The Applicability of the Collectibility Defense to a Legal Malpractice Action

Legal Malpractice v. Breach of Fiduciary Duty: Determining the Proper Remedy

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1992 – 2007
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A Farewell to Shirley

The news that Shirley Stevens is retiring as Executive Director of the Illinois Association of Defense Trial Counsel brings back memories of her early years with our organization.

Shirley was in the difficult position of replacing the legendary Arlene Moody, who had started when the IDC was organized and was the only staff person it had ever had. Arlene had served from 1964 to 1989 with only a ten-month hiatus in 1979-1980. She had virtually invented the organization, and no one could imagine how she could be replaced.

After a brief transition, the IDC entered into a contract with K. E. Consultants. Shirley Stevens was the primary contact person. She became Executive Director in 1992. Over the past 15 years, she did something that we had considered impossible—she replaced Arlene Moody.

Although the IDC is now and always has been a member-driven organization, the Executive Director position carries a lot of responsibility and involves a great deal of work.

Most of this is done behind the scenes with relatively few members realizing how hard it is.

Shirley made the arrangements with hotels, restaurants and special venues. She took care of out-of-town speakers and such problems as late reservations, late cancellations, special food requests, and inexperienced committee chairs.

Shirley handled all of this with a helpful attitude and incredible good cheer. These qualities were especially important as the organization expanded and our membership became younger and younger and less and less experienced. Without exception, the leaders of the IDC will tell you that Shirley was wonderful, that she showed them the ropes, that she led them by the hand, and that their projects would not have been nearly as successful without her.

All of this was done for a rapidly growing organization. The “Shirley Era” involved a great deal of change. The Quarterly had evolved in ten years from a four-page fold-over into the full-sized professional journal that is published today. The Trial Academy was in its early stages in 1992 and had to be nursed along to maturity. Shirley assisted with a very active amicus program and an expanded legislative program. In addition, the Defense Tactics Seminar grew year by year and was joined
in 1989 by a greatly expanded Fall Seminar and in 1993 by a Rookie Seminar for newly admitted lawyers. More recently, the IDC has developed a Young Lawyers Division with its own newsletter and eight active substantive law committees. All of these require time and attention from the Executive Director.

Shirley was a first-class meeting planner who staged excellent special events. Interestingly enough, she had a real baptism by fire in her first solo Fall Seminar. On January 8, 1992, the original main building at the Eagle Ridge Inn and Resort in Galena was the victim of a spectacular fire and had to be demolished. With eight months to go and no reasonable alternative site available, Shirley put together an outstanding “road show” Fall Seminar with meeting sites spread out over much of the large expanse of Eagle Ridge. It was a memorable and very successful event.

She also managed the extensive arrangements for the 30th Anniversary celebration at the John G. Shedd Aquarium, the 35th Anniversary at the Field Museum, and the 40th Anniversary, which featured a dinner cruise on Lake Michigan.

And so Shirley Stevens has done what was seemingly impossible. She successfully replaced Arlene Moody, and we now wonder how anyone can possibly replace Shirley.

Thank you, Shirley, for all you have done for the IDC.

Willis R. Tribler

You May Have Passed the Bar, But Don’t Forget Your CLE!

Newly admitted attorneys are required to complete a Basic Skills Course to be eligible to practice law in Illinois. This requirement must be met within one year of admission. Have you met this requirement? How about your firm’s new attorneys? Have you met all of your CLE requirements? If not, don’t waste time – plan now to attend the IDC Basic Skills Course, to be presented at the Hilton Garden Inn in Springfield.

This in-depth program is worth 15 CLE hours and is open to any attorney, whether newly admitted or not.

The following presentations will be offered during the 2.5 day Basic Skills Course:

- Evaluating and Avoiding Conflicts, Client Retention, Billing and Retaining Client Funds
- Communication and Reporting Skills
- Illinois Civil Procedure – State Court Jurisdiction, Service, Venue, Local Rules; Federal Rules
- Jury Instructions
- Pleading, Motion and Courtroom Practice
- Professionalism in the Courtroom
- Written Discovery
- Medical Records
- Requests to Admit
- Oral Discovery
- Expert Witnesses – Consulting and Disclosed
- Case Evaluation
- Effective Negotiation and ADR
- Mandatory Arbitration
- Trial Techniques, Preparation and Practice
- Preservation of Appellate Record, Appellate Practice
- Time Management, Organization and Time Keeping

Don’t miss this opportunity to meet your CLE requirements and attend an excellent legal education program. Mark your calendar today!
President’s Message

By: Steven M. Puiszis
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What Do the Amendments to the Federal Rules of Civil Procedure for Electronic Discovery and the Rock Musical Hair Have in Common?

The rock musical Hair made its Broadway debut in 1968. While the play was initially panned by the critics, its musical score became immensely popular. The song “Aquarius/Let the Sunshine In” held the number one slot on the U.S. Billboard top 100 list for six weeks following its release by the Fifth Dimension. The song’s lyrics addressed an astronomical legend – the dawning of the age of Aquarius – a time when “peace will guide the planets and love will steer the stars.”

According to astronomers, the age of Aquarius will not dawn for another six hundred years. So what do the new e-discovery amendments and Hair have in common? The answer lies in the song Aquarius. Less than four decades after Hair first premiered on Broadway pronouncing the dawning of the age of Aquarius, lawyers are now facing the dawning of a new age – the age of electronic discovery. This age of electronic discovery is not one likely to be characterized by peace and love; rather it is an age where e-discovery consultants will “guide the planets” and the search for metadata and smoking gun e-mails will “steer the stars.”

The first mainframe computer recently celebrated its 50th birthday. The first patent for voice mail was issued in 1982. The first e-mail system was developed even before that, in the early ’70s. So what prompted the dawning of this new age? The technology has been around for years. The dawning of this age of electronic discovery was triggered by the explosion in the growth of electronic communications and the simultaneous advancement in the ability to capture and store those communications. Rather than picking up the phone to make a call, people now send an e-mail. Rather than sending records or documents via regular mail, people are now scanning the information and sending it over the internet, thereby saving time and money. The federal e-discovery rules are simply an attempt to catch up with those developments and adapt traditional discovery rules to the overwhelming amount of electronic information that is now technologically available.

On December 1, 2006, the amendments to the Federal Rules of Civil Procedure addressing the discovery of “electronically-stored information” went into effect. The Committee Notes to Rule 34(a) explain that the term electronically-stored information was deliberately left undefined by the drafters of the rule amendments because of the “wide variety of computer systems in use and the rapidity of technological change.” The drafters wanted these amendments to be “broad enough to cover all current types of computer-based information and flexible enough to encompass future changes and developments.” See Fed. R. Civ. P. 34(a) Advisory Committee Notes.

While it might be a bit of an overstatement to describe these amendments as the dawning of a new age, it is not too far from the truth. The e-discovery amendments were clearly intended to alter how lawyers have historically practiced in federal court. They have introduced a whole new language to learn for those of us who grew up on Fortran, Cobol and “mag cards” – hash values, topology, metadata, de-duplication, TIFF and native application – are just a few of the new terms of art in this e-discovery age. No longer are instant messages just for the kids. Now baby boomers will have to learn not only about “IM,” but also why their clients’ information system(s) are either able or unable to capture employees’ instant messages. It is no longer enough to simply learn the intricacies of the product your client developed. Circumstances may require that we also learn the client’s information systems and its document retention practices while we are also learning about the product or procedure at issue in the litigation.

Whoever said computers would make our lives easier was certainly not thinking of discovery. Hard drives, with capacity measured in terabytes, can now be purchased for less than $400 for your desktop computer at home. How much information can be held on a terabyte? The University of California at Berkley estimated that it would take 50,000 trees to create enough paper to record one terabyte of information. See http://www.sims.berkley.edu/research/projects/how-
Much info-2003/. That same study estimated that the 19 million books and other print collections in the Library of Congress would require 10 terabytes of storage. Many of the companies we represent today have computer systems with far more storage capacity than 10 terabytes. So it should be readily apparent that electronic discovery involves an exponentially greater volume of potentially relevant information than traditional paper discovery.

Making things even more difficult is the dispersion of electronic information. In the “good old days,” the locations where a client stored its records could be readily identified. It was finding a particular document that proved to be the challenge. In this new age, merely figuring out where sources of electronic information are located is a real challenge. Potentially relevant electronic records and documents can be stored not only on employee workstations and laptops, but on back-up media, network e-mail servers, file and application servers, PDAs such as Blackberries and Treos, voicemail systems and smart phones, portable storage devices such as pen drives, DVDs, CDs or floppy disks, web site blogs, third party e-mail hosts, company intranets and even home computers are but a few possible sources of information. Following the September 11th attack on the World Trade Center, many corporations have developed remote co-location facilities where duplicate servers are waiting to be activated in the event of a disaster. A client’s sources of electronic information may be located and stored in a number of different states and countries around globe.

Moreover, internet content providers such as Google make word processing and spreadsheet capabilities available online. Information generated online through such a content provider will not be found by simply going to the client unless the information generated online is backed-up locally on the client’s information system. Due to increasing software costs, smaller companies are outsourcing some or all of their software applications or processing functions to third-party application service providers (ASPs) such as NetSuite or Autodesk. Those ASPs own, operate and maintain the servers and software applications generating such a client’s electronic information. They are another source of electronic information that should not be overlooked.

All sources of potentially relevant electronic information have to be located. Then the electronic information from those sources must be preserved, collected and reviewed for relevancy and privilege before any production can even begin to occur. Just the thought of having to take such extraordinary measures to first find the source and then review the available information makes one long for the dreary hot days of youth spent culling through boxes of records in dusty warehouses looking for paper records.

Further complicating electronic discovery is the existence of metadata, or “data about data.” Metadata cannot be viewed when a document is printed on paper or when normally viewed on a computer screen. However, metadata is generated for each document generated by a client’s computer system and for every e-mail generated or received by the client. The next time you have a document open on your computer, go to the browser menu, scroll down and click on “properties.” There you will find some basic metadata about that particular document. Over 300 fields of metadata potentially exist depending on the type of computer system, format, and electronic information involved. Information such as a document’s author, the date it was created, the number of versions that were created, persons who revised the document or who had access to the document are just some of the metadata fields that can be found for a given document. If a document is shared with a client who made changes or comments to it, those tracked changes are embedded in the electronic version of that document and are not easily removed, making privilege reviews more complicated and expensive than they are currently. If you send such a document to opposing counsel without first scrubbing its metadata or converting it to a PDF, you may have inadvertently produced privileged information. If you neglect to list privileged information that is only available in a document’s metadata on a privilege log, you also may have waived privilege if the court orders production of electronic information with its metadata.

(Continued on next page)
President’s Message (Continued)

Even more vexing is the paradoxical nature of electronic information. In the “good old days,” when an original paper document was put into a shredder, it was gone forever. Today, hitting a computer’s delete button does not dispose of an electronic document. All that happens is that the binary code assigned by the computer to that document is altered so that the computer views the document’s location on its file allocation table as unused space. Until that document’s disk location is actually overwritten by the computer, it remains hidden on the hard drive, capable of being at least partially found through a forensic examination of the computer. However, several fields of that same document’s metadata can be altered through the routine operation of a computer, simply by opening the document or moving it into a new file.

Further confounding the matter is that electronic information can be stored in multiple different formats depending on the type of information involved. Sound recordings are stored in a WAV format, letters or documents are frequently stored in Word or Word Perfect, spreadsheets in Excel or Lotus 123, and many companies utilize specialized or industry-specific data-base applications or proprietary software for the creation and storage of electronic records.

The format in which electronic information is stored also has to be carefully considered before it is requested or produced. Metadata cannot be viewed when electronic documents are imaged and produced as a PDF or in a regular TIFF format. Metadata can be reviewed by opposing counsel when electronic documents are produced in their “native format” or in “loaded TIFF” files. However, when produced in their native format, those electronic documents cannot be redacted or Bates numbered without altering the original document. Additionally, when produced in its native format, specialized software may be needed to review electronic documents or information generated by a specialized software or proprietary database applications. It was these and other differences between paper and electronic discovery that prompted the development of the e-discovery amendments to the federal rules.

The federal rule amendments mandate early attention to electronic discovery. No longer can we simply stick our heads in the sand and hope that opposing counsel neglects to ask for electronic discovery. Rule 26(f) was specifically amended to require the parties to meet and discuss the preservation and discovery of electronically-stored information prior to the initial scheduling conference with the court. See Fed. R. Civ. P. 26(f). The rule amendments will likely prompt plaintiff’s counsel who in the past had not actively sought electronic discovery to now seek it because the rule amendments force the issue to be discussed at the initial conference between the parties. In order to be able to effectively discuss a fair discovery plan involving the preservation and production of electronic information with opposing counsel, the rules require that we identify the client’s sources of electronic information and become familiar with the client’s information system(s) as well as its document retention practices.

Rule 26(f) requires the parties to “meet and confer” at least 21 days before the initial scheduling conference. Rule 16(b) provides that the scheduling order “shall issue” within 90 days of the defendant’s appearance or 120 days after service. Counting backwards, that means defense counsel has at most 99 days after the client was served to learn about its information systems, identify potential sources of electronic information and be prepared to negotiate a fair discovery plan at the initial Rule 26(f) conference with opposing counsel. Defense counsel should be prepared to explain at that initial Rule 26(f) conference what sources of electronic information are not readily accessible because of “undue burden or cost” and therefore, do not have to be initially produced under the rules. See Fed. R. Civ. P. 26(b)(2)(B). That may require a meeting with the client’s general counsel and/or the head of its information technology department depending on the type of case and the sources of information at issue.

This age of electronic discovery involves great risk and promises little reward for the defense lawyer. Unless you are defending a commercial litigation matter, it is likely that the plaintiff will have comparatively little electronic information to discover. Thus, the impact of the federal rule amendments will fall principally upon the defense bar and the clients we represent. One only needs to read the *Zubulake* line of decisions (see, e.g., *Zubulake V*, 229 F.R.D. 422 (S.D.N.Y. 2004)), or refer to the headlines involving the Morgan Stanley case (see Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., No. 502003CA005045XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005) where a jury returned a $1.45 billion verdict after receiving an adverse jury instruction arising out of e-discovery issues), to recognize that the mishandling of e-mails and backup tapes can lead to serious financial ramifications for you, your clients and your law firm. Large monetary sanctions and adverse instructions over lost or destroyed evidence – every lawyer’s nightmare – loom as greater risks than when paper discovery was the modus operandi. The exponentially greater volume of potentially relevant electronic information and its dispersion throughout a client’s offices and business units in various states and countries makes the imposition of an effective “litigation hold” as well as the forensically sound capture and collection of electronically-stored information no mean feat.
Additionally, the rule amendments will drive up the cost of discovery. Companies do not typically have unlimited budgets available for the defense of lawsuits. In 2005, United States’ companies spent $1.2 billion on outside e-discovery vendors and another $4.6 billion to analyze their e-mails. See Sharon D. Nelson, Bruce A. Olson and John W. Simek, *The Electronic Evidence and Discovery Handbook*, ABA Law Practice Management Section (2006), pp. xv—xvi. The greater the amount spent on electronic discovery, the less there will be available to defend or try a case. The vanishing civil jury trial will be even harder to find in federal court once the impact of the rule amendments comes into full effect.

Electronic discovery poses the greatest single threat to the continuing vitality of the civil jury trial if it is allowed to be abused. In 2005, ten percent of general counsel surveyed reported that they had settled a case rather than incur the cost of electronic discovery. Id. If left unchecked by district courts, the percentage of cases settled solely because of the cost of electronic discovery rather than on the merits of the suit will surely increase.

Take the orders entered in *Zubulake*, an employment discrimination case, for example. In *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003), the defendant was ordered to pay the cost of restoring sample backup tapes at a cost of $19,000. In *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003), the defendant was ordered to pay 75% of the $165,000 cost to restore the remaining backup tapes ($123,000) and to incur 100% of the expense for reviewing those tapes (estimated at $107,000). Thus, $230,000 was spent by the defendant in simply dealing with the discovery of backup tapes. Is it any wonder why general counsel are inclined to settle cases to avoid the cost of electronic discovery? Rule 1 of the Federal Rules of Civil Procedure explains that the rules “shall be construed and administered to secure the just, speedy and inexpensive determination of every matter.” Fed. R. Civ. P. 1 (emphasis added). Somewhere Rule 1 was lost in the shuffle by the district court in *Zubulake*.

For those defense lawyers who think these rule amendments can be ignored simply because they do not have a federal practice, think again. New Jersey has adopted the federal rule amendments in their entirety and it has been reported that other states are “cherry picking” selected provisions of the federal e-discovery rules. Because today’s companies, both large and small, rely on computers, electronic discovery-related questions and disputes in state court proceedings throughout the country are rapidly increasing. As a result, the Conference of Chief Justices in August of 2006 issued *Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information*. Those Guidelines are intended to assist state court judges when confronted with an electronic discovery dispute. While those Guidelines generally follow the approach taken by the amendments to the federal rules, there are subtle yet potentially significant differences between them. Thus, state court litigators can no longer ignore the trend and hope this new age passes them by like a bad dream. The federal rule amendments are simply a “preview of coming attractions” in state court venues around the country.

Learning what sources of potentially relevant electronic information might exist for your clients could require a meeting with general counsel and the head of the client’s information technology department. Take a moment to look at the potential impact of these rules from the perspective of a general counsel whose company is engaged in litigation in multiple states or jurisdictions. That general counsel will not likely be enamored with the idea of having members of his or her legal and information technology departments spending hours and perhaps days educating defense counsel from various firms about the company’s information systems, backup procedures and document retention practices when necessary. Thus, we are entering an age where our clients will be inclined to compress the number of panel counsel they employ or hire a single firm to handle all electronic discovery issues on a national basis. This means that those firms that demonstrate an ability to effectively and efficiently handle electronic discovery issues will succeed, and those that do not may go the way of the dinosaur.

(Continued on next page)
President's Message (Continued)

That is why the IDC is more important to our members than ever before. On January 5, 2007, we held a day-long seminar dedicated solely to electronic discovery. Judge James F. Holderman, the Chief Judge of the United States District Court for the Northern District of Illinois and Thomas Allman, senior counsel at Mayer, Brown and one of the authors of the Sedona Principles and the Sedona Guidelines, which address the management and production of electronic information, presented an insightful and thought provoking session on the new federal rules. Jennifer Wojciechowski of Kroll Ontrack addressed technological issues and outlined strategies to consider for handling electronic discovery and negotiating fair discovery plans with opposing counsel. Bradley Nahrstadt of Williams, Montgomery & John addressed litigation hold letters and drafting electronic discovery requests. Dan Farroll of the Hepler, Broom firm discussed Illinois electronic discovery issues and the potential impact of the Conference of Chief Justices Guidelines. Richard Duda of Corn Products International presented the general counsel’s perspective on electronic discovery and proactive strategies for dealing with litigation holds. David Levitt of Hinshaw provided a critical analysis of the Zubulake line of decisions. He cogently explained why the mandatory duties to monitor and direct a client’s litigation-hold process and the steps which the district court concluded had to be taken by outside counsel in accomplishing that task were overbroad and unwarranted under the federal rules as they then existed and under the new amendments to those rules. Those are arguments that every member of the defense bar should consider when the specter of Zubulake is raised in a case they are defending. If left uncontained, Zubulake will inevitably lead to a new species of malpractice liability for the defense bar. The federal rules impose a duty of “reasonable inquiry” by counsel. Zubulake imposes a far more onerous standard and mandatory duties, unlike any that heretofore existed with paper-based discovery.

In short, the IDC presented one of the finest programs available on these cutting-edge issues relevant to your defense practice. The importance of these issues is also why we have recently begun running a column on electronic discovery issues in the IDC Quarterly. For those of you who were unable to attend our e-discovery seminar, we will be presenting a condensed version of the e-discovery program, addressing the new federal rules and technology issues you are likely to encounter, at our Spring Defense Tactics Seminar in March of 2007. Those sessions are perfect for any lawyer who wants to dip his or her toe in the water or for state court practitioners like myself who need to learn more about issues that are looming around the corner of our local courthouse. I hope to see you at our Spring Seminar for a further review of the dawning of this new age we have entered.
When I joined the IDC in 1994, I knew only a few members, except for the attorneys from our law firm. Fortunately, whenever I attend an IDC event, Shirley Stevens was always there to provide a warm welcome and a smiling, familiar face. Shirley always went the “extra mile” to introduce me to other IDC members and make me feel at home. I am proud to have Shirley as our “cover story” for this edition of the IDC Quarterly and invite you to read Bill Tribler’s tribute entitled “A Farewell to Shirley”. Along with the IDC membership, I would like to personally thank and congratulate Shirley for the fine job which she did as the Executive Director of the IDC from 1992 to 2007.

This edition of the 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. The Monograph consists of two outstanding articles relating to the defense of legal malpractice claims. James Smith and Andrew Seiber wrote on the status of the collectibility defense to a claim for legal malpractice. Adam Carter’s article addresses whether Illinois law allows claims against an attorney for both legal malpractice and breach of fiduciary duty. Both portions of the Monograph provide a comprehensive analysis of Illinois law and recent trends in these areas, along with creative and practical advice for defending legal malpractice claims.

This edition of the Quarterly also contains two excellent feature articles. John Lynch’s feature article on the status of Kotecki waivers provides a thorough review of Illinois case law, including the First District Appellate Court’s decision in Estate of Willis v. Kiferbaum Construction Corporation. Anna Chapman’s feature article regarding the admissibility of expert opinions on vehicle speed contains a thoughtful analysis and makes a persuasive argument in favor of admitting such evidence in cases where there is also eyewitness testimony.

Bob Park’s case note provides an interesting discussion on the status of the tort of wrongful discharge under Illinois law. Bob’s column addresses the very recent First District Appellate Court decision in Bajalo v. Northwestern University and notes that this case continues the trend of limiting the scope of wrongful discharge actions. Jim Ozog’s product liability column provides a detailed analysis of the recent First District Appellate Court case of Townsend v. Sears Roebuck & Co. In Townsend, the plaintiff filed a product liability action against Sears seeking damages for injuries which occurred when his father backed over him while operating a lawn tractor. The accident occurred in Michigan and plaintiff and his father were both Michigan residents. The First District performed a complicated conflict of laws analysis which focused upon the differences between Illinois and Michigan law on strict liability, punitive damages, and caps on non-economic damages. The Townsend court held that Illinois law governs both the liability and damages issues. As Jim notes in his column, if the Townsend decision is not reversed, it is likely to generate additional product liability lawsuits in Illinois—even in cases where the plaintiff is not an Illinois resident and the accident occurred outside of Illinois. A petition for leave to appeal was filed on December 19, 2006 and it will be important to monitor whether the Illinois Supreme Court takes the Townsend case.

The Quarterly will continue to be a premier legal journal only with the input, effort, and contributions of the IDC membership. During my tenure as Editor-In-Chief, I have been impressed with the level of interest and enthusiasm for submitting feature articles to the Quarterly. Publishing articles in the Quarterly not only enhances your reputation among your peers but also allows you to at least partially fulfill your CLE requirements. Once again, 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.
**Featured Article**

**Kotecki Protection:**

Has *Estate of Willis* Changed the Rules?

By: John P. Lynch, Jr.

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**Background**

On April 18, 1991, the Illinois Supreme Court held in *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 1023 (1991), that a third-party defendant/employer’s liability under the Illinois Contribution Act was limited to an amount no greater than its total workers’ compensation liability. The rationale underlying the *Kotecki* opinion was that this limitation achieved the most equitable balance between the competing interests of the Workers’ Compensation Act and the Illinois Contribution Among Joint Tortfeasors Act. This decision had a profound impact on cases involving work-related injuries, since plaintiffs who sought compensation in a civil action for a work-related injury typically received workers’ compensation benefits for that injury. Under *Kotecki*, defendants’ rights of contribution against a plaintiff’s employer were now severely limited.

*Kotecki* quickly changed the dynamics of settlement negotiations in such cases as third-party defendant/employers and their insurers were much more reluctant in light of their *Kotecki* protection to waive their workers’ compensation liens and refused to contribute “fresh money”, i.e., funds above and beyond a lien waiver, to help effect settlements. Indeed, third-party defendant/employers and their insurers became substantially more aggressive in seeking recovery of their worker’s compensation liens through their employees’ civil actions after *Kotecki*. As a result, many of these cases became more difficult to settle and *Kotecki* found disfavor at the trial court level. Illinois courts, however, soon recognized an important exception to *Kotecki* that returned to many defendants’ their full rights of contribution against plaintiffs’ employers.

In *Herington v. J. S. Alberici Construction Company, Inc.*, 266 Ill. App. 3d 489, 639 N.E.2d 907 (5th Dist. 1994), the Illinois Appellate Court found that an employer’s contractual agreement to assume “the entire liability for its own negligence” is an agreement to make unlimited contribution to the party with whom it contracts and, consequently, a waiver of that *Kotecki* protection. The Illinois Supreme Court adopted the *Herington* rationale in *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 676 N.E.2d 1295 (1997) and reaffirmed its position in *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 687 N.E.2d 968 (1997). Since these rulings, most courts and practitioners have considered standard, general indemnity language in contracts to be *Kotecki* waivers by the indemnifying party. Could this be changing?

**Estate of Willis v. Kiferbaum Construction**

On May 26, 2005, Illinois’ First District Appellate Court issued its opinion in the *Estate of Willis v. Kiferbaum Constr. Corp.*, et. al., 357 Ill. App. 3d 1002, 830 N.E.2d 636 (1st Dist. 2005). Robert Willis suffered fatal injuries on a construction site. His estate then brought a negligence action against Kiferbaum Construction, the general contractor, and Arlington Structural Steel Corporation, the structural steel subcontractor. Both Kiferbaum and Arlington filed third-party complaints for contribution against Willis’ employer, Decking & Steel, Inc., which entered into a sub-subcontract with Arlington for the steel erection. Decking & Steel moved for partial summary judgment under *Kotecki* contending that its liability was limited to its exposure under the Workers’ Compensation Act. Decking & Steel’s motion as to Arlington was denied. But the trial court granted its motion with respect to Kiferbaum. The trial court’s decision was affirmed on appeal.

