that the FDA regulated public health issues associated with electronic products emitting radiation pursuant to the Electronic Product Radiation Control Act. The Act expressly authorized the FDA Secretary to establish standards to control radiation emissions from electronic products “if he determines that such standards are necessary for the protection of public health and safety.” The plaintiffs asserted that preemption did not apply because the regulatory agency had not established any standards pursuant to the authority accorded by the Act. However, the court noted that the power to set such standards resided exclusively with the FDA, and any action by a state court would usurp this exclusive power. Therefore, the failure-to-warn claims were preempted.

Courts have rejected preemption arguments in cases involving pharmaceuticals. For example, in Caraker v. Sandoz Pharmaceuticals Corporation, the plaintiff alleged that the defendant failed to warn of the risk of stroke associated with the defendant’s postpartum drug. The court employed a conflict analysis, noting that conflict preemption may arise where there is a direct conflict between state and federal law, or where the state law serves to obstruct or frustrate the Congressional purpose and objective. The court further noted a basic assumption against preemption in the absence of a clear intent to override state law. This anti-preemption presumption is heightened in cases involving areas traditionally left to the states, such as the protection of the health and safety of its citizens.

In rejecting the defendant’s preemption argument, the court noted that federal law provided only minimum standards for labeling of pharmaceuticals and that the manufacturers were specifically encouraged, pursuant to the regulations, to strengthen warnings without prior approval of the regulatory agency. Accordingly, there was no direct conflict between state and federal law, and any state requirements for additional warnings would not frustrate Congressional intent.

Earlier this year, the FDA issued a new rule modifying labeling requirements for prescription drugs and biological products. In addition to providing significant changes in drug labeling requirements, in the preamble to the rule the FDA set forth its view that certain state product liability actions involving allegations of inadequate warnings were preempted. This pronouncement should be considered by any defense practitioner in cases involving federal preemption of state prescription drug claims.

IV. ADEQUACY OF WARNINGS

Once the determination is made that a warning is required, the question arises regarding how its adequacy is measured. Once the defendant reaches this stage, summary judgment would appear to be almost impossible and trial inevitable. Below are a few cases that discuss warnings, each one finding warnings to be inadequate under the circumstances presented.

In Nelson v. Hydraulic Press Manufacturing Co., the plaintiff sued a manufacturer of a plastic injection molding machine as a result of injuries received from the machine. The plaintiff was a machine maintenance man. The machine at issue melted raw plastic and then shot the plastic into molds. At the time of the incident the machine was being cleaned. A clog of material was discovered and workers were in the process of removing the blockage. The plaintiff was informed of the
blockage and was observing the effort to solve the problem from a ladder. As he was descending the ladder, molten plastic erupted from the machine, knocking the plaintiff off the ladder and burning him.

At trial, the plaintiff argued that the machine was not reasonably safe because it lacked proper instruction for operation and maintenance, it failed to contain any warnings regarding the potential for molten plastic erupting during cleaning operations, and the defendant was aware of these problems. The machine contained no warning labels at all regarding the potential for molten plastic erupting during the cleaning process. However, the machine did have a number of warnings present on the machine, including warnings advising users about placing hands inside the machine or operating it while clearing obstructions. Evidence at trial showed that the manufacturer was aware of the danger of molten plastic being ejected from the machine during cleaning operations. Because the defendant did not warn about this particular danger, the warnings they supplied were found to be inadequate.

In *Pell v. Victor J. Andrew High School*, a high school student was paralyzed after an accident involving a mini-trampoline. The minor plaintiff was a gymnast and was injured after performing a somersault. The school district bought the mini-trampoline in an unassembled state. A faculty member assembled it. The trampoline came with a heat laminated caution label affixed to the bed of the trampoline. When the mini-trampoline was assembled, the side of the bed was placed so that the caution label faced the floor and was not visible to someone using the trampoline. There were printed warnings around the frame of the mini-trampoline, but they were covered by the frame pads. The plaintiff filed suit against the mini-trampoline manufacturer alleging a failure to warn regarding use of the trampoline without a harness, safety belt or supervision by trained instructors. The plaintiff won at trial and the defendant appealed.

The defendant argued, in essence, that the mere act of supplying a warning itself was adequate. The appellate court disagreed. In affirming the trial court, the appellate court discussed various factors that courts use to determine whether a warning is adequate. The court stated:

Warnings must be adequate to perform their intended function of risk reduction. Warnings may be inadequate, however, if they: (1) do not specify the risk presented by the product; (2) are inconsistent with how a product would be used; (3) if they do not provide the reason for the warnings; or (4) they do not reach foreseeable users.

Given the above, the court compared the facts of the case to the factors it described. The court noted that the warning did not specify the risk of severe spinal cord injury which would result in permanent paralysis while somersaulting from the trampoline if performed without a spotter or safety harness. The coach present at the time of the accident testified that she was unaware that there was any unique risk of spinal cord injuries associated with the mini-tramp as distinguished from other gymnastic equipment.

In addition, the court found that the location of the warnings was inconsistent with the equipment’s use in that, for example, the instructions did not specify that the warning label on the bed of the mini-tramp should be assembled so that it was clearly visible to a user (i.e. facing up). Additionally the warnings on the sides of the metal frame were seen as ineffective because they were covered by the frame pads. The court noted that the defendant, as a member of an equipment safety association, was familiar with the warnings that the association recommended should be clearly visible to users and what they should say. Finally, the court observed that the manufacturer had a trampoline safety certification clinic but that no one from the school had attended due to lack of funding.

In *Collins v. Sunnyside Corporation*, the plaintiff was injured after suffering a burn while using acetone to clean paint spots on a tile floor. The plaintiff had poured the acetone into a bucket and mopped the floor with it. After a few minutes, the floor started on fire. The ignition source for the acetone was the pilot light for a water heater. The plaintiff sued and alleged that the acetone was unreasonably dangerous due to inadequate warnings regarding the extreme flammability of the acetone. The defendant moved for summary judgment, and in so doing provided an expert affidavit from one of its employees that the warning label was consistent with labeling recommended by trade associations and various governmental agencies.

It is useful to see what the label in this case said as its verbiage is consistent with many labels routinely seen on similar products. The label stated:

**ACETONE**

Sunnyside Acetone is a powerful, fast evaporating chemical. These characteristics make it a valuable solvent for industrial and home use. It is widely used as a solvent for celluloid, various resins, epoxies, vinyls, lacquers, contact cements, plastics, dope, and adhesives. Because Acetone is a very strong solvent, it may be harmful to some materials. Always test before using to avoid damage.

(Continued on next page)
CAUTION CONTAINS ACETONE

Keep away from heat, spark and open flame. Avoid rubbing; friction may cause static electric sparks. Avoid contact with eyes or skin. Avoid breathing of vapor or spray mist. In case of eye contact, flush thoroughly with water and get medical attention; for skin contact, wash thoroughly. Close container after each use. Do not transfer contents to unlabeled containers. Vapors may ignite explosively. Extinguish all sources of ignition during use and until all vapors are gone.

Use only with adequate ventilation.

KEEP OUT OF REACH OF CHILDREN

The trial court granted summary judgment, primarily because the plaintiff did not have an expert to rebut the defendant’s expert’s affidavit regarding the adequacy of the warning. On appeal the plaintiff argued that because the issue of warning adequacy was typically a fact question, summary judgment was improperly granted. The appellate court agreed.

The court discussed the law relating to the adequacy of warnings noting that this was typically a jury question. It laid out the factors described above that were articulated by the court in Pell. In finding that a jury question existed as to the adequacy of the warnings the court in Collins found that jury questions included issues such as what the meaning of “adequate ventilation” is and whether the plaintiff genuinely appreciated the dangers described in the warning. Curiously, the court reversed the grant of summary judgment despite the fact that the plaintiff never countered the defense expert’s affidavit, thus leaving it not rebutted.

Another interesting case involving a product with extensive warnings on its packaging is Byrne v. CM Corporation. In Byrne, the plaintiff sued the manufacturer and the distributor of an epoxy paint after purportedly sustaining brain damage due to exposure to epoxy paint fumes. The plaintiff was a painter who had used the paint as part of a painting job at work. The epoxy paint consisted of two components which came in two separate containers. The constituents were to be added together before using. The court’s opinion contains a verbatim recitation of the various warnings. The warnings contain phrases that are common on similar types of products, such as “vapor harmful,” “use only with good ventilation,” etc. The labels were observed by plaintiff’s co-worker, and there was nothing obscuring the labels; so the warnings could be read. The case went to trial with only the strict liability count remaining.

The evidence at trial focused on the warnings but, in particular, the issue of recommended respiratory protection or the lack thereof. The plaintiff’s expert testified that respiratory protective devices were required and that the warnings should have said so. There also was criticism of the phrase: “use only with good ventilation” as being ambiguous.

The experts compared the information contained in the defendant’s material safety data sheets (MSDS) with the information on the labels relating to recommended respiratory protection. It was noted that the MSDS recommended specific types of respiratory protection, while the labels did not. One of the defendant’s employees testified that the MSDS had more information about recommended respiratory protection than the label. He admitted that if users did not see the MSDS, relying on the label could present a problem in that not enough information would be conveyed. The evidence also showed that changes to this label were made later in time, which contained recommendations regarding the type of respiratory protective devices. After a verdict was rendered for the plaintiff, defendant appealed.

The appellate court affirmed the verdict, and in so doing, addressed the warning issues. The defendant argued that either there was no duty to warn because the danger was known to the plaintiff or, if a warning was required, the warnings were adequate as a matter of law. The appellate court disagreed with both contentions. The court noted that experts at trial testified that the labels were not adequate. The warnings on the labels were deemed inadequate, particularly in relation to the precise safety equipment needed to protect the user. Material safety data sheets, which arguably contained this information, were never provided to foreseeable users. Although the plaintiff, as an experienced painter, may have been aware of some danger associated with painting with epoxy paint, the specific need for ventilation and respiratory protection was something about which the plaintiff was unaware. The court found that unless the danger was fully obvious and generally appreciated, a duty to warn existed.

While the discussion above is not an exhaustive study of the cases on the issue, the reader should be able to obtain from it an understanding of how the courts deal with the issue of adequacy of warnings. There is little doubt that unless the fact situation mirrors the precise hazard which your client’s warning is designed to address, it is likely that the warning may be found inadequate.
V. THE RESTATEMENT VIEW

A. Introduction

Modifications made in the Restatement (Third) of Torts: Products Liability (“Third Restatement”), regarding product defect claims based on inadequate instructions and warnings reflect the American Law Institute’s recognition of certain shortfalls in the treatment of such issues by the Restatement (Second) of Torts (“Second Restatement”). For example, section 402A of the Second Restatement was “created to address manufacturing defects, [but] did not adequately cover design defects or defects based on inadequate warnings.”

Another significant difference between the Second and Third Restatements pertains to the treatment of the “open and obvious” defense. In contrast to the Second Restatement’s declaration that the defense provides an absolute bar to recovery, the Third Restatement “has noted a course change in products liability cases, recognizing that the strong majority rule is now that the open and obvious nature of a product is not necessarily an absolute bar to recovery.”

Although Illinois has not expressly adopted the provisions of the Third Restatement with regard to liability for inadequate product warnings, the possibility has not been dismissed by the Illinois Supreme Court. Across the United States, different jurisdictions have had varied responses to the treatment of the issue of liability for defective products under section 2 of the Third Restatement. Although many states have rejected the Third Restatement outright, at least one state has adopted the provision.

The following sections will outline the treatment of product warnings by the Second and Third Restatements and the movement by the Illinois courts toward embracing the Third Restatement and its handling of failure-to-warn claims.

B. Restatement (Second) of Torts

1. Negligence Claims for Failure to Warn

Section 388 of the Restatement (Second) of Torts governs the duty to warn in negligence actions, imposing liability on suppliers of chattels who fail to exercise reasonable care to inform expected users of the chattel, or those probable users who could become endangered by its use, of the chattel’s dangerous condition. Such liability will arise in any of three instances: first, if the supplier knew or had reason to know that the chattel was or was likely to be dangerous for the use for which it was supplied; second, if the supplier had no reason to believe that the user would realize the chattel’s dangerous condition; and third, if the supplier failed to exercise reasonable care to inform the user of the chattel’s dangerous condition or of the facts that make it likely to be dangerous. A supplier is absolved from liability, however, “where the dangerous condition is one which a consumer would be expected to realize.”

Illinois courts have consistently applied the provisions of section 388 of the Second Restatement of Torts when deciding cases regarding the duty to warn and have acknowledged that courts in other jurisdictions have also uniformly relied on the section. For example, in Quinton v. Kaffer, the Illinois Appellate Court for the Second District recognized that “when a claim is based on negligence for failure to warn of the dangerous propensities of a chattel … the duty to warn is governed by section 388 of the Restatement (Second) of Torts.”

Most significantly, however, the Quinton court acknowledged that in applying the “open and obvious doctrine,” Illinois courts have consistently relied on comment k to section 388 of the Second Restatement of Torts. Moreover, the open and obvious doctrine, which declares that “where a danger is open and obvious, there is no duty to warn a consumer of that danger,” has been established as clear precedent in Illinois. The reasoning behind this doctrine is that nothing is gained by providing a warning for a dangerous condition that is generally recognized and already obvious to the average consumer; thus, while a duty of care is satisfied by providing a warning, in instances where a danger is open and obvious, the obvious nature of that danger is the equivalent of a warning.

The Illinois courts have consistently relied on the provisions of section 388 and, based on the principles of the section, barred the plaintiff’s action for wrongful death. The court determined that the defendant could not be subject to liability for the death because under section 388, it is “only liable for injuries to those whom it ‘should expect’ to use the [product]… or to those whom [defendant] ‘should expect… to be endangered by its probable use’ when used ‘in the manner for which and by a person for whose use it is supplied.’” In addition, the Busch court recognized that under comment e of section 388, the scope of the defendant’s liability did not extend to bodily harm caused by the use of the product by a third person “without the consent of him for whose use it is supplied.”

2. Strict Liability Claims for Failure to Warn

Section 402A of the Restatement (Second) of Torts imposes strict liability for physical harm caused by defective products. Thus, in Illinois, to recover under strict liability in tort for a defective product, a plaintiff must prove that an unreasonably dangerous condition existed in the product at the time it left the manufacturer’s control, and that the condi-
tion proximately caused the plaintiff’s injury or damage.  

In *Hunt v. Blasius*, the Illinois Supreme Court, based on section 402A of the Second Restatement of Torts, declared that “strict liability applies only when the product is ‘dangerous to an extent beyond that which would be contemplated by the ordinary [person]… with the ordinary knowledge common to the community as to its characteristics.’” The test articulated by the *Hunt* court and based on section 402A of the Second Restatement of Torts has come to be known as the “consumer expectation test” and has consistently been applied by Illinois courts in strict products liability cases. However, as the court recognized in *Wortel v. Somerset Industries, Inc.*, Illinois does not exclusively require the application of the consumer expectation test in design defect cases, and since the *Lamkin v. Towner* decision in 1990, the “risk-utility test” may also be applied.

In Illinois, the open and obvious doctrine, outlined in comment k to section 388 of the Second Restatement of Torts, has also been applied to strict product liability actions, barring recovery in instances when a danger was open and obvious. However, Illinois courts have also acknowledged that, in instances when an action, whether based in negligence or strict liability, is not merely predicated on a failure-to-warn claim but also contains allegations of defective design, the open and obvious doctrine does not act as a per se bar to recovery.

C. Restatement (Third) of Torts: Product Liability

Section 2 of the Restatement (Third) of Torts: Product Liability, however, restructured its handling of product warnings, amending the recognized flaws of the Second Restatement. In particular, the Third Restatement expressly defines three categories of product defects that may occur at the time of sale or distribution: manufacturing defects, design defects, and inadequate instructions or warnings. In addition, under section 2(c), a product is deemed defective because of inadequate instructions or warnings “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.” Regarding a claim of failure to warn, Comment j of section 2 of the Third Restatement states that a product seller is not liable for failing to warn of risks that should be obvious to foreseeable users of the product. Thus this comment reiterates the “open and obvious” rule.

Comment a of section 1 of the Third Restatement states that sections 2(b) and 2(c) are founded on the reasonableness test traditionally used in negligence cases and thus achieve the same objectives as liability predicated on negligence.

The Third Restatement seeks to distinguish the concepts of negligence and strict liability, noting that negligence focuses on the conduct of the manufacturer, whereas strict liability focuses on the product.