**About the Author**

John P. Lynch, Jr. is a partner in the law firm of Cremer, Kopon, Shaughnessy & Spina, LLC. He received his B.B.A. from St. Norbert College in 1985 and his J.D. from DePaul University in 1988. His practice is concentrated in the defense of transportation, product liability, construction and commercial cases in the state and federal court systems. His trial experience includes the defense of catastrophic injury and wrongful death suits. For the past several years, Mr. Lynch has served as a columnist for the *IDC Quarterly*. His writings have also been published in the *Tort & Insurance Law Journal* and the *Products, General Liability, and Consumer Law Newsletter of TIPS*. In 2002, John was selected by the Law Bulletin Publishing Company as one of the “40 Illinois Attorneys Under Forty to Watch.” He is currently on the Board of Directors of the Illinois Association of Defense Trial Counsel.
The appellate court noted that Decking & Steel, as a second tier subcontractor, only had a contract directly with Arlington. Although Decking & Steel’s contract with Arlington did contain a clear waiver of its Kotecki protection, that waiver was not applicable to Kiferbaum since Kiferbaum was not a third party beneficiary of the contract. The court reasoned that a strong presumption exists against creating contractual rights in third parties, which can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent to benefit the third party. The court found such an intent missing from the Arlington-Decking & Steel contract and then went on to offer some advice to general contractors:

“[W]e feel it incumbent upon us to advise general contractors to insert language into future standard contracts requiring that their subcontractors designate the general contractor as an explicit third-party beneficiary of all subcontracts entered into in furtherance of the general contract. We believe such alterations would protect general contractors by providing them explicit rights of recovery in their appurtenant subcontracts, and would prevent the future recurrence of the result we have just reached.” Estate of Willis, 803 N.E.2d at 645.

So Kiferbaum could not avail itself of Decking & Steel’s Kotecki waiver as to Arlington because it had no rights under that contract.

Notably, Kiferbaum also argued that Decking & Steel waived its Kotecki protection as to Kiferbaum, because Kiferbaum’s contract with Arlington contained a Kotecki waiver and the Kiferbaum-Arlington contract was incorporated into the Arlington-Decking & Steel contract. The court disagreed that Kiferbaum’s subcontract with Arlington contained such a waiver. As such, there was no Kotecki waiver by Decking & Steel as to Kiferbaum even if the Kiferbaum-Arlington contract was incorporated into the Arlington-Decking & Steel contract. In explaining its decision, the court drew a distinction between the Arlington-Decking & Steel subcontract (which contained a waiver) and the Kiferbaum-Arlington subcontract (which did not).

Paragraph 11.11.1 of the Arlington-Decking & Steel subcontract stated that Decking & Steel agreed to indemnify Arlington against claims of injury “caused in whole or in part by any negligent act or omission of the Subcontractor.” Next, Paragraph 11.11.2 of that subcontract stated that “the indemnification obligation under this Paragraph 11.11 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Sub-

contractor under . . . workmen’s compensation acts.” The court found that these provisions clearly waived Decking & Steel’s Kotecki protection as to Arlington. Estate of Willis, 803 N.E.2d at 642.

In contrast, Paragraph 7 of the Kiferbaum-Arlington contract stated that Arlington agreed to indemnify and assume responsibility for all damages or injury to all persons resulting from the execution of its work “to the fullest extent permitted by law.” The court found it significant that the words “shall not be limited” or other phrases “purporting to indemnify either party for its own negligence” were not included in the contract, as they were in the Arlington-Decking & Steel subcontract. Based on this, the court rejected Kiferbaum’s contention that its subcontract with Arlington contained a waiver of the Kotecki cap. Therefore, even if it was incorporated in the Arlington-Decking & Steel sub-subcontract no waiver was achieved. Estate of Willis, 803 N.E.2d at 642.

One could argue that Estate of Willis is inconsistent with the Herington, Braye and Liccardi decisions. In fact, this is exactly what Kiferbaum asserted in its petition for leave to appeal the Estate of Willis decision to the Illinois Supreme Court. Kiferbaum argued that Estate of Willis is in direct contrast with Braye and Liccardi and that the Estate of Willis decision narrowed, if not overruled, the Braye and Liccardi rulings. Kiferbaum also took issue with the appellate court’s ruling that it was not a third-party beneficiary of its subcontractor’s contract. Kiferbaum’s petition was denied on September 29, 2005. 216 Ill. 2d 683, 839 N.E.2d 1023. Does Estate of Willis indicate a change in what our courts will deem effective Kotecki waiver language?

Language found to have waived Kotecki

Illinois case law has accepted the following language as sufficient to waive a third-party defendant/employer’s Kotecki limitation on liability:

“[Employer] hereby assumes the entire liability for its own negligence and the negligence of its own employees . . . [Employer] agrees to indemnify and save harmless Contractor and its agents, servants and employees, from and against all loss, expense, damage or injury, including legal fees, that Contractor may sustain as a result of any claims predicated [on] said allegations of [Employer’s] own negligence. This provision shall specifically not require [Employer] to indemnify Contractor for Contractor’s own alleged negligence in violation of Chapter 29, Section 61 of the Illinois Revised Statutes.” – Herington, 639 N.E.2d at 909.

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Statute of Repose (Continued)

“[Employer] shall take all necessary precautions to prevent the occurrence of any injury to person or damage to property during the progress of such work, except to the extent that any such injury or damage is due solely and directly to ADM’s or its customer’s negligence, as the case may be, [Employer] shall pay ADM for all loss which may result in any way from any act or omission of [Employer], its agents, employees, or subcontractors.” – Braye, 676 N.E.2d at 1297.

“If [Employer] performs services * * * hereunder, [Employer] agrees to indemnify and hold harmless Stolt Terminals (Chicago), Inc. from all loss for the payment of all sums of money by reason of all accidents, injuries or damages to persons or property that may happen or occur in connection therewith.” – Liccardi, 687 N.E.2d at 972.

“To the fullest extent permitted by law, the Subcontractor [Decking & Steel] shall indemnify and hold harmless the Owner, the Architect and the Contractor [Arlington] . . . from and against all claims, damages, losses and expenses . . . arising out of the performance of the Subcontractor’s Work . . . to the extent caused in whole or in part by any negligent act or omission of the Subcontractor . . . regardless of whether it is caused in part by a party indemnified hereunder. . . .

“[T]he indemnification obligation . . . shall not be limited in any way by . . . compensation or benefits payable by or for the Subcontractor under worker’s compensation acts. . . .” – Estate of Willis, 803 N.E.2d at 639-640.

Language found NOT to have waived Kotecki protection

But the First District Appellate Court says that the following language is not sufficient to waive the Kotecki limitation on liability:

“The Subcontractor [Arlington] agrees to assume entire responsibility and liability, to the fullest extent permitted by law, for all damages or injury to all persons, whether employees or otherwise. . . resulting from or in any manner connected with, the execution of the work provided for in this Subcontract * * * and the Subcontractor, to the fullest extent permitted by law, agrees to indemnify and save harmless the Contractor * * * from all such claims, without limiting the generality of the foregoing, claims for which the Contractor may be or may be claimed to be, liable . . .” – Estate of Willis, 803 N.E.2d at 639.

Conclusion

While the argument that Estate of Willis overruled Braye and Liccardi might be a bit of a stretch, at a minimum it seems inconsistent with Herington. Is there any real difference between the Estate of Willis contractual language that unsuccessfully attempted a Kotecki waiver and the Herington language that initially established the concept that one can waive Kotecki? The Illinois Supreme Court in Braye based its decision in large part on the concept that freedom of contract should be respected. Is there any doubt that a Kotecki waiver was intended in Paragraph 7 of the Kiferbaum-Arlington contract? The Estate of Willis court relied heavily on the fact that the contract contained neither a direct statement that the indemnification agreement was not limited by workers’ compensation acts nor a statement “purporting to indemnify” the indemnitee for its own negligence” in finding no Kotecki waiver. But Herington contains no such statements either. Indeed, Herington specifically states that the indemnitor has no duty to indemnify the indemnitee for its own negligence and cites the Construction Contract Indemnification for Negligence Act (740 ILCS 35/0.01 et. seq.), which forbids such agreements.

The Estate of Willis court does not distinguish or even discuss Herington so we do not know its views on that case. And, since the Illinois Supreme Court denied Kiferbaum’s petition, we do not know if it sees a conflict in these cases. Whether Estate of Willis signals a change in Kotecki waiver rules, or if it is an aberrant opinion, defense attorneys are well advised to review their cases to see if they can take advantage of this recent decision or if an opponent can do so. Counsel should also consider reviewing their clients’ contracts for appropriate amendments in light of Estate of Willis. Illinois courts have not drawn a bright-line between what language constitutes a Kotecki waiver and what does not. The only cases addressing this issue are cited in this article, but they do provide ample guidance. Those seeking Kotecki waivers should include in their contracts (1) contractual language stating that the indemnification obligation is not limited in any way by benefits payable under worker’s compensation acts, (2) an agreement that the indemnitor will indemnify the indemnitee for its own negligence, and/or (3) explicit language identifying the client as a third-party beneficiary of contracts containing clear Kotecki waiver language. In any event, in light of Estate of Willis, if you are drafting a Kotecki waiver clause be as clear, detailed and redundant as possible.
Medical Malpractice

By: Edward J. Aucoin, Jr.
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Has the First District Recognized a New Cause of Action Against Physicians?

In December 2006, the Illinois Appellate Court, First District, delivered an opinion that some attorneys feel may have created a new cause of action against physicians in Illinois. The most notable of these attorneys is First District, Second Division Appellate Judge, Warren D. Wolfson, who wrote a scathing dissent to the majority’s decision in Mansmith v. Hameeduddin, No. 1-04-1243, 2006 WL 3490101 (1st Dist. December 4, 2006).

Background

On January 14, 1998, Delphine Mansmith died of a brain stem abscess caused by an infection that developed after receiving an epidural steroid injection for back pain. Her estate sued Mansmith’s primary care physician, Anjum Hameeduddin, M.D., and her neurosurgeon, R. Lawrence Ferguson, M.D. for medical malpractice.

Dr. Hameeduddin had treated Mansmith since early 1996 for complaints of back pain. After conservative treatment failed, Dr. Hameeduddin referred Mansmith to Dr. Ferguson in August 1996. Dr. Ferguson diagnosed her with spinal stenosis and a bulging disc at the L4-L5 vertebrae and recommended surgical removal of the bulging disc, which was performed on August 12, 1996. However, instead of operating at the L4-L5 level, he performed surgery at the L1-L3 level. Further, in the postoperative report that he sent to Dr. Hameeduddin, Dr. Ferguson mistakenly stated that he performed the surgery at the L4-L5 level.

By August 1997, Manssmith’s back pain and numbness in her lower extremities had returned and were not responding to conservative treatment. Dr. Hameeduddin ordered a second MRI, which showed that Mansmith had in fact had surgery at the L1-L3 vertebrae and that the spinal stenosis and bulging disc at the L4-L5 vertebrae remained. Dr. Hameeduddin did not inform Dr. Ferguson or Mansmith about these inconsistencies. After Manssmith indicated that she did not want to go back to Dr. Ferguson for further evaluation, Dr. Hameeduddin referred her to Dr. Miz, an orthopedic surgeon, but did not provide the report of the first MRI scan (pre-surgery) or Dr. Ferguson’s postoperative report to Dr. Miz.

Based on Dr. Miz’ review of the second MRI report, one of his recommendations was that Manssmith receive an epidural steroid injection. He did not recommend surgery because Mansmith had undergone surgery by Dr. Ferguson the previous year and he wanted to attempt conservative treatment first. In December 1997, Manssmith received an epidural steroid injection. In early January, she complained of severe headache and back pain and on January 14, 1998, Manssmith died from an acute staph infection after the epidural injection introduced bacteria into Mrs. Manssmith’s spinal canal, which caused a brain stem abscess.

Trial

At trial, Dr. Finley Brown, plaintiff’s family practice expert, opined that Dr. Hameeduddin violated the standard of care by not telling Manssmith that Dr. Ferguson operated on the wrong vertebrae, and by not coordinating her care and letting Dr. Ferguson know that he operated on the wrong level. Dr. Brown explained that when a primary care practitioner

(Continued on next page)

About the Author

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

discovers an inconsistency between what a surgeon says he did and what that surgeon actually did, the practitioner must ask the surgeon to resolve the discrepancy, and inform his patient of the discrepancy. Because Mansmith did not know that Dr. Ferguson operated on the wrong level, Dr. Brown opined that she could not seek appropriate medical treatment and was exposed to an unreasonable risk associated with receiving the epidural steroid injection, thereby proximately causing her pain, suffering, and death.

Dr. Hameeduddin testified that if she became aware that a specialist had negligently treated her patient, she would have a duty to tell the patient. But when asked what her duty was when she received the second MRI report, she testified: “To render her the proper care and send her to the appropriate surgeon to have it reviewed to find out what was still causing her pain.” 2006 WL 3490101, *8. Dr. Hameeduddin also admitted that she knew there was an inconsistency between the postoperative report and the second MRI, but that she did not tell Mansmith or Dr. Ferguson about the inconsistencies.

Dr. Steven Eisenstein, a family practitioner, an expert witness retained by Dr. Hameeduddin, testified that Dr. Hameeduddin’s duty to Mansmith after receiving the second MRI report was as follows: “[s]he was required to inform the patient that the MRI revealed abnormalities and that she felt these were significant enough that surgical consultation was necessary.” Id. at *4. Dr. Eisenstein testified that the standard of care did not require Dr. Hameeduddin to discuss the inconsistencies between the MRIs with Dr. Ferguson “[b]ecause the [second] MRI was ordered with the specific idea that this patient had pain and we were trying to get her better.” Id. Dr. Eisenstein also opined that nothing Dr. Hameeduddin did contributed to Mansmith’s death.

The plaintiff and Dr. Ferguson reached a settlement agreement before the jury reached its verdict. A jury found for the plaintiff and awarded damages in the amount of $1,198,734.94. After a setoff in the amount paid by Dr. Ferguson of $750,000, judgment was entered against Dr. Hameeduddin in the amount of $448,734.94. On appeal, Dr. Hameeduddin argued that the trial court erred by denying her motions for directed verdict and Judgment N.O.V. because: 1) the plaintiff failed to establish that the treatment she provided Mansmith deviated from the standard of care, and 2) the plaintiff failed to establish causation because Dr. Brown could only speculate as to what actions Mansmith would have taken had she been informed that Dr. Ferguson operated on the wrong vertebrae. The court disagreed, finding that sufficient expert testimony was presented at trial to not only establish the appropriate standard of care, but also to establish a breach thereof that proximately caused Mansmith’s injuries.

The court acknowledged Dr. Hameeduddin’s testimony that the conclusions contained in the two reports were “confusing,” making her “[u]naware of what had happened,” and stated that the jury was free to, but did not reject Dr. Brown’s testimony. Id. at *7. The court determined that an “inconsistency” was insufficient to trigger a duty on the part of Dr. Hameeduddin to discuss the results of the 1997 MRI and Dr. Ferguson’s postoperative findings with Mansmith. Instead, the majority found sufficient evidence in the record to support the jury’s verdict against the doctor, including: 1) Dr. Hameeduddin’s testimony during cross-examination that she would have a duty to tell the patient if she became aware that a specialist had provided negligent treatment her patient, 2) Dr. Brown’s testimony that Dr. Hameeduddin deviated from the standard of care by failing to act to correct her “confusion” and resolve the “inconsistency” between the reports, and 3) the reports from Dr. Miz and Dr. Santos post occurrence which corroborated the accuracy of the August 1997 MRI film and report, and confirmed Dr. Ferguson’s negligence during the operation.

Accordingly, “[i]t was within the jury’s prerogative to conclude that Dr. Hameeduddin had a continuing duty to discuss with Mansmith what amounted to substantial evidence of the same pathology that existed presurgery in 1996, in direct conflict with Dr. Ferguson’s claim that he performed the operation as he had intended.” Id. at *8. The First Circuit further reasoned that “where the record evidence reveals that Dr. Hameeduddin was the only physician that had reviewed the conflicting MRI scans (1996 and 1997) and Dr. Ferguson’s postoperative report, the burden to have passed on Dr.
Ferguson’s postoperative report to the other specialists was slight. Passing on Dr. Ferguson’s report might well have provided the cover she claims here of deferring to a specialist. *Id.* at *9.

The court determined that an “inconsistency” was insufficient to trigger a duty on the part of Dr. Hameeduddin to discuss the results of the 1997 MRI and Dr. Ferguson’s postoperative findings with Mansmith.

As for proximate cause, the court found opposing doctrines were offered to assist it in analyzing the issues therein. Dr. Hameeduddin contended that the case should be analyzed under the “loss of chance” theory, citing *Scardina v. Nam*, 333 Ill. App. 3d 260, 775 N.E.2d 16 (2002), and *Aguilera v. Mt. Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 691 N.E.2d 1 (1997). Hameeduddin contended that *Aguilera* and *Scardina* were instructive on the speculative nature of the claimed causal connection in this case. However, the court, without much reasoning, found the circumstances present were not comparable to those in *Aguilera* or *Scardina*.

Mansmith cited to an “informed consent” case, *Coryell v. Smith*, 274 Ill. App. 3d 543, 653 N.E.2d 1317 (1995). However, the court found that the case, “given its unique facts, does not fall neatly within either doctrine” forwarded by the parties, but instead, it found “support from cases involving each doctrine in addressing the issue before us.” *Id.* In support of its reasoning, the court recited the testimony from almost all the medical experts that the surgical operation that Mansmith agreed to undergo in 1996 was the correct surgical operation for her in 1997 and that Mansmith was counterindicated for an epidural steroid, which put her at a greater risk of infection. *Mansmith*, 2006 WL 3490101 at *10-11. The Court further concluded that “it is also clear on the record that, had a laminectomy been properly performed in either 1996 or prior to December 1997, Mrs. Mansmith would never have undergone the epidural steroid injection, which resulted in the acute staph infection that killed her.” *Id.* at *11.

However, as Judge Wolfson pointed out in his dissent, Dr. Wiz had access to Mansmith’s medical records and recommended the epidural injection instead of the surgery “because Mrs. Mansmith had increased risk factors for surgery and had suffered previous postsurgical problems.” *Id.* at *18. Dr. Wiz was not asked if he would have recommended surgery instead of the epidural injection if he had been told that Dr. Ferguson may have operated at the wrong level, and as such, “[w]e are left with no credible evidence that the defendant’s failure to inform Mrs. Mansmith had substantial impact on Dr. Wiz’s decision to use the epidural injection.” *Id.*

The majority found that the plaintiff’s focus was never on Dr. Miz, or what he should or should not have done. Instead, the court stated that the plaintiff’s case against Dr. Hameeduddin centered on what Dr. Hameeduddin knew and did not disclose, and what Dr. Ferguson would have done had Dr. Hameeduddin complied with the standard of care owed to Mansmith. The court further rejected Dr. Hameeduddin’s contention that it is pure speculation that Dr. Ferguson would have done anything differently had Dr. Hameeduddin informed him that he performed the laminectomy on the wrong level, finding Dr. Ferguson’s testimony “clearly supports the contrary.”

But, as Judge Wolfson correctly points out in the dissent, Mansmith’s cause is “not aided by the fact that the defendant failed to inform Dr. Ferguson he might have operated on the wrong part of Mrs. Manssmith’s back. The Manssmiths had decided not to return to Dr. Ferguson even before they learned about his misplaced surgery. For what conceivable reason would they return to him after learning about his gross negligence?” *Id.*

The court also rejected Dr. Hameeduddin’s argument that “[w]ithout any direct testimony from the decedent, plaintiff cannot sustain his burden as to causation,” finding no direct evidence was needed. Instead, the court found that the circumstantial evidence was sufficient to make the causal connection between Dr. Hameeduddin’s professional negligence and the ultimate injuries suffered by Mansmith a question for the jury to determine. Specifically, the First District found there was objective medical evidence, without providing that evidence in its opinion, that Mansmith would have acted as she acted in August 1996 by undergoing a second laminectomy had she been informed that the laminectomy she under-
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went in 1996 was incorrectly performed. This, according to the court, was because “[p]resumably, and consistent with Dr. Hameeduddin’s standard of care, she discussed the available options with Mrs. Mansmith in light of Dr. Ferguson’s recommendation.” Id. at *12. A reasonable inference could be drawn by the jury, according to the court, that Mansmith agreed to undergo the epidural injections, with attendant risks, because she had the misimpression that the first surgery was performed properly and did not provide any relief. In addition to the aforementioned medical evidence on the issue of proximate causation, the court stated that the “case, to a certain extent, also involves Mrs. Mansmith being deprived of the medical evidence to determine for herself what surgical procedure to undergo.” Id. at *14.

Perhaps most concerning about the court’s determination on this particular issue is its finding that the jury could speculate as to proximate causation, as it had “more than sufficient evidence to make a reasonable and objective determination as to what Mrs. Mansmith likely would have done based on the evidence that was presented.” Id. As Judge Wolfson states:

“The factual chain from the defendant’s lack of candor to the acute staph infection that killed Mrs. Mansmith has been stretched beyond the breaking point. The evidence invites the jury to guess and speculate. Dr. Brown’s testimony engraved the invitation. From the simple fact that at one point the Mansmiths expressed a desire to go to the University of Chicago Medical Center for a second opinion Dr. Brown concluded she would have sought a neurosurgical reevaluation and had a second operation. That is unsupported speculation. The Mansmiths did not seek a referral to the University of Chicago until after Mrs. Mansmith received the injection. On several occasions, the trial court sustained objections when Dr. Brown attempted to testify to what, in his opinion, Mrs. Mansmith would have done if the defendant had told her about the discrepancy between Dr. Ferguson’s operative report and the second MRI. The grounds for the objection were that the witness was being asked to speculate. The trial court rulings were correct. But then the jury was allowed to engage in that same speculation.” Id. at *18.

The majority states that because the trial court instructed the jury to answer a special interrogatory which asked whether the epidural steroid injection performed by Dr. Carobene was the sole proximate cause of the death of Mansmith, it “guarded against [speculation] by the use of appropriate instruction to the jury”. Id. at *14. Yet the court does not explain how answering that special interrogatory in the negative prevented the jury from speculating as to how Mansmith would have acted in this matter.

Judge Wolfson’s dissent correctly finds that “[p]laintiff has pursued a theory, successfully so far, that never has been approved by any reported decision in this State.” Id. at *17. Mansmith v. Hameeduddin is not an informed consent or “loss of chance” case. Rather, the majority agreed with the plaintiff, who referred to it as a “failure to inform case,” without “any support for the proposition that such a theory exists in this State.” Id. If anything, Dr. Hameeduddin created a condition that made the injury possible in this matter. Her actions were not, “standing alone, enough to establish proximate cause.” Unger v. Eichleay Corp., 244 Ill. App. 3d 445, 451 (1993). Id.

What does the majority’s holding mean to the provision of care to medical providers?

Many questions necessarily arise from the Mansmith v. Hameeduddin decision. First, the majority intimates that Dr. Hameeduddin could have provided “cover” to herself by passing on the MRI reports and post-operative reports to the conferring specialists. If so, would those conferring specialists also have a duty to inform the patient of the negligence by Dr. Ferguson? Where would this chain of duty stop? Does this mean that exclusive knowledge of the information is not a factor in imposing liability?

Second, what degree of “confusion” or “inconsistency” needs to be present before this proposed “duty to inform” becomes applicable. Do we now require physicians to inform on each other for any supposed breach of the standard of care to the patient, regardless of whether it has caused injury? Would this duty to inform cause a negative situation where physicians would not accept referrals from a referring physician known to have informed on another physician in the past, and is that in the best interest of the patients?

Finally, are there any limits to the application of the “duty to inform” cause of action proposed by the majority? Exactly what information does the physician have a duty to inform the patient of during the provision of treatment? Does this duty survive the patient’s death and apply to the estate?

Certainly, the Mansmith v. Hameeduddin decision creates more questions than answers. As such, defense counsel can hope that the decision is an anomaly in the jurisprudence rather than the development of a new cause of action. Either way, we need to start answering the questions.
Diversity

By: Margaret M. Foster
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Law firms with the best intentions to create and maintain a diverse workplace face many challenges. As with most life endeavors, good intentions in meeting these challenges are not a guaranteed path to success. In order to further develop your firm’s focus on diversity and establish a diversity plan, attorneys, particularly law firm decision makers, should understand the associated issues and challenges. While the representation of women and minorities in private practice in the legal profession has been an object of interest for several years, there are many open questions. A variety of organizations, such as the American Bar Association, the National Association of Women Lawyers, the Minority Corporate Counsel Association and others, provide useful information and suggested best practices, which will be addressed in future IDC Diversity columns.

The ABA Commission on Racial and Ethnic Diversity in the Legal Profession has reported significant differences in the initial employment of minority lawyers, who are less likely to start their legal careers in law firms. Further, the number of diverse attorneys dwindle as one approaches the highest levels of law firm participation, equity partnership and governance. Seven years ago, the National Association for Law Placement reported that, within eight years of initial hire, the retention rate for minority women was zero percent. Further, reports have revealed that male minority associates were more likely to leave law firms than white males. The shocking figure for retention of minority women led to a recent ABA report on the status of minority women in law firms. The report, based upon responses to an online questionnaire, provided discouraging information. For example, 44 percent of minority women attorneys, 39 percent of white women and 25 percent of minority men reported that they were passed over for preferable work opportunities, while only two percent of white males reported these negative career experiences. Further, exclusion from networking opportunities was another area showing striking distinctions between minority women and white men, with reporting rates of 62 versus four percent, respectively. While women comprise about 50 percent of new law students, the percentages drop off significantly, to about 15 percent, when the percentages of female equity partners and chief legal officers are considered. Likewise, the number of minority partners and corporate general counsel reveal under representation, as minorities reportedly comprise less than five percent of the attorneys in these categories.

A recent survey of conducted by the National Association of Women Lawyers, which focused on the nation’s 200 largest law firms, revealed that women were well represented at the lower levels, with females making up approximately 45 percent of law firm associates, but only 16 percent of equity partners. Further, the survey supported anecdotal evidence of differences in compensation between male and female partners and of counsel attorneys, even at the equity partner level. The survey also revealed a significant disparity in law firm governance, as women accounted for only five percent of managing partners and 16 percent of members of the highest law firm governance committees.

The low percentages of women and minorities participating in law firm decision making reveals that the success of the diversity challenge facing firms today generally rests upon the shoulders of non-diverse decision makers. Foresight and planning are necessary elements in the recruitment and particularly the retention of a talented, diverse workforce, and firms which fail to focus on these issues may well see an impact in their bottom line.

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Expert Testimony

Questioning of Experts Not Reversible Error

In Lange v. Freund, 367 Ill. App. 3d 641, 855 N.E.2d 162 (1st Dist. 2006), the plaintiffs Michael and Lindy Lange, sued the defendant, Mary Freund, for the wrongful death of their unborn child after a car collision. Prior to trial, issues regarding damages other than those related to the loss of the unborn child were resolved. In the litigation that followed, the defendant admitted negligence but denied that the loss of the unborn child was caused by the collision. The plaintiffs presented three experts who testified that the accident was the cause of the plaintiff’s miscarriage. The defendant presented one expert who testified that the pregnancy was progressing abnormally prior to the incident. A special interrogatory, regarding whether the accident was the proximate cause of the loss of the unborn child, was also presented to the jury. The jury returned a general verdict in favor of the defendant and answered the interrogatory in the negative. Lange, 855 N.E.2d at 167. The appellate court found that the trial court’s statement was not a misleading or inaccurate statement of Illinois law and the Walsh decision merely cautioned that the “one witness against a number” instructions could potentially become suggestive if the instructions focused on the credibility of the witnesses. Lange, 855 N.E.2d at 168. The appellate court pointed to the language of the plaintiffs’ closing argument to support its conclusion that the trial court’s comments were reasonable. Specifically, the appellate court cited to portions of the plaintiffs’ closing argument, where the appellate court interpreted the argument as suggesting to the jury that the outcome of the case should be determined by the number of witnesses presented by the plaintiff versus the defendant. Id. at 168-169.

The plaintiffs next argued that the trial court erred in allowing the defendant to cross-examine their expert witnesses regarding the level of certainty of their conclusions. Specifically, the trial court allowed the defendant to ask the plaintiffs’ experts whether there were other possible causes for the miscarriage other than the collision. Id. at 170-171. The appellate court noted that it was acceptable for expert witnesses to provide their opinions “in terms of probabilities or possibilities.” Citing Matuszak v. Cerniak, 346 Ill. App. 3d 766,

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The appellate court rejected the plaintiffs’ argument that the trial court erred in allowing the experts to testify to a degree of certainty beyond the minimal requirement in Illinois law of a “reasonable degree of medical certainty.”

Specifically, the plaintiffs argued that the trial court erred in allowing the defendant to ask the plaintiffs’ experts whether the experts were “certain” that the pregnancy was progressing normally prior to the collision. Lange, 855 N.E.2d at 171. The appellate court noted that, subject to the trial court’s discretion, Illinois law allowed questioning of the certainty of the direct testimony of a witness as within the permissible boundaries of cross-examination. See Downing v. United Auto Racing Ass’n, 211 Ill. App. 3d 877, 888, 570 N.E.2d 828 (1st Dist. 1991), Collum v. Fred Tuch Buick, 6 Ill. App. 3d 317, 320, 285 N.E.2d 532 (1st Dist.1972), Lange, 855 N.E.2d at 171. As such, the appellate court found the trial court was within its discretion to allow cross-examination of the plaintiffs’ expert witnesses regarding the degree of certainty of their opinions. Lange, 855 N.E.2d at 172.

The appellate court rejected the plaintiffs’ argument that the trial court erred in allowing the experts to testify to a degree of certainty beyond the minimal requirement in Illinois law of a “reasonable degree of medical certainty.” Citing Hunter v. Chicago & North Western Transp. Co., 200 Ill. App. 3d 458, 473, 558 N.E.2d 216 (1st Dist. 1990), Lange, 855 N.E.2d at 171. The appellate court cited Zavala v. Powermatic, Inc., as the dispositive Illinois law regarding the certainty requirement for expert testimony. Zavala v. Powermatic, Inc., 167 Ill.2d 542, 545, 658 N.E.2d 371 (1995), Lange, 855 N.E.2d at 172. The appellate court noted that in Zavala, the Illinois Supreme Court held that expert testimony could be expressed in absolute terms without interfering with the jury’s role because the jurors were free to make their own decisions as to whether to accept or disregard expert testimony. Citing Zavala, 167 Ill.2d 542, 545, 658 N.E.2d 371 (1995), Lange, 855 N.E.2d at 172. The appellate court concluded that although the “reasonable degree of medical certainty” is required for an expert medical opinion to be competent and admissible under Illinois law, an expert opinion meeting that minimum standard may also be expressed in “more conclusive terms.” Lange, 855 N.E.2d at 172.

The court also briefly considered the plaintiffs’ arguments that the jury selection was improper and that the trial court’s editing of the jury instructions was improper. In modifying one of the jury instructions regarding damages, the trial court edited one of the instructions identified as a plaintiffs’ instruction by hand. Id. The appellate court rejected the plaintiffs’ argument that this handwritten editing showed contempt for the plaintiffs and their counsel. The appellate court noted that the Illinois Supreme Court has held that handwritten editing of jury instructions, in which the stricken language remains legible through the editing, is not prejudicial. Citing People v. Foster, 288 Ill. 371, 123 N.E. 534 (1919), Lange, 855 N.E.2d at 172. The court determined there was no basis for reversal of the verdict on these issues. Lange, 855 N.E.2d at 169, 172.

In an unpublished portion of the opinion, the court addressed the plaintiffs’ assertion that the court erred in instructing the jury with the short form proximate cause jury instruction rather than the long form proximate cause instruction. The appellate court noted that the long form of the IPI proximate cause instruction is proper only when “there is evidence that a cause other than the acts allegedly committed by the defendant concurs or combines with the defendant’s act to bring about the harm at issue.” Citing Borowski v. Von Solbrig, 60 Ill.2d 418, 430-431, 328 N.E.2d 301 (1975). The appellate court found no evidence was presented at trial that established any causes concurred or combined with the defendant’s negligent collision to cause the miscarriage.

Additionally, in the unpublished portion of the opinion, the court analyzed the trial court’s exclusion at trial of three documents, including a letter and affidavit created by one of the plaintiffs’ treating physicians who testified as an expert wit-
Recent Decisions (Continued)

ness at trial. The excluded letter and the affidavit provided an explanation of the doctor’s opinion that the miscarriage had occurred as a result of the collision. Though the letter and affidavit were excluded, the trial judge permitted testimony regarding the doctor’s opinions of the cause of the miscarriage. In affirming the trial court’s decision to exclude the documents, the appellate court noted that Illinois law provides that the exclusion of evidence is harmless where “facts shown by an erroneously excluded item are established by other evidence.” Citing Taluzek v. Illinois Central Gulf R.R. Co., 255 Ill. App. 3d 72, 626 N.E.2d 1367 (1st Dist.1993).

Sanctions

Dismissal of Claim With Prejudice Was Improper
Sanction Pursuant to Rules 137 and 219

In Gonzalez v. Nissan North America, No. 1-05-3539, 2006 WL 3490065 (1st Dist. Dec. 4, 2006), the plaintiffs, Elvin and Ana Gonzalez, filed suit against defendant Nissan North American, alleging that the sport utility vehicle they purchased had a defect which caused the vehicle to pull towards the right while driving and braking. The circuit court dismissed the plaintiffs’ claim with prejudice as a sanction pursuant to Rules 137 and 219. Gonzalez, 2006 WL 3490065 at *1, 3.

The appellate court first outlined the provisions of Rule 137 and Rule 219. Specifically, the court noted that Rule 137 provides that when an attorney signs a pleading, motion or other paper, the attorney is certifying that he or she has read the forgoing, it is grounded in fact and law and not “interposed for any improper purpose.” 155 Ill.2d R. 137, Gonzalez, 2006 WL 3490065 at *2. Rule 137 authorizes, within the discretion of the trial court, the imposition of “an appropriate sanction” if the rule is violated. Id.

Illinois Supreme Court Rule 219 pertains to the unreasonable failure to comply with discovery rules and orders. Sanctions pursuant to Rule 219 may be imposed for intentional and unintentional violations of the rule, but the sanctions must be “just and appropriate to the offense.” Citing 166 Ill.2d R. 219, Nehring v. First National Bank in DeKalb, 143 Ill. App. 3d 791, 803, (2nd Dist. 1986). Boettcher v. Fournie Farms, Inc., 243 Ill. App. 3d 940, 948 (5th Dist. 1993), Gonzalez, 2006 WL 3490065 at *2.-3.

The appellate court then considered the merits of the appeal. Prior to trial, the trial court ruled on motions in limine. Defendant presented a motion in limine “to bar plaintiffs from calling any witnesses not timely and properly disclosed and barring plaintiffs from utilizing documents not properly disclosed.” The trial court granted this motion. Gonzalez, 2006 WL 3490065 at *3.

During cross-examination of one of the plaintiffs’ experts, defense counsel questioned the plaintiffs’ expert about a specific report the expert had prepared regarding the plaintiffs’ vehicle. Specifically, the expert was questioned about a document he relied upon in preparing the report and attached to the report as a one-page exhibit, the “technical service bulletin.” During cross-examination, the plaintiffs’ expert indicated that the bulletin was actually four to five pages in length and that three or four of the pages were not attached as part of the exhibit to his report. Id.

Out of the presence of the jury and the witnesses, the court was informed by the plaintiffs that only one page was initially disclosed by the plaintiffs and that the plaintiffs only realized the omission of the other pages during preparation for the trial testimony the day before. The trial court admonished the plaintiffs for not disclosing the additional pages and failing to seasonably supplement discovery in a timely fashion once the omission was discovered. The parties agreed that the jury would be instructed to disregard testimony regarding any additional bulletin pages not previously produced and that the plaintiffs would stipulate that only one page had been produced during discovery. Id. at *4.

The next day, during direct examination of a different witness, plaintiffs’ counsel attempted to reference the entire bulletin to refresh the recollection of the witness. Defense counsel objected. The trial court found that plaintiffs’ attempted use of the previously barred document was a purposeful violation of the court’s prior order. The trial court then dismissed the complaint with prejudice pursuant to Supreme Court Rules 137 and 219. Id. at *5.

Upon review, the appellate court determined that the dismissal was improper. Specifically, the court found that a sanction pursuant to Rule 137 was inapplicable based on the text of Rule 137. See Sanchez v. City of Chicago, 352 Ill. App. 3d 1015, 1020, 817 N.E.2d 1068 (1st Dist. 2004), Gonzalez, 2006 WL 3490065 at *5. The appellate court also cited its prior ruling in Day v. Schoreck, in which it held that Rule 219 was generally not a proper provision for sanctioning conduct at trial. See Day v. Schoreck, 31 Ill. App. 3d 851, 852, 334 N.E.2d 864 (1st Dist.1975), Gonzalez, 2006 WL 3490065 at *5.

Further, the appellate court opined that even if the violation of the motion in limine was considered a discovery vio-
The appellate court noted that because a dismissal with prejudice is the most severe sanction available, it should be used only as a last resort.

The appellate court considered the proportionality of the sanction to the violation and determined the sanction imposed by the court was too harsh. Specifically, the appellate court noted that the dismissal with prejudice prevented a resolution of the matter on the merits. Id. at *6. The appellate court cited its decision in *Nehring for the proposition that dismissal of an action with prejudice is so harsh a sanction under Illinois law that it should be used “only as a last resort” when “all other enforcement measures have failed.” *Citing Nehring, 143 Ill. App. 3d at 803, Gonzalez, 2006 WL 3490065 at *3. Instead, the appellate court suggested that a more appropriate sanction would have been to strike all witness testimony regarding the bulletin. Id. at *6.

Finally, the appellate court cited *Walton v. Throgmorton, in which a trial court’s dismissal of a claim with prejudice as a sanction was reversed in part because the offending party was given no warning by the court that a dismissal was imminent. *Citing Walton v. Throgmorton, 273 Ill. App. 3d 353, 652 N.E.2d 803 (5th Dist. 1995), Gonzalez, 2006 WL 3490065 at *6. The appellate court noted that because a dismissal with prejudice is the most severe sanction available, it should be used only as a last resort. Gonzalez, 2006 WL 2490065 at *6. The appellate court also stated that dismissing with prejudice generally opposes the public policy of Illinois courts, which is to resolve cases on their merits. *Citing Smith v. City of Chicago, 299 Ill. App. 3d 1048, 702 N.E.2d 274 (1st Dist. 1998), Gonzalez, 2006 WL 3490065 at *6. As such, the appellate court reversed the trial court and remanded the case for further proceedings with a different judge. Gonzalez, 2006 WL 3490065 at *7.

Class Actions

Common Issues Do Not Predominate in Mass-Tort Personal Injury Claims

In *Smith v. Illinois Cent. R.R. Co., No. 102060, 2006 WL 3491683 (1st Dist. Nov. 30, 2006) the plaintiffs, Marvin Smith and ten other individuals, filed suit alleging personal injury and property damage after a train derailed in Tamaroa, Illinois. *Smith, 2006 WL 3491683 at *1. As a result of the derailment, toxic chemicals spilled onto the ground, some train cars caught fire, and more than 1,000 individuals were subject to a mandatory evacuation. In the complaint, the plaintiffs alleged that they were injured due to their exposure to the harmful chemicals through the air, water and food supply, they suffered physical and mental anguish and they incurred damage to their property. *Id. at *1-2.

In the motion to certify the class, the plaintiffs alleged that the class description included persons, firms and legal entities present in or in the vicinity of Tamaroa, Illinois, on or after the date of the incident, who sustained or may claim to have incurred “legally cognizable compensatory or punitive damages” as a result of the alleged incident. *Id. at *2. The circuit court granted the plaintiffs’ motion to certify the case as a class action and the appellate court affirmed the trial court’s ruling. The Illinois Supreme Court reversed the ruling of the trial and appellate courts. *Id. at *1.

On appeal before the appellate court, the defendant argued that the personal injury actions should not be certified as class actions due to the fact-intensive, claimant-specific questions that would be raised and need to be adjudicated at trial. *Id. at *2. In response, the appellate court discussed more recent federal and state decisions that allowed class certifications involving personal injuries when the actions are based on single catastrophic incidents. *Id. The defendant also argued before the appellate court that the plaintiffs failed to satisfy the commonality requirement for class certification. *Id. However, the appellate court found that while the extent of exposure to chemicals and personal injury sustained by each class member was different, the issue of liability could be determined
Recent Decisions (Continued)

on a classwide basis and thus did not preclude class certification. Id. The appellate court also rejected the defendant’s arguments that the class definition was overbroad. Id. at *3.

On appeal to the Illinois Supreme Court, the defendant argued the circuit and appellate courts abused their discretion in granting class certification. Id. Specifically, the defendant argued that: the common issues of law and fact did not predominate, the class was too small, the class definition required individual claim reviews and the geographic area as outlined in the class definition was “too amorphous.” Id.

The Illinois Supreme Court first considered Section 2-801 of the Illinois Code of Civil Procedure, which outlines the four requirements for class actions. 735 ILCS 5/2-801 (West 1998), Smith, 2006 WL 329183 at *3. First, the class must comprise enough members that joinder of all members is impractical. Second, the questions of law and fact must be common to the class, and these common questions need to predominate over questions affecting individual members. Third, the representative parties must fairly and adequately protect the interest of the class. Fourth, a class action must be an appropriate method for the fair and efficient adjudication of the controversy. The decision to certify a class is within the discretion of the trial court. Citing 735 ILCS 5/2-801 (West 1998), Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill.2d 100, 835 N.E.2d 801 (2005), Smith, 2006 WL 3491683 at *3.

The Illinois Supreme Court considered the defendant’s argument that Illinois appellate courts had not previously approved class certifications in mass-tort personal injury cases. Smith, 2006 WL 3491683 at *3. The Illinois Supreme Court recognized an absence of Illinois law on the subject and noted that Section 2-801 of the Illinois Code of Civil Procedure was modeled after Rule 23 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 23. As such, the court stated that federal decisions that interpreted Rule 23 of the Federal Rules of Civil Procedure were persuasive authority in analyzing questions of class certification under Illinois law. Citing, Avery, 216 Ill.2d at 125, Smith, 2006 WL 3491683 at *3-4.

In analyzing federal decisions interpreting Rule 23, the Illinois Supreme Court noted that the purpose of the predominance requirement is “to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation.” See Fed.R.Civ.P. 23(a)(2), Bell Atlantic Corp. v. AT & T Corp., 339 F.3d 294, 301 (5th Cir. 2003) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-24 (1997)), Smith, 2006 WL 3491683 at *4. In determining whether issues of the class as a whole predominate over issues of individuals, courts must consider the claims, defenses, relevant facts and substantive law applicable to the class. Citing Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996), Smith, 2006 WL 3491683 at *4. The test for predominance is “whether common or individual issues will be the object of most of the efforts of the litigants and the court.” Citing Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000), Smith, 2006 WL 3491683 at *4.

Specifically, the Illinois Supreme Court noted that the predominance requirement of Section 2-801 requires that “successful adjudication of the purported class representatives’ claims will establish a right of recovery in other class members.” Citing Avery, 216 Ill.2d at 128 (quoting Goetz v. Village of Hoffman Estates, 62 Ill. App. 3d 233, 236, 378 N.E.2d 1276 (1st Dist. 1978)), Smith, 2006 WL 3491683 at *4. If the predominance test is satisfied then a judgment for the class members would settle the entire controversy, and to recover the remaining class members would only need to file proof of their claim. Citing Southwestern, 22 S.W.3d at 434, Smith, 2006 WL 3491683 at *4.

The Illinois Supreme Court indicated that class certification for mass tort personal injury cases has not historically been accepted by the courts. See Castano, 84 F.3d at 746, Smith, 2006 WL 3491683 at *5. Specifically, the court explained that the significant questions of liability and defenses to liability would affect individual members of the class in different ways in the case of mass tort personal injury, and thus would be improper for a class action. Smith, 2006 WL 3491683 at *5.

The court cited Southwestern’s explanation of the problems with this issue, specifically that the “thorny causation and damage issues with highly individualistic variables that a court or jury must resolve,” make mass tort personal injury cases inappropriate for a class action setting. Southwestern, 22 S.W.3d at 436, Smith, 2006 WL 3491683 at *5. In Southwestern, the court noted that while the issue of whether the defendant was liable for an explosion was an issue common to the class, the resolution of that issue would not answer questions regarding the extent to which each class member was harmed or whether the exposure was the proximate cause of each class member’s injury. Southwestern, 22 S.W.3d at 436-437, Smith, 2006 WL 3491683 at *5. The Illinois Supreme Court also noted that the Fifth Circuit recently held that the issues of individual damages in a mass tort personal injury situation are inappropriate for resolution in a class action setting. Citing Steering Committee v. Exxon Mobil Corp., 461 F.3d 598 (5th Cir. 2006), Smith, 2006 WL 3491683 at *6-7. The Illinois Supreme Court agreed with the reasoning of Southwestern and Steering Committee and overruled the lower court’s ruling. Smith, 2006 WL 3491683 at *7.
Specifically, the court determined that the lower court mistakenly “equated liability for derailment with liability for the alleged health consequences arising from exposure to the chemicals.” *Id.* The Illinois Supreme Court further found that the plaintiffs sought a variety of types of damages and that each individual would be required to prove the amount and types of damages incurred. The issues of proximate causation would also be highly individual and could not be resolved merely by determining whether a defendant was liable for the derailment of the train. *Id.*

The Illinois Supreme Court also distinguished two cases relied upon by the plaintiff, *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494 (E.D. Pa. 1988) and *Sterling v. Velsicol Chemicals*, 855 F.2d 1188 (6th Cir. 1988). In *Sala*, a class of plaintiffs alleging injury after the derailment of an Amtrak train was certified after the court determined that all of the class members shared the same issue of causation, specifically the collision and derailment of the train. In *Sterling*, a class certification arising out of injuries from an alleged chemical leak was upheld after the court concluded that evidence regarding the level of chemical contamination and any casual connection between consumption and alleged injuries would be nearly identical to all members of the class. *Smith*, 2006 WL 3491683 at *7. The Illinois Supreme Court noted that unlike the *Smith* plaintiffs, the injuries claimed by the class in *Sala* arose out of a single event, and found *Sterling* unpersuasive. *Id.* at *7-8.*

The Illinois Supreme Court found the issues of proximate causation and damages would consume the majority of the time at trial and that as a result, the common issues did not predominate. *Id.* at *7.* For these reasons, the court reversed the circuit and appellate court’s class certification and remanded the case for further proceedings. *Id.* at *7.*

**Privilege**

**Physician/Patient Privilege Protects Identity of Doctor’s Other Patients**

In *Defillipis v. Gardner*, No. 2-06-0019, 2006 WL 3410690 (2nd Dist. Nov. 21, 2006), the appellate court considered whether the physician-patient privilege protects the identity of nonparty patients who underwent a particular medical procedure performed by a particular doctor. The plaintiff, Dawn Defillipis, filed a complaint against the defendant, Dr. William Gardner, alleging medical malpractice in the performance of a certain medical procedure. During his deposition, the defendant testified that he had performed the same procedure on approximately 20 other patients prior to performing the procedure on the plaintiff. *Defillipis*, 2006 WL 3410690 at *1.* After the defendant’s deposition, the plaintiff issued supplemental written discovery requesting information and records regarding the other individuals upon whom the defendant allegedly performed this procedure, including their names and addresses. The defendant objected to the requests, asserting that the physician-patient privilege applied. The plaintiff then filed a motion to compel, which the trial court granted. The defendant filed a motion to reconsider, which was denied. *Id.* at *2.* The defendant appealed.

The appellate court cited the physician-patient privilege, codified in Section 8-802 of the Illinois Code of Civil Procedure, which provides that physicians may not disclose information, including medical records, “he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient.” *Citing* 735 ILCS 5/8-802 (West 2004), *Reagan v. Searcy*, 323 Ill. App. 3d 393, 398 751 N.E.2d 606 (5th Dist. 2001), *Defillipis*, 2006 WL 3410690 at *3.* The appellate court found the trial court erred in granting the plaintiff’s motion to compel because the information requested by the plaintiff directly related to a particular medical procedure associated with a particular medical condition, and the disclosure of the patient’s name would result in the disclosure of information obtained by the physician attending to the patient in a professional nature. As such, the appellate court reversed the trial court, finding that the information sought by the plaintiff was covered by the physician-patient privilege. *Defillipis*, 2006 WL 3410690 at *4.*
Appellate Practice Corner

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Section 2-1303
Post-judgment Interest

As appellate counsel, we are often asked by our trial lawyers to complete the handling of our appeal by calculating the total amount due and owing, and requesting the issuance of the check from our clients. Part and parcel of that effort is the often difficult task of calculating the appropriate amount of post-judgment interest. On first read, section 2-1303 of the Code of Civil Procedure seems an easy read: “[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, …, a school district, a community college district, or any other governmental entity.” 735 ILCS 5/2-1303.

Two recent appellate court decisions have addressed various aspects of the interest calculation. In Farmer v. Country Mutual Ins. Co., 365 Ill. App. 3d 1046, 851 N.E.2d 614 (5th Dist. 2006), the court, hearing the case without a jury, returned a verdict for the plaintiff against the insured, Brady, for $1.5 million and against his carrier, Country Mutual, for $100,000. The circuit court ruled that interest on the award accrued against Country Mutual on the full $1.5 million judgment only until the $100,000 award was entered against Country Mutual.

According to the court, the original arbitration award had been vacated in its entirety and, therefore, had the effect of a void order, which essentially returned the parties to their pre-arbitration status.

On appeal, the court reversed, relying in part on language contained in the Country Mutual policy of insurance to the effect that Country Mutual would, in addition to the limits of liability state on the declarations page, “pay interest on the full amount of any judgment even if the judgment is higher than our limit of liability.” Thus, Country Mutual was required to pay the interest on the entire verdict against its insured, until paid, not just the interest on the $100,000 it owed. The court refused to apply the doctrine of merger because the judgment was based on the insurance policy. “[W]e must look beyond the Country Mutual judgment, applying postjudgment interest rules in light of the insurance policy provisions in question, to give the judgment its just effect.” Farmer, 365 Ill. App. 3d at 1051.

In 7-Eleven, Inc. v. Dar, 363 Ill. App. 3d 41, 842 N.E.2d 260 (1st Dist. 2005), the court addressed when interest begins to accrue following a remand in a franchise agreement arbitration proceeding. Section 2-1303 states, in part, that “interest shall be computed … from the time when made or rendered to the time of entering judgment upon the same, ….” 735 ILCS 5/2-1303. In 7-Eleven, a December 24, 1998, arbitration award was vacated and the case remanded for a rehearing in compliance with the appellate court opinion addressing the merits of the case. Following the modified arbitration decision, Dar moved to confirm the arbitration award and requested post-judgment interest on the award dating back to the date of the original arbitration award, December 1998. The court denied Dar’s interest request.

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While acknowledging that arbitration awards are entitled to interest in the same manner as a judgment, the appellate court affirmed the circuit court’s order and upheld the finding that interest accrued from the date of the modified award. According to the court, the original arbitration award had been vacated in its entirety and, therefore, had the effect of a void order, which essentially returned the parties to their pre-arbitration status. Thus, the parties stood as if no award had been entered at all. Thus, the court held that interest was not available until issuance of the modified award.

The 7-Eleven court was careful to distinguish the facts before it from other cases involving remands. In particular, the court discussed Edward Electric Co. v. Automation, Inc., 229 Ill. App. 3d 89, 593 N.E.2d 833 (1st Dist. 1992), in which the appellate court vacated only a part of the award. There, the court vacated the punitive damages aspects, while leaving the underlying compensatory award intact. The 7-Eleven court noted that the two awards were different and that the punitive damages award was not dependent on any other part of the award. In the 7-Eleven case, however, the arbitrator’s failure to resolve all of the party’s claims required that the entire award be vacated.

The 7-Eleven court also distinguished Browning, Ektelon Div. v. Williams, 348 Ill. App. 3d 830, 807 N.E.2d 984 (1st Dist. 2004), in which the arbitration award that was appealed was initially vacated via a section 2-1401 motion, but later reinstated on appeal. The 7-Eleven court observed that the section 2-1401 proceeding was a new cause of action apart from the initial claim, and therefore, not a continuation of the original proceeding. In the case before it, no new cause of action was commenced and the original arbitration award was never affirmed nor did it become final. Instead, the circuit court vacated the entire award prior to it becoming final.

In a third appellate decision, Radosevich v. Industrial Comm’n, 367 Ill. App. 3d 769, 856 N.E.2d 1 (4th Dist. 2006), a majority of the Appellate Court, Fourth District, addressed the interplay between section 2-1303 and sections 19(g) and (n) of the Workers’ Compensation Act, and ruled that a workers’ compensation claimant was entitled to interest at section 2-1303’s nine percent rate (rather than the much lower section 19(n) rate) from the date of the award through the date the circuit court’s section 19(g) judgment was entered. Justice Myerscough, dissenting on the interest issue, argued that section 2-1303 interest applied only on judgments and that the higher interest rate should not apply until after the section 19(g) proceeding reduced the Commission award to a judgment. The Supreme Court denied the petition for leave to appeal on January 25, 2007.