1. Illinois Courts and the Third Restatement

Although Illinois courts have neither adopted nor rejected the Restatement (Third) of Torts: Product Liability, and few Illinois court opinions have cited to it, the commentary that does exist has not been adverse to it. For example, in *Hansen v. Baxter Healthcare Corporation*, the Illinois Supreme Court declined to consider applying the standard set forth in the Third Restatement only because the argument had not been raised at trial, briefed, or argued. In fact, the court stated that it would not “foreclose the consideration” of the Third Restatement in a future case where it was properly raised at trial and appropriately briefed.


In 2005, the Illinois Supreme Court made the most thorough analysis of section 2 of the Third Restatement found in Illinois jurisprudence to date. In *Blue v. Environmental Engineering, Inc.*, a products liability case based on a theory of negligence, the Illinois Supreme Court acknowledged the inadequacies of the Second Restatement’s treatment of defects based on a failure to warn and, although it did not go as far as adopting the Third Restatement, the court applied it to its analysis. The *Blue* court discussed the rationale behind the modifications in the Third Restatement regarding the concepts of negligence and strict liability. While noting that it is rare in Illinois for product liability claims to sound in negligence rather than strict liability, the court noted that strict liability is far better suited to manufacturing-defect claims, whereas claims for design defects are more akin to negligence claims. The *Blue* court held that, in regard to product liability cases sounding in negligence, the risk-utility test is not applicable; rather, a negligence analysis should be applied.

The *Blue* court also recognized that whereas the Second Restatement provides assumption of risk as a defense to a strict product liability claim, the Third Restatement recognizes that the open and obvious doctrine has been rejected by a majority of courts as an absolute defense to strict product liability claims that are not based on a failure to warn. In such instances, the open and obvious nature of a risk is treated as merely one factor to be considered when applying the risk-utility test. However, although the *Blue* court conducted a thorough analysis of the Second and Third Restatements’ contrasting treatment of defective product design actions, defective product warnings were not specifically at issue.
Consequently, they were not thoroughly discussed. Thus, in regard to pure failure-to-warn claims, neither Illinois courts nor the Third Restatement have discarded the “open and obvious” defense as a possible bar to recovery.

D. Final Thoughts Regarding the Restatement.

Although Illinois courts have historically relied heavily on sections 388 and 402A of the Second Restatement of Torts in assessing liability for inadequate product warnings, the Illinois Supreme Court has also recognized that, in regard to product liability actions for failure to warn, the Second Restatement does have its shortcomings. In response to these weaknesses, the court has also recognized that the Third Restatement has incorporated some needed revisions to meet the deficiencies. Yet, despite their positive appraisals of the Third Restatement, Illinois courts have not gone so far as to expressly adopt the provisions. However, this possibility has not been foreclosed by the Illinois Supreme Court; and such a development could occur in the not too distant future.

VI. CONCLUSION

Hopefully, the above discussion will engender some good defense strategies for dealing with warnings claims. The types of cases are so numerous, and the number of fact scenarios too great for there to be a hard and fast, bright-line rule. Each case must be examined individually in order to determine which of the various tools may be available for defense counsel to use. While there are situations where a common sense approach to the notion of what is open and obvious to most persons was later found not so open and obvious to the court, clearly there are cases that the courts approach with open minds and eyes. Be mindful of the other methods available to defeat product liability claims, including preemption and the fact that warnings need not always be directed to ultimate users. On the other hand, also be aware that no amount of warnings can encompass every foreseeable use, and that an argument over whether the warnings given were adequate will most likely get you to a trial.

Endnotes

1 Suvada v. White Motor Company, 32 Ill. 2d 612, 21 N.E.2d 182 (1965)
2 Id. at 621, 21 N.E.2d at 187. Section 402A provides:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to reach the user or consumer in the condition in which it is sold.
   (2) The rule stated in (1) applies although:
      (a) the seller has exercised all possible care in the preparation and sale of his product and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
3 32 Ill. 2d at 623, 21 N.E.2d at 188
5 Id. at 547, 356 N.E.2d at 781
6 Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 402 N.E.2d 194 (1980)
7 Id. at 29, 402 N.E.2d at 195-196
8 RESTATEMENT (SECOND) OF TORTS, §402A, Comment j (1965) states:
   Direction or Warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in a case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.
9 Woodill, 79 Ill. 2d at 35, 402 N.E.2d at 198-199
10 Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974)
11 Id. at 10-11, 310 N.E.2d at 3-4
12 Id. at 12-13, 310 N.E.2d at 4-5
13 Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978)
14 Id. at 211, 384 N.E.2d at 372
15 Palmer v. Evco Distributing Corporation, 82 Ill. 2d 211, 412 N.E.2d 959 (1980)
16 Id. at 221-222, 412 N.E.2d at 964
Id. at 222-223, 412 N.E.2d at 965


Id. at 4, 772 N.E.2d at 217

Id. at 6, 772 N.E.2d at 218

Id. at 7, 772 N.E.2d at 219

Id. at 14, 772 N.E.2d at 222-223


Id. at 90-93, 828 N.E.2d at 1137-1139

Id. at 94-97, 828 N.E.2d at 1140-1142

Id. at 101-102, 828 N.E.2d at 1144

Id. at 102-113, 828 N.E.2d at 1145-1151

Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967)

Id. at 210-211, 230 N.E.2d at 184


Id. at 465, 343 N.E.2d at 470

Id. at 467, 343 N.E.2d at 471


Id. at 767-769, 483 N.E.2d at 939-941

Id. at 771-773, 483 N.E.2d at 942-944


Id. at 885-887, 501 N.E.2d at 161-163

Id. at 888-890, 501 N.E.2d at 164-165


Id. at 225-229, 803 N.E.2d at 980-983

Id. at 232-233, 803 N.E.2d at 985-986


Id. at 883-884, 452 N.E.2d at 575

Id. at 886-887, 452 N.E.2d at 577-578

Hayes v. Kay Chemical Co., 135 Ill. App. 3d 932, 482 N.E.2d 611 (1st Dist. 1985)

Id. at 932, 933, 482 N.E.2d at 612

Id. at 934-935, 482 N.E.2d at 613-614


Id. at 23-24, 589 N.E.2d at 572

Id. at 25-28, 589 N.E.2d at 572-575

Id. at 31-34, 589 N.E.2d at 577-578

Id. at 134-135, 589 N.E.2d at 579

Kirk v. Michael Reese Hospital and Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987).

Suvada, 32 Ill. 2d 612, 210 N.E.2d 182 (1965)

For example, Mahr v. G.D. Searle & Co., 72 Ill. App. 3d 540, 390 N.E.2d 1214 (1st Dist. 1979)

Kirk, 117 Ill. 2d 517, 513 N.E.2d 392

Stone v. Smith, Kline & French Laboratories, 731 F.2d 1575, 1579 (11th Cir. 1984)

Kirk, 117 Ill. 2d 519, 513 N.E.2d 393

Id.


Kirk, 117 Ill. 2d 519, 513 N.E.2d 393

Blue, 215 Ill. 2d 78, 828 N.E.2d 1128 (2005)

Leesley, 165 Ill. App. 3d at 139-140, 518 N.E.2d at 761

Id. at 141-142, 518 N.E.2d at 762-763


Id. at 182-183, 766 N.E.2d at 1121-1122

Id. at 195-197, 766 N.E.2d at 1128-1129


Id. at 1091-1093, 435 N.E.2d at 519-521

Robert P. Pisani, Sophisticated User and Bulk Supplier Defenses – The Time For Their Use In Illinois Is Now, IDC QUARTERLY, 14:4 at M1.


U.S. Const., art. VI, cl. 2, which provides, in part: The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any state to the Contrary notwithstanding.


15 U.S.C. §§ 1261-1277. The express preemption provision of FHSA

78 Busch v. Graphic Color Corporation, 169 Ill. 2d 325, 662 N.E.2d 397 (1996)

79 Id. at 337, 662 N.E. 2d at 404


81 15 U.S.C. §1334 (a)

82 Cipollone, 505 U.S. at 521, 112 S.Ct, at 2620, 120 L.Ed.2d at 426

83 7 U.S.C. §§ 136 et seq

84 Traube v. Freund, 333 Ill. App. 3d 198, 775 N.E.2d 212 (5th Dist. 2002)

85 Id. at 203, 775 N.E.2d at 217


87 7 U.S.C. § 136v(b)


90 Verb v. Motorola, 284 Ill. App. 3d 460, 672 N.E.2d 1287 (1st Dist. 1996)

91 29 U.S.C.§§ 360hh - 360ss

92 29 U.S.C. § 360 kk(a)(1)


94 Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products, 71 Fed. Reg. 3922 (FDA, Jan. 24, 2006)


96 Id. at 44-45, 404 N.E.2d at 1015-1017

97 Id. at 46, 404 N.E.2d at 1016-1017


99 Id. at 426-427, 462 N.E.2d at 861-862

100 Id. at 428, 462 N.E.2d at 862-863

101 Id. at 428- 429, 462 N.E.2d at 863

102 Collins v. Sunnyside Corporation, 146 Ill. App. 3d 78, 496 N.E.2d 1155 (5th Dist. 1986)

103 Id. at 79, 496 N.E.2d at 1156

104 Id. at 80-81, 496 N.E.2d at 1157-1158


106 Id. at 532-536, 538 N.E.2d at 800-803

107 Id. at 545-547, 538 N.E.2d at 810-811

108 See Blue, 215 Ill. 2d 78, 828 N.E.2d 1128, 1139 (2005)

109 Id., 828 N.E.2d at 1138

110 Id., 828 N.E.2d at 1147-48 (citing Restatement (Second) of Torts § 398, Comment b (1965); and Restatement (Third) of Torts: Products Liability § 2, Comment d (1998))


112 Restatement (Second) of Torts § 388 (1965)

113 Id.


115 See Pagano v. Occidental Chemical Corp., 257 Ill. App. 3d 905, 912-13, 629 N.E.2d 569, 575 (1st Dist. 1994) (adopting the position taken by section 388 of the Restatement (Second) of Torts); See also Busch v. Graphic Color Corp., 169 Ill. 2d 325, 662 N.E.2d 397 (1996) (recognizing that the Supreme Court of Illinois “although not explicitly adopting section 388’s provisions, [the court] cited to those provisions with approval" in Huckabee v. Bell & Howell, Inc., 47 Ill. 2d 153, 265 N.E.2d 134 (1970)); See also Venus v. O’Hara, 127 Ill. App. 3d 19, 24, 468 N.E.2d 405, 408 (1st Dist. 1984) (“we have looked for guidance in decisions in other jurisdictions... and it appears that other courts have uniformly relied on section 388 of the Restatement (Second) of Torts”).

116 Quinton v. Kuffer, 221 Ill. App. 3d 466, 472, 582 N.E.2d 296, 301 (2nd Dist. 1991) (owner of oil drum did not owe welder, who was injured in an explosion, a duty to warn of flammable nature of contents).

117 Id. at 473, 582 N.E.2d at 301; See also Restatement (Second) of Torts § 388, Comment k (1965)

118 Blue, 345 Ill. App. 3d 455, 463, 803 N.E.2d 187, 194 (1st Dist. 2003) (aff’d 215 Ill. 2d 78, 828 N.E.2d 1128 (2005); See also Restatement (Second) of Torts § 388, Comment k (1965)

119 Id. at 464, 803 N.E.2d, at 194

120 Id.

121 Busch, 169 Ill. 2d, at 348, 662 N.E.2d, at 409

122 Id. at 349, 662 N.E.2d, at 410

123 Id. at 350, 662 N.E.2d, at 410; See also Restatement (Second) of Torts § 388, Comment e (1965)

124 Restatement (Second) of Torts § 402A (1965)


126 Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978)
Id. at 74 Ill. 2d 203, 211-12, 384 N.E.2d 368, 372 (1978) (quoting Restatement (Second) of Torts § 388, Comment i (1965))


Id. at 702, 770 N.E.2d at 1217 (discussing Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449 (1990)). Since Lamkin v. Towner, “under Illinois law, a plaintiff has had two alternative methods to prove a manufacturer’s liability for defective design.” These methods are the consumer expectation test and, as identified in Lamkin, the risk-utility test.

Blue, 345 Ill. App. 3d, at 465-66, 803 N.E.2d, at 196; See Wortel., 331 Ill. App. 3d 895, 770 N.E.2d 1211 (holding that the open and obvious doctrine applies to all product liability actions whether based in negligence or strict liability); See also Restatement (Second) of Torts § 388, Comment k (1965)

Id. at 345 Ill. App. 3d, at 466, 803 N.E.2d at 196; Wortel., 31 Ill. App. 3d 895, 770 N.E.2d 1211


Id.

Restatement (Third) of Torts: Prod. Liab. § 2, Comment j (1998); compare with Restatement (Second) of Torts § 388, Comment k (1965)

Blue, 215 Ill. 2d 78, 828 N.E.2d 1128, 1140 (2005); Restatement (Third) of Torts: Prod. Liab. § 1, Comment a (1998)

Blue, 215 Ill. 2d 78, 828 N.E.2d at 1139; Restatement (Third) of Torts: Prod. Liab. § 1, Comment a (1998)


Id. at 438, 764 N.E.2d at 46.

Blue, 215 Ill. 2d 78, 828 N.E.2d 1128

Id. 828 N.E.2d at 1139

Id., 828 N.E.2d at 1140

Id. 828 N.E.2d at 1141

Id. 828 N.E.2d at 1142 (noting that the risk-utility test may still be applied in strict liability cases).

Id. 828 N.E.2d at 1145

Id.
Possibly the most noteworthy portion of the court’s holding is its analysis of DiTusa’s actions within the equal protection context. On the issue of intent, the court found that questions of material fact existed as to whether DiTusa intentionally condoned Tominello’s harassment of Valentine. The evidence showed that DiTusa continually told Valentine he would address her complaints about Tominello and that he was aware that his actions were “obviously inadequate” in remedying the problems. The court reasoned:

A juror could infer from [all of the] evidence that DiTusa had consciously chosen not to protect Valentine from Tominello’s advances, and was angry when Valentine took matters into her own hands.

Id., at 684 (emphasis added). Hence, the court found there was a material question of fact as to whether DiTusa intentionally discriminated against Valentine.

C. No Custom, Policy, or Practice of Discrimination

The court briefly discussed the City’s policies addressing sexual harassment and discrimination. The court noted that unconstitutional policies or customs can take three forms: (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a “custom or usage” with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority. Id. (quoting Rasche v. Vill. of Beecher, 336 F.3d 588, 597 (7th Cir. 2003)).

Valentine argued that there was a widespread practice by the City of condoning sexual harassment. However, the court found that all of Valentine’s allegations stem from only one harasser – Tominello – and only two supervisors – Senese and DiTusa. This did not constitute a widespread practice. The court affirmed the district court’s finding that Valentine failed to show that the City’s policies or customs fit within any of these three forms of unconstitutional conduct. Id., at 684-85.
Insurane Law

By Howard Jump
Jump & Associates
Chicago

General News

The Insurance Law Committee continued its activities over the summer. An end-of-summer newsletter has been prepared and planning is presently under way for an Insurance Symposium scheduled for the Fall of 2007, in St. Louis. The Committee invites input from the membership with respect to a theme or topics for the Symposium. Please send comments and suggestions to co-chairs, David Lewin at Tribler Orpett & Meyer P.C. or Dan Wills at Swanson Martin & Bell LLP. All IDC coverage lawyers are encouraged to join the Committee.

Case Law News

1. Horizontal Exhaustion Trumps Selective Tender

The First Appellate District, in *Kajima Construction Services, Inc. v. St. Paul Fire Insurance Company*, 2006 Ill. App. LEXIS 837 (Docket No. 1-05-1248, Sept. 15, 2006), has held that the “selective tender rule” of *John Burns Construction Company v. Indiana Insurance Company*, 189 Ill. 2d 570, 727 N.E.2d 211, 244 Ill.Dec. 912 (2000), cannot be used to “vertically exhaust” a subcontractor’s primary and excess coverages before the additional insured’s own primary policy pays. In *Kajima*, the general contractor, Kajima, (insured by Tokio), contracted with subcontractor, Midwestern, (insured by St. Paul), for a construction project. The contract required Midwestern to provide $1,000,000 in primary coverage, $5,000,000 in excess/umbrella coverage and further required Midwestern to add Kajima to its policies as an additional insured. Midwestern added Kajima as an additional insured to a $2,000,000 primary policy and a $5,000,000 excess policy, both issued by St. Paul.