These decisions should provide some added assistance when dealing with the interest issue. Aside from the mathematics of the computations, here are a few other significant reminders when confronted with interest questions:

- Interest accrues from the date of entry until paid. Tracey v. Shanley, 311 Ill. App. 529, 36 N.E.2d 753 (2nd Dist. 1941). Only a full, unconditional tender stops the accrual of interest.
- Interest accrual stops only upon the tender of the judgment, costs, and interest accrued to date. Barry v. Retirement Bd. Of Firemen’s Annuity and Benefit Fund of Chicago, 357 Ill. App. 3d 749, 828 N.E.2d 1238 (1st Dist. 2005).
- If the appellate court increases the amount of a judgment, any interest on the additional award accrues commencing on the date of the appellate court order. State, Dept. of Transp. ex rel., Moline Consumers Co. v. American Ins. Co., 199 Ill. App. 3d 1068, 557 N.E.2d 932 (3rd Dist. 1990).
- Interest is not recoverable unless it is provided for by an agreement of the parties or by statute. Ochoa v. Maloney, 69 Ill. App. 3d 689, 387 N.E.2d 852 (1st Dist. 1979).
- In chancery matters, the decision to award statutory interest is discretionary. Hadley Gear Mfg. Co. v. Zmigrocki, 152 Ill. App. 3d 358, 502 N.E.2d 6 (1st Dist. 1986). In all other cases, interest is mandatory.
- Judgment creditor was not justified in refusing to accept tender that was not by certified check. Neither the statute nor interpreting case law imposes requirement on form of tender. Shuster v. Brantley, 238 Ill. App. 3d 770, 660 N.E.2d 612 (1st Dist. 1992).
- All recoverable costs are added to the judgment for purposes of calculating interest. Halloran v. Dickerson, 287 Ill. App. 3d 857, 679 N.E.2d 774 (5th Dist. 1997).

Counsel should also check any special statutory provisions governing a particular agency, such as section 19(n) of the Workers’ Compensation Act, which contains a lower interest rate for certain awards. 820 ILCS 305/19(n).
An issue that has developed over the years that is still not crystallized in Illinois case law is the ability to offer and have admitted evidence of speed in automobile accidents. The traditional, judicially preferred method is through one or several eyewitnesses. Although courts allowed the use of expert testimony concerning vehicle speed throughout the twentieth century, provided that experts based their testimony on “principles of science and physics,” the Illinois Supreme Court has never definitively ruled how and when such evidence is proper.

Expert testimony regarding vehicle speed and other aspects of automobile accidents is referred to as accident reconstruction. The courts’ hesitation to admit such evidence may spring partially from this name. A court is likely to be skeptical that an accident could be properly and accurately “reconstructed.” An expert offering such evidence would certainly require much vetting. While courts correctly require the party offering such expert testimony to establish that it is based on sound scientific principles, the decision to allow expert reconstruction is often based on whether there are eyewitnesses and whether they testify rather than on whether the expert testimony is scientifically sound or helpful to the jury.

This odd rule was first set forth in Plank v. Holman, 46 Ill. 2d 465, 264 N.E.2d 12 (1970). In Plank, the decedent’s widow brought suit seeking damages for her husband’s death in a three car accident. The plaintiff, Maxine Plank, had been driving a separate vehicle several car lengths behind her husband’s car on a country road in Kane County. Mrs. Plank testified to the decedent’s careful driving habits. Additionally, she called an expert witness to reconstruct the accident. The plaintiff, however, did not testify as an eyewitness despite being in court and having seen the accident occur. Defendants contended that the court erred in admitting the careful habits testimony and the reconstruction testimony because the plaintiff was an available eyewitness. Id. at 469. The court rejected the plaintiff’s contention that she was not an available eyewitness because she did not see the path of all three vehicles before the accident, stating that “it is not necessary that an eyewitness see everything that occurred at the accident scene.” Id.

Amazingly, the Court held that “the best evidence of decedent’s due care was the plaintiff’s testimony or that of another who witnessed the accident. The plaintiff was not compelled to call one of the adverse parties to testify but she was compelled to call herself in the absence of other direct testimony. Id. at 470. The court concluded, in a statement that was destined to muddy the waters for years, that “reconstruction testimony may not be used as a substitute for eyewitness testimony where such is available.” Id.

Did Someone Say Best Evidence?

The trouble with Plank, unlike many of the Illinois cases discussing vehicle speed evidence, is that the case holds that if an eyewitness was present and is available, that witness, or those witnesses must testify at trial. It goes further to bar expert testimony of speed if there are any available eyewitnesses to vehicle speed. Plank has caused, and still has the potential to create, a good deal of confusion regarding requiring certain witnesses to testify. While it is often appropriate to bar a witness’ testimony, it makes little sense to condition the ability of an expert witness to testify on whether an eyewitness testifies, particularly when a party chooses not to call the eyewitness.

The court’s reference to the “best evidence” suggests that it may have been influenced by the best evidence rule. If so, however, the ruling in Plank is a misapplication of the best

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evidence rule, which applies only to documents. Not only is what constitutes the best evidence subjective, but a party may disregard so-called “best evidence” as part of trial strategy. Aside from the question of whether the expert testimony is cumulative, there is no reason to condition the ability of an expert witness to testify about speed on the testimony of zero, one or one hundred eyewitnesses.

**Expert speed testimony and analysis presents the age-old weight-versus-admissibility problem.**

A better approach is to simply rely on the general standard for admissibility of expert testimony – whether the expert is qualified and whether the expert’s testimony will aid the trier of fact in understanding the evidence. E.g., *Hiscott v. Peters*, 324 Ill. App. 3d 114, 122, 754 N.E.2d 839, 847 (2d Dist. 2001). This analysis was set forth by the Illinois Supreme Court in *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 516, 211 N.E.2d 733, 735 (1965), and by the First District Appellate Court in *Morrison v. Reckamp*, 294 Ill. App. 3d 1015, 1020, 691 N.E.2d 824, 828 (1st Dist. 1998), which held that expert testimony on construction of an automobile accident is admissible where it is necessary to rely on knowledge and application of principles of physics, engineering and other sciences beyond the ken of the average juror. Similarly, in *Augenstein v. Pulley*, 191 Ill. App. 3d 664; 547 N.E.2d 1345 (5th Dist. 1989), the court ruled that allowing accident reconstruction testimony is not an abuse of discretion when the witness is qualified and relies on scientific principles that aid the trier of fact in forming an opinion.

What assisting the jury means is not entirely clear. At first it would seem that if the expert relies on principles of science, her or his testimony should assist the trier of fact. But in creeps the nagging issue of eyewitnesses. What if ten witnesses state that the vehicle was going 50 miles per hour and the expert calculates it was only going 35? Instead of determining that the vehicle was going 50 miles per hour and the expert calculates it was only going 35? Instead of determining that the expert should testify and the jury should give the evidence what weight it will, the judge has the option of determining, and the appellate court under *Plank* could still affirm, that the eyewitness testimony is the “best” evidence to aid the jury.

**See No Evil**

The best scenario for a party attempting to admit expert testimony of speed in a moving vehicle accident is when no eyewitnesses are present. *People v. McDermott* is a case in which there was no eyewitness to the defendant’s speed at impact. 141 Ill. App. 3d 996, 490 N.E.2d 1293 (1st Dist. 1985). The court admitted expert accident reconstruction testimony as to the defendant’s speed. *Id.* Although a witness testified that he was following the victim’s car just before it was struck head on, he did not see the accident itself, nor did he see the defendant’s car until after the collision occurred. *Id.* at 1002. The court concluded that the expert’s testimony regarding defendant’s speed was “appropriate due to lack of reliable eyewitness testimony on both the defendant’s speed and the point of impact.” *Id.* at 1007. It should be recalled that often the speed of a vehicle before an accident is not as important as the speed of the vehicle at the point of impact. Therefore, it may well be possible to admit expert speed testimony based on the assertion that the expert can testify through scientific principles to the speed at impact, whereas an eyewitness might only have seen the vehicle moments before impact. This lends credibility to the expert and also could establish that the expert’s testimony would aid the jury in the absence of other speed at impact evidence.

In a slightly earlier case, *People v. Wolfe*, the issue was not the speed of the defendant’s vehicle at the point of impact, but rather at the point just before the defendant’s truck began skidding into an oncoming vehicle. 114 Ill. App. 3d 841 (2nd Dist. 1983). In *Wolfe*, there were five eyewitnesses to the truck’s speed before the accident, but none to its speed at the instant the defendant’s vehicle began to skid. *Id.* at 848. The expert accident reconstructionist testified to defendant’s speed at the instant of skidding. The court stated, “Therefore, [the expert’s] reconstruction testimony was admissible as relating to a factual issue not precisely addressed by the eyewitnesses’ testimony.” *Id.*

**Accept No Substitutes**

Unfortunately, to win the trial – including the affirmation on appeal – a party must first walk the perilous *Plank* and its oft-cited refrain that “reconstruction testimony may not be used as a substitute for eyewitness testimony where such is available.” Though the case itself may be fading into history, its rationale is out there in numerous guises.

In truth, a plaintiff relying on *Plank* to assert that expert speed testimony should not be admitted if it is otherwise admissible is misconstruing Illinois law. First of all, in *Brown v.*

(Continued on next page)
Speed Evidence (Continued)

*Ford*, 306 Ill. App. 3d 314, 714 N.E.2d 556 (1st Dist. 1999), for instance, there was an eyewitness – a driver in another car – but the appellate court found his testimony to be “equivocal,” even though he saw the entire accident occur. The eyewitness testified that he might have been as far as a half-mile away from Brown’s van when it started to slide toward an abutment, that the van was “some distance north” when it slid, and that the van could have been traveling faster than he had estimated, noting, “It’s very possible [that the van was going faster] because that’s the reason I hesitated before when the question was asked how fast he was going.” *Brown*, 306 Ill. App. 3d at 317.

The *Brown* Court held that because the eyewitness’s testimony was equivocal, “[w]e therefore do not find that the trial court erred in allowing the reconstruction evidence.” *Id.* Therefore the expert testimony was necessary to aid the jury in determining whether plaintiff’s excessive speed contributed to the car explosion that injured plaintiff. *Id.*

Notwithstanding its early holding in *Plank*, the Illinois Supreme Court has held that the existence of an eyewitness is not the conclusive factor in deciding whether to admit expert accident reconstruction testimony. *Watkins v. Schmitt*, 172 Ill. 2d 193, 665 N.E.2d 1379 (1996); *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 392 N.E.2d 1 (1979). In *Watkins*, the court stated:

The fact that there were three eyewitnesses who could testify as to the speed of the cement truck does not amount to an absolute bar to expert reconstruction testimony. Instead, we look at whether in addition to eyewitness testimony, expert reconstruction testimony would be needed to explain scientific principles to a jury and enable it to make factual determinations. *Watkins*, 172 Ill. 2d at 206. Thus, *Watkins* and *Augenstein* undermine the rationale behind the *Plank* rule, and provide a strong rebuttal to any attempt to bar expert reconstruction because of the presence of eyewitnesses under *Plank*.

**Buyer Beware**

The problem with relying on *Watkins*, however, is that it was an appeal from a summary judgment granted to the defendants after barring the testimony of a deputy sheriff, who calculated that the defendant had been speeding at the time of the accident. The supreme court agreed with the trial court that the deputy’s opinion concerning the truck’s speed should be barred, but believed that the deputy should still be able to testify to his observations concerning the skid marks and other physical evidence that supported a conclusion that the driver was speeding. With respect to the issue of speed, the court distinguished the issue of whether a car is speeding from other types of expert testimony, noting that estimating the speed of a vehicle is not beyond the ken of the average juror. Since there were three eyewitnesses who had an opportunity to observe and testified to similar estimates of the defendant’s speed, the testimony of the deputy was not needed to assist the jury in understanding the evidence. 172 Ill. 2d at 206-207.

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**Watkins presents perhaps one of the more difficult scenarios for admitting expert speed testimony. That is, when a party not only attempts to admit expert testimony, but when the expert is also one of the police officers who reconstructed the scene.**

*Watkins* presents perhaps one of the more difficult scenarios for admitting expert speed testimony. That is, when a party not only attempts to admit expert testimony, but when the expert is also one of the police officers who reconstructed the scene. An analysis of this scenario is beyond the scope of this article. However, it is crucial when the expert is not a police officer to distinguish this fact from *Watkins* and rely instead on the case’s support for the theory that whether expert testimony is admissible should not rely on the number of lay eyewitnesses available to testify. The unfortunate problem with *Watkins* is that it still emphasizes the analysis of whether expert testimony is needed, rather than allowing a jury to determine the weight it should be given.

The most valuable judicial contribution to the argument on how to prove vehicle speed is found in *Augenstein v. Pulley*, 191 Ill. App. 3d 664, 547 N.E.2d 1345 (5th District 1989).

Perhaps the most important statement in the opinion is as follows:
We will discuss the law on the admissibility of reconstruction testimony in some detail because of our further concern that the courts have created exceptions to the limited rule of admissibility for reconstruction testimony that are unnecessary if the problem is viewed in the overall context of opinion evidence.

*Id.*, 191 Ill. App. 3d at 673. The *Augenstein* case then provides a chronology of cases regarding the use of expert opinion testimony in general, leading into a further chronology of expert accident reconstruction cases including the more liberal *Miller v. Pillsbury*, 33 Ill. 2d 514, 211 N.E.2d 733 (1965), which was limited by *Plank*. Later courts have held that there are numerous exceptions to the *Plank* limitations on expert testimony, which are laid out in *Augenstein*. These examples may be useful for determining the case law you wish to rely on.

**Tip of the Iceberg**

As the court noted in *Augenstein*, along with the exceptions to the *Plank* rule have come additional restrictions, including that reconstruction testimony may not be used to impeach otherwise credible eyewitness testimony, and the exceptionally restrictive voice of *Iverson v. Iverson*, which stated that “[t]he testimony of a reconstruction expert, however, should never be used as a substitute for eyewitness testimony.” 56 Ill. App. 3d 297 (1977) (Emphasis added by *Augenstein* Court).

After discussing the various permutations of the rule, Justice Chapman wrote in *Augenstein*:

After one has fought his way through the myriad of exceptions only to stumble upon the additional restrictions, it is no wonder that such esteemed experts on evidence as Cleary and Graham have commented that “there appears to be a certain amount of confusion as to when reconstruction testimony may be received when eyewitness testimony is available.”

191 Ill. App. 3d at 678.

But after all the discussion, is this as far as we can get? Exceptions and restrictions? The *Augenstein* court lays down the law:

We hold ... that the admissibility of reconstruction evidence is to be determined upon the rules announced by the supreme court for opinion evidence.”

1. *Is the expert qualified in the field?* and
2. *Will the expert testimony aid the fact finder in the resolution of the dispute?*
Insurance Law

By Anthony Karamuzis
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Kajima Round II—Application of the Selective Tender Rule to Excess Carriers


However, it should be noted that on January 24, 2007, the Illinois Supreme Court accepted the PLA on Kajima I, and the PLA on Kajima II is currently pending. This sets the stage for the Illinois Supreme Court to potentially revisit the targeted tender rule in Illinois in its entirety.

Kajima I was decided on September 15, 2006. Kajima II was decided on December 8, 2006. Both decisions were issued by the Sixth Division of the First District and both were authored by Justice O’Malley.

In Kajima I, the court held that an insured must exhaust all available primary insurance coverage, or its equivalent, before an excess policy can be triggered, even when one of the primary policies has been deactivated through a directed tender. Kajima, a general contractor, argued that the John Burns decision gave it a paramount right to selectively tender its defense and indemnity to both the primary and excess carrier of a subcontractor who agreed to provide insurance coverage before Kajima’s own primary limits would be invoked. The subcontractor’s insurer contended that the selective tender rule applied to concurrent primary insurers, but had no application to excess policies.

In effect, Kajima argued that the selective tender rule allowed “vertical exhaustion”, which would allow an additional insured to seek coverage from an excess carrier, as long as the insurance policies immediately beneath that excess policy were exhausted. In earlier “non-selective tender” cases, Illinois has followed the “horizontal exhaustion” rule, which requires an insured to exhaust all primary policy limits before excess coverage becomes available. See Illinois Emcasco Insurance Co. v. Continental Casualty Co., 139 Ill. App. 3d 130, 487 N.E.2d 110 (1st Dist. 1985).

Kajima I recognized the differences between primary policies and excess or umbrella policies, citing Illinois Emcasco. In Illinois Emcasco, the court recognized the intentions of the contracting parties, the premiums paid, the conditions of coverage, and the uniqueness of excess coverage, and acknowledged a qualitative difference between primary and excess insurance. Based on those differences, Kajima I refused to allow the activation of an excess policy through a selective tender prior to exhaustion of all of the insured’s other primary coverage.

In Kajima II, the court applied the selective tender rule to excess coverage, holding that once primary coverage is exhausted, an insured may selectively tender its indemnity to one of two or more “concurrent” excess carriers.

In Kajima II, Kajima was covered by a primary CGL insurance policy and an excess / umbrella policy, both issued by Tokio Marine. Kajima entered into a subcontract with Shelco Steel Works, Inc., to perform work on a construction project. An actual dispute arose when a claim was made under the subcontractor’s policy, and Kajima tendered to both carriers. Shelco’s insurer argued that the selective tender rule had triggered its policy.

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The author thanks fellow IDC Insurance Law Committee members David M. Lewin of Tribler Orpett & Meyer, P.C., Chicago, Illinois, and Richard Valentino of SmithAmundsen, LLC, Chicago, Illinois for their ideas and suggestions with regard to this article.
During jury deliberations in the underlying suit, the parties reached a settlement for $4 million. North River and Grinnell, the primary CGL carriers for Shelco and American, each contributed and exhausted their respective $1 million limits. U.S. Fire, the excess carrier for Shelco, contributed and exhausted its $2 million excess policy. Tokio Marine, the CGL and excess carrier for Kajima, refused to participate in or contribute to the settlement.

Tokio Marine argued that it was not obligated to contribute to Kajima’s defense and indemnity because its policy was not an “available” policy, as Kajima had selectively tendered its defense and indemnity to Shelco and American. U.S. Fire argued that Kajima’s and American’s excess insurers were obligated to equally contribute to the loss at the excess level due to the policy’s mutually repugnant “other insurance” conditions. (Grinnell, the carrier for American, had settled.) First, *Kajima II* held that the horizontal exhaustion doctrine preempted the selective tender rule, pursuant to the First District’s decision three months earlier in *Kajima I*. Kajima’s primary carrier, Tokio Marine, was required to contribute its $1 million primary policy.

The *Kajima II* court then went on to decide whether the selective tender rule also applied to multiple excess policies. Prior to this case, there was no published authority in Illinois specifically addressing whether a common insured may selectively tender its indemnity to a particular excess carrier after exhaustion of all primary coverage. *Kajima II* held that the “other insurance” conditions contained in excess policies do not preempt the selective tender rule. The purpose of “other insurance” conditions is to provide a method of apportioning coverage among triggered concurrent policies. Quoting John Burns, *Kajima II* stated that if a policy is never triggered, the issue of liability under the “other insurance” conditions does not arise.

Tokio Marine argued that U.S. Fire waived its right to seek reimbursement or should be estopped from asserting that right because it did not issue a reservation of rights letter in response to Kajima’s tender. Specifically, Tokio asserted that an insurance broker, Crum & Forster, accepted Kajima’s selective tender on behalf of North River and U.S. Fire and failed to notify Tokio in a timely manner that U.S. Fire would not agree to vertical exhaustion. The court rejected this argument. First, the court held that waiver and estoppel apply only where an insurer has breached its duty to defend. As U.S. Fire was an excess carrier, and the primary carriers were providing Kajima with a defense in the litigation, U.S. Fire was required to indemnify Kajima, but was not required to defend it. Thus, waiver and estoppel were inapplicable to U.S. Fire.

Second, the court rejected the theory that a letter from an insurance broker accepting a tender of defense and indemnity on behalf of a primary insurer must also expressly address coverage which may be available from excess insurers. Finally, Tokio Marine argued that, in its capacity as an excess carrier, it was entitled to an allocation of fault. However, the court noted that it was improper for Tokio Marine to sit idle throughout the settlement negotiations without requesting an allocation of fault from the trial court. Thus, Tokio Marine waived this issue.

It is interesting to note that neither *Kajima I* nor *Kajima II* examined the particular “other insurance” conditions of the excess policies. In fact, the decisions cite no policy language. Another interesting point is that the Plaintiffs in *Kajima I* argued that they would have been better situated if they had no insurance because the subcontractor’s excess policy would have covered the loss. In response the court stated:

> [T]he problem of which Kajima complains can be easily remedied by requiring its subcontractors to increase their primary limits of insurance coverage.

The court appears to be suggesting that, in addition to requiring a subcontractor to provide a certain level of total insurance coverage, e.g., $5 million, a general contractor should also require its subcontractor to maintain that limit on a primary basis rather than by a combination of primary and excess policies. However, actually implementing this suggestion may be cost prohibitive. Most standard CGL policies have a $1 million liability limit. Primary policies with limits higher than $1 million will entail substantially greater premium, assuming the subcontractor can find an insurer willing to underwrite the risk to begin with. Primary policies issued to construction contractor for $5 million are virtually unknown.

In summary, the 6th Division of the First District of the Appellate Court has clearly stated that it will apply the selective tender rule at both the primary and excess levels, while purporting to maintain the clear distinction between primary and excess coverage. However, the uniqueness of excess policies recognized in *Kajima I* appears to be given less deference.

(Continued on next page)
Insurance Law (Continued)

eence in Kajima II. Excess carriers provide much higher limits for much less premium but are being treated in the same manner as primary carriers.

It remains to be seen whether other Divisions and other Districts will follow the Kajima II approach. One must surely take note of Justice Quinn’s concurrence in American National v. National Union, 343 Ill. App. 3d 93, 796 N.E.2d 1133 (1st Dist. 2003), where he stated:

I believe that if Illinois retains the targeted tender rule, it should be limited to instances involving parties which are additional insureds under concurrent primary policies. This situation is most commonly seen in the context of the construction trade.

Id. at 108. (Emphasis added). Justice Quinn sits in the First Division of the First District. In fact, his concurrence is cited in both the Kajima I and Kajima II decisions.

One wonders if the result in Kajima II will be followed should the facts be different in a subsequent case. For example, if the excess limits are $10 million per insurer and the cost of settlement hypothetically is $13 million, will the court be so quick to allow selection of a single insurer to the exclusion of the other two? As stated above, with the acceptance of the PLA on Kajima I, the Illinois Supreme Court may revisit the targeted tender rule in Illinois in its entirety. Round III may answer such questions.

E-Discovery

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Metadata: Ethics and Issues

One of the recurring themes in electronic discovery is “metadata.” The term arises frequently in discussions of electronic discovery and occasionally in case law. It does not appear in any of the new Federal Rules, but is the subject of several ethics opinions.

What is metadata?

According to the simplest definition, metadata is data about other data. Primarily it is information about a document that is outside the text of that document. Put another way, it is information that cannot be seen on the face of the document. In the context of electronic documents, it is information embedded in the electronic file to provide information about that file. For example, a Microsoft Word document will contain information including the dates on which the document was created, modified, accessed and printed; and the title, subject, author and company of origin. Word Perfect documents, spreadsheets, and virtually every other computer file contain similar information. Much of this information can be accessed by checking the electronic document’s “properties.” This can

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Can I search my opponent’s metadata?

Yes, unless you are practicing in New York or Florida. Illinois has not issued any guidance directly on point, but the question has been addressed by New York, Florida and the ABA.

The New York State Bar Association Committee on Professional Ethics addressed the question of whether a lawyer who transmitted documents reflecting client confidences or secrets violated a rule prohibiting a lawyer from knowingly revealing a confidence or secret. New York State Bar Assn. Comm. on Professional Ethics, Formal Op. 782 (2004). The opinion concluded that a lawyer must exercise reasonable care to avoid making inadvertent disclosures. Despite imposing this obligation on the sending lawyer, the opinion further concluded that “[l]awyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets.”

The Florida Bar Association went a step further in its opinion. Florida Bar Assn. Comm. on Professional Ethics, Formal Op. 06-2 (2006). The Ethics Committee was asked to evaluate the ethical duties arising where lawyers receive electronic documents. The opinion noted that it did not address the question in the context of documents that are subject to discovery. Rather, it is limited to documents such as those created by the attorney or communications to the attorney. The opinion noted that Florida lawyers must take reasonable steps to protect their client’s confidential information in all types of documents, including electronic documents.

Like the New York opinion, the Florida opinion went beyond the duty of the sending lawyer and concluded that “[a] lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer.” In other words, gentlemen and ladies do not read other people’s metadata. If a lawyer inadvertently receives such information, the lawyer should notify the sender.

Despite these opinions from New York and Florida, the weight of the commentary seems to indicate that there is nothing unethical about examining the metadata in documents received by an attorney. The ABA took this position in rendering its opinion. ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 06-442 (2006). Relying upon the Model Rules of Professional Conduct, the Committee concluded that there was no specific prohibition against reviewing and using embedded information in electronic documents whether those documents are received from counsel, an adverse party, or a party’s agent.

The Committee noted that an attorney can take steps to prevent the inadvertent disclosure of metadata. It therefore placed the burden upon the producing attorney to avoid disclosure of such data. The opinion noted that Model Rule 1.6 requires that a lawyer act competently to safeguard client information. The Committee expressly disagreed with the approach taken by New York and Florida, which placed a burden on the recipient to avoid seeing metadata. The committee also noted that lawyers could negotiate a confidentiality agreement, seek a protective order, or utilize a clawback agreement, such as those permitted by Fed. R. CIV. P.26(b)(5)(B). Clawback agreements allow parties to demand the return of privileged documents after they are produced to adverse parties. As a practical matter, it is simpler to require that the sending attorney refrain from sending confidential information, rather than expect receiving attorneys to refrain from reading information once it is in their possession.

Illinois’ Rules of Professional Conduct (“RPC”) do not expressly prohibit reviewing metadata. Two provisions of the rules are potentially applicable. RPC 1.6 provides that “[a] lawyer shall not . . . use or reveal a confidence or secret of a client known to the lawyer . . .” This seems to place a burden upon the sending attorney to avoid the inadvertent disclosure of client confidences via metadata. Rule 3.4 states that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.” This provision, as well as common law cases pertaining to spoliation, prohibit scrubbing metadata from evidentiary documents that are to be produced during discovery.

Protect Your Metadata

The mechanics of elimination or “scrubbing” metadata from documents are beyond the scope of this note, but there are some simple steps that can be taken to avoid inadvertently producing metadata. First, you can follow a “don’t ask, don’t tell” policy. If your opponent does not ask, you do not have to turn it over. Under the new Federal rules, the requesting party may specify the form in which documents should be produced. If they do not specify a form, the answering party is free to select the form in which the documents will be produced. This could be an image form, such as TIFF or PDF, which will contain little or none of the metadata contained in the original document.

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

There is also software available to scrub metadata from documents before they are produced. This could be appropriately used for attorney-prepared documents. Vendors include Microsoft, Payne Consulting, and various other software vendors. The NSA (yes, the same one that is probably reading your email and listening to your phone calls) drafted a paper with a recommended procedure for sanitizing Microsoft Word documents. National Security Agency, Redacting With Confidence: How To Safely Publish Sanitized Reports Converted From Word to PDF, (Dec. 2, 2006), http://www.nsa.gov/snac/vtechrep/I333-TR-015R-005.PDF. Many of the recommendations in that article are applicable or easily transferred to documents other than Microsoft Word documents.

In considering whether electronic documents should be scrubbed of their metadata, electronically stored information should be divided into two separate categories. The first category includes any document which may contain information subject to attorney client or work product privileges. Documents such as answers to interrogatories or settlement offers fall into this category. Such documents can generally be scrubbed of metadata without breaching RPC 3.4 or creating a spoliation issue. It may be necessary to scrub them to comply with RPC 1.6 (protecting client confidences). The second class of documents includes electronically stored information created or possessed by the client or other third parties that is not privileged. This includes information such as a client’s internal emails or memoranda describing an accident or harassing emails in a sexual harassment case. Those materials, including their metadata, are potential evidence which must be preserved and disclosed if requested. Those documents should not be scrubbed of their metadata. The second class of documents can be produced in a format that does not include their metadata (such as TIFF or PDF) if no production form is specified by the requestor, if the parties agree, or if the court orders production in that format. Metadata may also be protected by the use of a clawback agreement.

The following questions and issues often confront us regarding arbitration:

- Have the parties entered into a pre-dispute or post-dispute agreement to arbitrate?
- Is the arbitration agreement enforceable?
- Has a motion to compel arbitration been waived? Omar v. Ralphs Grocery Co., 13 Cal. Rptr. 3d 562 (Ct. App. 2004). Who decides, the arbitrator or the court? Id.
- Is a party obligated to arbitrate a dispute when less than all of the parties to the contract have agreed to arbitrate? If all of the parties do not agree to the provisions for arbitration in the contract, who is to decide, the court or the arbitrator? Will-Drill Resources, Inc. v. Samson Resources Co., 352 F.3d 211 (5th Cir. 2003).
- Is the agreement to arbitrate unconscionable? Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88 (Ct. App. 2004).
- What are some of the circumstances under which the courts have found agreements to arbitrate unconscionable? Parilla v. IAP Worldwide Services VI, Inc., 368 F.3d 269 (3d Cir. 2004); Green Tree Financial Corp. – Alabama v. Randolph, 531 U.S. 79, 92 (2000); West Virginia ex rel. Wells v. Matis, 600 S.E.2d 583 (W. Va. 2004).
- Are attorney fees to be awarded when a party claims that the attorney fee provision is unconscionable? Parilla v. IAP

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Who is to make such a decision? \textit{Id.}

- In an instance where an agreement provides that each party would bear its own costs and expenses, including attorney fees, is such a provision unconscionable? \textit{Faber v. Menard, Inc.}, 367 F.3d 1048 (8th Cir. 2004) (holding that such a provision is unconscionable).

- Are there any vagaries or ambiguities in the agreement as to whether the parties have agreed to a binding or non-binding arbitration? \textit{Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.}, 79 Fed. Appx. 238 (8th Cir. 2003).

- Are the arbitration provisions of an employment contract valid and enforceable where they require the employee, but not the employer, to arbitrate all employment-related disputes?

- Are such provisions valid and enforceable where a pre-dispute resolution procedure permits the employer or supervisor, but not the employee, to look at the employee’s file/case in advance of the arbitration? \textit{Nyulassy v. Lockheed Martin Corp.}, 16 Cal. Rptr. 3d 296 (Ct. App. 2004).

Pre-dispute agreements to arbitrate are generally enforceable. The Sixth Circuit, however, has held that an arbitration agreement under which the arbitrator was selected from a list compiled solely by the employer was not enforceable. The agreement was found to be fundamentally unfair. A question remained, however, whether that offending provision is severable from the remainder of the agreement. \textit{McMullen v. Meijer, Inc.}, 355 F.3d 485 (6th Cir. 2004).

Courts do hold arbitration to be mandatory but, at the same time, it may not be binding. In any negotiations in this regard, the parties must be sure the agreement provides for binding or non-binding arbitration for the resolution of the issues.

Attorney fees and costs are legal terms of art. In Illinois, it is well established that attorney fees and ordinary expenses of litigation are not allowable to the successful party in the absence of any statutory provision or specific agreement of the parties. \textit{Bertuli v. Gaul}, 215 Ill. App. 3d 603, 604 (3d Dist. 1991).

Regarding whether a motion can be made before the court to compel arbitration, such motions have been denied on the grounds that the agreement to arbitrate was illusory when the employer reserved the right to alter, amend, modify or revoke. \textit{Cheek v. United Healthcare of Mid-Atlantic, Inc.}, 835 A. 2d 656 (Md. 2003).

A party does not waive its right to arbitration by filing a motion to dismiss or by filing a lawsuit and participating in it, absent prejudice to the party opposing arbitration. A California court held that this is true even where the party’s position in the lawsuit is that the contract containing the provision for arbitration never came into being (i.e., was void \textit{ab initio}). \textit{St. Agnes Med. Ctr. v. PacifiCare of Calif.}, 82 P. 3d 727 (Cal. 2003).

Most courts adhere to the time honored doctrine of \textit{functus officio}—an arbitrator’s authority ceases upon the signing of the award. Thus, any award signed after the time period provided in the agreement is void and should be vacated. By the same token, any attempted modification of an award is of no benefit. The initial award will be confirmed. \textit{Smith v. Transp. Workers Union of Am., AFL-CIO Air Transp. Local 556}, 374 F.3d 372 (5th Cir. 2004).

In the event the arbitration agreement vests in the administrator the power to assess fees and costs, a court may not order payment in any different manner.

The above questions and explanatory points that follow them comprise food for thought. They are issues which may appear before you at your next arbitration.
Product Liability

By: James W. Ozog
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Product Liability and Conflict of Laws


In Townsend v. Sears Roebuck & Co., No. 1-05-4045, 2006 WL 3228815 (1st Dist., November 8, 2006), the First District held that Illinois law will determine the issues of product liability, compensatory damages and punitive damages in a personal injury case involving an accident which occurred in Michigan involving Michigan residents. In reviewing the conflict of laws issues raised by the parties, the First District answered the following question: whether Illinois or Michigan law applies to a products liability and negligence action where the plaintiff is a Michigan resident and the injury occurred in Michigan, the product was manufactured in South Carolina, the defendant is a New York corporation domiciled in Illinois and the conduct complained of occurred in Illinois. The decision is certain to rattle the nerves of product manufacturers and merchants domiciled in Illinois as well as commercial groups that are seeking to promote business to locate in our state.

The Townsend plaintiffs filed a complaint based upon theories of strict product liability and negligence premised on defective design and failure to warn of defects associated with a Craftsman riding lawn tractor purchased in Michigan from Sears. Plaintiffs were Michigan residents, the tractor was purchased in Michigan and the accident occurred in Michigan when the minor plaintiff’s father accidentally backed over him with the tractor.

In their complaint, the plaintiffs sought both compensatory and punitive damages. The plaintiffs alleged that Sears designed, marketed, manufactured, inspected, tested and sold the tractor that was unreasonably dangerous. Specifically, the plaintiffs alleged that the tractor lacked a no-mow-in-reverse (NMIR) safety feature to prevent back over injuries. Sears brought a motion to dismiss on the basis of forum non conveniens, which the trial court denied. The appellate court denied leave to appeal the dismissal and Illinois was determined to be the forum state.

With respect to compensatory damages, Illinois has rendered unconstitutional statutory caps on non-economic damages whereas Michigan imposes caps on non-economic damages in product liability actions.

After the forum was established, the plaintiffs moved to apply Illinois law to the issue of liability as well as the issues of compensatory and punitive damages. The trial court concluded that Illinois had a superior interest in having its policies applied and held that Illinois law should govern the case with respect to both liability and damages. Thereafter, the appellate court granted Sears’ application for leave to appeal.

The parties agreed that conflict existed between Illinois and Michigan law in three significant respects: 1) liability; 2) compensatory damages; and 3) punitive damages.

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2) compensatory damages; and 3) punitive damages. As to liability, Illinois has adopted the rule of strict liability in product defect cases whereas Michigan has adopted a negligence doctrine with respect to product liability cases. (See, e.g., Hansen v. Baxter Health Care Corp., 198 Ill. 2d 420, 764 N.E.2d 35 (2002); Prentis v. Hale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176 (1984)). The distinction between the two theories lies in the concept of fault. The inability of the defendant to know of or prevent a risk is not a defense to a strict liability action, where such an inability would preclude a finding of negligence. Blue v. Envtl. Eng’g, Inc., 215 Ill. 2d 78, 828 N.E.2d 1128 (2005).


Illinois v. Michigan Product Liability Law

The First District looked to the conflicts law of Illinois, the forum state, to determine which state law to apply on these issues. Illinois has adopted the most significant relationship test under the Restatement (Second) of Conflicts of Law (1971). Under this test, the law of the place of the injury controls unless another state has a more significant relationship with the occurrence and with the parties with respect to the particular issue. Esser v. McIntyre, 169 Ill. 2d 292, 661 N.E.2d 1138 (1996). The First District noted that the Restatement provides two sets of criteria for measuring the state with the most significant relationship.

First, the court must consider the broad general principles contained in Section 6 of the Restatement (Second) which underlie all choice of law rules. As applied to this case, those issues included: 1) the basic policies underlying the particular field of law; 2) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; and 3) the relevant policies of the forum. Esser, 169 Ill. 2d at 299-00, 661 N.E.2d 1138; Restatement (Second) of Conflict of Laws §6 (1971).

Second, in a tort action, Section 145(2) of the Restatement (Second) sets forth the contacts to be evaluated applying the principles of Section 6. These contacts include: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, place of incorporation and place of business of the parties; and 4) the place the relationship between the parties, if any, is centered. Esser, 169 Ill. 2d at 298, 661 N.E.2d 1138; Restatement (Second) of Conflict of Laws § 145(2).

In conducting a significant relationship analysis the First District noted that Illinois courts do not merely count contacts. Wreglesworth v. Arctco, Inc., 316 Ill. App. 3d 1023, 738 N.E. 2d 971 (1st Dist. 2000). The Wreglesworth court applied a three-step analysis: 1) isolate the issue presented; 2) identify the relevant policies embraced in the laws in conflict; and 3) examine the context to determine which jurisdiction had superior interest in having its policy applied. Id. at 1031, 738 N.E. 2d 971.

The court compared Illinois and Michigan law as to the relevant issues and the policy reasoning behind those laws. The first issue was whether Illinois strict liability or Michigan negligence applied to determine whether Sears defectively designed the lawn tractor. The court observed that the policy underlying strict liability in Illinois is consumer protective as well as a corporate regulatory policy. The purpose is to “place the loss caused by defective products on those who create the risks and reap the profits by placing such products in the stream of commerce.” Trans States Airlines v. Pratt & Whitney Canada, Inc., 177 Ill. 2d 21, 682 N.E.2d 45 (1997). In contrast, Michigan’s negligence law is based on a producer protective policy designed to protect in contrast, domiciled producers from excessive financial liability. In re Disaster at Detroit Metro. Airport on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989). In explaining this policy, the court in Disaster stated: “[b]y protecting the economic health of companies that conduct business in Michigan, the state derives substantial revenues in sales and tax, directly and indirectly, and furthers the economic well being of the entire state.” Id. at 801.

In finding that Illinois’ strict product liability law applied, the court held that Illinois had a more significant relationship to the issue than Michigan. This decision is based on the fact that the decision to design the lawn tractor without the MNIR feature took place in Illinois and that Illinois is Sears’ principal place of business. The court reached this conclusion even after acknowledging that generally the law of the place of injury determines the liability law. Even though the accident occurred in Michigan and the lawn tractor was purchased in

(Continued on next page)
Product Liability (Continued)

Michigan, the Court stated that Michigan’s corporate protective products law would not materially advance the goal of protecting resident producers from strict liability in this case.

Punitive Damages

In determining the issue of damages, the Court applied the doctrine of “depection”, which is used to determine choice of law on an issue-by-issue basis. Ruiz v. Blentech Corp., 89 F.3d 320 (7th Cir. 1996); Restatement (Second) of Conflict of Laws §145(1) and comment d (1971). Based on this doctrine, the court stated that it could apply the law of one state as to liability and that of another to issues of measuring damages against the same defendant, citing 63B Am.Jur.2d Products Liability §1522 (1997). Thus, the court analyzed punitive and compensatory damages separately.

The court compared Illinois and Michigan law regarding punitive damages. The court observed that the purposes underlying the allowance of punitive damages are distinct from compensatory damages, namely, punishment of the defendant and deterrence of future wrongdoing. Ziarko v. Soo Line R.R. Co., 161 Ill. 2d 267, 641 N.E.2d 402 (1994). Therefore, Illinois law on punitive damages reflects a corporate regulatory policy. Conversely, the purpose underlying Michigan’s disallowance of punitive damages is to protect resident defendants from excessive financial liability and reflects a corporate protection policy. In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir. 1981). “By insulating those companies, which conduct extensive business within its borders, the non-punitive damages state hopes to promote corporate migration into its economy. The protection of the financial stability of domiciliary corporations is designed to enhance the economic climate and well being of the state by generating revenues.” In re Disaster at Detroit Metro. Airport, 750 F. Supp. at 806; see also In re Aircrash Disaster Near Monroe, Michigan on January 9, 1997, 20 F. Supp.2d 1110, (E.D.Mich.1998).

The court again noted that Michigan was the place of plaintiffs’ residence and the place of the accident, yet found that Illinois was where the alleged design defects occurred. As a result, the court found that Illinois, as the forum state, has a definite interest in punishment, corporate accountability and deterrence of future wrongdoing and found that punitive damages were allowable.

Non-Economic Damages

The court next evaluated which state’s law governed the extent of non-economic damages. In Illinois, caps on non-economic damages were held unconstitutional in the Best case. In Best, the Illinois Supreme Court held that caps on non-economic damages created arbitrary legislative classifications that discriminated in favor of a select group without a sound, reasonable basis. Best, 179 Ill. 2d 409, 689 N.E.2d 1057. The Illinois Supreme Court also determined that caps disregarded the jury’s process in determining damages and unduly encroached upon the judicial prerogative of determining whether a jury’s damage award was excessive. Id. at 414, 689 N.E. 2d 1057.

In upholding the corporate regulatory policy of a business’s domicile as a paramount interest in deciding to impose punitive damages for corporate misconduct, the Court failed to appreciate the ramifications of its decision.

Conversely, Michigan allows caps on non-economic damages. Michigan courts have held that caps are “rationally related to the legitimate governmental interests of encouraging the manufacture and distribution of products in Michigan and protecting those who place products into the stream of commerce from large damage awards in jury trials.” Kenkel v. Stanley Works, 256 Mich. App. 548, 564-65, 665 N.W.2d 490 (2003).

The court found that since the plaintiffs were Michigan residents who were not subject to Illinois constitutional protections, Illinois would have little or no interest in protecting
plaintiffs from caps on non-economic damages. The court further stated that it must consider that Illinois, as the forum state where the case will be tried, has a very strong interest in its constitutional protection of separation of powers within its borders and, therefore, has a strong interest in protecting against another state’s legislative encroachment on the inherent power of its judiciary to determine whether a jury verdict is excessive. Thus, Illinois has a compelling public policy interest in applying Illinois law with respect to caps on non-economic damages.

The court recognized that Michigan has a definite interest in seeing that its residents are compensated for their injuries as that is the state which will be socially and economically impacted by their recovery or non-recovery. However, where the purpose of the cap is not directed toward the injured victim who resides in Michigan, these contacts are not related to the policies underlying its law, and, therefore, Michigan does not possess a strong interest in having its law applied. Where Illinois’ compelling public policy interests override any interest that Michigan may have with respect to this issue, the law of Illinois applies to compensatory damages.

The Townsend decision is disturbing on several grounds. While the court did its best to uphold Illinois’ Consumer Protection Policy, it virtually ignored Michigan’s equitable policy to allocate fault among all parties who might be responsible for an injury regardless of whether the person is, or could have been, named as a party to the action. M.C.L.A. Section 600.2957. This decision to apply Illinois law on liability will permit the trier of fact to disregard the conduct of the minor plaintiff’s father in running over his son with the lawn mower. This result avoids an in-depth choice of laws analysis of the contacts outlined in the Restatement Second. Aside from the injury occurring in Michigan, the conduct causing the accident also occurred in that state. In that regard despite the alleged design defect of the tractor, this accident could not have happened but for Plaintiff’s father’s inattention when driving the tractor in reverse. Moreover, the parties’ relationship was centered in Michigan where Plaintiff and his parents live, and Sears operates its chain of retail stores. Thus the contacts and the parties’ relationship to Michigan overwhelmingly favor the application of Michigan law.

In deciding the issue of punitive damages, the court essentially held that since Sears was domiciled in Illinois, and the design conduct occurred in Illinois, Illinois had a definite interest in punishment and the deterrence of future wrongdoing. In upholding the corporate regulatory policy of a business’s domicile as a paramount interest in deciding to impose punitive damages for corporate misconduct, the Court failed to appreciate the ramifications of its decision. For example, in the next automotive product liability case, is the First District going to apply Michigan Law to the conduct of the automobile manufacturers since most of them are headquartered in Michigan? In the case of consumer products, is the court going to apply Chinese law to those companies which originally design and manufacture products in China?

Sears has appealed this decision to the Illinois Supreme Court. As of this writing, the court has not decided whether to take the case. Unless the Townsend decision is reversed by the Supreme Court, it is sure to invite product liability plaintiffs from other states with any connection to the Illinois forum and is also sure to discourage the relocation of business headquarters to this state for fear of the application of Illinois’ more generous product liability laws in accident cases which arise outside Illinois borders.
First District Reviews and Retains Limits on Wrongful Discharge Actions

Although breaking no new ground, the recent First District case of Bajalo v. Northwestern University, No. 1-05-3175, 2006 WL 3702902 (1st Dist. Dec. 15, 2006), provides a thorough review of the common law tort of wrongful discharge in Illinois, and continues the trend of limiting the scope of that action.

Northwestern University (NU) engages in federally funded medical research, some involving live laboratory animals, thus requiring it to comply with the Federal Animal Welfare Act (7 USC § 2131 et seq.) (Act). NU hired the plaintiff, a veterinarian, as a research associate for a one-year period. Her contract was renewed twice. During her last two years, she advised her superiors and U.S. Department of Agriculture (USDA) inspectors of her concerns about the health and welfare of the research animals.

According to the complaint, in early 2003, shortly after she wrote to the USDA and the National Institute of Health about her concerns regarding animal care, NU advised the plaintiff her contract would not be renewed when it expired. The university further advised her not to return to its campus or research center during the remainder of her appointment. Later, NU’s human resources department allegedly blocked the plaintiff’s employment in another capacity.

The complaint alleged that the plaintiff was discharged from her employment in retaliation for reporting violations of the Act. Federal regulations prohibit discrimination against employees for reporting violations of standards under the Act. 9 C.F.R. § 2.32(c)(4). The defendant denied it discharged the plaintiff, saying that she remained employed during the balance of her contract and that it had elected not to renew her contract because of her “flagrant insubordination.”

The trial court denied the defendant’s motion for judgment on the pleadings but certified for appeal under Supreme Court Rule 308 the question of whether a contract employee engaged in protected whistleblowing activity may bring suit for retaliatory discharge when her employer fails to renew her written contract.

On appeal, the court stated that in order to maintain a retaliatory discharge claim, a plaintiff must show “(1) that she has been discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy.”

This tort was first recognized in Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978), where the plaintiff claimed he was fired in retaliation for filing a workers’ compensation claim. The action was expanded in Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981), to provide a remedy for an employee who said he was discharged for reporting a coworker’s criminal activity. In Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), the Illinois Supreme Court held that union workers could bring a retaliatory discharge claim independent from their collective bargaining agreement.

Since Midgett, the Supreme Court has refused to enlarge the scope of the action. Specifically, the court has not allowed a suit based on an employee’s exercise of the right of free speech, Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 478 N.E.2d 1354 (1985), or a claim for constructive discharge. Hartlein v. Illinois Power Co., 151 Ill. 2d 142, 601 N.E.2d 720 (1992). It has further held that loss of employment status and income without termination will not support a claim. Zimmerman v. Buchheit of Sparta, Inc., 164 Ill. 2d 29, 645 N.E.2d 877 (1995).

The appellate court has likewise held that retaliatory discharge does not extend to any employment action short of firing. E.g., Graham v. Commonwealth Edison Co., 318 Ill. App. 3d 736, 742 N.E.2d 858 (1st Dist. 2000); Welsh v. Com-

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In New Horizons Electronics Marketing, Inc. v. Clarion Corp. of America, 203 Ill. App. 3d 332, 561 N.E.2d 283 (2nd Dist. 1990), where an independent contractor alleged it was terminated as the defendant’s sales representative for refusing to participate in illegal bribes and kickbacks, the appellate court refused to extend the tort outside the employment setting.

In a recent case, an assistant athletic trainer for the Chicago Cubs sued for the non-renewal of his one-year contract following his complaints regarding violations of state law (the Illinois Athletic Trainers Practice Act, 225 ILCS 5/4). In Krum v. Chicago National League Ball Club, Inc., 365 Ill. App. 3d 785, 790, 851 N.E.2d 621, 625 (1st Dist. 2006), the court affirmed the dismissal of the trainer’s action, saying that in the absence of a specific statute, an employee may not sue for retaliatory discharge when an employer declines to renew an employment contract. The Bajalo court also cited cases from Missouri and California which declined to expand retaliatory discharge to contract non-renewal situations. The court further noted that the Act did not expressly provide for a private cause of action for whistleblowers, leaving its enforcement to the Secretary of Agriculture. Refusing to imply a private right of action in favor of employees is consistent with recent Supreme Court holdings. Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 722 N.E.2d 1115 (1999); Metzger v. DaRosa, 209 Ill. 2d 30, 805 N.E.2d 1165 (2004).

Consequently, the court in Bajalo answered the certified question in the negative, finding that non-renewal of a contract is not equivalent to the discharge of an at-will employee and will not support a retaliatory discharge claim.

It thus appears that any further expansion of this tort will have to await new legislation or a change of approach by the Illinois Supreme Court.
Employment Law

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Age Discrimination

Plaintiff Failed to Present Either Direct or Indirect Evidence of Age Discrimination


Luks, who was 52 years old at the time of his discharge, began his employment with Baxter in 1982 and had attained the position of Senior Business Systems Consultant. In August 2000, Luks began to report to John Goode, the newly hired Vice President of Architecture, Technology and Planning, who prepared Luks’ year-end evaluation for 2000. The original draft of that evaluation indicated that Luks failed to meet expectations in two areas, but after a discussion with Luks, Goode revised the evaluation to indicate that Luks had met expectations in those areas. The final evaluation, however, still criticized Luks in certain respects.

In March of 2001, Baxter hired Carol Kazl as the Director of the Program Office. Goode assigned Luks to work under Kazl while developing a process to assist the Program Office in its evaluation and prioritization of requests for information technology work and the assignment of that work to teams in another department. In late August of 2001, while Luks was well into the development of the process, Kazl gave him his mid-year evaluation, rating him as meeting expectations overall. Kazl, however, did suggest that Luks needed to submit his reports on time, be open to new ideas, implement his ideas, and more effectively discuss the process in less technical detail. By the end of the year, Kazl had become dissatisfied with Luks’ performance, and stated in his year-end evaluation that he was not meeting expectations.

Luks voiced his disagreement with the evaluation to both Kazl and Goode, but Goode said that he would defer to Kazl’s assessment. Kazl, after consulting with Goode and Human Resources Manager Gretchen Nester, placed Luks on a 30-day performance improvement plan. Luks understood that he was subject to termination if he failed to meet the objectives of the plan. After the 30-day period, Luks’ performance still was unacceptable to Kazl. After meeting with Nester, Kazl decided to terminate Luks. Goode reviewed the plan and concurred in the decision.

Baxter then posted Luks’ position as open, and directed two of his former co-workers to temporarily assume his duties. Subsequently, Baxter concluded that budgetary constraints precluded hiring a replacement. One of Luks’ co-workers took over the bulk of Luks’ former responsibilities, and Baxter later abandoned altogether the process that Luks had spearheaded.

Luks believed that he could establish age discrimination through both direct and indirect means. Recognizing that the distinction between the two means of proof was “vague,” the appellate court explained that “direct” proof of discrimination includes not only near-admissions by an employer that its decisions were based on proscribed criterion, but also circumstantial evidence that suggests discrimination through a longer chain of inferences. Citing Sylvester v. SOS Children’s Villages Illinois, Inc., 453 F.3d 900, 903 (7th Cir. 2006). “Indirect” proof involves a subset of circumstantial evidence that conforms to the prescription of the burden-shifting test of McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973).

Luks presented a series of events, remarks, and documents that he believed amounted to a “mosaic” of facts bespeaking direct proof of age discrimination. In one set of facts, Luks pointed to the fact that Goode had fired Cynthia Overby, Manager of Web Services, after Overby took steps to prevent the termination of two employees, Glen Jurmann and Larry Helsith, with whom Goode had become dissatisfied. Jurmann,
Helsith, and Luks were the three oldest employees in Goode’s chain of command. Second, Luks pointed to three documents: (1) a sheet of paper in Goode’s possession that had the names of Jurmann, Helsith, and Luks written on it; (2) a blank performance plan in Luks’ personnel file that appeared to envision certain action vis-à-vis Luks’ employment, which also named Jurmann and Helsith, but that was removed from Luks’ file; and (3) a blank “Performance Objective Template” that bore the names of Jurmann, Helsith, and Luks, and that bore a February 8, 2001 handwritten note reflecting a meeting between Goode and someone else concerning efforts to document Luks’ performance just before Goode began keeping a log concerning Luks. Luks and Overby believed that Luks, like Helsith and Jurmann, was being set up for discharge. The Seventh Circuit, however, concluded that nothing affirmatively supported the inference that Goode wished to terminate Luks (or the others) because of their age, although the evidence was consistent with age being the reason why Goode might have singled them out.