Jones, an employee of a subcontractor of Midwestern, was injured on the project and brought suit against Kajima and Midwestern. Kajima made a targeted tender to Midwestern. Kajima and Tokio demanded that St. Paul settle the claim for $3,000,000, which would have required $1,000,000 from St. Paul’s excess policy. When St. Paul declined to contribute to the settlement from its excess policy, the case was settled by payment of St. Paul’s $2,000,000 primary policy and Tokio’s $1,000,000 primary policy.

Kajima and Tokio then filed a declaratory judgment action seeking reimbursement of the $1,000,000 settlement contribution and a determination that Tokio had no duty to defend or indemnify Kajima under the “selective tender rule.” The trial court found in favor of the defendants, Midwestern and St. Paul, on cross motions for summary judgment and the plaintiffs appealed.


The First District rejected all of the plaintiffs’ arguments and stated the question and rule as follows:


The appellate court expressly declined to apply a vertical exhaustion rule to selective tenders and expressly limited the

About the Author

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The appellate court went on to find that St. Paul did not waive its rights under the excess policy by not reserving those rights and distinguished Home Insurance Company v. Cincinnati Insurance Company, 213 Ill. 2d 307, 821 N.E.2d 269, 290 Ill.Dec. 218 (2004), on the grounds that St. Paul’s excess policy did not contribute to the settlement. Slip op. at 16. It also rejected the plaintiffs’ argument that Tokio’s policy was not required to contribute because it insured different risks from those of St. Paul’s policy (risks arising from Kajima’s work versus risks arising from Midwestern’s work). The court observed that Kajima and Tokio failed to explain why vertical exhaustion would be required by the Schal Bovis decision and held that the argument was without any legal basis since equitable contribution is not available between primary and excess insurers. 2006 Ill. App.LEXIS 837 at *17.

The Kajima case further defines appropriate application of the Burns “selective tender rule” and, based upon the way the opinion is written, invites questioning of the scope of the rule. For example, may the rule be used to trigger more than one concurrent primary policy? May the rule be invoked between true excess/umbrella policies? Most practitioners seem to assume that the answers to these two questions are in the affirmative; however, Kajima, in the author’s opinion, provides support for contrary answers, as well as arguments that could severely restrict the scope and application of the “selective tender rule.”

The opinion was filed on September 15, 2006, and is not yet final.

2. UIM Per Person Limit Applies To Derivative Claims Not Per Occurrence Limit


In Marchwiany, the defendant’s decedent was killed in an automobile accident involving two other vehicles. Decedent’s vehicle was covered by American Family’s policy with UIM limits of 100/300 and Farmers’ policy, also with UIM limits of 100/300. (Farmers claimed excess status.) The other two vehicles had liability limits of $100,000 and $20,000, respectively and the insurers paid those limits to settle the claims for survival and wrongful death. The defendants then sought UIM limits from American Family which paid $80,000 to settle the UIM claim against it. Farmers refused to pay, arguing that it owed nothing under its $100,000 UIM “per person” coverage.

The defendants filed a counterclaim in Farmers’ declaratory judgment action arguing that the “per occurrence” limit of $300,000 should apply since two or more persons were seeking recovery as a result of a single accident. The trial court and the First District Appellate Court ruled in favor of Farmers. (Illinois Farmers Insurance v. Marchwiany, 361 Ill. App. 3d 916, 838 N.E.2d 172, 297 Ill.Dec. 685 (2005)).

The defendants argued that the policy provisions dealing with “per person” and “per occurrence” limits were ambiguous since there was no express requirement that the “per occurrence” limit be “subject to” the “per person limit”. As a result, where two or more people make claims for a single person’s injuries arising out of one accident, both provisions could reasonably be applied, creating the ambiguity. 2006 Ill. LEXIS 1116at *10.

and ruled that the “per person” provision unambiguously limited UIM coverage to $100,000 for one person’s bodily injury, including all claims for consequential damages, such as loss of consortium. The specific policy provision deemed to unambiguously limit coverage to the “per person” limit provided as follows:

“1. The uninsured motorist bodily injury limit for each person is the maximum we will pay for all damages resulting from bodily injury sustained by one person in any one accident or occurrence. Included in this limit, but not as a separate claim or claims, are all the consequential damages sustained by other persons, such as loss of services, loss of support, loss of consortium, wrongful death, grief, sorrow and emotional distress.”

2006 Ill.LEXIS 1116 at *5-6.

The supreme court concluded that the Roth decision was incompatible with its holding and overruled it.

The opinion was filed on September 21, 2006, and is not yet final.

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Insurance Law (Continued)

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Product Liability

By: James W. Ozog*
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Asbestos Revisited:


In Nolan v. Weil-McLain, 365 Ill. App. 3d 963, 851 N.E.2d 281 (4th Dist. 2006), the Fourth District Appellate Court dealt another blow to defendants in asbestos cases. In Nolan, the Fourth District held that evidence of a plaintiff’s exposures to asbestos at the hands of settling or dismissed defendants is irrelevant at trial. In so holding, the court denied a defendant’s request to introduce evidence of these other exposures and consequently prohibited the defendant from challenging proximate cause. The Nolan case presents dangerous implications for asbestos defendants. For example, regardless of how obviously minimal a plaintiff’s exposure is to a defendant’s product, that defendant would be prevented from negating that its product proximately caused the plaintiff’s injury. In addition, the Nolan decision raises questions as to whether an asbestos-defendant in the Fourth District would be afforded protections under section 2-1117, Illinois’ joint and several liability statute, as recently discussed by the First District in Ready v. United/Goedecke Services, Inc., No. 1-04-1762, 2006 WL 2434935 (1st Dist., Aug. 23, 2006).

In Nolan, the plaintiff, Sally Louise Nolan, as administratrix of the estate of her husband, Clarence Nolan, sued various manufacturers of asbestos-containing products including the defendant, Weil-McLain. Weil-McLain manufactured boilers which Clarence Nolan installed, repaired and removed during his career, and at least a portion of the boiler components contained asbestos. Mr. Nolan developed mesothelioma, an asbestos related lung disease, and died on October 1, 2001.

Before trial, all of the defendants except for Weil-McLain either settled or were dismissed. At trial, the jury returned a verdict against Weil-McLain and awarded the plaintiff $2,368,000.00. Weil-McLain appealed, arguing in part that the trial court erred by prohibiting Weil-McLain from presenting evidence of decedent’s other exposures to asbestos. Specifically, Weil-McLain argued that by excluding such evidence,
the trial court had denied Weil-McLain the right to assert a sole-proximate-cause defense.

In particular, Weil-McLain argued that the trial court erred by refusing to admit certain discovery documents from a 1988 lawsuit filed by the decedent as evidence of his other exposures to asbestos. In the 1988 lawsuit, the decedent claimed he developed asbestosis as a result of his exposure to certain asbestos containing products. The decedent never named Weil-McLain in this lawsuit. While the trial court took judicial notice of the 1988 lawsuit and the fact that Weil-McLain was not a defendant, the trial court refused to admit any evidence of the decedent’s other asbestos exposures.

Relying on its earlier decision in Spain v. Owens Corning Fiberglass Corporation, 304 Ill. App. 3d 356, 710 N.E.2d 528 (4th Dist. 1999), the Fourth District upheld the trial court’s decision to prohibit evidence of other asbestos exposures. In Spain, the Fourth District analyzed the Illinois Supreme Court’s decision in Thacker v. UNR Industries, Inc., 151 Ill. 2d 343, 603 N.E.2d 449 (Ill. 1992), in which the supreme court adopted the “frequency, regularity and proximity” test to assist plaintiffs in proving proximate cause in fiber-drift asbestos cases. The Spain court found that once a plaintiff satisfies the Thacker test with respect to a specific defendant, that defendant “is presumed to be a proximate cause of the decedent’s asbestos injury,” and therefore, evidence of other exposures is irrelevant. Spain, 304 Ill. App. 3d at 365, 710 N.E.2d at 535.

In excluding the evidence of other exposures in Nolan, the Fourth District adopted verbatim its reasoning articulated in Spain. As it had in Spain, the Fourth District in Nolan found that “once a plaintiff satisfies the Thacker test, a defendant is presumed to be a proximate cause of a decedent’s asbestos injury.” Nolan, 365 Ill. App. 3d 963, 965, 851 N.E.2d 281, 287 (4th Dist. 2006). The Fourth District found that Illinois law then “requires the trier of fact to independently evaluate whether the exposure was a substantial factor in causing the decedent’s injury, thereby making evidence of other asbestos exposures irrelevant.” Id. The Fourth District noted, however, that a “[d]efendant can rebut the presumption by proving (1) decedent was not exposed to its product, (2) his exposure was insufficient to cause injury, or (3) its product contained too low an amount of asbestos to be hazardous.” Id. Based on this reasoning, the Fourth District denied Weil-McLain’s request to introduce evidence of other asbestos exposures and thus, limited its ability to argue a sole proximate cause defense.

As explained by the Nolan dissent, there are dangerous implications for asbestos defendants as a result of this decision.

As a result, regardless of how clearly minimal a plaintiff’s exposure is to a defendant’s product, that defendant would be prohibited from negating that its product proximately caused the plaintiff’s injury.

First, the Nolan decision prohibits any asbestos defendant, regardless of whether the case involved asbestos-fiber drift, from raising a sole proximate cause defense. The dissent recognized that while the Spain decision could be viewed as prohibiting a defendant in an asbestos-fiber drift case from raising the sole proximate cause defense, the “[Illinois] supreme court has never held that the rules that govern negligence cases do not apply in appropriate asbestos cases.” Nolan, 365 Ill. App. 3d at 971, 851 N.E.2d at 289. The dissent reasoned that in appropriate cases “where undisputed evidence exists of direct contact between the decedent and a defendant’s asbestos-containing product, the defendant should be able to negate causation.” Id. at 972, 851 N.E.2d at 290. In Nolan, the Fourth District essentially extended the Illinois Supreme Court’s decision in

(Continued on next page)
Product Liability (Continued)

Thacker, which only addressed an asbestos-fiber drift situation, to all asbestos cases. As a result, regardless of how clearly minimal a plaintiff’s exposure is to a defendant’s product, that defendant would be prohibited from negating that its product proximately caused the plaintiff’s injury.

To emphasize the harmful implications of the majority’s decision, the dissent presented a number of hypothetical situations. For example, the dissent asked one to consider a situation where the evidence “shows beyond any doubt that the injured plaintiff worked only once in his life on an asbestos-containing product of the defendant.” Id. at 974, 851 N.E.2d at 290. Under the majority’s opinion even this defendant would be prohibited from questioning proximate cause. According to the dissent, barring a sole proximate-cause defense in this hypothetical scenario or in cases where the exposure is even more remote “defies logic and common sense.” Id. at 975, 951 N.E.2d at 292.

An implication that the dissent did not consider, but asbestos defendants should, is the difficulty of rationalizing the Fourth District’s decision in Nolan with the First District’s recent decision in Ready v. United/Goedecke Services, Inc., 2006 WL 2434935, at * 5. In Ready, the First District addressed whether a settling defendant should be considered a “defendant sued by the plaintiff” within the meaning of section 2-1117 of the Code of Civil procedure, the Illinois joint and several liability provision. The First District held that a “remaining defendant’s culpability should be assessed relative to the culpability of all defendants, including settling defendants.” Id. Moreover, the First District found that “settling defendants must appear on the verdict form so as not to affect the rights of the nonsettling defendants.” Id. The Ready court observed that the purpose of section 2-1117 is to hold “minimally culpable defendants minimally responsible.” Id. at *4. The result in Nolan is directly at odds with the legislative intent of section 2-1117 and will probably be revisited in future appellate opinions. Meanwhile the saga of asbestos litigation continues.

Diversity

By: Margaret Foster
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Diversity is Good for Business

While a few professions can point to significant diversity gains, the legal profession has made slower progress in reflecting society’s gender, racial and ethnic diversity. The IDC’s commitment to developing and maintaining diversity in its member ranks was formalized with the adoption of a Diversity in Participation statement. Further, in March of this year, the IDC’s Board of Directors adopted a set of core values, which include an expression of the IDC’s emphasis on diversity. Specifically, the IDC committed to “Support Diversity Within Our Organization, the Defense Bar and the Legal Profession.” In keeping with this core value, welcome to the IDC Quarterly’s inaugural Diversity column, which will be a regular feature in future editions. In each issue, we will focus on a particular topic relevant to diversity in the legal profession.

We all agree that supporting diversity is the right thing to do. Furthermore, there is a strong business incentive for the IDC and its members to promote diversity. In 1999, BellSouth Corporation’s vice president and general counsel, Charles Morgan, advocated greater diversity in the workplace, noting the importance of diversity from both a business and a moral perspective. His ideas were set forth in a document entitled Diversity in the Workplace – A Statement of Principle. Several hundred general counsel endorsed the Statement on behalf of their companies. The Statement of Principle set forth the expectation that law firms representing the signatory compa-

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nies would “work actively to promote diversity within their workplaces.” Thus, the signatories agreed that, in selecting outside counsel, significant weight would be accorded to outside counsel’s commitment to and progress in the area of diversity.

Five years after the Statement of Principle was issued, statistics published by the National Association for Law Placement revealed that women represented approximately 17 percent of law firm partners, and less than five percent of partners were minorities. While such data has not been fully reported and reviewed, it is probable that the percentages of women and minorities in equity partner positions are substantially lower.

After a thorough analysis of its outside counsel, Wal-Mart noted that the vast majority of its relationship partners were not diverse. Under general counsel Thomas Mars, Wal-Mart moved approximately $60 million of the $200 million it spends on outside legal work to female and minority attorneys. Further, it ended relationships with outside counsel that failed to demonstrate a meaningful, tangible commitment to diversity.

Inclusive and diverse law firms have a competitive advantage in gaining and keeping the business of an ever-expanding number of companies. Thus, recruitment and retention of diverse attorneys is not simply the right thing to do – it is an important factor in your success.

Endnote

1 The Diversity Call to Action, as well as a list of signatories, can be viewed online at www.cloCallToAction.com.
The Defense Philosophy

By: Willis R. Tribler
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Reasonable Decisions Gone Bad

The time has come for my annual baseball column, in which I analyze the National Pastime (when did you last hear it called that?) and the lessons that it imparts for the practice of law. This one considers reasonable decisions that turn out to be bad.

On June 15, 1964, the Chicago Cubs made the now-infamous Brock-for-Broglio trade. It turned out badly for the Cubs, and just this year, a Chicago Tribune poll ranked it the worst disaster ever to befall Chicago, finishing ahead of such inconveniences as the great Chicago flood of 1992. In addition to being silly, this ranking is totally wrongheaded and a fine example of second-guessing at its worst.

I lived in Peoria in 1964. It had, and still has, an almost equal representation of Cub and Cardinal fans. When the Brock-for-Broglio trade was made, I thought that the Cubs had fleeced the Cardinals, and most Cub fans agreed. A large majority of Cardinal fans were distraught. Ernie Broglio was 28 years old and one of the top pitchers in the National League. He had won 70 games in a little over five years with an earned run average (ERA) barely above three runs per game (3.00). On the other hand, Lou Brock was three days short of being 25 and in two full years with the Cubs had 18 home runs, 40 stolen bases, and a batting average under .260. In 1962, the Tribune called him “the least talented outfielder in the National League.”

From that perspective, it looked like a Cub triumph. The problem was that Brock went on as a Cardinal to hit .293 with 149 home runs and 935 stolen bases, numbers that caused him to be elected to the Baseball Hall of Fame in 1985. On the other hand, Broglio was plagued by injuries and won only seven games for the Cubs before retiring in 1966.

Obviously, this was a bad decision by the Cubs, but it is unfair to say that it was bad from the start. It was a reasonable decision at the time. It just did not work out for the Cubs.

In the interest of fairness, I will give you an example of a Cub decision that was bad from the start. Following the 1992 season, Cub pitcher Greg Maddux was 26 years old. He had been in the league since 1987, had 95 wins against 75 losses, had a career ERA of 3.35 and had just won the Cy Young Award, which is given every year to the most outstanding pitcher in each of the two leagues. Not wanting to meet his salary demand, and seeking to avoid his tough agent, the Cubs let him go. Maddux signed with Atlanta and, now at the age of 40, has 333 wins and three more Cy Young Awards and is a shoo-in for the Hall of Fame. That is a glittering example of a bad decision from the start.