Next, Luks presented a second collection of facts, including a series of remarks, which he believed provided direct proof of discrimination. First, Goode remarked at one point, regarding Helsith and Jurmann, that he wanted to get rid of the “good old boys” and bring an end to the “good old boys club.” On another occasion, Goode indicated that he was looking for “higher energy” employees. Second, both Jurmann and Helsith had complained that Goode was “disrespectful,” “lacked professionalism,” and made remarks to them about “old timers” in reference to long-time Baxter employees. Third, Goode introduced Luks to a new secretary as “the old guy in the department.” Ultimately, the court concluded, none of these remarks supported the inference that Goode wished to terminate Luks (or the others) because of their age. None of the remarks by themselves, although potentially consistent with age discrimination, directly evidenced such discrimination and could just as well refer to tenure rather than age. Furthermore, it was Kazl, not Goode, who made the decision to fire Luks after concluding that his performance was unsatisfactory. Although Goode approved Kazl’s decisions that led to Luks’ termination, and even coached her in the implementation of the performance plan, there was nothing to support an inference that Goode’s possible dislike of older workers played any role in Luks’ termination.

Finally, the court evaluated Luks’ claim under the McDonnell Douglas framework, which first requires a plaintiff to establish a prima facie case of discrimination. A defendant must then articulate a legitimate, nondiscriminatory reason for discharging the plaintiff. The plaintiff must counter by establishing that the articulated reason for the discharge is pretext to discrimination. The Seventh Circuit proceeded directly to the issue of pretext, finding that Luks failed to make such a showing. Luks argued that the criticisms against him were unfounded, but the court concluded that his disagreement proved nothing more than the potential for mistaken assessment or bullheadedness on the part of Goode and Kazl.

Next, evidence that others who worked with him to develop the process were not negatively evaluated was not convincing, because Luks was responsible for the process and thus held to a higher standard. The court, in conclusion, reiterated that it was Kazl, not Goode, who determined that Luks should be terminated, and there was no evidence of age bias held by Kazl.

### Retaliation

#### Plaintiff Failed to Establish Claim of Retaliation Through Negative Referrals

In *Szymanski v. County of Cook*, 2006 WL 3346150 (7th Cir. Nov. 20, 2006), Evelyn Szymanski sued Cook County, alleging that its employee, Dr. John Raba, retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by “blackballing” her after her employment with Cook County ended. The district court granted summary judgment for Cook County, and the Seventh Circuit affirmed.

Szymanski, a registered nurse and a nurse practitioner, was hired by Cook County Hospital in 1983. In 1999, she filed her first charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) against Cook County. Of the ten she ultimately filed, at least three resulted in federal lawsuits. In 2002, a jury rejected Szymanski’s 2000 claim of racial and national origin discrimination. Approximately three weeks after the verdict, Cook County terminated Szymanski’s employment. Dr. Raba, the medical director, claimed that Szymanski was terminated because she did not meet the requirement that a nurse practitioner was to have a “collaborative agreement” with a licensed physician. Szymanski then filed a charge of discrimination alleging retaliation for engaging in a protected activity, and a jury ultimately returned a verdict in her favor. The judge entered a judgment for back pay and front pay, and directed Cook County to expunge from Szymanski’s personnel file any reference to her termination.

Szymanski began to seek new employment. Although she obtained a position as a staff nurse, she unsuccessfully continued to apply for many other positions. She contended that she was unable to obtain those positions because Dr. Raba...
Employment Law (Continued)

blackballed her, and she filed a charge that ultimately landed in federal court. Szymanski claimed that Dr. Raba, by giving negative references, interfered with her applications at the University of Chicago Hospitals, two agencies that provide nurses to hospitals or clinics, and a firm in the business of confirming employment references. She also claimed that Dr. Raba said that she was going to pay for “this” for the rest of her life (“this,” according to Szymanski, referred to her complaints), and ignored the order to expunge her file.

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), prohibits an employer from discriminating against an employee because she has “opposed” practices forbidden under Title VII or because she has “made a charge, testified, assisted, or participated in” a Title VII “investigation, proceeding, or hearing.” The provision goes beyond workplace-related or employment-related retaliatory acts or harm, and extends to “materially adverse nonemployment-related discriminatory actions that might dissuade a reasonable employee from lodging a discrimination charge.” Szymanski, 2006 WL 3346150 at *2, citing Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006). A former employee can assert a claim that negative references were given in retaliation for engaging in protected activity. Citing Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997).

The court noted that Szymanski could prove her case either by the direct or the indirect method of proof. Under either method it must be proven that Dr. Raba’s actions were “adverse.” “Adverse” in this setting, under an objective standard, means “the dissemination of false reference information that a prospective employer would view as material to its hiring decision.” Szymanski, 2006 WL 3346150 at *2. Because Szymanski’s claim rested entirely on what Dr. Raba said or did, the question was what did Dr. Raba say to the entities to which he spoke, and whether what he said amounted to an “adverse” action against Szymanski.

The court found Dr. Raba’s conversations with the firm in the business of confirming employment references was of limited relevance because the firm was not an employer or an employment agency. Although Dr. Raba mentioned Szymanski’s termination and alluded to the litigation regarding that termination, he added that there were no issues regarding her clinical skills or knowledge and no negative assessments regarding her duties or the quality of her work. The court did not view this reference as negative, much less blackballing.

For one of the two agencies that provided nurses to hospitals or clinics, Dr. Raba filled out a half-page chart rating Szymanski on six attributes. He rated her “good” on three attributes and “fair” on three (“poor” was the lowest rating). Regardless, that agency “hired” her as someone they would send to a hospital, although she was never given an assignment. For the other agency, Dr. Raba spoke to a recruiter on the phone as the recruiter completed a form. His reference to the second agency was somewhat better than his reference to the first, as he rated her a “good” in all categories. That agency also “hired” Szymanski, although it too never gave her an assignment. The court noted that to obtain an assignment, one had to call the agency. Szymanski claimed that she had called repeatedly, but she had no telephone records to support her claim.

Finally, the court described Szymanski’s interaction with the University of Chicago Hospital System as “truly bizarre.” First, she claimed that she had a conversation with the University’s recruiter, who told her that Dr. Raba stated that she was fired for misconduct. The recruiter, however, denied having any conversation with Dr. Raba and said that Szymanski’s references were not checked. Dr. Raba did not recall any conversation with anyone at the University. Additionally, the court found Szymanski to have been her “own worst enemy” to her chances of employment. She sent 287 emails to the University seeking employment. In response to a question on a written application, she wrote that the University did not have her written permission for a reference check, and that her application somehow was electronically signed, which was illegal. Finally, in an email she admitted that she had been “barred” from attaining employment based on her education and experience. Accordingly, there was nothing in the record that established any adverse post-employment action taken by Cook County against Szymanski.

Hostile Work Environment

Seventh Circuit Upholds Jury Verdict Against Employer Because Failure to Respond to Female Employee’s Concerns Regarding Male Inmate Was Unreasonable

In Erickson v. Wisconsin Department of Corrections, No. 05-4516, 2006 WL 3290202 (7th Cir. Nov. 14, 2006), Georgina Erickson sued her employer, the Wisconsin Correctional Center System (WCCS), a division of the Wisconsin Department of Corrections (WDC), for hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, after she was raped by an inmate about whom she had previously expressed concerns. A jury ultimately found in favor of Erickson, and the district court denied the WDC’s mo-
tion attacking the verdict. The appellate court affirmed.

Erickson was a payroll and benefits specialist at WCCS. The Oregon Correctional Center (OCC), an all-male minimum-security prison under the authority of WDC, was housed in the same building as WCCS. On December 20, 2001, Erickson was working alone at her cubicle in the WCCS offices, when John Spicer, an OCC inmate working as a janitor, entered the offices and was looking back and forth between Erickson and a vacuum that he was “fiddling with.” Upon discovering Spicer’s presence in the office, Erickson immediately got out of her chair and told Spicer that she had to meet some friends. Erickson went directly to a bar where some of her co-workers had gathered, including OCC assistant superintendent Todd Johnson, WCCS warden Margaret Thompson, WCCS director of human resources and Erickson’s supervisor Andrea Bambrough, and Sector Chiefs Wayne Mixdorf and Cindy Schoenike. As soon as she arrived at the bar, Erickson told the assembled group what had occurred and that she was “scared and really freaked.” She conveyed to them that she left her cubicle in haste and in disarray. When the others heard the story, they seemed surprised and “their mouths kind of dropped.” Warden Thompson told Erickson that she was sorry and that “they would make sure nothing like this ever happened again,” as inmates were not permitted to be alone with office workers. Erickson did not expect to see Spicer in the WCCS offices again.

On December 27, 2001, Erickson returned to work. The next day, Spicer again appeared in the office after hours while Erickson was alone. He attacked and brutally raped her, escaping the OCC in her car. No one had taken any action regarding Spicer during the week that Erickson was not at work, although Johnson had previously removed an inmate from his duties after that inmate exhibited behavior that was “too friendly.” Erickson then brought her Title VII hostile work environment claim, alleging that WDC’s failure to prevent the sexual assault by Spicer amounted to discrimination against her based on her sex.

To establish the existence of a hostile work environment, a plaintiff must demonstrate that she was (1) subjected to unwelcome sexual conduct, advances, or requests (2) because of her sex (3) that were severe or pervasive enough to create a hostile work environment, and (4) that there is a basis for employer liability. Citing Rhodes v. Illinois Dep’t of Transp., 359 F.3d 498 (7th Cir. 2004); Smith v. Sheahan, 189 F.3d 529 (7th Cir. 1999). Under Title VII, the status of the harasser and the type of injury caused by the harassment determines an employer’s liability. The greater care an employer must take depends upon the degree of the potential injury to the employee. In this case, the court held that whether Spicer was actually a co-worker of Erickson was irrelevant, and that it was proper to evaluate Erickson’s claim under the negligence standard, because the source of the problem does not matter. Rather, what matters is how the employer handles the problem. Citing Dunn v. Washington County Hosp., 429 F.3d 689 (7th Cir. 2005). Under the negligence standard, employers are liable for hostile work environment harassment when they know or should know that bad behavior is occurring and fail to take steps reasonably designed to stop that behavior. Citing Hostetler v. Quality Dining, Inc., 218 F.3d 798 (7th Cir. 2000).

The court characterized its task as determining whether a reasonable jury could have found that WDC negligently addressed the risk that Spicer might sexually harass Erickson. WDC argued that it could be liable only if it had been put on notice of actual prior acts of sexual harassment, which Erickson’s report at the bar failed to do. The court found the argument made little sense. The court reasoned that an employer must take all necessary steps to prevent the occurrence of sexual harassment, and that the greater the potential for harm to an employee the more vigilant the employer must be. Before liability can arise for sexual harassment, however, an employee must give the employer enough information so that a reasonable employer would think that there was some probability that the employee was being sexually harassed. Citing Zimmerman v. Cook County Sheriff’s Dep’t, 96 F.3d 1017 (7th Cir. 1996). The court identified two typical sources of information from which an employer draws to determine the risk of sexual harassment to an employee: direct information from the employee, and the employer’s knowledge of its specific working environment. Under certain circumstances, an employee’s effort to bring a threat of potential sexual harassment to the attention of an employer can be enough to give rise to liability. Citing Frazier v. Delco Electronics Corp., 263 F.3d 663 (7th Cir. 2001). The threat provides “the essential context” for appraising the gravity of the subsequent acts of harassment.

Erickson’s fear in this case was based on finding herself alone after hours with a male inmate who stared at her in a way that made her very uncomfortable, especially because he did not appear to be actually operating his vacuum, she had never before been alone with an inmate, she was unarmed, and her job description did not require her to deal with men in custody. When she told her supervisors about the incident, they exhibited signs of concern and expressed promises that the incident would not recur. The court found that, consequently, a reasonable jury could have found that there was an implicit threat of sexual harassment about which Erickson’s

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supervisors had been put on notice. In addition to Erickson’s report, the supervisors had specific information about the workplace environment at WCCS. Specifically, WDC knew, prior to December 20, that most of the WCCS office employees were female, that all of the OCC inmates were male, and, as shown through its training courses, that an inmate’s unusual attention to a female employee might suggest that the inmate posed a threat.

Given the totality of the circumstances, the court found that a reasonable conclusion was that one of the threats Spicer posed to Erickson was the threat of an assault because of her sex. Based on the evidence at trial, the court held, a reasonable jury could have found that WDC had enough information so that a reasonable employer would think that there was some probability that Erickson was being sexually harassed. WDC, however, took no action in response to Erickson’s complaint. A reasonable jury could find that lack of response to be unreasonable.

Age and Sex Discrimination/Equal Pay Act

Plaintiff Fails to Demonstrate Pretext and that Male Employee’s and Female Employee’s Jobs Were Equal for EPA Purposes


In September 1983, Merillat began her employment with Metal Spinners, a company that provided various metal-forming services. She worked in the materials department with Amy Stevenson, who initially supervised her. Ultimately, Merillat became the Senior Buyer, whose duties included creating a variety of reports, entering orders, purchasing, shipping, meeting with management, scheduling, supervising department employees, negotiating with and evaluating suppliers, and creating a plan for the reduction of tools costs. She maintained that Metal Spinners failed to give her computer upgrades.

During the first 15 years of her employment, Merillat kept a cartoon on her bulletin board that somewhat crudely lamooned the differences between the salaries of men and women. In late 2002, Metal Spinners’ CEO Olin Wiland told her to remove the cartoon.

That same day, Wiland told Merillat that Craig Wehr had been hired to fill a newly created vice president position. Wehr’s duties included managing the materials department employees, as well as establishing strategies to reduce inventory costs, increase profitability, and implement a new computer system. Merillat helped train Wehr, who was 38 years old and who was earning a starting salary of $62,500. Merillat earned $49,800.

Shortly after Wehr was hired, and into the first half of 2003, Metal Spinners suffered significant financial difficulties and consequently underwent a reduction in force (RIF). Merillat, who was 49 years old, and ultimately three others were terminated. Of the three others, however, one retired and another returned to a former position on the production floor. Some of Merillat’s former duties were performed by a computer system, while the others were absorbed into the duties of Wehr and Stevenson. Merillat sued Metal Spinners, claiming that she was discriminatorily terminated based on her age and her sex. She also claimed that she was paid less than Wehr because of her gender.

Because Merillat’s claims arose from within the context of a mini-RIF, a situation whereby the terminated worker’s duties were absorbed by another employee rather than eliminated, a modified version of the framework established in McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973), must be employed. Citing Johal v. Little Lady Foods, Inc., 434 F.3d 943 (7th Cir. 2006). The modified approach requires that a plaintiff establish a prima facie case of discrimination by demonstrating (1) that she is a member of a protected class; (2) that she was meeting her employer’s legitimate performance expectations; (3) that she suffered an adverse employment action; and (4) that employees not in the protected classes absorbed her duties. Citing Johal, 434 F.3d at 946; Michas v. Health Cost Controls of Ill., 209 F.3d 687, 693 (7th Cir. 2000). The parties in this case disputed the second and the fourth prongs only.

The Seventh Circuit summarily concluded that there was agreement that Wehr assumed a good deal of Merillat’s responsibilities, and thus, Merrilat met the fourth prong. The court also found that there was an issue of fact as to whether Merrilat met her employer’s legitimate expectations. Where a plaintiff does establish a prima facie case of discrimination, then the burden shifts to the defendant to articulate a
legitimate, non-discriminatory reason for the termination. Citing Johal, 434 F.3d at 946. Upon the defendant’s successful articulation of such a reason, the burden shifts back to the plaintiff to prove that the proffered reasons were pretext to discrimination. Id.

To determine whether two jobs are equal, the court looks to whether the jobs have a “common core” of tasks, that is whether a significant portion of the two jobs is the same. If a common core of tasks is established, the court determines whether any additional tasks make the jobs “substantially different.”

Metal Spinners offered several nondiscriminatory reasons for its termination of Merillat as part of its RIF. First, many of her duties were eliminated by the implementation of a computer system. Second, historically she had difficulty working with co-workers and suppliers. Third, her education and experience was less desirable than that of Wehr, who also was more willing and able to implement new strategies. Merillat admitted that many of her former tasks could be performed by the computer system. Consequently, at least one of the reasons given by Metal Spinners was not pretextual. Nevertheless, Merillat contended that Wehr had done a poor job. The court rejected Merillat’s explanations for Wehr’s poor performance as irrelevant, because much of those explanations referred to Wehr’s performance after Merillat’s termination. Furthermore, even if Metal Spinners made a mistake in retaining Wehr and terminating Merillat, that fact, even if true, did not mean that Metal Spinners honestly did not believe that doing so was the right decision when it was made. Additionally, statements allegedly made to Merillat regarding her termination were consistent with a termination under a RIF.

Merillat also argued that Wiland preferred to work with men rather than women. As evidence of her allegation, Merillat pointed to the fact that Wiland had lunch, drinks, or dinner with Wehr on several occasions. The court rejected that fact as evidence of discrimination in this context.

Finally, Merillat argued that Wiland’s request that she remove her somewhat crude cartoon regarding male and female salaries showed bias against women in the workplace. The court stated that isolated comments that equate to “stray remarks” in the workplace are insufficient to show that a particular decision was motivated by discriminatory animus. Citing Cullen v. Olin Corp., 195 F.3d 317, 323 (7th Cir. 1999). The exception is when the decision-maker or one having input in the decision makes such a comment (1) around the time of, and (2) in reference to, the adverse employment action complained of. Quoting Hunt v. City of Markham, Illinois, 219 F.3d 649, 652-53 (7th Cir. 2000). Wiland’s request, the court concluded, did not fit into the exception, and did not otherwise demonstrate a bias sufficient to support an inference of discriminatory animus. Accordingly, Merillat failed to produce evidence sufficient to create a triable issue of fact that the legitimate, nondiscriminatory reason provided by Metal Spinners for her termination was pretextual.

The court then turned to Merillat’s claim under the EPA, and held that she failed to present a prima facie case. In order to present a prima facie case under the EPA, a plaintiff must show that (1) higher wages were paid to an employee of the opposite sex (2) for equal work requiring substantially similar skill, effort and responsibilities, and (3) the work was performed under similar working conditions. Quoting Cullen v. Indiana Univ. Bd. of Trs., 338 F.3d 693, 698 (7th Cir. 2003). In this case, only the second prong, whether Merillat and Wehr’s positions required substantially similar skill, effort and responsibilities, was in dispute.

To determine whether two jobs are equal, the court looks to whether the jobs have a “common core” of tasks, that is whether a significant portion of the two jobs is the same. Quoting Cullen, 338 F.3d at 698. If a common core of tasks is established, the court determines whether any additional tasks make the jobs “substantially different.” Id. When making the assessment regarding job duties, the elements in the EPA (skill, effort, and responsibilities) must be met individually. Id.; 29 C.F.R. § 1620.14. The actual job duties performed by each employee, and not the job description or title, are examined. Citing Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1461 (7th Cir. 1994). The court found that in this case Wehr bore corporate-wide responsibility that Merillat did not bear, in addition to greater supervisory authority over other

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personnel. Accordingly, the jobs were different and Merillat could not establish a *prima facie* case under the EPA.

Going further, the court evaluated Metal Spinners’ affirmative defense to Merillat’s EPA claim. The statutory defenses to an EPA claim occur when the pay rate is determined by (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. *Quoting 29 U.S.C. § 206(d)(1).* The court held that the record revealed real differences between Wehr’s and Merillat’s educational background and industry-related experience. Additionally, Metal Spinners enlisted the help of a search firm and consulted trade journals that helped it to determine the market rate for Wehr’s position. Accordingly, Metal Spinners established a differential in pay based on factors other than sex, namely education, experience and market forces.

Disability Discrimination

**Plaintiff Fails to Establish That Placement on Involuntary Disability Leave Was Discriminatory**


Timmons began working for GM in 1974, and by 1999 he was one of only five Customer Activities Managers nationwide. His duties required him to travel as much as 50 percent of the time. Driving was a critical aspect of his job. In 1992, Timmons was diagnosed with multiple sclerosis (MS). GM, however, accommodated Timmons’ condition by providing him with a motorized scooter, equipping his car to lift the scooter in and out, paying for scooter rentals when Timmons went on trips of longer distances, allowing Timmons to work from home, providing him with a modified computer monitor and keyboard, and installing automatic door openers. On multiple occasions, GM offered Timmons positions that would require less travel, but Timmons declined. In 2002, as Timmons’ condition worsened, his supervisor received reports that called into question Timmons’ ability to drive, to stay awake on the job, and to generally perform his work. By February 2003, Timmons had lost control of his scooter and crashed it. His supervisor witnessed Timmons’ questionable driving first-hand. Timmons agreed to undergo an evaluation by one of GM’s doctors, who became concerned that Timmons could not drive safely. After the examination, GM placed Timmons on involuntary disability leave.

The ADA prohibits employers from discriminating against qualified disabled individuals because of their disabilities, and requires employers to reasonably accommodate the disabilities of qualified individuals. *Citing 42 U.S.C. § 12112(a), 12112(b)(5)(A).* Timmons claimed disparate treatment, which may be proved under the indirect burden-shifting method established in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973). The burden-shifting method requires the establishment of a *prima facie* case of discrimination, which requires a plaintiff to show, among other things, that he was meeting his employer’s expectations and that circumstances suggest his employer took an adverse employment action against him because of his disability.

Although the appellate court held that placing Timmons on involuntary disability leave was an adverse employment action, it also held that Timmons had not shown that he was meeting GM’s expectations, and that there was no evidence to suggest that GM put him on leave because of his disability rather than his inability to perform critical aspects of his job. GM had evidence that Timmons’ ability to drive was deteriorating, and Timmons produced no relevant evidence to the contrary.
Civil Rights Update

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Introduction

To prevail in an excessive force claim under Section 1983, a plaintiff has to show that a state actor violated his Fourth Amendment rights by exercising force that was “objectively unreasonable” under the circumstances. See DeLuna v. City of Rockford, Illinois, 447 F.3d 1008, 1010 (7th Cir. 2006) (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)). The United States Supreme Court has held that the reasonableness of a particular officer’s use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Graham, 490 U.S. at 396. As such, federal courts employ a fact intensive analysis and contemporaneous review of the circumstances in assessing the reasonableness of an officer’s conduct. Defense counsel should take note that an officer’s violation of a departmental order, policy, or practice is irrelevant to the determination of reasonableness.

In Thompson v. City of Chicago, 472 F.3d 444, (7th Cir. 2006), defense counsel successfully moved to bar plaintiffs’ introduction of evidence regarding police department general orders and expert testimony on police practices that supported plaintiffs’ excessive force claim. The Seventh Circuit Court of Appeals, in affirming the district court, confirmed that under Rules 401 and 403 of the Federal Rules of Evidence, evidence of the violation of police regulations or practice are irrelevant and prejudicial to a prima facie showing of the reasonableness of an officer’s conduct in an excessive force claim under Section 1983.

Background

1. High Speed Police Chase and Altercation at Arrest

In Thompson, the plaintiffs were the mother and widow of James Thompson. During the evening of December 5, 2002, Chicago Police Department (“CPD”) Officers Cardo and Spanos were on routine patrol on the west side of Chicago when they noticed a black Ford Mustang parked with the engine running. The officers did not notice anyone in the idling Mustang, but when they slowed down to assess the situation, they observed an unknown male, who turned out to be Thompson, emerge from an adjacent apartment building, approach the Mustang, reach into the passenger side of the vehicle, and run back into the building. Based on their observation and knowledge of the neighborhood’s reputation as a high drug trafficking area, the officers believed they witnessed a drug sale. Thompson, 472 F. 3d at 447. The officers made a U-turn only to see the Mustang pulling away from them. The officers followed Thompson’s Mustang a few blocks until Thompson ran a stop sign. At that point, the officers initiated a traffic stop and Thompson yielded. However, after the officers exited their squad car and approached the Mustang, the Mustang sped off.

Thompson led the CPD on a high speed chase, which ended when he crashed into a viaduct at an intersection. The first officers on the scene, Officers Dougherty and Reyes, requested ambulance assistance and attempted to assist Thompson out of the vehicle. As Thompson exited the vehicle, Officer Dougherty instructed him to “get down on the ground,” but instead of obeying the command, Thompson, who stood six-foot-one and weighed 330 pounds, swung at Officer Reyes and landed a blow on his shoulder. Officer Dougherty tried to

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About the Author

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Civil Rights (Continued)

handcuff Thompson. By the time additional officers arrived, Thompson was struggling on the ground with Officers Dougherty and Reyes. Officers Cygnar, Rellinger, and Hespe joined in the struggle to handcuff Thompson. In an effort to keep Thompson on the ground, Officer Hespe jumped on Thompson’s back and placed his arm around Thompson’s neck until the other officers completed handcuffing him.

After Officer Hespe let go of Thompson, he continued to struggle. Id., at 448. Once subdued, Thompson began complaining that he had trouble breathing. The officers rolled him over and released him from the handcuffs so he could breathe easier. By the time the paramedics arrived, Thompson had stopped breathing and was unresponsive. The officers did not administer first aid to Thompson while waiting for the ambulance. Id., at n.7. The ambulance transported Thompson to Mt. Sinai Hospital, where he was pronounced dead on arrival.

On April 12, 2001, following Thompson’s death, the Cook County medical examiner conducted an autopsy and issued a report concluding that Thompson died as a result of asphyxia due to a choke hold. The report also indicated that Thompson suffered from hypertensive cardiovascular disease and opiate intoxication, which were contributory causes of his death.

2. Underlying Litigation

On November 16, 2001, the plaintiffs sued the City of Chicago (“City”) and 11 officers in the Federal District Court for the Northern District of Illinois. The complaint alleged that the City and the officers violated Thompson’s Fourth and Fourteenth Amendment rights in denying him equal protection and due process by the use of excessive force. The complaint also alleged common law causes of action for wrongful death and civil conspiracy under Illinois state law.