Now, you might wonder what this has to do with the practice of law. The answer is that it has a lot to do with it. Suppose a plaintiff turns down a $50,000 offer and recovers nothing, or a defendant refuses to pay $50,000 and gets hit for $1,000,000. These could be either bad decisions from the start or good decisions that went sour. For instance, if the defendant is handling a leg-off case with clear liability, the refusal to pay $50,000 is terrible. But if the injury is relatively minor and the liability is unclear, the decision is reasonable and the result unpredictable. You must analyze the case so as to best benefit your client and be certain that your client understands the situation and agrees with the decision. Then if you get a bad result, get rid of the case as best you can, learn from the experience, and move on. The key is to try to reach a correct decision and not agonize over it if it turns out to be wrong.

The good news is that your case is not likely to rank as the worst disaster ever to befall Chicago.

About the Author

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First District Appellate Court Raises the Bar for Pleading Consumer Fraud Act Claims Based Upon Non-Disclosure


In this case the First District Appellate Court recently was faced with a class action complaint brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq., (“the Act”), alleging that DaimlerChrysler Corporation (“Chrysler”) concealed a material defect in manufacturing and selling jeep vehicles. The plaintiff alleged that the exhaust manifolds of the vehicles failed at an “unacceptable high rate.” The trial court granted Chrysler’s motion to dismiss for failure to state a claim. The First District affirmed.

The plaintiff alleged that the standard in the industry for vehicles such as jeeps is to use cast iron exhaust manifolds. The plaintiff alleged that from 1991 until early 1999, Chrysler used less expensive tubular steel exhaust manifolds instead of cast iron exhaust manifolds. The plaintiff alleged that the new tubular steel exhaust manifolds were prone to crack and were inferior. The plaintiff further alleged that Chrysler knew as early as 1991 that the tubular steel exhaust manifolds would not last as long as conventional cast iron manifolds and would fail at unacceptably high rates and intentionally concealed these facts from the plaintiff and the class.

The First District first went through a history of the Act and cited similar cases that had survived motions to dismiss. The court noted that a plaintiff alleging a consumer fraud violation must plead the claim with the same particularity and specificity as required under a common law fraud count.

The court next scrutinized the plaintiff’s allegation that the failure to disclose was material. The court held that while the plaintiff alleged that the exhaust manifolds had an “unacceptable high rate of failure,” he failed to allege that he would have acted differently if he had possessed the information that he claimed should have been disclosed before the sale. The court also noted that the plaintiff failed to allege how or why consumers would be expected to rely on that information before making a purchase. More importantly, the court noted that the allegations fell short of the specificity required by the Act. Although the plaintiff alleged that the exhaust manifolds were “prone to crack and failure” and “would fail at unacceptably high rates,” and that Chrysler was “aware of high frequency of failures,” the plaintiff failed to define these general phrases or provide more detail about the number of failures that occurred, how the defendant knew about the failures or what Chrysler knew at the time of the sale to the plaintiff. The court found that the complaint was “laden with conclusion and conjecture.” Thus, the court found that the plaintiff had failed to allege with sufficient particularity the facts that made Chrysler’s omission or concealment material.

The court also found that the plaintiff failed to adequately plead damages. The court noted that the plaintiff failed to specify how the value of his vehicle had been diminished by the alleged nondisclosure, or whether the defect had an impact on his jeep’s “resale value.” The court found it significant that the plaintiff did not allege that he would have done anything differently, like bargain for a lower price or refuse to buy the vehicle, if he had known about the exhaust manifold failures. The court noted that the plaintiff had never paid for a repair to the exhaust manifold in his vehicle or sold the vehicle at some diminished value. Under these circumstances, the court also found that the plaintiff had failed to plead actual damages with the requisite level of specificity.

This is a good decision for those facing claims of nondisclosure or concealment under the Act. The court’s willingness to apply the stringent common law fraud pleading requirements for claims under the Act should be useful in defending this type of claim.

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.
Health Law

By: Roger R. Clayton*
    Heyl, Royster, Voelker & Allen
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What Every Lawyer Needs to Know about the Poliner Case

Recently a federal court in Texas ruled that Dr. Lawrence Poliner was entitled to a $366 million verdict against a hospital for summarily suspending his hospital privileges without obtaining adequate information about his clinical performance. The case, Poliner v. Texas Health Systems, No. Civ.A.3:00-CV-1007-P, 2006 WL 770425 (N.D. Tex., March 27, 2006), raises interesting issues about what hospitals should do to protect themselves from huge judgments when attempting to protect patients.

The Facts

Plaintiff, Dr. Poliner, had his cardiac catheterization lab (“Cath Lab”) and echocardiography privileges suspended for parts of 1998 because of the hospital’s concern over his care of four patients. The first incident occurred on September 29, 1997, when a nurse filled out a Committee Event Report Form (“CERF”) regarding a patient who died following a procedure Dr. Poliner performed. The second incident on October 29, 1997, involved a patient who had a stroke following a cath lab procedure that Dr. Poliner performed. On December 18, 1997, a nurse filled out a CERF because the nurse was concerned that Dr. Poliner used a contaminated sheath. These three cases were referred to the hospital’s Internal Medicine Advisory Committee (“IMAC”). But, while the IMAC review was still pending, on May 12, 1998, Dr. Poliner performed an angioplasty on the wrong artery and missed a totally occluded artery on another patient.

Two days later, one of the members of the IMAC, after talking to the president and in-house counsel of the hospital, wrote an abeyance letter and asked the plaintiff to sign it. This letter would effectively suspend Dr. Poliner until a committee could investigate the incidents. According to Dr. Poliner, he was given the letter after 2:00 p.m. and told to sign and return it by 5:00 p.m. the same day or his privileges would be revoked. He also was told that he could not consult an attorney before signing it. The letter purported to revoke his cath lab privileges until an ad hoc committee could review his care. Dr. Poliner signed the abeyance letter, but claimed at trial that the letter was a revocation of his hospital privileges.

The defense claimed that the committee had immunity under the Health Care Quality Improvement Act (“HCQIA”) because it determined that patients were in imminent danger. The court awarded partial HCQIA immunity, but not with respect to the abeyance letter and allowed the jury verdict of $366 million to stand based on a defamation cause of action.

What to Do When Confronted with Possible Danger to Patients

1. Document the Immediate Danger Posed by the Physician

Based on the evidence, the court determined the hospital committee was prepared to suspend Dr. Poliner’s privileges “despite the fact that [the committee] did not know whether Dr. Poliner posed a present danger to his patients.” This was based on the testimony of Dr. Knochel, who was on the committee, stating that he had not made any “determinations” on Dr. Poliner’s safety. The “determination” was only in a scientific sense. Dr. Knochel did not “know” with scientific certainty that Dr. Poliner posed a danger to his patients even though the evidence at the time was pretty strong. The purpose of the summary suspension was simply to protect patients.

To correct this problem, the hospital should have documented with particularity the reason that Dr. Poliner was being put on summary suspension. It should have used the

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* The author acknowledges the assistance of Nathaniel E. Strickler in the preparation of this article.
hospital bylaw language to specifically document the reason that there was a summary suspension, which could help in a later court proceeding. This would have protected the hospital by showing the court (and the jury) that the hospital was simply following its procedures and not maliciously suspending the doctor.

2. Keeping Up Appearances
The court also relied on Dr. Knochel’s testimony that he was going to suspend Dr. Poliner if he did not sign the abeyance letter and that Dr. Poliner could not consult an attorney before signing the letter. Further, the court stated that Dr. Poliner was not given a hearing or an opportunity to be heard before the summary suspension, which was sufficient to support the jury finding that the hospital acted with malice.

However, HCQIA does not require a hearing before a summary suspension. Even the most limited hearing and allowing the doctor to consult an attorney before signing a document with legal consequences would help to show that the hospital committee was not acting with malice, but in the best interest of its patients. In this case, simply allowing Dr. Poliner a night to review the letter and being presented with the cases the hospital was concerned about would have gone a long way to show both Dr. Poliner and the court that the hospital was acting in good faith.

3. Communication Is Important
While not discussed in the opinion, much of the ill will between the parties began when the hospital failed to effectively communicate to Dr. Poliner the concerns it had over his care of patients. If the hospital had informed Dr. Poliner when it first learned of possible substandard care, then he might have been able to improve his performance. Also, if Dr. Poliner had been involved in the review process at the very beginning, it would have been harder to argue that the process was unfair.

Conclusion
While a $366 million verdict is an aberration, a hospital must be cognizant of the need to protect itself when it decides to protect patients from possible substandard care by suspending a physician. When deciding whether to suspend a doctor, a hospital should inform the doctor early of concerns and keep the lines of communication open. It should then begin the precautionary measures needed to protect patients and take quick, but thoughtful action by allowing the doctor input into the process and the opportunity to explain him or herself. If a suit is filed, the hospital will look as if it is trying to protect patients while still respecting the doctor’s rights. A jury will be less likely to award such an eye-popping verdict if it feels that a doctor’s rights were fairly protected.

In this case, simply allowing Dr. Poliner a night to review the letter and being presented with the cases the hospital was concerned about would have gone a long way to show both Dr. Poliner and the court that the hospital was acting in good faith.
Evidence and Practice Tips

By: Joseph G. Feehan
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Fifth District Appellate Court Holds That Frye General Acceptance Test Does Not Apply to Nonscientific Expert Testimony

In In re Marriage of James Alexander, No. 5-05-0109, 2006 WL 2615575 (5th Dist., September 7, 2006), the Appellate Court of Illinois, Fifth Judicial District, held that the Frye general acceptance test for admissibility of expert testimony only applies to expert testimony that is both novel and scientific. In Alexander, the plaintiff Dr. James Alexander (James) filed for divorce from his wife, Valery Alexander (Valery). The evidence presented to the trial court at the dissolution hearing revealed that James owned and operated two family practice medical facilities. The bulk of the evidence at trial pertained to the value of James’ medical practices. The trial court concluded that the medical practice was worth $379,473, of which $160,000 consisted of “enterprise goodwill.” Enterprise goodwill is defined as goodwill that exists independently of one’s personal efforts that will outlast one’s involvement with the business. Personal goodwill is also attributed to one’s personal efforts but will cease when that person is no longer involved in the business. For purposes of a marriage dissolution proceeding, enterprise goodwill is treated as a marital asset and personal goodwill is not.

At trial, Valery’s expert accountant, David Wood, testified that James’ medical practice had a total goodwill value of $350,000, of which $245,000 consisted of enterprise goodwill and $105,000 consisted of personal goodwill. Conversely, James contended that his practice was worth only $10,000.

Accountant Wood testified that in reaching this conclusion, he utilized an approach called the “multiatribute utility theory.” James argued that the trial judge should not consider Wood’s testimony regarding the value of enterprise and personal goodwill because the multiatribute utility theory is a novel scientific methodology that is not generally accepted in the relevant scientific community. James argued that Wood’s opinion on the amount of the total goodwill that constituted enterprise goodwill was inadmissible under the “general acceptance” test established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The trial judge rejected James’ arguments and specifically found that “Mr. Wood’s approach, though not scientific, was thoughtful and persuasive.” Alexander, 2006 WL 2615575 at *1. Although the trial court admitted Wood’s testimony, it rejected his proposed total goodwill figure of $350,000 and found that James’ medical practice had a total goodwill value of $240,000. The trial court then employed Wood’s opinion to the extent that Wood suggested that approximately two-thirds of the total goodwill in the practice consisted of enterprise goodwill. Thus, the trial court concluded that the enterprise goodwill was a marital asset worth $160,000.

On appeal, the Alexander court noted that Illinois has adopted the Frye standard to be used when courts are faced with the question of the admissibility of novel scientific evidence. The Alexander court emphasized that the Frye test only applies to evidence that is both novel and scientific—and that it can be difficult for a court to distinguish between scientific and nonscientific evidence, stating:

If an expert’s opinion is not novel or scientific, it is not subject to the Frye test but still remains subject to the general admissibility test applied to all expert testimony. (Citations omitted.) Unfortunately, there is no clear line that distinguishes scientific evidence from nonscientific evidence. However, the appellate court has noted that when a court examines whether evidence is scientific, the focus is to be on the methodology employed by the expert in reaching his or her conclusion and not on the conclusion itself. (Citation omitted.) The court is to

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focus on how the expert reached his or her conclusion and not on what the conclusion is. (Citation omitted.)

If an expert’s opinion is derived solely from his or her observations and experiences, the opinion is generally not considered scientific evidence. (Citation omitted.) On the other hand, if the expert’s opinion is derived from a particular scientific methodology, such as the application of scientific principles or the use of other literature or studies, then the opinion is generally considered scientific. (Citation omitted.) Again, the line that separates scientific evidence from nonscientific evidence is not always clear. (Citation omitted.) (Emphasis in original.) Id. at *3-4.

The appellate court then conducted a detailed analysis of expert David Wood’s multiattribute utility theory. The court noted that Wood testified that he was the first accountant to use the multiattribute utility approach to determine separate values for enterprise goodwill and personal goodwill. Wood testified in detail about the multiattribute utility theory and explained that his approach was “scientific.” However, the court ultimately concluded that Wood’s multiattribute utility theory did not constitute scientific evidence because he did not employ scientific methodology. The court stated:

After conducting a thorough examination of Wood’s multiattribute utility theory, we are convinced that his method does not constitute scientific evidence subject to a Frye hearing. The methodology employed by Wood does not rely on the application of scientific principles but incorporates basic math with the observations and experience of the valuators. As Wood points out, the creation of the alternatives, the creation of the ranges, the creation of the attributes, and the values assigned to the attributes are all derived from the subjective determinations of the valuator. Wood never contends that there are universal alternatives, attributes, utility values, or ranges that must be applied in each and every situation. Furthermore, he does not allege that there are constant or universal values that must be assigned. Wood leaves just about everything to the sole discretion of the valuator.

Although Wood repeatedly describes his approach as “scientific,” this does not make it so for purposes of subjecting it to a Frye hearing. Wood acknowledged that the “whole process” is “subjective” and that the methodology he uses simply attempts to make a “precise decision from imprecise and subjective criteria.” In addition, to the extent that mathematics is employed in Wood’s methodology, the types of mathematics employed by Wood (addition, multiplication, and division) are certainly not novel. Most people are at least familiar with these basic mathematical principles, although certainly some are more versed at applying them than others. But suffice it to say, to the extent that mathematics is employed in Wood’s methodology, this does not make it a scientific methodology subject to Frye. However, even if it were sufficiently scientific to trigger a Frye hearing, the evidence would pass the general-acceptance test because elementary mathematics has gained general acceptance in all fields of science and engineering. (Citation omitted.) Id. at *7.

It is well known that the Daubert standard for determining the admissibility of both scientific and nonscientific expert testimony has been adopted by the federal courts and most state courts. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire v. Carmichael, 526 U.S. 137 (1999). Illinois remains one of the few states that still applies the Frye general acceptance standard to scientific evidence.1 Based on the principles of law set forth in Alexander, supra, it appears that in Illinois state courts, the Frye general acceptance test does not apply to determine the admissibility of nonscientific expert testimony. Rather, the Frye standard only applies to scientific expert testimony.

Footnote

1 See 90 ALR 5th 453, Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts. (28 states apply Daubert or a similar test, 16 states (including Illinois) continue to exclusively apply Frye, and 6 states have not rejected Frye, but also apply Daubert factors.)
Employment Law

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SEXUAL HARASSMENT

Seventh Circuit Holds No Duty of Cooperation on Part of Complainant at EEOC Level; Sexual Relations With Minor Unwelcome as Matter of Law

In Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006), a high-school student who was permitted to litigate her case under the pseudonym, Jane Doe, sued her employer, Oberweis Dairy, for sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. She alleged that a shift supervisor at the store where she worked sexually harassed her and had sexual intercourse with her. The appellate court reversed the trial court’s grant of summary judgment in favor of the employer, reasoning that the plaintiff had exhausted her administrative remedies, even though she declined to be interviewed by the Equal Employment Opportunity Commission (EEOC), and that a genuine issue of material fact regarding the extent to which the intercourse was attributable to events at the workplace precluded summary judgment.

Jane Doe, a 16-year-old high-school student, worked as a part-time ice cream “scooper” at an Oberweis Dairy store. This job was her first. Matt Nayman was a 25-year-old shift supervisor at the store. He had the supervisory authority to direct the work of the scoopers and to issue disciplinary write-ups, but he had no authority to fire them. Often, he was the only supervisory employee present at the parlor. For several months under his watch at the parlor, sexual banter occurred. Nayman routinely hit on the mostly teenage girls (including the plaintiff) and young women employed there, at times groping, kissing and hugging them. He also grabbed the females’ buttocks and gave them “tittie twisters.” Although such acts occurred at the store, he would invite the girls to his apartment, where he had sexual intercourse with three of them, including the plaintiff and another minor. For less than two weeks after their sexual encounter, the plaintiff continued to work at the store, in close proximity to Nayman. Subsequently, Nayman was convicted of statutory rape for the intercourse with plaintiff.

The plaintiff was 17 years old when her attorney filed her charge with the EEOC. Her attorney supplied the EEOC with information that enabled the interviews of ten witnesses to the alleged harassment. The plaintiff, however, declined to be interviewed by the EEOC, because both her attorney and her psychotherapist believed the interview would be too upsetting to her. The attorney offered to supply the EEOC with answers to any of its questions for the plaintiff. Regardless, the EEOC dismissed the charge on the basis of the plaintiff’s failure to cooperate with the investigation. The EEOC nonetheless issued the plaintiff a right to sue letter, an act that the defendant did not contest. The plaintiff then filed her complaint in federal court. The federal court, however, held that the plaintiff failed to exhaust her administrative remedies and that the plaintiff’s conduct with Nayman had been voluntary. Accordingly, the court granted summary judgment in the employer’s favor.

The appellate court reversed. First, the court held that Title VII does not impose a duty of cooperation. Disagreeing with the Tenth Circuit’s decision in Shikles v. Sprint/United Management Co., 426 F.3d 1304 (10th Cir. 2005), the Seventh Circuit found no basis in Title VII for the position that a complainant’s failure to cooperate with the EEOC investigation constitutes a bar to suit. Recognizing the Supreme Court’s admonition that courts must not impose any requirements beyond those in the statute, citing Mohasco Corp. v. Silver, 100 S. Ct. 2486 (1980), the Seventh Circuit reasoned that, unless the suit seeks review of an action by the EEOC, the procedural requirements imposed by Title VII are a mere precondition to a private-sector employee bringing a federal suit. Thus, Title VII does not require a plaintiff fully exhaust administrative remedies before filing suit. Furthermore, Congress has not barred the judiciary from hearing an action until the administrative agency has come to a final decision. Accordingly, the

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plaintiff in this case “exhausted” her administrative remedies for the purposes of filing suit under Title VII.

Second, the court held that the age of consent in the state in which suit is brought is the rule of decision in Title VII cases. Consequently, because the plaintiff was younger than the age of consent in Illinois when she and Nayman engaged in sexual intercourse, she was incapable of “welcoming” Nayman’s sexual advances as a matter of law. As a result, this case was one of a worker subjected to nonconsensual sex by an authority figure that arose from an employment relation. The court made it clear, however, that it was not holding that Nayman’s conduct with the plaintiff and the other underage girls before the sexual intercourse occurred was sexual harassment per se. Indeed, the employer is permitted to put the sexual banter in context, and consent to sexual relations, although not a defense to sexual conduct between an adult and a minor, might be used to reduce the employer’s damages.

Finally, the court stated that although Nayman lacked the authority to fire the plaintiff and thus he did not fit within the normal paradigm of a supervisor, the court nevertheless would have called him a supervisor, because he often was the only supervisory employee at the store and therefore was in charge. Moreover, he had the ability to indirectly cause the plaintiff’s termination by simply telling his boss that she was not doing a good job. Rather than conduct an investigation, the court reasoned, the boss probably would have taken Nayman’s word for it, because the plaintiff, as a part-time teenage worker, would not be considered a valued employee. An employer that does hire teenagers, however, acts at its own peril if it fails to warn the teens’ parents when the employer knows or should know that statutory rape by an older male supervisor under circumstances constituting workplace harassment is a substantial risk for the children. In this case, evidence existed to show that other shift supervisors were aware of Nayman’s conduct but nothing was done to prevent or even deter the harassment and rape. Consequently, summary judgment in favor of the employer was improper.

HOSTILE WORK ENVIRONMENT

Seventh Circuit Finds Objectively Hostile Work Environment Supports Claim of Constructive Discharge

In Patton v. Keystone RV Company, 455 F.3d 812 (7th Cir. 2006), Brenda Patton sued her former employer, Keystone RV Company, alleging hostile work environment and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Finding that the case fell short of a hostile work environment, the trial court granted summary judgment for the employer. The appellate court reversed, determining that the facts of the case constituted an objectively hostile work environment that supported a claim of constructive discharge.

Keystone RV Company manufactures high-end recreational vehicles (RVs). Brenda Patton worked with the company beginning in April 2001. Her job duties of cleaning the RVs often required her to crouch, kneel and bend over. Rod Ramey was her direct supervisor, and part of his job of monitoring work performance at times required him to hover around individual employees. Patton, however, felt that Ramey often would leer at her, spend an inordinate amount of time around her, and stare at her body as she worked in the RVs. Ramey made a comment to her about a rumor that she and he were having an affair and questioned her about an alleged affair with another supervisor.

Ramey also touched Patton inappropriately. During the first incident, when Patton was wearing shorts, as she spun around while crouched in the doorway of an RV, Ramey slid his hand under her shorts, up her inner thigh to her underwear, while commenting that her legs were smooth. Contact broke when Patton fell backwards. On another occasion, Ramey put his hand on her calf as she was kneeling down in an RV. On yet another occasion, as she was squatting down to repair a carpet, Ramey crouched behind her, put his arm on her back with his hand near her neck, and the placed his face next to her ear while telling her to meet him for a drink. Patton declined and squirmed away from him. After the first incident, Patton had panic attacks and became very nervous whenever Ramey was around her, concerned that he would sneak up on her and touch her. She felt unsafe and spent her days fearfully looking over her shoulder for him. Nevertheless, she thought the stress made her work harder and faster.

Around the same time, the plant where Patton worked was being phased out, and Ramey transferred her to a new plant where he spent most of his time. The transfer not only interfered with Patton’s children’s daycare schedule, but also meant that she would have more contact with Ramey. Patton believed the transfer was made because Ramey wanted her close to him. On her first day at the new plant, Ramey met her at the door, put his arm around her waist, let his hand fall down to her buttocks, and guided her while saying that she brightened up the place. In addition to Ramey’s behavior, Patton endured the ridicule of another employee who had been demoted because of her arrival and who accused her of being favored because of her sexual relationship with Ramey. Crying, she reported this incident to a supervisor, who told her to see a supervisor at the old plant. While she waited to

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speak with that supervisor, Ramey showed up and told her to get back to work. Instead, Patton went home and never returned to work.

The appellate court, upon review of the trial court’s grant of summary judgment in favor of the employer, addressed the issue of whether a reasonable person would have considered Patton’s work environment hostile. A hostile work environment is created when the subject conduct is “sufficiently severe or pervasive to alter the conditions of the [victim’s] employment and create an abusive working environment.” Patton, 455 F.3d at 815-16, quoting Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 533 (7th Cir. 1993). Although rare, one very severe act of harassment might create a hostile environment. Citing Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000). More typically, a combination of severity and frequency reaches the level of actionable harassment.

In this case, however, Ramey’s touching of Patton’s inner thigh and underwear was in close proximity to her vagina. Previously, the court held that direct contact with another’s intimate body part constitutes one of the most severe forms of sexual harassment. Citing Worth v. Tyer, 276 F.3d 249, 268 (7th Cir. 2001). In this case, the court, focusing intently on the specific circumstances of physical harassment, had no difficulty describing Ramey’s touching of Patton as contact with an “intimate body part,” even if he did not in fact touch her vagina. Furthermore, although that conduct might alone have been sufficient to create an abusive working environment, it was not the only act. Over a span of approximately one month, the conduct consisted of three additional instances of physical contact, several sexually charged comments, and alleged stalking. Accordingly, the court found that a reasonable fact finder could agree that Patton should have quit to protect herself, and thus the conduct by Ramey met the standard for constructive discharge.

AGE AND GENDER DISCRIMINATION

Genuine Issue of Material Fact Precludes Summary Judgment in Discrimination Action Against Union

In Randolph v. Indiana Regional Council of Carpenters and Millwrights, 453 F.3d 413 (7th Cir. 2006), Elsie P. Randolph sued her union, the Indiana Regional Council of Carpenters and Millwrights, Millwright Local Union 1003 (the Union), alleging gender and age discrimination when the Union failed to place her on its “out of work” list. The district court rejected her discrimination claims, reasoning that Randolph failed to establish that male millwrights had obtained work exclusively from the list and that her qualifications and experience were comparable to theirs. The Seventh Circuit reversed, finding that the district court overlooked Randolph’s main theory of discrimination, which centered on the Union’s refusal to place her on the list.

Randolph, who was 59 years old at the time of the alleged discrimination, was the sole female member of the Union, whose members performed welding, bolting, and other metal work. The Union maintains an “out of work” list, which construction companies consult when they need additional union members for a project. Randolph was not on the list for half of 2002 and the last quarter of 2001, even though she claimed that every month she requested to be placed on the list when she called up Rick Bowersock, the Union official who was in charge of the list. Randolph claimed that as a result of her not being on the list she earned only $1,334 doing millwright work, as compared to $23,193 earned by the average male Union member who sought work through the list. Her own telephone records, however, showed four telephone calls to the Union in seven months. After the fourth call, she was placed on the list. Bowersock submitted a sworn denial that Randolph asked to be on the list during the first three calls. Additionally, Randolph alleged that both she and a younger male millwright, Dan Blacketer, complained that members of another local union were working at a job site within the Union’s jurisdiction, but only Blacketer obtained a positive response for the information. Bowersock denied that Randolph raised the jurisdictional issue with him.

Noting that Unions tend to favor older workers because they need more union protection than younger workers, the
Sylvester was one of four employees of the defendant, all women, who signed a lengthy letter of complaint dated May 5, 2003, to the chairman of the defendant’s board, Joseph Skender. The letter accused the defendant’s chief executive officer, Job West, of abusing the women and other staff members by calling them “bitches” (in Sylvester’s case, a “narcissistic bitch”), of commenting on the sexuality of a female executive officer, and of inappropriately responding to the unwanted touching of a female staff member by a foster child. Nine days later, the board of directors met to consider the letter. The board decided to fire two of the women for poor performance. Sylvester’s recent performance evaluation, however, was positive. The decision to fire Sylvester was left up to Skender, based in part upon her reaction to the terminations of the other two women. The next day, Skender announced the terminations at a staff meeting, and Sylvester asked to talk with him privately. During the private meeting, Sylvester accused Skender of talking about her in a profane, derogatory, and untrue manner, which he denied. After some words were exchanged, he told her to leave his office and fired her for insubordination.

The appellate court addressed the question of whether a reasonable jury could find that Sylvester was not fired for insubordination, but rather was fired for signing the letter that accused West of sexual harassment. The court concluded that there was no direct evidence of retaliation, which essentially would have consisted of an admission by West or other company officers that Sylvester was fired in retaliation for the complaint in the letter she signed. Sylvester proceeded under the direct method, which could be proven by means of circumstantial evidence that she engaged in a protected activity and consequently suffered an adverse employment action. Citing Culver v. Gorman & Co., 416 F.3d 540, 545-46 (7th Cir. 2005). The court noted that the distinction between direct and circumstantial evidence is vague, but from the relevant standpoint of probative value, they are the same in principle. Citing Achor v. Riverside Golf Club, 117 F.3d 339, 341 (7th Cir. 1997). Conventionally, direct evidence is distinct from circumstantial evidence in that direct evidence does not require drawing an inference from the evidence to the proposition that the evidence is offered to establish. Citing 1 John H. Wigmore, Evidence § 25, at 953.

The court, however, put little weight on the distinction, recognizing that all evidence requires drawing inferences. Eyewitness accounts, for example, require inferences drawn from raw perceptions and depend upon the accuracy of the witness’s recollection and the witness’s honesty for its accuracy. Although circumstantial evidence might require a longer chain of inferences, if each link is solid then the evidence might be very compelling. Moreover, the court noted that creating a standard by which circumstantial evidence in a discrimination or a retaliation case must, like a mosaic, assemble a number of pieces of evidence that are meaningless in themselves but when taken as a whole provide strong support if they all point in the same direction. Citing Troupe v. May Dep’t Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). Therefore, the court concluded, circumstantial evidence in a discrimination or in a retaliation case need not have a mosaic-like character if it is to preclude summary judgment for the defendant.

Accordingly, the court found circumstantial evidence in this case to preclude summary judgment. First, the court pointed to the prompt termination of two of the four women who signed the letter, noting that their termination for indisputable poor performance did not come until shortly after signing the letter. Second, the fact that Sylvester had no current performance issues yet her performance was brought up at the board meeting where the other two women were fired raised questions for the court. Third, questions were also raised by the authorization given to West at that same meeting to terminate Sylvester not for performing poorly but rather for reacting negatively to the

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news of the firing of her two cosignatories.

The court concluded that a reasonable jury might conclude that Sylvester was being set up by the defendant's officers who had met the previous night and who knew that she would be upset by the terminations of her cosignatories. A reasonable jury could conclude that the board invited West to interpret Sylvester's predictable reaction of dismay as insubordination. The court decided that no more than the circumstantial evidence presented by Sylvester was needed to establish her prima facie case through the “direct” method of proof.

DISABILITY DISCRIMINATION

Plaintiff Fails to Establish Prima Facie Case Under ADA

In Yindee v. CCH Inc., 458 F.3d 599 (7th Cir. 2006), Ma-linee Yindee sued her former employer under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., alleging discrimination and retaliation because of her conditions of vertigo and endometrial carcinoma, which led to a hysterectomy. The district court granted summary judgment in favor of the employer, concluding that Yindee no longer had cancer and that her vertigo was not a disability. Additionally, the district court dismissed the retaliation claim. The Seventh Circuit affirmed.

In 2000, the defendant hired Yindee as a Programmer Analyst to work with a database system. Three years later, she was fired. During a considerable portion of that three-year period, she was on leave because of cancer, which resulted in infertility, and other ailments, including vertigo and related frequent headaches. Yindee first sought an accommodation in 2002, when her vertigo worsened and she could no longer drive. The defendant agreed to allow her to telecommute from her home, which she did exclusively for three weeks. For another ten weeks she split her time between her home and the office while using taxis or public transportation to commute. By the end of three months, however, the defendant concluded that Yindee was not productive and insisted that she return full time to the office. Yindee then filed a charge with the Equal Employment Opportunity Commission (EEOC). Several months later, the defendant informed Yindee that she was at risk of discharge unless she successfully completed a performance improvement plan. She then filed a second EEOC charge. More than a month later, the defendant discharged her. She filed a third EEOC charge, claiming retaliation for filing the other charges.

The district court had concluded that infertility was not a disability. The appellate court disagreed, but found nothing in the record to imply that defendant held Yindee’s infertility against her. The district court also concluded that vertigo is not a disability because “driving” is not a major life activity and balance problems did not prevent Yindee from performing her job. Yindee, however, maintained that the vertigo was an aspect of a single disability caused by cancer. The appellate court found no evidence that would allow a reasonable jury to find that the vertigo was an aspect of her infertility. Therefore, Yindee’s disability claim failed.

The court next evaluated Yindee’s retaliation claim. Noting that this case did not present a situation where a worker with a pristine record complained about discrimination and

Consequently, the court held that Yindee failed to satisfy her burdens of production and persuasion, which arise after the employer articulates a nondiscriminatory explanation. Thus, the employer’s explanation stood uncontradicted.

suddenly found herself in trouble, the court supposed that Yindee did make out a prima facie case of retaliation based on her request to telecommute as an accommodation. Looking to whether the defendant’s reason for the termination was pretextual, the court found that the defendant’s explanation was that Yindee fell behind on both quantity and quality of output. She missed deadlines, other employees had to step in to help, and she did not keep up with the latest version of the database with which she worked. Yindee failed to counter these reasons. Instead, she put forth procedural arguments, such as CCH fired her before her performance plan ended. Consequently, the court held that Yindee failed to satisfy her burdens of production and persuasion, which arise after the employer articulates a nondiscriminatory explanation. Thus, the employer’s explanation stood uncontradicted.
TITLE VII
Husband and Mother of Restaurant’s Sole Proprietor Were “Employees” for the Purposes of Title VII

In *Smith v. Castaways Family Diner*, Cyndee Smith sued her former employer, Castaways Family Diner (Castaways) and its sole proprietor, Carrol A. Gonzalez, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging discrimination based on sex, race, and national origin, as well as retaliation. The district court granted summary judgment in favor of the defendants, because they did not have at least 15 “employees” for the requisite time period and thus were not “employers” subject to Title VII. Because the district court erred in excluding two individuals from its count of “employees,” the Seventh Circuit reversed.