After the close of discovery, all the defendants moved for summary judgment on all claims. The district court granted the motion in part and dismissed the plaintiffs’ equal protection claims under Section 1983, as well as the civil conspiracy claims as to all the defendants. See Thompson v. City of Chicago, No. 01-C-8883, 2004 WL 1197436, at *10-17 (N.D. Ill. May 28, 2004). The district court also dismissed plaintiffs’ wrongful death claims as to all of the officer defendants, except Officer Hespe, who allegedly applied the fatal choke hold. The plaintiffs later voluntarily dismissed the other 10 officer defendants, leaving only the City and Officer Hespe in the case on the Section 1983 due process claim and the wrongful death action.

3. Pre-trial Motions in Limine

The issues on appeal focus on the district court’s granting of the defendants’ motions in limine. The first motion sought to exclude any reference to the CPD’s General Orders, policies, and procedures. The second motion argued for the exclusion of plaintiff’s expert testimony from an inspector from the CPD Office of Professional Standards and a CPD sergeant that investigated the allegations of excessive force in Thompson’s arrest. The plaintiffs intended to have these experts opine that Officer Hespe used excessive force in applying the choke hold and violated CPD’s General Orders. The district court granted both motions under Rules 401 and 403 of the Federal Evidence.

4. Expert Testimony at Trial

At trial, both sides put on a number of expert witnesses. The plaintiffs first called the Cook County medical examiner, who had concluded that Thompson had died of asphyxiation caused by a choke hold. The plaintiffs also called another forensic pathologist, Dr. Kris Sperry, Chief Medical Examiner for the State of Georgia, who testified that the choke hold initiated a fatal heart arrhythmia, which led to Thompson’s death. Dr. Sperry acknowledged that Thompson’s pre-existing heart disease and the presence of morphine in his blood contributed to the arrhythmia.

The plaintiffs’ next expert was Sergeant Jackie Campbell, an instructor at the Chicago Police Academy. Campbell testified that CPD trained officers to identify the threat level of an assailant and the corresponding levels of authorized force. Campbell testified that a choke hold constituted deadly force and would not be warranted against a suspect resisting arrest, such as Thompson. Further, Campbell made clear that CPD officers have not received training on choke holds since 1983, and that a choke hold would be contrary to the officers’ training and CPD procedures.

The plaintiffs’ last expert was Dr. Geoffrey Alpert, a professor of criminology at the University of South Carolina. Dr. Alpert testified that the officers did not have authority under CPD procedures to use lethal force based on Thompson’s level of resistance.

In response, the defendants countered with two experts, a cardiac electrophysiologist at Loyola University Medical Center, and the Chief Medical Examiner and Director of Forensic Sciences for Suffolk County, New York. Both opined that Thompson’s heart condition, obesity and hypertension led to Thompson’s cardiac arrest and death, not Officer Hespe’s choke hold.
The defendants also put on a number of officers that testified about their attempts in handcuffing Thompson. Officer Hespe admitted placing his arm over Thompson's neck in an attempt to keep him from thrashing around, but none of the other officers recalled Officer Hespe placing Thompson in a choke hold. Officer Hespe denied placing any pressure on Thompson's neck.

At the end of the nine-day trial, the jury returned a verdict finding for the defendants on all counts. Plaintiffs moved for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, which the district court denied.

**Seventh Circuit’s Analysis**

On appeal, the plaintiffs challenged the district court’s decision to grant the defendants’ two motions in limine excluding the CPD’s General Orders on the appropriate use of force and expert testimony from CPD officers regarding whether Officer Hespe used excessive force in arresting Thompson. In reviewing the district court’s ruling, the Seventh Circuit applied an abuse of discretion standard, “giv[ing] special deference to the district court’s assessment of the balance between probative value and prejudice because that court is in the best position to make such assessments.” *Thompson*, 472 F. 3d at 453 (quoting *United States v. Hale*, 448 F.3d 971, 985 (7th Cir. 2006) (citing *United States v. Turner*, 400 F.3d 491, 499 (7th Cir. 2005)). On appeal, the plaintiffs argued that the CPD’s General Orders were relevant under Rule 401 of the Federal Rules of Evidence because they would have provided the jury with objective criteria to evaluate Officer Hespe’s conduct and that the introduction of such evidence would have allayed, rather than caused jury confusion under Rule 403.

1. **Police Department Orders and Policies on the Appropriate Use of Force are Irrelevant Under Rule 401 of the Federal Rules of Evidence**

Under Rule 401, “[t]o be relevant, evidence need not conclusively decide the ultimate issue in a case, nor make the proposition appear more probable, ‘but it must in some degree advance the inquiry.’” *Thompson*, 472 F. 3d at 453 (quoting *E.E.O.C. v. Indiana Bell Telephone Co.*, 256 F.3d 516, 533 (7th Cir. 2001) (Flaum, C.J., concurring in part & dissenting in part) (quoting 1 J. Weinstein & M. Berger, *Weinstein’s Federal Evidence* § 401.04[2][b])). The Seventh Circuit held that the CPD’s General Orders regarding the use of force “would not have been of any consequence whatsoever and would have failed to advance the inquiry of whether Officer Hespe violated Thompson’s Fourth Amendment rights by using excessive force in apprehending him.” *Thompson*, 472 F. 3d at 454.

The Seventh Circuit pointed out that in order to establish an excessive force claim under Section 1983, the plaintiffs had to show that Officer Hespe’s use of force was “objectively unreasonable” under the circumstances. *Id.* (citing *DeLuna*, 447 F.3d at 1010 (citing *Graham*, 490 U.S. at 396-97)). The Seventh Circuit had previously held that “what constitutes ‘reasonableness’ in apprehending a suspect under the Fourth Amendment is ‘not capable of precise definition or mechanical application,’” but requires a fact intensive inquiry that considers the severity of the crime, whether the suspect posed an immediate threat to the officers and others, and whether the suspect actively resisted or evaded arrest. *Thompson*, 472 F. 3d at 454 (quoting *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005) (quoting *Graham*, 490 U.S. at 396)). Further, the determination of reasonableness “must be judged from the perspective of a reasonable officer on the scene” and must account for the fact that police officers often have to make split-second judgments. *Thompson*, 472 F. 3d at 454 (quoting *Graham*, 490 U.S. at 387, 396).

Based on these principles, the Seventh Circuit held that where excessive force is “not capable of precise definition,” the CPD’s General Orders do not shed light on what may be “objectively reasonable” under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter.” *Thompson*, 472 F. 3d at 454. Rather, the court noted that such orders were only relevant in providing the CPD a basis of evaluating an officer’s conduct and job performance. The Seventh Circuit also pointed to the text of the CPD’s General Orders, which stated that they were intended “to provide members guidance on the reasonableness of a particular response option” when taking a suspect into custody.

Further, the Seventh Circuit noted that it has consistently held that “42 U.S.C. § 1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices.” *Thompson*, 472 F. 3d at 454 (quoting *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003)); see also *Pasiewicz v. Lake County Forest Preserve Dist.*, 270 F.3d 520, 526 (7th Cir. 2001); *Soller v. Moore*, 84 F.3d 964, 969 (7th Cir. 1996). The Seventh Circuit also analogized to the Supreme Court’s decision in *When v. United States*, 517 U.S. 806 (1996), which held that because police regulations vary in geography and time, they are an unreliable gauge to measure the objective reasonableness.

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Civil Rights (Continued)

of police conduct. Although Whren dealt with the constitutionality of searches, as opposed to excessive force, the Seventh Circuit pointed out that both analyses involved fact intensive inquiries. The Seventh Circuit stated that it was “confident” that if the Supreme Court were presented with the issue of whether police guidelines or general orders were “reliable gauges” of reasonableness as to an officer’s use of force, the Court would reach the same conclusion. Thompson, 472 F. 3d at 455. Accordingly, the Seventh Circuit affirmed the district court’s exclusion of CPD’s General Orders as immaterial and irrelevant on the issue of the reasonableness of Officer Hespe’s split-second judgment in how much force to use.

Alternatively, the Seventh Circuit noted that even if it were to find that the district court improperly excluded the orders, such error was harmless. Because of the numerous references to CPD’s policies and procedures during trial by both parties, the court posited that the jury would have reached the same result despite the error. Both parties’ experts referenced CPD’s policies in opining that a choke hold constituted lethal force that was unauthorized for dealing with suspects who were resisting arrest.

2. Police Departmental Orders Do Not Establish a Legal Duty in the Plaintiffs’ Claim of Wrongful Death Under Illinois Law

The plaintiffs also argued that the CPD’s General Orders were relevant to their state law claims of wrongful death. The Seventh Circuit affirmed the district court’s finding that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Under the Illinois Wrongful Death Act, the plaintiffs had to prove that defendants owed Thompson a duty, they breached that duty, and that the breach proximately caused Thompson’s death and resulting damages. 740 ILCS 180/1, et seq. The Seventh Circuit pointed out that Illinois courts have consistently held that the failure to comply with self-imposed rules or internal guidelines does not create a legal duty to the public. See, e.g., Morton v. City of Chicago, 286 Ill. App. 3d 444, 676 N.E.2d 985 (1st Dist. 1997); Blankenship v. Peoria Park District, 269 Ill. App. 3d 416, 647 N.E.2d 287 (3d Dist. 1995). As such, the court noted that Officer Hespe’s failure to adhere to the orders may cause him problems with his superiors, but it does not have any bearing on whether he breached his duty of care in arresting Thompson. Even if the district court gave a limiting instruction to the jury to that effect, the Seventh Circuit indicated that it would create confusion and possibly mislead the jury.

Thus, the Seventh Circuit held that the district court did not abuse its discretion in excluding the CPD’s General Orders as they related to the plaintiffs’ wrongful death claims.

3. The Probative Value of the Plaintiffs’ Expert Testimony on Officer’s Violation of Department Policies Was Substantially Outweighed by the Danger of Unfair Prejudice and Jury Confusion

The plaintiffs’ last challenge on appeal was of the district court’s exclusion of expert testimony of the inspector from CPD’s Office of Professional Standards and Sergeant Campbell, who both would have testified that Officer Hespe violated the Fourth Amendment by using excessive force in applying the choke hold on Thompson. The district court granted defendants’ motion in limine as to this testimony under Rule 403 on the same grounds already mentioned. Due to the fact intensive inquiry as to whether a particular officer’s conduct was “reasonable,” the Seventh Circuit held that whatever insight these expert opinions would have offered would have had little value other than possibly causing unfair prejudice and jury confusion. The Seventh Circuit noted that the jury, after hearing all the evidence, was in as good a position as the experts to decide whether Officer Hespe’s use of force was objectively reasonable under the circumstances.

Conclusion

While excessive force claims hinge on the specific facts and circumstances of the underlying situation, a general rule applicable to all excessive force cases is that a plaintiff cannot use evidence of an officer’s violation of department regulations or state law as a basis for establishing a violation of a constitutional right. Similarly, police department policies, practices, and procedures do not create a legal duty between officers and the general public. Simply put, such evidence is irrelevant and immaterial in a Section 1983 action for excessive force and related tort and statutory claims under Illinois law. Regardless of whether plaintiff’s counsel seeks to introduce such evidence in documentary form or via opinion testimony, defense counsel should move to exclude the introduction of this type of evidence before trial and object to any references to the evidence at trial on the basis of Rules 401 and 403 of the Federal Rules of Evidence.
First Quarter 2007

Technology Law

By: Michael C. Bruck
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The Internet at a Crossroads – Will Net “Tollgates” Dominate?

A battle is brewing over the future of the Internet. The fight revolves around the telecommunications networks, referred to as the “pipes,” that supply all of the content that most Internet users take for granted on an open network. That open network may fall by the wayside.

Cable and phone companies (“telecoms”) own these pipes and, of course, wish to be paid for their use. Telecoms envision a tiered payment system akin to home television cable service. Pamela A. MacLean, Battle Building Over Net “Tollgate,” The National Law Journal, September 6, 2006. As a result, the “Information Highway could be laden with tollgates, express lanes, and traffic tie-ups – all designed to make money for the network companies.” Catherine Yang, At Stake: The Net as We Know It, Business Week, December 15, 2005.

I. What Telecoms Say

Telecoms point out that they have invested billions of dollars in the networks that deliver Internet services to consumers. They argue that content providers such as Google and Yahoo and web-phone providers such as Vonage profit by sending vast amounts of data over these network lines. Therefore, these providers should pay preferred rates, according to the telecoms. MacLean, supra. If any ambiguity existed regarding the position of the telecoms, it ended last November when AT&T Chairman Edward Whitacre, Jr. said publicly that content providers were “nuts” for thinking they could use “my pipes” (AT&T’s networks) without paying extra. MacLean, supra.

II. Concerns Abound

The prospect of Internet tollgates has raised the concerns of many advocates of “neutrality.” Internet neutrality refers to a separation between the network infrastructure and the content it carries. William G. Laxton, Jr., The End of Net Neutrality, 2006 Duke L. & Tech. Rev. 15 (2006). Advocates of neutrality want telecoms to provide all data with equal treatment. Id. They fear an Internet filled with preferential content treatment, reduced consumer choice, and even censorship. Id. For example, the telecoms could block popular sites such as Google, Yahoo, and Amazon in favor of their own sites or degrade the delivery of these sites by perhaps loading the pages at a snail’s pace while their own would zip along. Yang, supra. According to Vonage CEO Jeffrey Citron, “this new view of the world will break apart the Internet and turn it into small fiefdoms” divided up among the cable and telephone network providers. Yang, supra.

III. The U.S. Supreme Court Weighs In

In June 2005, the U.S. Supreme Court rendered a decision in the Brand X case which has provoked much of the current controversy. National Cable & Telecommunications Association v. Brand X Internet Services, 125 S.Ct. 2688, 2696 (2005). Under Title II of the Communications Act of 1934, providers of “telecommunications services” are subject to regulation as a common carrier. 47 U.S.C.A. § 153 (44)(2006). Telecommunications services “must charge just and reasonable, nondiscriminatory rates to their customers, design their systems so that other carriers can interconnect with their communications networks, and contribute to the federal ‘universal service’ fund.” Brand X, 125 S.Ct. at 2696.

However, Congress passed the Telecommunications Act of 1996, which reduced the regulatory obligations of services classified as “information services” by determining that they should not be subject to common carrier regulations. Brand X Internet Services v. FCC, 345 F.3d 1120, 1126 (9th Cir.

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2003). This attempt to address the evolving forms of communication technology did not designate whether cable modem and DSL services qualified as “telecommunication services” or “information services.” This ambiguity led to immense confusion in the courts. Brand X, 345 F.3d at 1126. In response to the confusion, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in March 2002. 17 F.C.C.R. 4798, 4802 (FCC 2002). The Declaratory Ruling determined that cable modem services were “information services,” and that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.” Id.

In 2002, the Ninth Circuit heard Brand X, a consolidation of seven cases challenging the FCC’s ruling. 345 F.3d 1120. The Ninth Circuit held that cable modem service is both an “information service” and a “telecommunication service,” and that cable modem services were subject to common carrier regulations. Id.

The Supreme Court reversed the Ninth Circuit in Brand X. 125 S.Ct. 2688 (2005). The Court determined that the Ninth Circuit incorrectly analyzed the Telecommunications Act of 1996. Id. at 2699. The Court held that the Chevron deference model applied and, consequently, held that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” Id.; Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Using Chevron, the Court determined that the FCC had reasonably classified cable modem services as “information services.” Id. at 2703. The Court held that cable modem services were not “telecommunications services” because “from a consumer’s point of view . . . ‘[a]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.’” Id. at 2703-04. In other words, the telecoms do not have to provide equal access to network lines supplying Internet content through their cable modem services because such services are free of common-carrier regulation.

The Court further ruled that the FCC was not obligated to apply the cable modem services classification to DSL. The Court explained that the FCC could take a step-by-step approach in reclassifying the industry, and that it was acceptable that the FCC classify DSL as an “information system” in the interim. Id. at 2711.

In the end, the Brand X decision established that the telecoms do not have to share their infrastructure with competing service providers such as Brand X and EarthLink. There is no equal access requirement. Instead, the Supreme Court paved the way for privatized and tightly controlled network systems.

Brand X opened the door to the current fight over content neutrality. The fear is that telecoms are deemed to have so much control over these pipes that, in addition to limiting access to other service providers, they can control the actual content that goes through the pipes.

Brand X opened the door to the current fight over content neutrality. The fear is that telecoms are deemed to have so much control over these pipes that, in addition to limiting access to other service providers, they can control the actual content that goes through the pipes. The potential result is that certain content providers such as Google and Vonage could likewise be barred from sending content over the network lines. At the very least, the telecoms’ powerful position will allow them to extract high prices from content providers with deep pockets.

IV. An Unpredictable Future

In the wake of Brand X opening the door to deregulation, the telecoms and Internet content providers have marshaled their lobbyists to try and push their respective interests in the Congress. MacLean, supra. Presently, the U.S. Senate is considering a massive telecommunication reform bill. Communication, Consumer’s Choice, and Broadband Deployment Act of 2006, S. 2686 (“2006 Telecom Act.”) A key provision would grant telecoms the right to negotiate national cable franchise agreements. Id. Today, they obtain franchise rights one city at a time. However, a growing number of senators fear that the bill lacks meaningful neutrality requirements.
U.S. Senators, such as Ron Wyden (D-OR.), oppose the telecommunications bill’s lack of neutrality. Senator Wyden has proposed his own bill called the Internet Nondiscrimination Act of 2006. S. 2360. Under Wyden’s bill, network operators would be prohibited from charging internet content providers for faster delivery or favoring certain content over others. See http://wyden.senate.gov/media/2006/03022006_net_neutrality_bill.html.

Most recently, U.S. Senate Commerce Committee Chairman Ted Stevens (R-AK) announced that the 2006 Telecom Act lacked the support needed to bring the bill to the floor for a full vote. Jeremy Pelofsky, Senate Telecom Bill Still Short of Votes: Stevens, Reuters, September 22, 2006. Senator Stevens, the bill’s chief proponent, stated that the bill is “still a few votes short” of the 60 needed to avoid a filibuster by those that oppose the bill’s perceived lack of neutrality. Id.

V. Conclusion

The Brand X decision has sparked a contentious fight between the telecoms and the advocates of Internet neutrality. On the one side, telecoms believe that they should be allowed to obtain payment from those that use their network infrastructure to carry vast amounts of data. On the other side, neutrality advocates view the telecoms’ control over the pipes that feed the Internet as a grave threat to the currently open network.

For the time being, it appears that this issue is dead in the Congress until after the November elections. It remains to be seen whether the telecoms can muster the Congressional support needed to avoid the imposition of measures designed to ensure neutrality. The only thing that is clear right now are the stakes and that the victors will likely define the future of the Internet.
Supreme Court Watch

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On September 27, 2006, the Illinois Supreme Court allowed Petitions for Leave to Appeal in the following civil cases of general interest.

Applying the Four-Year Medical Malpractice Statute of Repose to Health Care Institutions

Orlak v. Loyola University Health System, Gen. No. 102534, First District 1-04-0401

The plaintiff received a blood transfusion from the defendant prior to 1990. She alleged in her complaint that the defendant knew or should have known by 1996 of a need to inform individuals who had received blood transfusions before 1990 of the importance of being tested for the Hepatitis C virus. She further alleged that the defendant delayed informing her to receive such testing until August 2000. On July 31, 2002, the plaintiff filed her initial action against the defendant, which was eventually amended to assert constructive fraud, medical negligence, medical battery, and ordinary negligence.

The defendant moved to dismiss the complaint in its entirety pursuant to 735 ILCS §5/2-619(a)(5), arguing that it was barred by the four-year statute of repose regarding medical negligence actions. See 735 ILCS §5/13-212(a). The defendant further argued that the plaintiff’s fraud allegations did not toll the statute of repose and that such allegations did not rise to the level of fraud.

The trial court dismissed the plaintiff’s entire complaint with prejudice, finding that the statute of repose barred all of her claims. Specifically, the trial court stated that the defendant’s failure to inform the plaintiff to be tested for Hepatitis C necessarily arose from her status as the defendant’s patient and the care received regarding her 1989 blood transfusion.

The First District Appellate Court affirmed the trial court’s dismissal of the complaint, finding that the statute of repose for medical malpractice actions applied, that the narrow fraudulent concealment exception did not apply, and that the defendant was not estopped from raising a limitations defense.

The plaintiff seeks leave to appeal to the Illinois Supreme Court, arguing that the appellate court erred in finding that ordinary negligence and constructive fraud were barred by the four-year statute of repose. She argues that the conduct at issue and the nature of the acts alleged do not constitute medical care or the exercise of medical judgment within the scope of 735 ILCS §5/13-212(a). Further, the plaintiff contends that the appellate court erred in finding that the ordinary negligence and constructive fraud allegations were insufficient to demonstrate a confidential relationship between the parties. The plaintiff argues that due to the confidential relationship, the defendant’s failure to disclose information that would have put the plaintiff on notice of the need to be tested for Hepatitis C constitutes fraudulent concealment. Finally, the plaintiff claims that the defendant should not be able to assert the four-year statute of repose where it was put on notice of the need to inform patients to be tested for Hepatitis C by the National Institute of Health and the Food and Drug Administration.

When Does the Statute of Limitations Regarding a Breach of Limited Warranty Action Begin to Run?

Mylalach v. DaimlerChrysler Corp., Gen. No. 102588, First District 1-03-1402

The plaintiff purchased a used 1996 Dodge Neon on June 20, 1998. The car was warranted by its manufacturer and put in service on June 24, 1996. At the time of purchase, approximately one year or 10,000 miles remained on the vehicle’s

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The defendant moved for summary judgment on all claims, asserting that the plaintiff failed to file suit within four years from the date of original delivery, which was the applicable statute of limitations found in 810 ILCS §5/2-725(2). Nowalski v. Ford Motor Co., 335 Ill. App. 3d 625, 632, 781 N.E.2d 578 (1st Dist. 2002). Further, the defendant argued that the plaintiff was not entitled to revocation without privity and an underlying breach of warranty claim.

The trial court granted summary judgment in the defendant’s favor based on the four-year statute of limitations. Specifically, the trial court found that the warranty claim began to run from the vehicle’s original delivery date.

On appeal, the plaintiff argued that “delivery” included the subsequent used car sale. The First District Appellate Court held that the four-year statute of limitations under Section 2-725(1) did not bar the plaintiff’s express limited warranty claim and further held that the Magnuson-Moss Warranty Act permitted the plaintiff to seek revocation of acceptance based upon her breach of written warranty claim. The First District declined to follow Nowalski, and instead found Cosman v. Ford Motor Co., 285 Ill. App. 3d 250, 674 N.E.2d 61 (1st Dist. 1996) controlling, which held that the statute of limitations begins to run on the date when the warranty was “breached” or when the car was not fixed within a “reasonable number of attempts.” The appellate court further reasoned that the UCC does not cover limited warranties within its definition of warranty and that Magnuson-Moss allows a separate and independent cause of action for limited warranties under 15 U.S.C. §2304(a).

The appellate court denied the defendant’s subsequent petition for rehearing and modified its previous opinion reversing summary judgment. Again, the First District relied upon Cosman, but relied on a different section of the Magnuson-Moss Warranty Act. The First District ruled that a breach of limited warranty occurs after a “reasonable opportunity to cure,” based on Section 2310(e), which applies to class actions.

In its petition for leave to appeal, the defendant argues that the appellate court erred in following Cosman and that its opinion is in conflict with other opinions of the First and Second Districts. See Nowalski, supra; Jones v. Ford Motor Co., 37 Ill. App. 3d 176, 807 N.E.2d 520 (1st Dist. 2004); and Nelligan v. Tom Chaney Motors, Inc., 133 Ill. App. 3d 798, 479 N.E.2d 439 (2nd Dist. 1985) (stating that the UCC Section 2-725(2) is the applicable statute of limitations for breach of express and implied warranty actions). Further, the defendant argues that the First District is in conflict with several other appellate court decisions holding that the UCC, and not Magnuson-Moss, governs limited warranty cases. See Pearson v. DaimlerChrysler Corp., 349 Ill. App. 3d 688, 813 N.E.2d 230 (1st Dist. 2004); Lara v. Hyundai Motor America, 331 Ill. App. 3d 53, 61, 770 N.E.2d 721 (2nd Dist. 2002); Bartow v. Ford, 342 Ill. App. 3d 480, 794 N.E.2d 1027 (1st Dist. 2003); Hasek v. DaimlerChrysler Corp., 319 Ill. App. 3d 780, 745 N.E.2d 627 (1st Dist. 2001); and Sorce v. Naperville Jeep Eagle, 309 Ill. App. 3d 313, 722 N.E.2d 227, 234 (1999). Additionally, the defendant argues that the appellate court extended the limitations period for express warranties by rewriting provisions of Magnuson-Moss. The defendant asserts that Pearson, Lara, Bartow, and Sorce all hold that Section 2304(a) of Magnuson-Moss and its minimum standards only apply to “full warranties” and not to “limited warranties” like the one at issue in this case.

On November 29, 2006, the Illinois Supreme Court allowed Petitions for Leave to Appeal in the following civil cases of general interest.

Does an Insurance Agent Owe a Duty of Care to an Insured?


The insured, a general contractor, purchased a CGL insurance policy from the insurer through its agent, the third-party defendant in this case. The insured was sued for alleged damage to a home he constructed for which he filed a claim with the insurer. The insurer filed a declaratory judgment action, asserting that it owed no duty to indemnify or defend the insured because the property damage was caused by his own work, which was excluded from the CGL coverage. The insured then amended his third-party complaint against the agent, alleging breach of statutory duty to provide ordinary care in selling and procuring insurance. See 735 ILCS 5/2-2201(a).

The trial court dismissed with prejudice the negligence counts of the insured’s third-party complaint. The trial court found that the agent owed the insured no duty and that the Moorman doctrine barred such claims.

The Fourth District Appellate Court reversed, finding that

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Supreme Court Watch (Continued)

Section 2-2201(a) required the agent to exercise ordinary care in procuring the CGL policy the insured requested and that the Moorman doctrine did not apply. The appellate court reasoned that the plain language of Section 2-2201(a) requires insurance producers, including both brokers and agents, to act with ordinary care in procuring insurance for insureds. Because the appellate court found that the agent owed an extra-contractual duty to the insured, it found that the Moorman doctrine did not apply, citing Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill. 3d 151, 812 N.E.2d 741 (1st Dist. 2001). Further, the appellate court found that the agent owed an extra-contractual duty to the insured, it found that the Moorman doctrine did not apply, citing Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill. 3d 151, 812 N.E.2d 741 (1st Dist. 2001). Because the appellate court found that the agent owed an extra-contractual duty to the insured, it found that the Moorman doctrine did not apply, citing Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill. 3d 151, 812 N.E.2d 741 (1st Dist. 2001).