Castaways was a family restaurant. Its sole proprietor, Gonzalez, worked full-time in health care. Her mother, Phyllis Foust, and her husband, Ricardo Gonzalez (Ricardo), managed the restaurant on a day-to-day basis, without Gonzalez’s supervision or regulation. Ricardo works in the kitchen full-time, creates the menus, and orders the supplies. Foust runs the front of the restaurant and has the authority to issue checks drawn on the restaurant’s account. Both handle the bookkeeping, are authorized to set policies and procedures for the restaurant’s employees, and can hire, discipline and fire restaurant employees. They receive regular paychecks. Gonzalez, however, never considered either one to be her employee.

Smith, who worked at the restaurant part-time as a waitress for approximately four months, began to be sexually harassed by two co-workers. When she went to Foust to complain, Foust was unmoved. Smith felt that she had no option except to quit working at the restaurant. Six months later, she filed her charge with the Equal Employment Opportunity Commission (EEOC).

Because Title VII applies only to business that employ fifteen or more employees for at least twenty weeks in a relevant calendar year, 42 U.S.C. § 2000e(b), the district court granted summary judgment in favor of the defendants after determining that neither Ricardo nor Foust were to be counted as “employees.” The appellate court held that the two were erroneously excluded from the calculation.

Title VII circularly defines “employee” as “an individual employed by an employer.” 42 U.S.C. § 2000e(f). The court recognized several tests that existed for determining who is an “employee” versus an “employer.” In *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), the Supreme Court in the context of the Employee Retirement Income Security Act, 29 U.S.C. § 1002(6), looked to the common-law definition of the master-servant relationship to determine who is an “employee,” and focused on the element of control. From *Darden*, the EEOC derived a sixteen-factor test to identify “employees,” focusing on the extent to which the employer controls the means and manner of the worker’s performance. *Citing EEOC Compliance Manual (CCH) ¶ 7110(A)(1), at 5716. In *Clackamas Gastroenterology Associates v. Wells*, 123 S. Ct. 1673 (2003), the Supreme Court in the context of shareholders and directors as “employees” under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., set out factors that distinguish individuals whose title or ownership in the business comes without meaningful authority to run the business from those whose office or stake in the company is genuine. The Seventh Circuit found these definitions unworkable in this case, as neither Foust nor Ricardo held an ownership interest in the restaurant, but yet they wielded much authority and control.

The court recognized that what power Foust and Ricardo had was delegated to them by Gonzales to run the restaurant for her. Regardless, at a fundamental level, a supervisor or a manager is still an employee, because that individual serves the employer’s interests and has interests distinct from the employer’s. *Citing Packard Motor Car Co. v. N.R.L.B.*, 67 S.Ct. 789 (1947). Moreover, that individual’s day-to-day discretion and authority is exercised at the owner’s discretion; no inherent right exists for that individual to control the business. Thus, the court concluded that to properly determine who is an “employee” versus an “employer” the source of that individual’s authority must be considered, and if it is exercised by right, the individual is an “employer.” Because Foust and Ricardo exercised only delegated authority, the court held they were “employees,” and thus reversed the trial court’s grant of summary judgment in the defendants’ favor.
Alternative Dispute Resolution

By: John L. Morel

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Mediation

This column has primarily dealt with mediation as an alternative dispute resolution vehicle. Arbitration is judgmental, whereas mediation is not.

There is often skepticism regarding the value of the cases. At times, a party may have deep animosity, distrust and a belief that mediation will not be fair, and will favor the other side. Counsel for that party should alert the mediator and opposing counsel to the temperament, feelings or nature of his client’s feeling and animosity toward the other side. The mediator will then need to help diffuse it. Letting a party vent to the mediator in their first caucus, letting off steam, will lead to a more productive mediation.

A request to mediate is not an indication of weakness. If opposing counsel is not familiar with mediation, he should be advised that mediation is the most cost efficient and, albeit, best and quickest avenue to access settlement.

At the outset, it is necessary for the parties to have a genuine interest in participating in the mediation with the intention of reaching a settlement. Without a good faith effort, the likelihood of a successful resolution is slim, indeed.

Most mediators should require that each party provide them with a summary of the case, a summary of medical records, or other essential documents, and an indication of the strengths and weaknesses of their case. Because such disclosures are confidential, counsel need not over exaggerate or downplay the evidence in that respect.

If a negligence, products liability or medical malpractice case is involved, someone who practices in that field of law should be chosen as a mediator, if at all possible (e.g., not a corporate counsel, criminal defense lawyer or the like). If the mediator you may have selected is not experienced as such, he or she should be encouraged to obtain suggestions or generally confer with some experienced mediator. One should evaluate the temperament, skills, knowledge and experience of the mediator selected, and suggestions should be made, if necessary.

You must educate your client before mediation as to the process and what he or she should expect during the mediation. By all means, avoid creating unrealistic expectations for your client. Explain that the process may be slow, and that the initial figures that are offered may not be close to where they end up. There will probably not be any indication as to how or at what amount the case may be ultimately settled, and you should advise your client of the strengths and weaknesses of their case and the strengths and weaknesses of the opponent’s case.

Some counsel arrive at a mediation thinking in advance that two or three hours is enough time to devote to it. If the case is not settled by then, they move on to trial. Nothing is more counterproductive. Several fruitful mediations in which I have been a mediator have taken as long as two days. In that process, counsel and his party or representative have had further opportunity overnight to confer, to reflect upon the liability, value the claim, weaknesses and strengths. The next day generally becomes far more productive or ends abruptly.

For any mediator to have success in resolving the case, he must use creativity, knowledge of the facts and the applicable law. At the beginning of a mediation, the mediator should indicate the manner in which the mediation is to proceed, including the confidentiality attendant to it and the need for all participants to proceed in good faith. The mediator should also define his role.

The mediator should limit those who may attend the mediation. The insurance representative should be present. Where the distance between the office of the insurance representative and the site of the mediation are significantly distant, it may be necessary to make some compromise. I, however, have had claims representatives come to Illinois from Washington, Arizona, Oklahoma, South Carolina and Missouri. I found that to be encouraging, and by far, preferable to a mediator using distant phone calls to a superior who will probably have less

About the Author

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knowledge, not have enough authority or otherwise take a position which is counterproductive.

In most instances, even if I have received and read all the material from the respective counsel, I offer them the opportunity to make an opening statement. In some instances, since parties have submitted written materials, exhibits and statements of their strengths and weaknesses, some mediators will not do so.

I, personally, do not advise either side of my opinion as to the value or range of value of the case during our separate caucuses. I will respond to questions about what I believe are the most damaging points or issues against them and those that are the most favorable. I often am asked if there have been any verdicts in the venue that were under similar circumstances. There usually will have been some similar circumstances but more than likely none of them will be identical. If asked, I typically give an opinion as to the range of verdict or the highest verdict on a similar case in Illinois. These caucuses should provide substantial insight to the mediator. I am reluctant to offer information on value and typically will avoid this unless asked to do so.

The attorney that appears before mediators should thoroughly evaluate the mediator, everything from his skills to his demeanor. The evaluation should be sent or delivered to the administrator or judge involved in the mediation.

I have participated in mediations other than as a mediator. Some of the mediators in cases where I have been an attorney for a party are dogmatic. They have, however, given what they believe is the range of verdict, and if you do not offer it, or offer it and it is rejected, this will terminate the mediation.

There should be periodic meetings or sessions with and among the mediators as a group to get their input, to perhaps offer tips or recommendations, either positive or negative. By the same token, those mediations that were unsuccessful should identify whether this occurred due to counsel, counsel’s client, the mediator, or the nature of the case, and should render an appropriate observation. Who presided? What law firms were involved? What was the nature of the action? This review and analysis can be time consuming but should still be done regularly, and kept current. It is no burden and is of great benefit to fellow mediators.

The parties should take steps to ensure that a clerk or other designated officer in the county or circuit maintains a record of the number of mediations, type of mediations, and mediators, parties and counsel. The resolution or outcome of the mediation should also be recorded. This data can then be compared month to month and year to year. It should reflect whether the program is successful and, if so, to what degree, identify the names of those mediators who have had more success and, perhaps, those counsel who have participated in mediation and the number that have been resolved vis a vis attempted.

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For any mediator to have success in resolving the case, he must use creativity, knowledge of the facts and the applicable law.
Professional Liability

By: Martin J. O’Hara
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The Long and Winding Road to a Legal Malpractice Defense Verdict

As experienced practitioners are well aware, obtaining a defense verdict in a legal malpractice action often involves a long and arduous journey. A very recent decision from the First District Appellate Court demonstrates this point well. *Weisman v. Schiller, DuCanto & Fleck*, Ltd., No. 1-04-2950, 2006 WL 2708324 (1st Dist. Sept. 21, 2006).

In *Weisman*, plaintiff Wendy Weisman (“Wendy”) retained the law firm of Schiller, DuCanto & Fleck (the “Schiller firm”) to represent her in a marital dissolution action against her husband, Larry Weisman (“Larry”). Larry was a partner in the law firm of Goldberg, Weisman & Cairo. Throughout 1994, the Schiller firm conducted discovery on behalf of Wendy, which included attempts by the Schiller firm to obtain information regarding the value of Larry’s interest in his law firm.

In September 1994, Larry filed a motion to close discovery. The Schiller firm filed a response setting forth documents that it had received from Larry, as well as documents that it still sought in an effort to determine the value of Larry’s interest in his law firm. Nonetheless, the trial court granted the motion, and ordered that all discovery be closed on January 5, 1995. The court additionally set the matter for trial for February 27, 1995. In November and December 1994, the Schiller firm continued to seek documents from Larry that would allow both it and an expert the Schiller firm had retained to properly value Larry’s interest in his law firm.

On December 28, 1994, Wendy terminated the Schiller firm and retained the services of Kaufman, Litwin and Feinstein (the “Kaufman firm”). The Kaufman firm filed a motion to extend the discovery cut-off date and to continue the trial date on the basis that Larry had not produced all documents relating to the value of his interest in the law firm. The trial court denied the motion to extend, although it ordered that Larry appear for his deposition before trial. During the deposition, Larry testified regarding his various assets. However, Larry was not questioned regarding the value of his interest in the law firm during the deposition.

On February 25, 1995, on the advice of the Kaufman firm, Wendy settled her marital dissolution case. Wendy received approximately $3,103,747 in the settlement, which consisted of $2,070,000 in assets and $1,033,747 in non-modifiable maintenance to be paid over 10 years.

Following the settlement, the Schiller firm filed a petition for fees. In response to the petition, Wendy asserted as an affirmative defense that the fees claimed by the Schiller firm were “not reasonable, in light of the results obtained by them in the work that they failed to do or do adequately.” *Weisman v. Schiller, DuCanto & Fleck*, 314 Ill. App. 3d 577, 581, 733 N.E.2d 818, 822 (1st Dist. 2000). The trial court ultimately ordered Wendy to pay the Schiller firm approximately $26,000 for the dissolution proceedings, and approximately $28,000 for proceedings relating to an order of protection that was sought by Larry against Wendy.

Wendy then filed a legal malpractice action against the Schiller firm. Wendy alleged that the Schiller firm was negligent in failing to fully investigate and discover the nature and extent of the parties’ marital property. Wendy further alleged that the Schiller firm failed to prepare the property valuation and property division aspects of the dissolution action for trial. Wendy asserted that due to the Schiller firm’s legal malpractice, she did not obtain the division of marital property that she would have obtained had the Schiller firm not been negligent in its preparation in the dissolution action. *Weisman*, 314, Ill. App. 3d at 578, 733 N.E.2d at 819-20.

The Schiller firm moved to dismiss Wendy’s legal malpractice action, asserting that it was barred by the doctrine of *res judicata* based upon Wendy’s prior assertion of the affirmative defense in connection with the Schiller firm’s fee petition. The trial court granted the Schiller firm’s motion to dismiss, finding that because Wendy had raised the Schiller firm’s negligence as an affirmative defense to the fee petition brought by the Schiller firm, the issue of the Schiller firm’s negligence as an affirmative defense to the fee petition brought by the Schiller firm is precluded by the doctrine of *res judicata*.

About the Author

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negligence had already been adjudicated in the dissolution proceeding.

The First District Appellate Court reversed the dismissal order. *Weisman*, 314 Ill. App. 3d 577, 733 N.E.2d 818. Although it agreed that there was a final judgment on the merits rendered by a court of competent jurisdiction, and that there was an identity of parties or their privies, the appellate court held that there was not an identity of causes of action as required for the application of *res judicata*. The court found that although Wendy was able to assert affirmative defenses to the Schiller firm’s request for fees, she had no right or opportunity to litigate her claim for damages resulting from the Schiller firm’s professional negligence. The court specifically noted that the fee petition hearing did not afford Wendy an opportunity to obtain a judgment for damages in excess of the amount of the fee sought by the Schiller firm.

Moreover, the appellate court found that even if Wendy had been permitted to litigate her professional negligence action in the context of the fee petition hearing, she would have been deprived of her right to have the claim decided by a jury. Although a plaintiff in a legal malpractice action has a constitutional right to a jury trial, the right to a jury is precluded by Section 103 of the Illinois Marriage and Dissolution of Marriage Act. Therefore, Wendy would have been precluded from having a jury determine her claims against the Schiller firm had she attempted to bring those claims in the context of the fee petition hearing. The court thus held that “the application of the doctrine of *res judicata* in the case at bar would create an injustice by impermissibly infringing upon plaintiff’s fundamental rights to a full remedy and to a jury trial.” *Id.*, 314 Ill. App. 3d at 581, 733 N.E.2d at 822. The appellate court thus reversed the judgment of the trial court that had dismissed Wendy’s legal malpractice claim, and remanded the case for trial.

At trial, Wendy called Stephen Katz, a partner in the Schiller law firm, in her case-in-chief. Katz acknowledged that a full financial deposition of Larry was not conducted during the Schiller firm’s representation of Wendy. Katz also confirmed that expert disclosures in the underlying case were not filed 60 days before the trial date, which put the Schiller firm at risk of being barred from offering expert testimony. On cross-examination, Katz testified that a full financial deposition of Larry was conducted by the Kaufman firm after the Schiller firm had been terminated. Wendy also presented testimony of Glenn Kaufman, a partner at the Kaufman firm, as well as expert testimony from Joseph Mirabella, an experienced divorce attorney. Kaufman testified that the Schiller firm’s representation forced the Kaufman firm to recommend that Wendy settle her divorce case for a stated amount. Mirabella testified that he believed that the Schiller firm deviated from the standard of care in its representation of plaintiff. However, on cross-examination, Mirabella admitted that he had not reviewed the entire record of the underlying case.

Lastly, Wendy called Michael Goldman to testify as an expert on the valuation of Larry’s law firm and his interest therein. Goldman intended to testify that the value of the law firm as of December 31, 1994, was $7,902,000. However, the trial court granted the Schiller firm’s motion *in limine* to bar much of Goldman’s testimony because Goldman’s report incorporated enterprise good will, an element of valuation that was not recognized at the time of the Schiller firm’s representation of Wendy. Goldman was therefore limited to testifying that the value of the law firm was approximately $4.1 million, and that Larry’s interest in the law firm had a value of approximately $2 million.

In its case-in-chief, the Schiller firm presented expert testimony from Timothy Cummins. Cummins testified that Larry’s interest in the law firm at the time of the Schiller firm’s representation of Wendy had a value of $1.2 million. The Schiller firm also presented testimony of James Feldman. Feldman testified that at the time of the underlying divorce action, Illinois courts had not permitted a valuation of professional good will when valuing a law firm.

Following the close of the evidence and closing arguments, the jury deliberated and returned a verdict for the Schiller firm. The trial court thereafter denied Wendy’s motion for a

(Continued on next page)
Legal Malpractice (Continued)

new trial, and she appealed.

Wendy raised various issues on appeal, including issues relating to evidentiary rulings by the trial court. The primary issue that Wendy raised, however, was that the trial court erred by not granting her motion for a new trial on the basis that the jury’s verdict was against the manifest weight of the evidence. The court initially noted that to prove legal malpractice, Wendy was required to prove the existence of an attorney-client relationship establishing a duty on the part of the Schiller firm, a negligent act or omission constituting a breach of that duty, a proximate causal relationship between the breach and the damages sustained, and actual damages. *Weisman v. Schiller, DuCanto, and Fleck, Ltd.*, No. 1-04-2950, 2006 WL 2708324, at *7. “Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.” *Id.* (quoting *Governmental Inter-Ins. Exch. v. Judge*, 221 Ill. 2d 195, 199, 850 N.E.2d 183, 186-187 (2006)).

The court further stated:

Where the alleged legal malpractice involves litigation, no actionable claim exists unless the attorney’s negligence resulted in a loss of an underlying cause of action. If the underlying action never reaches trial because of the attorney’s negligence, the plaintiff is required to prove that but for the attorney’s negligence, the plaintiff would have been successful in that underlying action. A legal malpractice plaintiff must therefore litigate a “case within a case.”

*Id.* (quoting *TRI-G, Inc. v. Burke, Bosselman, & Weaver*, Nos. 99584 and 99595, 2006 WL 1702282, at *2 (Ill. 2006)). The court in *Weisman* thus found that to prove her legal malpractice claim, Wendy had to establish that she would have received a larger share of the marital estate as a result of the divorce proceedings but for the Schiller firm’s malpractice.

The court held that although the record clearly established that an attorney-client relationship existed between Wendy and the Schiller firm and that the Schiller firm had a duty to represent her, Wendy failed to establish that she suffered damages as a result of the Schiller firm’s representation. The court held that Wendy failed to present any concrete evidence that demonstrated that she would have received more than the $2,070,000 in assets and the $1,033,747 in non-modifiable maintenance to which she agreed, had she not settled the case out of court. Although Wendy had presented testimony from the attorney for the Kaufman firm and her expert, Joseph Mirabella, the Schiller firm had countered with the testimony of Timothy Cummins. Further, while Wendy argued that her witnesses were more credible than those of the Schiller firm, the court held that it could not say that the jury’s verdict was against the manifest weight of the evidence. Thus, the court once again reaffirmed the critical importance of the requirement that a legal malpractice plaintiff establish actual damages caused by the attorney’s negligence.

The court also addressed Wendy’s assertion that the trial court had improperly restricted the testimony of her expert Goldman by prohibiting him from testifying regarding the enterprise goodwill in Larry’s law firm. The court traced the legal history surrounding enterprise goodwill. *Id.* at *9-10.

The court found that the first case to recognize enterprise goodwill was *In re Marriage of Talty*, 166 Ill. 2d 232, 652 N.E.2d 330 (1995). The Talty decision was issued on June 22, 1995, approximately six months after the Schiller firm had been terminated.

At the time the Schiller firm was representing Wendy, *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991), was the applicable law on the subject of enterprise goodwill in valuation. *Zells* had held that since goodwill was reflected in maintenance and support awards, additional consideration of it as a divisible asset was “duplicative and improper.” *Id.* at 256. Although *Zells* addressed personal goodwill and not enterprise goodwill, the *Weisman* court found that the Schiller firm could not have been negligent in failing to value enterprise goodwill when that was not recognized until after the Schiller firm had been terminated. The court thus held, “An inability to foretell the future cannot provide a basis to find an attorney liable for malpractice.” *Weisman*, 2006 WL 2708324, at *9. Moreover, because “enterprise goodwill was not a recognizable element of distribution at the time of the underlying divorce . . . it was inappropriate to consider it in determining the value of [Larry’s firm] for purposes of the legal malpractice action.” *Id.* at *10.

Thus, more than ten years after being terminated by Wendy, and more than eight years after being sued for legal malpractice, the Schiller firm obtained a decision from the appellate court affirming the jury’s verdict in its favor. The road to this result was indeed long and complicated, in part because of the earlier dismissal order being reversed on appeal. Nonetheless, the legal and factual issues were presented on behalf of the defendant law firm every step of the way, ultimately resulting in a defense verdict that was upheld on appeal.
Municipal Law

By: Thomas G. DiCianni
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As a part of tort reform legislation in 1986, the Illinois Tort Immunity Act was amended to reduce the statute of limitations for lawsuits against government entities and officials from two years to one, and a six month notice provision in the Act was revoked. Plaintiffs lawyers were happy to trade away the fastidious notice requirement, but the shorter one year period led to blown statutes, and creative arguments on ways to bring their cases within some longer limitations period.

For example, in Herriott v. Powers, 236 Ill. App. 3d 151, 603 N.E.2d 654 (1st Dist. 1992), the plaintiff sued a village public works employee who, while driving a village vehicle, crashed into the plaintiff’s car. The plaintiff missed the one year deadline, but tried to save the case by arguing that the longer two year personal injury limitations period of 13-202 of the Code of Civil Procedure applied because the suit was filed against the employee in his individual rather than official capacity. The appellate court thought it was a nice try, but logically concluded that when a public employee is sued for some act that falls within the scope of employment, the one year limitations period applies.

Another argument to avoid the shorter Tort Immunity Act limitation period focuses on the cause of action, arguing that a longer limitations period applicable to that type of claim trumps the Tort Immunity Act time limit. Those arguments have generally been unsuccessful. See, e.g., Tosado v. Miller, 188 Ill. 2d 186, 720 N.E.2d 1075 (1999) (one year statute of limitations under Tort Immunity Act governs over two year statute for medical malpractice actions); Ferguson v. McKenzie, 202 Ill. 2d 304, 780 N.E.2d 660 (2001) (statute of limitations for claim against public entity by minor after reaching 18 is one year under the Tort Immunity Act).

One might think that on the 20th anniversary of the 1986 tort reform legislation most questions regarding application of the one year statute would have been answered. The last year or two, however, has brought a flurry of judicial debate about various issues regarding the statute of limitations against government entities.

Individual Capacity Lawsuits

In Sperandeo v. Zavitz, 365 Ill. App. 3d 691, 850 N.E.2d 394 (2nd Dist. 2006), the court was asked to revisit the Herriott situation. The plaintiff there filed a lawsuit against a Kane County animal warden who was involved in a car accident with the plaintiff while bringing a stray dog to an animal control facility. The plaintiff filed suit more than one year but earlier than two years after the accident, and argued that the two year general personal injury limitations period applied because the lawsuit was filed not against the defendant in his official capacity, but as an individual. In upholding the Herriott rule, the court could have, but didn’t, address the threshold question of what it means to sue a public employee in an individual capacity. In federal civil rights litigation, the distinction between official and individual capacity lawsuits is significant – suing an individual in an official capacity is a completely different claim, having different elements and different proof requirements. It is essentially a lawsuit against the public entity, not the individual. State tort law, on the other hand, offers no meaningful distinction between an individual and official capacity lawsuit.

Certainly, a plaintiff can sue a public employee for tortious acts performed within the course of his or her employment, assuming the employee owed a duty to the plaintiff. However, the plaintiffs in Sperandeo and Herriott tried to sue the individual in a way that would take the case outside of the Tort Immunity Act statute of limitations. A plaintiff cannot effect that result in the complaint. If the governmental defendant is acting within the scope of his or her employment when the tortious act occurs, the Tort Immunity Act’s one year statute of limitations applies, despite how the plaintiff tries to frame the complaint.

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Municipal Law (Continued)

Which Statute of Limitations Holds the Trump Card?

When a conflict exists between two potentially applicable statutes of limitations, courts will recite the rule that the narrower statute governs over the broader one. But what makes one statute narrower than another? In Tosado v. Miller, 188 Ill. 2d 186, 720 N.E.2d 1075 (1999), a plurality of the Supreme Court suggested that the narrower statute is the one that specifically defines a class of defendants. The dissenters argued that the narrower statute is the one that defines a specific cause of action subject to the statute’s limitations period. In Ferguson v. McKenzie, 202 Ill. 2d 304, 780 N.E.2d 660 (2001), the Court relied on the Tosado plurality approach, and concluded that the legislature intended that the one year Tort Immunity Act limitations period should apply “broadly to any possible claim against a local government entity and its employees.” Ferguson was not without dissent.

In Paskowski v. Metropolitan Water Reclamation District, 213 Ill.2d, 820 N.E.2d 401 (2004), the Court followed the sweeping Ferguson conclusion giving the trumping effect to the Tort Immunity Act over a longer statute for construction related claims. For years there had been a split among appellate districts on whether the one year period applied to claims arising out of the “design, planning, supervision, observation or management of construction” of an improvement to real property, based on §13-214(a) of the Code of Civil Procedure. That provision created a four year statute of limitations for such claims against any “person,” then defined “person” as “any body politic.” Appellate courts disagreed on which provision won. See, e.g. Greb v. Forest Preserve District, 323 Ill. App. 3d 461, 752 N.E.2d 519 (1st Dist. 2001) (one year period applies); Zimmer v. Village of Willowbrook, 242 Ill. App. 3d 437, 610 N.E.2d 709, 182 Ill. Dec. 840 (2nd Dist. 1993) (four year period applies). In Paskowski, the Court resolved the dispute relying on the Ferguson rationale that the one year statute in the Tort Immunity Act will govern over any other limitations period as to government entities. Three judges dissented, however, arguing that the majority read Ferguson too broadly.

With three straight wins for the Tort Immunity Act, one might think the issue was clearly established, but then came Brooks v. Illinois Central Railroad Co., 364 Ill. App. 3d 120, 846 N.E.2d 931 (1st Dist. 2005). The General Assembly has established a specific statute of limitations for contribution claims brought under the Contribution Act, which requires that a defendant seeking contribution or indemnity must file the counterclaim or third-party complaint within two years after being served with process in the underlying action. 735 ILCS 5/13-204(b). In Brooks, the court decided that the Contribution Act statute applied over the one year Tort Immunity Act period for a contribution action against a government entity. The court was persuaded by language in the Contribution Act that its limitations period “shall preempt, as to contribution and indemnity actions only, all other statutes of limitations or repose.”

The Brooks court was also persuaded by the appellate court’s decision in Moore v. Green, 355 Ill. App. 3d 81, 822 N.E.2d 69 (1st Dist. 2004), which came a month after Paskowski. In Moore, the appellate court decided that a provision in the Illinois Domestic Violence Act creating liability for police who fail to enforce its protections for abuse victims trumped a Tort Immunity Act provision immunizing police for the same malfeasance. (Moore was ultimately affirmed by the Supreme Court, 219 Ill. 2d 470 (2006)). Even though Moore had nothing to do with limitations, the court there applied some of the statutory balancing analysis of Tosado, Ferguson and Paskowski. Moore revealed to the Brooks court a chink in the Ferguson armor. So, despite what appeared to be a broad promulgation from the Supreme Court settling a long debate, Brooks showed that the General Assembly’s intent is still open to interpretation, and creative efforts to invoke that intent can prevail.

Accrual

Another approach to lengthening the time to sue is to delay the commencement of the one year period. In Ferguson v. City of Chicago, 213 Ill. 2d 94, 820 N.E.2d 455 (2004), the Supreme Court addressed the question of when a malicious prosecution action accrues for application of the statute of limitations. Criminal charges against the plaintiff there had been stricken off call with leave to reinstate, affectionately referred to in the criminal courts as an “SOL.” An SOL’d case, unlike a nolle prosequied one, can be reinstated by the prosecutor until barred under the Illinois speedy trial act. Under the speedy trial statute, a criminal defendant not incarcerated awaiting trial must be brought to trial within 160 days, with any delays caused by the defendant excluded from the 160 day term. When a case is SOL, the prosecution has whatever time is left on the 160 day term after the SOL to reinstate the case.

In Ferguson, the plaintiff’s malicious prosecution claim was dismissed as time-barred, because it was filed more than one year after the SOL, but less than one year after the speedy trial term expired. The Supreme Court found that the malicious prosecution claim did not accrue until the plaintiff was completely out of jeopardy from the criminal charges, which did not happen until the 160 day term was over.
In Sims-Hearn v. Office of the Medical Examiner of Cook County, 359 Ill. App. 3d 439, 834 N.E.2d 205 (1st Dist. 2005), the plaintiff sued the Cook County Medical Examiner, after disagreement with the Medical Examiner’s conclusion that her son’s death was the result of an accidental drug overdose. The plaintiff believed her son had been murdered, and filed a claim under the Crime Victim’s Compensation Act to recover statutory benefits for the crime. The plaintiff asked the Medical Examiner to consider certain additional evidence which she believed supported her theory, and wanted the autopsy results revised. The Medical Examiner considered the additional evidence, but came to the same conclusion and issued a supplemental report stating so.

The plaintiff’s Crime Victim’s Compensation Act claim, based on the Medical Examiner’s opinion, was denied. The plaintiff then sued the Medical Examiner, alleging a negligent performance of the autopsy. The court, after first concluding that the claim was barred by the common law public duty rule, found that the one year statute of limitations had expired. The plaintiff invoked the common law discovery rule, and argued that the statute of limitations did not begin to run until the Medical Examiner considered the additional evidence and rendered its second opinion. The court disagreed, holding that the discovery rule delays the statute of limitation until the plaintiff knows there has been an injury and that the injury was wrongfully caused. The court found the plaintiff had the operative knowledge after the initial autopsy report.

Although time has hardened the rules for application of the Tort Immunity Act’s one year limitation period, recent decisions show continuing fluidity on that topic. Until the day when filing deadlines no longer get missed, one can expect a continuing supply of creative arguments for extension of the one year period.

During its May 2006 term, the Illinois Supreme Court accepted the defendant’s petition for leave to appeal in Bagent v. Blessing Care Corp. (Docket No. 102430). In Bagent the court will decide whether a hospital can be held vicariously liable for invasion of privacy because of an unauthorized disclosure of a patient’s confidential medical information by a hospital employee, which took place at a public tavern.

In a two-to-one decision, the Fourth District Appellate Court in Bagent had held that although the disclosure of medical information was not the type of conduct that the hospital employee was employed to perform and although the employee was off duty when she disclosed the information to the patient’s sister, a question of fact existed regarding whether the purpose of the disclosure was at least partly to serve the hospital. 363 Ill. App. 3d 916, 844 N.E.2d 469. The Illinois Supreme Court recently granted the IDC leave to appear and file its amicus curiae brief in support of the defendant’s brief.

On behalf of the IDC, the Amicus Committee thanks Daniel W. Farroll and Christian Willenborg of Burroughs, Hepler, Broom, MacDonald, Hebrank and True for taking the time from their other commitments to prepare the amicus brief for filing.

(Continued on next page)
Amicus Committee Report (Continued)

Since we last reported, the Illinois Supreme Court has handed down its decision in Tri-G, Inc. v. Burke, Bosselman and Weaver, Docket No. 99584, in which the IDC participated successfully as amicus. In that case of first impression, the Illinois Supreme Court addressed the issue of whether a law firm could be held liable for punitive damages lost as a result of legal malpractice. In holding that a legal malpractice plaintiff could not recover punitive damages, the Illinois Supreme Court began its analysis by examining the nature and purpose of punitive damages, that is, to punish the wrongdoer and deter others from committing similar acts rather than compensate the wronged party. The court observed that allowing the plaintiff to recover punitive damages that might have been recovered in the underlying action would in no way further that objective, but would instead shift punishment to the law firm. In view of the statutory bar to the recovery of punitive damages in a legal malpractice action, it would punish the wrong party to hold the law firm liable for the punitive damages attributable to another wrong-doer. Thus the Court rejected the plaintiff’s efforts to characterize lost punitive damages as compensatory damages when arising out of a legal malpractice action.

Thomas P. McGarry of Hinshaw & Culbertson wrote the amicus brief in support of the defendant.

The IDC was less successful in Marshall v. Burger King Corp., Docket No. 100372. In Marshall the plaintiff’s decedent was dining in a Burger King restaurant, when a car crashed through the half-brick, half-glass wall of the building thereby inflicting fatal injuries on him. The decedent’s father, as representative of the decedent’s estate, brought a wrongful death action against the fast food franchisor, the franchisee and others. The plaintiff claimed that the defendants failed to exercise due care in maintaining the restaurant in a manner that would protect patrons of the restaurant in the surrounding high traffic area and that the negligent failure to do so proximately caused the death.

The defendants filed a motion to dismiss, claiming that they owed no duty to protect the decedent from an unforeseeable injury. The trial court granted the motion to dismiss, but the appellate court reversed and remanded. The Illinois Supreme Court affirmed the appellate court, holding that the defendants owed a duty to protect the customer from the out-of-control vehicle. The Illinois Supreme Court reasoned that the special relationship between a business invitor and an invitee created a duty of reasonable care that was applicable to the defendants’ duty to protect the decedent from an unreasonable risk of physical harm, including out-of-control vehicles. In balancing the competing public policy considerations, the court concluded that the costs to businesses and the public were speculative when balanced against the foreseeability, magnitude and likelihood of the injury. The court emphasized that the recognition of a general duty of reasonable care did not mean that the evidence would show that the duty was breached in every case. Finally, overruling an earlier appellate court case that suggested otherwise, the Illinois Supreme Court dismissed the defendants’ argument that a duty of care could not exist without notice of a prior similar incident.

On behalf of the IDC, I wrote the amicus brief in support of the defendants.

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

- Michael Resis  
  (312) 894-3249  
  mresis@salawus.com

  First Judicial District
  John J. Piegore
  Sanchez & Daniels, Chicago
  (312) 641-1555

  Second Judicial District
  James DeAno
  DeAno & Scarry, Wheaton
  (312) 690-2800

  Third Judicial District
  Karen L. Kendall
  Heyl, Royster, Voelker & Allen, Peoria
  (309) 676-0400

  Fourth Judicial District
  Robert W. Neirynck
  Costigan & Wolrab, P.C., Bloomington
  (309) 828-4310

  Fifth Judicial District
  Stephen C. Mudge
  Reed, Armstrong, Gorman, Coffey, Thompson, Gilbert & Mudge, Edwardsville
  (618) 656-0257

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.
Association News

IDC Announces New Executive Director

The Illinois Association of Defense Trial Counsel (IDC) has announced that effective October 1, 2006, Sandra J. Wulf, CAE, IOM, joined the association as its Executive Director, replacing the current Executive Director Shirley A. Stevens, who will retire in March 2007.

Sandra has served as the President (Executive Director) for the Illinois Association of Mutual Insurance Companies (IAMIC) since 1996. In this capacity, she managed the association’s day-to-day operations, planned association meetings, prepared their quarterly newsletter, the *Lautum News*, and lobbied the Illinois General Assembly.

Prior to joining the IAMIC staff, Sandra worked as a Business Specialist with the Illinois Department of Commerce & Community Affairs where she assisted new and existing entrepreneurs in starting business ventures.

Sandra started her career in association management with the National Federation of Independent Business, where she served as Assistant State Director. In this position, Sandra lobbied the Illinois General Assembly.

She is a member of the American Society of Association Executives (ASAE) and the Illinois Society of Association Executives (ISAE). Sandra has served on numerous committees and the board of directors for the ISAE. Currently, Sandra serves as the ISAE President. Sandra received the Certified Association Executive (CAE) designation in 2001 and was presented in 2000 with the ISAE Rising Star Award. She also earned the IOM designation in 2004, after attending the US Chamber of Commerce Institute for Organization Management for four years.

Mrs. Wulf is a graduate of Illinois State University. She and her husband Martin live in Springfield with their two children.
The IDC Young Lawyers hosted their 1st annual cocktail party at Lizzie McNeil’s on August 24th, 2006. Young Lawyers met and mingled with IDC Board Members throughout the evening while enjoying drinks and a variety of appetizers. David Lewin, from Tribler Orpett & Meyer PC, and his German Shepherd relaxed in the outdoor seating area while talking with other young lawyers. During the cocktail party, door prizes were awarded to several attorneys, including a gift certificate to Julius Meinl on Southport and DRI certificates. We would like to thank all the IDC Board members for their support and the Young Lawyers that attended the event.

Several projects are underway for this fall. October kicked off the IDC Young Lawyers school supply drive. This year three schools were selected: East Aurora District 131 in Aurora, Sherman Elementary in Englewood (Chicago), and Alton Junior High Special Education in Alton. The IDC Young Lawyers requested that IDC members donate various school supplies, winter clothing items or money to one of the participating schools. The drive ran for two weeks and then all items collected were delivered to the schools on behalf of the IDC Young Lawyers. A special thanks to all those who participated!

The IDC Young Lawyers plan to reach out to the above three schools again in March to volunteer to read to an elementary class in celebration of Dr. Suess’ birthday and the “Read Across America” program. Attorneys will also talk to students about being attorneys and what their jobs entail. This program will take place on March 2, 2007. Anyone interested in participating in this event should contact Jennifer Groszek at jennifer.groszek@guntymccarthy.com.

Several social events are in the works as well! The suburban co-chairpersons are planning a happy hour event for the Friday of the Trial Academy on January 26 and 27, 2007. Additionally, the IDC Young Lawyers plan to host a continental breakfast during the basic skills seminar taking place November 30-December 2, 2007. A Judicial Reception is being planned for late January 2007, which will enable IDC Young Lawyers to meet and greet Judges.

This issue includes an article co-authored by Patrick Stufflebeam and Jennifer Groszek on the Construction Statute of Repose. We plan to contribute an article authored by young lawyers to each IDC Quarterly. If you are interested in authoring an article, please contact Patrick Stufflebeam at patrick.stufflebeam@ilmlaw.com.

We are currently developing other projects and events for the 2007 calendar.
year. We look forward to hosting events throughout Illinois and are looking for new members who would like to get involved. If you are interested in joining the IDC Young Lawyers committee, please contact Jennifer Groszek at Jennifer.Groszek@guntymccarthy.com or Tim Epstein at tepstein@osalaw.com.
North Central Region

TRIAL academy

The Trial Academy is the only trial technique seminar in Illinois, Indiana, Minnesota and Wisconsin specifically designed for the defense lawyer. With a ratio of four students to one instructor, every student is guaranteed individual attention during each phase of the trial. Each student is videotaped while conducting part of the trial, and each receives a copy of that videotape upon conclusion of the Trial Academy. Watching one’s own performance on videotape is a proven and valuable learning tool.

The Trial Academy is an excellent means of providing “on your feet” experience for lawyers who have limited courtroom and trial experience. Written materials are provided to the students well in advance so that they have time to prepare for the different phases of the trial. The students are responsible for coming to the Trial Academy prepared to conduct the entire defense of the trial, from the opening statement to the closing argument. The materials provided, which include investigative materials, statements from witnesses to be used for impeachment, pleadings, deposition testimony, jury instructions and articles on trial advocacy, allow the students to conduct an entire trial. The participants are advised that they are required to review the materials in advance in preparation for the Academy. The students are to be prepared as if they were actually engaged in trial.

Enrollment for the Academy is limited to 44 students with registration being accepted on a first come, first serve basis. The registration fee includes written materials, videotape and meals. The early registration fee on or before December 31, 2006 is $745 for IDC, DTCI, MDLA & CTCW members (or associates of IDC, DTCI, MDLA & CTCW members), and $795 for nonmembers. Registration after December 31, 2006 increases to $845 for IDC, DTCI, MDLA & CTCW members (or associates of IDC, DTCI, MDLA & CTCW members), and $895 for nonmembers.

The Committee recommends that all participants spend Friday night, January 26, 2007, at the hotel. Due to the intensity of the program, spending the night at the hotel provides the participants with additional time for preparation so that they can get as much out of the program as possible. The hotel room charge of $149 per night is not included in the Academy fee.

To guarantee that students receive their Academy materials in plenty of time to prepare for the Academy, and due to the limited enrollment of 44 students, early registration is recommended. The deadline for all registration is January 10, 2007.

For additional information, call Shirley Stevens at the IDC office (800-232-0169)
IDC, DTCI, MDLA and CTCW  North Central Region Trial Academy

SCHEDULE
Thursday, January 25, 2007
7:00 pm Informal Gathering for early arrivals (location to be announced)

Friday, January 26, 2007
7:45 am Registration and Continental Breakfast
8:30 am Orientation
8:45 am Motions in Limine
8:55 am Jury Instructions
9:05 am Faculty Demonstration of Voir Dire
9:30 am Faculty Present Plaintiff’s Opening Statement
10:00 am Defendant’s Opening Statement
11:30 am Faculty Demonstration of Defendant’s Opening Statement and Discussion of Defense Opening Statement Strategy
12:00 pm Lunch
1:00 pm Faculty Demonstration of Plaintiff’s Direct Examination
1:30 pm Faculty Lecture on Cross Examination
1:45 pm Defendants Cross Exam
3:30 pm Faculty Demonstration of Witness’ Direct Examination
3:45 pm Cross-Examination of Plaintiffs Witness
5:00 pm Faculty Demonstration of Direct Examination of Plaintiff’s treating Physician
5:15 pm Cross-Examination of Treating Doctor
5:30 pm Direct Examination of Defendant’s Examining Doctor
6:00 pm Faculty Demonstration of Direct Examination of Defendant’s Examining Physician
7:00 pm Dinner and general review with the faculty and other participants

Saturday, January 27, 2007
7:45 am Continental Breakfast
8:15 am Faculty Lecture on Trial Notebooks Trial Procedures and Procedures at End of Plaintiff’s Case
8:45 am Direct Examination of Defendant
10:30 am Faculty Cross-Examination of Defendant
11:00 am Direct Examination of Defendant’s Witness
11:30 am Lunch
12:30 pm Faculty Presentation of Plaintiffs Closing
1:30 pm Defendant’s Closing Argument
3:00 pm Adjournment

FACULTY
LONNIE D. JOHNSON, Mallor, Clendening, Grodner & Bohrer, LLP, Bloomington, IN
JANE KIRKEIDE, Menn Law Firm, Ltd., Appleton, WI
KEVIN FERGUSON, American Family Insurance, Madison, WI
DAVID SCHOOLER, Larson King, LLP, St. Paul, MN
C. DAVID DIETZ, Ramsey County Attorney’s Office, St. Paul, MN
JAMES D. AHERN, Cassiday, Schade & Gloor, Chicago, IL
FRANCIS “CHIP” SPINA, Cremer, Kopon, Shaughnessy & Spina, Chicago, IL
ALICE K. KUSH, Hinshaw & Culbertson, Chicago, IL
J. DENNIS MAREK, Ackman Marek & Boyd, Kankakee, IL
THOMAS E. JONES, Thompson Coburn, LLP, Belleville, IL
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COMMITTEE
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LISA M. PAGEL, SmithAmundsen, L.L.C., Chicago, IL
LISA A. TRULL, Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C., Chicago, IL

Registrations:
- Registration fee includes program, written materials, videotape and meals.
- Hotel sleeping room is a separate fee of $139/single or $149/double per night.
- The deadline for the early registration fee has been extended to December 31, 2006.
- No registrations will be accepted after January 10, 2007.
- Please register early to insure the student receives Academy study guide materials in advance, to allow preparation time before the Academy begins. Enrollment is limited to 44 students with registration being accepted on a first come, first served basis.
- Fax registration information and mail registration fee and room reservation information to:
  Sandra Wulf, Executive Director
  Illinois Association of Defense Trial Counsel, P.O. Box 3144, Springfield, IL 62708-3144
  800-232-0169  FAX 217-585-0886
North Central Region Trial Academy Registration
January 26 & 27, 2007 • Oak Brook Hills Hotel & Resort • Oak Brook, Illinois

Name:___________________________________________________________________________________________________________

Nickname for Badge:_______________________________________________________________________________________________

Firm Name:______________________________________________________________________________________________________

Address:_________________________________________________________________________________________________________

City:_______________________________________________________ State:_______________________ Zip:_________________________

Phone:_____________________________________________________ Fax:______________________________

Number of Bench Trials in Past 5 Years:______________________________ Number of Jury Trials in Past 5 Years:______________________________

IDC, DTCI, MDLA & CTCW Member Registration

On or Before December 31, 2006 $745.00 $________________________

January 1, 2007 and after $795.00 $________________________

*NON Member Registration

On or Before December 31, 2006 $845.00 $________________________

January 1, 2007 and after $895.00 $________________________

*Associates of IDC, DTCI, MDLA & CTCW members who register prior to January 1, 2007 are eligible for the Member Registration Fee.

Hotel Room - Thursday Evening, January 25, 2007 $139.00/Single $149.00/Double $________________________

Hotel Room - Friday Evening, January 26, 2007 $139.00/Single $149.00/Double $________________________

Arrival Date & Time:_________________________ Departure Date:_________________________

Total Amount Enclosed $________________________

*All students are encouraged to spend Friday night at the hotel. The program runs late on Friday and starts early Saturday morning. Spending the Friday night at the hotel allows the student ample time for review at dinner with the faculty and further preparation time Friday evening for the Saturday morning portion of the program. This hotel fee is not included in the Academy registration fee.

Fill out information completely (please print or type) and send with check to: IDC, P.O. Box 3144, Springfield, IL 62708-3144
FALL CONFERENCE 2007

We're Going BACK TO ST. LOUIS

Trial Tactics & Insurance Symposium

Thursday & Friday
September 20-21, 2007

at the Chase Park Plaza Hotel
www.chaseparkplaza.com

Including Dinner under the stars at the Saint Louis Science Center Planetarium, and Cocktails with the Penguins and Puffins at the Saint Louis Zoo.
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 smaller committees and usually are appointed by the Board of Directors. If you are particularly interested in one of these 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
Substantive Law Committee responsibilities include, but are not limited to, the following:

- Committees to meet on a schedule that works for the group in general;
- Meetings are always held in conjunction with the Spring Defense Tactics Seminar;
- Each committee is responsible for writing one Monograph per year for the IDC Quarterly, and to submit other articles, as warranted;
- To keep up with 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;
- If and when certain issues arise that would warrant a specific “topical” seminar, committee should, with the Board of Directors concurrence, produce such seminar.

Event Committees

- Spring Defense Tactics Seminar
- Fall Conference
- Trial Academy

Administrative Committees

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

Name: ____________________________________________
Firm: ____________________________________________
Address: _________________________________________
City, State, Zip: __________________________________
Phone: _________________________________________ Fax: ____________________
Email: __________________________________________
MEMBERSHIP BENEFITS

- **Annual Spring Seminar in Chicago**, the Defense Tactics Seminar, featuring speakers on topics of current interest to the civil defense bar and law updates on areas of law of interest to our members. The seminar is attended by members and business representatives from all parts of the state;

- **Annual Trial Academy**, at which trial skills, tactics and techniques are taught by experienced members of the civil defense bar. Open only to member-sponsored attendees;

- **The IDC Quarterly**, our law review quality publication on current legal topics and matters of interest to our members and our individual clients and the business community we represent;

- **Regular newsletters** from our substantive committees focusing on legal topics of interest in civil practice, employment, municipal, products liability, business, medical liability, professional liability, and insurance;

- **Topical seminars** presented by our substantive committees for those members practicing in specific areas;

- **Legislative liaison** to the Illinois General Assembly for the civil defense bar;

- **Amicus curiae briefs** in appellate cases of significance and importance to the civil defense bar;

- **Position papers and monographs** prepared for presentation and publication on current issues of legislation affecting civil litigation;

- **Support for and participation in the National Association of State and Local Defense Groups**, held in conjunction with the Defense Research Institute, Inc.;

- **Publication of the IDC Membership Directory**;

- **Political Action Committee** incorporated under the name: Defense Trial Counsels’ Political Action Committee.

HISTORY OF THE IDC

The Illinois Association of Defense Trial Counsel was organized to provide continuing education for civil and defense lawyers. It has continued in and expanded that role for 40 years.

The genesis of the IDC was the first Defense Tactics Seminar, held in Chicago in November, 1964. The first Seminar was devoted to the defense of personal injury litigation. It attracted more than 700 attendees, and the enthusiasm generated by the program led the sponsors to examine the possibility of forming a permanent organization designed to protect and further the interests of the defense bar and its clients. Bylaws were prepared and adopted in late 1964, and the organization which later became known as the Illinois Defense Counsel was on its way.

From that small group has grown an organization of about 1000 members which conducts numerous seminars, a multi-state trial academy, publishes the **IDC Quarterly**, a quarterly law review, has an active legislative program, presents *amicus curiae* briefs on significant topics, and is managed by a professional director. These activities are guided by five officers and eighteen directors, including representatives of Chicago, the suburbs and downstate Illinois. These directors are elected by ballot of the membership. The officers are elected by a majority of the directors.

PURPOSE OF THE IDC

The purpose of the IDC is to be the preeminent association of defense trial attorneys and voice of the defense bar in Illinois, and to serve the business and professional interests of its members.

STATEMENT OF CORE VALUES

- IDC will promote and support a fair, unbiased and independent judiciary
- IDC will take positions on issues of significance to the defense bar and advocate and publicize those positions
- IDC will promote and support the fair, expeditious and equitable resolution of disputes, including preservation and improvement of the jury system
- IDC will provide programs and opportunities for professional development to assist members in better serving their clients
- IDC will increase its role as the voice of the defense bar of Illinois to make IDC more relevant to its members and the general public
- IDC will support diversity within our organization, the defense bar and the legal profession
2007

CALENDAR of Events

- January 5, 2007          Electronic Discovery
  Chicago Bar Association • Chicago, IL

- January 26 & 27, 2007    North Central Regional Trial Academy
  Oak Brook Hills Hotel & Resort • Oak Brook, IL

- March 9, 2007            Spring Defense Tactics Seminar
  University Club • Chicago, IL