The agent seeks leave to appeal, stating that the legal community has requested guidance on the issue of to whom insurance agents and insurance brokers owe a duty. Further, the agent contends the Fourth District’s ruling conflicts with other appellate decisions and a Supreme Court opinion that hold a captive agent does not owe a duty to an insured. See Young v. Allstate Ins. Co., 351 Ill. App. 3d 151, 812 N.E.2d 741 (1st Dist. 2001); ATY Holding v. Avreco, 357 Ill. App. 3d 17, 826 N.E.2d 1111 (1st Dist. 2005); Pekin Life Ins. v. Schmid Family Irrevocable Trust, 359 Ill. App. 3d 674, 834 N.E.2d 531 (1st Dist. 2005); Moore v. Johnson Co. Farm Bureau, 343 Ill. App. 3d 581, 798 N.E.2d 790 (5th Dist. 2003), and Zannini v. Reliance Ins. Co. of Illinois, 147 Ill. 2d 437, 590 N.E.2d 457 (1992). The agent also asserts that the appellate court erred in failing to apply the Moorman doctrine, which contradicts the Illinois Supreme Court’s opinion in First Midwest Bank, N.A. v. Stewart Title Guarantee Co., 218 Ill. 2d 326, 843 N.E.2d 327 (2006).

Should Good Faith Settling Defendants Be Included on the Verdict Form Pursuant to Section 2-1117?

Ready v. United/Goedecke Surfaces, Inc. v. Midwest Generation EME, L.L.C., Gen. No. 103474, First District 01-04-1762

The decedent employee was a maintenance mechanic for the defendant employer. The employer hired the defendant general contractor to make various upgrades to the plant where the decedent worked. The general contractor hired the defendant subcontractor (“the subcontractor”) to erect scaffolding in the plant. During the elevation of one of the wooden I-beams for the scaffolding, the decedent was struck and killed by an I-beam that had been improperly rigged by the subcontractor’s employee.

The plaintiff, decedent’s surviving spouse, sued the general contractor, the sub-contractor, and the employer for negligence. Prior to trial, the plaintiff settled her claim with the general contractor and the employer. Both of those defendants presented motions for good faith finding, which were granted prior to trial without objection by the subcontractor. Plaintiff also moved in limine to bar evidence of the conduct of the good faith settling defendants, which the trial court granted. The plaintiff and the subcontractor proceeded to trial, and the jury returned a verdict in favor of the plaintiff, finding the plaintiff’s decedent 35% contributorily negligent.

The First District Appellate Court reversed the jury’s verdict as to liability issues only. The appellate court engaged in a lengthy analysis to determine whether a defendant who settles with the plaintiff prior to trial is still a “defendant sued by the plaintiff” within the meaning of Section 2-1117. It answered the question in the affirmative, based on the Illinois Supreme Court’s decision in Lannom v. Kosco, 158 Ill. 2d 535, 634 N.E.2d 1097 (1994). Thus, the appellate court concluded that the trial court erred in holding that the general contractor and employer should not have been included on the jury verdict form for fault apportionment. (The appellate court had also determined that the pre-2003 amendment of Section 2-1117 applied, and thus, had included the employer as a party on the verdict form).

The plaintiff petitions the Illinois Supreme Court for leave to appeal, arguing that the legislative history of Section 2-1117 demonstrates that evidence of the good faith settling defendants should not be admitted. Further, the plaintiff cites Lannom and Blake v. Hy Ho Restaurant, Inc., 273 Ill. App. 3d 372, 652 N.E.2d 807 (5th Dist. 1995) to support its contention that the conduct of a settling party should not have been introduced. The plaintiff argues that according to these two cases, the settling defendants are really “settling tortfeasors” and not included in the language of Section 2-1117 which applies to a “defendant sued by the plaintiff.”

Choice of Law Analysis for Class Actions

Barbara Sales, Inc. v. Intel Corp., Gen. No. 103287, Fifth District No. 5-04-0274

The plaintiffs brought a putative class action against the defendants alleging violations of the California Business & Professional Code, Section 17200, the California Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§1750 et seq., and alternatively the Illinois Consumer Fraud Act (“ICFA”), 815 ILCS 505/1 et seq. Specifically, the plaintiffs asserted that the Pentium® 4 processor did not perform as
represented. At the class certification hearing, the plaintiffs argued that California law should govern the plaintiffs and all putative class members’ claims, and that common questions of fact predominated because the name “Pentium® 4” in itself constituted a “uniform representation” that misled all purchasers of computers containing that processor.

The trial court entered a class certification order establishing an Illinois residents and purchasers only class. It ruled that it is inappropriate to apply California laws to an action filed by Illinois residents in Illinois as California did not have the “most significant relationship” with the cause of action as filed by the plaintiffs. Further, the trial court found that Illinois law could not be applied to a nationwide class.

The parties filed a joint motion for Rule 308 certification, which the trial court granted. The trial court certified the question of whether it erred (1) in certifying a class of Illinois consumers under Illinois law, rather than certifying a nationwide or Illinois class under California law or (2) in holding that the action should not proceed as a class action at all.

The Fifth District Appellate Court reversed the circuit court’s decision on the choice of law issue and vacated the class certification. It found that California had the most significant relationship to the occurrence and to the parties and that California law is applicable. Further, the appellate court remanded the case to the trial court with directions to apply California substantive law and to reconsider its class certification order in light of the applicability of California law.

The defendants urge Supreme Court review, arguing that the Fifth District ruling alters Illinois choice of law principles to facilitate certification of multi-state class actions. The defendants contend that no Illinois appellate court has ever held that the foreign law of a defendant’s principal place of business governs the consumer fraud claims of Illinois consumers for goods purchased in Illinois. Additionally, the defendants argue that the Fifth District violated the U.S. Supreme Court’s decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), which expressly held that choice of law analysis cannot be altered merely because the action is being advanced as a putative multi-state class. The defendants also aver that the Fifth District misapplied Section 148(2) of the Restatement (Second) of Conflicts of Law. They argue that no precedent from any appellate court in the nation applying Section 148(2) has directed that the foreign law of a defendant’s principal place of business governs the claims of a nationwide class action.

The defendants further argue that the application of California law in an Illinois court to a nationwide class would violate constitutional requirements under the Due Process, Commerce, and Full Faith and Credit Clauses of the federal Constitution and offend basic principles of federal comity. The defendants additionally request that the Court use this case to clarify the narrow holding in Martin v. Heinhold Commodities, Inc., 117 Ill. 2d 67, 510 N.E.2d 840 (1987), which they argue the Fifth District miscited in support of its position that California law could be applied in an Illinois court to the putative nationwide class. Finally, the defendants state that this case is the “proper case” to address the issue of the proper application of class action requirements within the context of ICFA claims.

**When an Employer and Employee Reach a Compensation Settlement Agreement, Must the Employer Expressly Reserve Its Right to a Lien on Any Amount the Employee Later Receives Through Litigation?**

*Gallagher v. Lenart*, Gen. No. 103522, First District 1-06-0065

The plaintiff employee was injured in the scope of his employment for the defendant employer. The employee was struck by a truck owned by the defendant delivery company, operated by its employee (“the driver”). The employee filed both a workers’ compensation claim against his employer and a liability claim against the delivery company and the driver. The employer’s workers’ compensation insurance company settled that claim in exchange for a written resignation of employment. The employer prepared a written resignation for the plaintiff’s signature in exchange for a mutual release from all employment obligations, including those under the Workers’ Compensation Act. The employer also obtained the driver’s job resignation. That settlement document made no express reservation of rights under Section 5(b) of the Workers’ Compensation Act. The employer paid approximately $229,000 in workers’ compensation benefits.

Ultimately, the delivery company agreed to pay the plaintiff and his wife, for his liability claim and for her loss of consortium claim, a total of $350,000. Although the plaintiff’s employer took part in those settlement discussions, it did not raise any issue regarding the assertion of its workers’ compensation lien until after the plaintiff’s settlement with the delivery company and the driver.

The trial court ruled that the plaintiff’s employer forfeited its lien when it settled the plaintiff’s workers’ compensation claim, relying on *Borrowman v. Prastein*, 356 Ill. App. 3d (Continued on next page)
Supreme Court Watch (Continued)
546, 826 N.E.2d 600 (4th Dist. 2005). The trial court found that there was no workers’ compensation lien because it was not expressly reserved in the settlement documents.

The First District Appellate Court reversed the trial court, finding the Borrowman decision unpersuasive. The appellate court stated that under Illinois law, the employee is entitled to retain only that portion of a recovery from the tortfeasor that exceeds the workers’ compensation benefits he received from his employer, even when the employer has waived the right to assert its workers’ compensation lien. The appellate court also indicated that the supreme court has repeatedly decreed that it is of utmost importance that the trial court protect an employer’s workers’ compensation lien. Finally, the appellate court opined that Borrowman’s holding contradicts general principles of contract law by assuming that silence regarding waiver of the lien is a valid waiver. The appellate court then remanded the case to the trial court to address the issue of allocation of the settlement funds.

The plaintiff contends review is warranted to resolve the conflict between the First District’s opinion in this case and the Fourth District’s opinion in Borrowman. According to the plaintiff, both cases raise the issue of whether a settlement and release of all claims arising under the Workers’ Compensation Act releases an employer’s Section 5(b) claim for subrogation from monies paid to that employee by a third-party tortfeasor. The question is whether such releases constitute general or limited releases. The plaintiff argues that Borrowman controls, which would require the employer to expressly reserve the right to its lien in the settlement agreement.

Property Insurance

By: Tracy E. Stevenson
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What Duties Do Property Owners Owe Now?

As one year ends and another begins, lawyers and property owners review the past and look forward to the future. In so doing, we also review the changes in potential liability exposure that may affect our property-owning clients. This article will address some recent clarifications made to the open and obvious doctrine and the impact recent decisions may have on duties to invitees and trespassers upon our property.

The Open and Obvious Doctrine

In each negligence claim, including one for the negligent maintenance of property, a plaintiff must establish that a defendant property owner first owes a duty to that specific plaintiff. The open and obvious doctrine sets forth the extent of the duty owed by a property owner to a person injured while on the landowner’s property. Bucheleres v. Chicago Park Dist., 171 Ill. 2d 435, 447, 665 N.E.2d 826 (1996). A landowner owes a duty to exercise due care to remedy a condition on the property dependent on 1) the foreseeability of injury; 2) the likelihood of injury; 3) the magnitude of the burden of guarding against the injury; and 4) the consequences of placing that burden on the defendant. Ward v. K-Mart, 136 Ill. 2d 132, 140, 554 N.E.2d 223 (1990). Recently, the First District Appellate Court in Harlin v. Sears Roebuck and Co., No. 1-05-2749, 2006 WL 3593779, at *5 (Dec. 11, 2006), stressed the often overlooked point that generally, an owner or occupier of land owes no greater duty to small children than that duty which they may owe to adults. Specifically, the court was asked to consider whether “Sears owed a duty to exercise due care to remedy the condition of [a] display stand or otherwise protect a two-year old child from any resulting injury.” Harlin, at *5. Stressing the foreseeability aspect of the open and obvious doctrine, the Harlin Court revisited the
ideal that the primary responsibility for the safety of a child rests with his or her parent. *Mt. Zion State Bank & Trust v. Consol. Communications, Inc.*, 169 Ill. 2d 110, 116, 660 N.E.2d 863 (1995). In doing so, the *Harlin* court reviewed the Illinois Supreme Court’s decision in *Kahn v. James Burton Co.*, 5 Ill. 2d at 625, 126 N.E.2d 836 (1955), one of the earliest cases regarding the issue.

Generally, under the supreme court’s precedent, a land owner or occupier has a duty to exercise due care to remedy a dangerous condition on the land or otherwise protect children from injury where: 1) the owner or occupier knows or should know that children habitually frequent the property; 2) a defective structure or dangerous condition is present on the property; 3) the defective structure or dangerous condition is likely to injure children because they are incapable, due to their age and immaturity, of appreciating the risk involved; and 4) the expense and inconvenience of remedying the defective structure or dangerous condition is slight when compared to the risk of children. See *Kahn*, 5 Ill. 2d at 625, 126 N.E.2d at 836; see also *Mt. Zion State Bank & Trust v. Consol. Communications, supra*. The supreme court again stressed that the foreseeability of harm to children is the cornerstone of imposing liability relying on the analysis in *Corcoran v. Libertyville*, 73 Ill. 2d 316, 326, 383 N.E.2d 177 (1978).

Initially, the *Kahn* case was used where a minor was trespassing or unaccompanied. Its principles, however, have been applied to injuries suffered by a minor even when accompanied by a parent. The *Kahn* analysis requires a threshold determination of whether a dangerous condition exists. A dangerous condition is defined by the *Kahn* Court as “one which is likely to cause injury to children, who, by reason of their age and immaturity, would not be capable of appreciating the risk involved.” *Mt. Zion State Bank & Trust*, 169 Ill. 2d at 120, 660 N.E.2d 863. “The law does not require a landowner to protect against the omnipresent possibility that children will injure themselves on obvious or common conditions.” *Barrett v. Forest Preserve District*, 228 Ill. App. 3d 975, 979, 593 N.E.2d 990 (1st Dist. 1992).

**The Harlin Court’s Analysis**

The *Harlin* court was asked to review a trial court’s grant of summary judgment in favor of Sears. Sears argued that it owed no duty to two-year-old Jaylan and her mother with the respect to a display stand that supposedly injured the child. Jaylan’s mother had allegedly permitted Jaylan to roam free in the store. There was no allegation that the display stand was one which would incite a child to climb or swing from it. *Harlin*, citing *Wal-Mart stores, Inc. v Lerma*, 749 S.W.2d 572 (Tx.App.Ct. S1988).

The court determined that a land owner or occupier has no duty to remedy a condition if it involves an obvious risk children generally would be expected to appreciate and avoid, such as fire or falling. Restatement (Second) of Torts, § 339 (1965). Furthermore, a landowner may be absolved of a duty towards a child if that child was under a parent’s care and control. If the parents were aware of a visibly dangerous condition, the defendant property owner may be relieved of their duty to protect a child. See *Stevens*, 219 Ill. App. 3d at 823, 580 N.E.2d at 160. A trial or reviewing court may also consider that parents are required to exercise due care in the face of obvious risks but not those which may be concealed by the landowner.

**The court determined that a land owner or occupier has no duty to remedy a condition if it involves an obvious risk children generally would be expected to appreciate and avoid, such as fire or falling.**

Applying the above reasoning, the court relied upon *Perri Furama Restaurant, Inc.*, 335 Ill. App. 3d 832, 781 N.E.2d 631 (1st Dist. 2002) to assert that, in some instances, the parents in question were likely to acknowledge the known dangers. (Continued on next page)

**About the Author**

Tracy E. Stevenson is a partner in the Chicago firm of Robbins, Salomon & Patt, Ltd., where she concentrates her practice in medical malpractice defense and insurance defense. She has defended cases on behalf of physicians and hospitals and represented various major insurance companies in claims involving fraud. Ms. Stevenson also represents corporations in litigation matters including TRO’s and shareholder actions. She is licensed in Michigan as well as Illinois and speaks at various seminars around the country.
Property Insurance (Continued)

er that may be caused by a child falling in or around wooden and metal structures. The Harlin court went so far as to say that it is a matter of common sense that 2-year olds often fall and may get hurt when they land on circular objects with metal at the bottom. For support, the court cited to Young v. Chicago Housing Auth., 162 Ill. App. 3d 53, 57, 515 N.E.2d 779 (1st Dist. 1987) recognizing that even children can appreciate the “commonsense principle ***: if you fall you might get hurt.” The court distinguished the case from those in which landowners and property owners have been sued, including whether the parents were distracted at the time of the child’s injury.

Conclusion

The analysis of the open and obvious doctrine is not novel. But, the manner in which the court has interpreted that duty owed to a child in the face of parental control may be novel. The case may stand for the proposition that even in our litigious society, parents continue to have a role in protecting their children from harm even against landowners who may not appreciate all the risks inherent in monitoring small children. Yet, the court’s recent ruling with respect to these obligations makes clear that landowners only owe a duty to maintain their property in a reasonably safe manner to those who may be upon the property. Liability is not absolute, however, and to make a case, each element of the open and obvious doctrine must be met. If the elements cannot be met, and especially when parents are in the presence of their children when injury occurs, a landowner’s duty may be obviated. “Let the buyer beware” when a child trips in a store and inadvertently comes into contact with a display stand.

Evidence and Practice Tips

By: Joseph G. Feehan
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Third District Holds That General Contractor Did Not Exercise Sufficient Control Over Subcontractor’s Work to Create Liability Under Section 414 of Restatement (Second) of Torts

In Moisyev v. Rot’s Building and Development Inc., No. 3-05-0761, 2006 WL 3786849 (3d Dist., Dec. 21, 2006), the Appellate Court, Third District affirmed the trial court’s decision to grant the general contractor’s motion for summary judgment, finding that the plaintiff failed to show that the general contractor had sufficient control over the subcontractor’s work to create a duty of care.

In Moisyev, the plaintiff Yevgeniy Moisyev was employed as a plasterer by OSI Construction, Inc. (OSI) on the construction of a residential home. The general contractor, defendant Rot Building and Development Inc. (RBD), hired OSI as a subcontractor to apply the exterior finish to the outside of the house. There was no written contract between RBD and OSI. On November 30, 1995, the plaintiff fell from a scaffold at the jobsite and was injured. Thereafter, the plaintiff filed a common law negligence action against RBD pursuant to Section 414 of the Restatement (Second) of Torts.

The plaintiff alleged that as general contractor, RBD employed various subcontractors, including OSI, to construct the residence. The plaintiff alleged that RBD supervised, directed, and controlled the work being performed by OSI and also had the authority to supervise, direct and control the safety of OSI’s employees working at the jobsite. He further alleged that RBD failed to provide him a safe scaffold, failed to require that OSI provide a safe scaffold, and failed to inspect the structural safety of the scaffold.

The owner of RBD, Keith Rot, testified at his deposition that RBD coordinated the work and organized the subcon-
tractors at the jobsite, but did not perform any of the physical construction work. Rot testified that RBD did not usually require that subcontractors sign written contracts. However, Rot admitted that RBD typically monitored the quality of the work performed by subcontractors to ensure that the work conformed to plans and specifications for a project. Rot testified that he would occasionally visit the jobsite to personally monitor the performance of the subcontractors and conceded that he could step in at any time and stop a subcontractor’s work if it did not conform to plans or if it appeared to be unsafe, but that he had not ever actually done so. Rot typically left safety issues up to the individual subcontractors and did not instruct subcontractors in any way about safety. Further, RBD did not have its own safety program or any type of written safety procedures. Rot testified that he would occasionally visit the jobsite and observe the work being done by OSI but he never had any contact with the plaintiff. OSI provided all of its own materials for its portion of the project and RBD did not provide any tools or equipment to OSI. Rot testified that no one from RBD ever discussed the means and methods of OSI’s work with anyone from OSI or corrected any of OSI’s employees on how to do their job. Rot further testified that he had seen the scaffolding that OSI had constructed at the jobsite, but he did not inspect the scaffolding or provide any materials for the scaffolding.

Plaintiff Moiseyev testified at his deposition that he had been employed by OSI as a plasterer for approximately seven months before the accident but did not have any other construction experience. He testified that the scaffold he was on at the time of the accident had been built solely by OSI employees and that they were instructed on how to build the scaffold by their bosses at OSI. The plaintiff admitted that he never had any contact with RBD personnel and no one from RBD ever instructed him on how to do his job. He testified that he was instructed by his OSI bosses to work on the scaffold and that although he had expressed concern about the safety of the scaffold to his OSI bosses, he never told Keith Rot or anyone from RBD that the scaffold was unsafe.

Sergei Ishkov was an owner of OSI and one of the plaintiff’s bosses at the jobsite. Ishkov testified that OSI owned the scaffold and instructed the OSI employees how to construct the scaffold. He testified that RBD never instructed OSI about how to apply the exterior finish nor did anyone from RBD ever discuss safety issues with OSI.

The trial court granted RBD’s motion for summary judgment, finding that the record was “devoid of any evidence that OSI was not free to do the work in its own way.” Moiseyev, 2006 WL 3786849 at *3. On appeal, the plaintiff argued that RBD had retained a sufficient amount of control over the jobsite as a general contractor to give rise to a duty to provide a safe workplace. He relied heavily upon Section 414 of the Restatement (Second) of Torts, which states:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

RBD argued on appeal that the trial court properly granted summary judgment because RBD did not control the manner and method of the work being performed by OSI at the time of the accident. RBD argued that merely retaining the authority to supervise or stop OSI’s work is not sufficient to create a duty of care under Section 414. RBD relied heavily upon comment c of Section 414, which states:

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

(Continued on next page)
Evidence and Practice Tips (Continued)

The Third District noted that courts have had significant difficulty interpreting the term “control” as that term is used in Section 414. The Moiseyev court conducted a detailed analysis of several Third District decisions that have interpreted and applied Section 414 and concluded that in order for a general contractor to have “control,” it must “retain control over routine and incidental aspects of the work, which includes an operative detail analysis.” Id. at *10. The Moiseyev court stated:

The Restatement and the case law find control under the following circumstances: when the defendant supervises the entire job and effects the means and methods of the subcontractor’s work, preventing the subcontractor from working in its own way, and/or is consistently present on the jobsite directing operative detail of the subcontractor’s work, or supervises the entire safety program, and fails to prevent the subcontractors from doing the details of the work in a way unreasonably dangerous to others . . . On the other hand, the defendant does not retain control when the defendant merely retains the general right to order the work stopped, or the defendant merely retains the general right to inspect work progress or process or receive reports . . . This approach emphasizes the importance of the degree of control over the manner in which the work is done and is a highly factual inquiry into the degree of control over routine and incidental aspects of the work. Moiseyev at *11.

The Moiseyev court then reviewed the deposition testimony provided by Keith Rot, Sergei Ishkov, and the plaintiff, and determined that there was insufficient evidence to show that RBD retained the requisite control over the work of the plaintiff to give rise to a duty under Section 414. The Moiseyev court stated:

. . . No contract existed at any point between defendants and subcontractor OSI, a factor that the Bieruta court took into account in finding no duty. (Citation omitted.) Further, as testified to by both defendant Keith Rot and plaintiff, OSI supplied all of its own tools to apply the exterior finish. Although defendant Rot retained the right to halt work at any time for any reason, and went on site to inspect work progress, no liability can apply unless defendant “retained control over the ‘incidental aspects’ of the independent contractor’s work.” Moiseyev at *11.

First District Holds that General Contractor’s Conduct and Written Contract Were Not Sufficient to Establish Control of the Subcontractor Under Section 414 of Restatement (Second) of Torts

In Joyce v. Mastri, No. 1-06-0086, 2007 WL 79438 (1st Dist., Jan. 11, 2007), the Appellate Court, First District affirmed the trial court’s decision to grant a general contractor’s motion for summary judgment, finding that the plaintiff failed to show that the general contractor had sufficient control over a subcontractor’s work to create a duty of care. In Joyce, the plaintiff was injured when he fell off a ladder at a construction site at the United States Army Reserve Base in Arlington Heights, Illinois. Defendant Madison Services (Madison) was a general contractor for the construction project, which consisted of demolishing and installing air handling systems at the army base. Madison hired the plaintiff’s employer, Elk Grove Mechanical, Inc. (EGM), to perform certain demolition and construction work and the parties entered into a written contract.

The First District reviewed the contract between Madison and EGM, and also conducted a detailed analysis of the deposition testimony of the plaintiff and various representatives of Madison and EGM. Under the contract, EGM was required to provide “all labor, materials, equipment, services and other items required to complete such portion of the Work.” The
The contract also provided that Madison “shall not give instructions or orders directly to employees or workmen of EGM, except to persons designated as authorized representatives of EGM.” The contract required that EGM “take reasonable safety precautions with respect to performance of this Subcontract, . . . comply with safety measures initiated by Madison and with applicable laws, ordinances, rules, regulations and orders of public authorities . . .”

The Madison project manager, Michael Reinersman, testified that he was responsible for overseeing Madison’s projects in six Midwestern states and that he was the only Madison employee who was ever present at the jobsite where the plaintiff’s accident occurred. Reinersman testified to the following: he visited the worksite during the course of EGM’s work on at least five occasions; Madison had the right to stop EGM’s work if there was some type of safety hazard but that Madison did not ever exercise that right; he never instructed EGM employees as to what tools to use or how to go about their work; and Madison did not provide any equipment to be used on the worksite, did not direct EGM employees as to the operative details on how to perform their work, or give any job assignments to EGM employees.

**The Joyce court found that a duty of care may be created even without a contract if the evidence shows that the general contractor retained control over the incidental aspects of the subcontractor’s work.**

Similarly, in this case, the facts indicate that Madison Services did not control EGM’s work. There is no evidence that Madison Services directed the “operative details” of the work site or that EGM was not free to perform the demolition work in its own way. The evidence showed that Madison Services did not participate in or supervise any of the demolition work. Reinersman, on behalf of Madison Services, visited the work site at the beginning of the project merely to inform EGM of the scope of the work and any subsequent visits were to monitor the progress of the work. Reinersman did not direct EGM employees as to the operative details of how to perform their work and did not give any job assignments to EGM’s employees.

EGM Superintendent Richard Olson testified that he was responsible for the job from start to finish and that “nothing happened unless it went through him.” Olson testified that: Michael Reinersman was the only Madison employee to ever visit the jobsite; Reinersman visited the site about every two to three days; when Reinersman was at the worksite, no safety issues came up and no safety meetings were ever conducted with Reinersman present; and Madison did not specify the manner in which EGM employees were to perform their work and did not provide any equipment.

The First District concluded that the contract between Madison and EGM did not grant Madison sufficient control over EGM’s work to create a duty to the plaintiff. However, the Joyce court noted that a written contract is not the only vehicle that can create a duty of care owed to the subcontractor under section 414. The Joyce court found that a duty of care may be created even without a contract if the evidence shows that the general contractor retained control over the incidental aspects of the subcontractor’s work. However, the Joyce court concluded that Madison’s involvement in the work being done by EGM was not sufficient to create a duty of care under Section 414. The court stated:

"Similarly, in this case, the facts indicate that Madison Services did not control EGM’s work. There is no evidence that Madison Services directed the “operative details” of the work site or that EGM was not free to perform the demolition work in its own way. The evidence showed that Madison Services did not participate in or supervise any of the demolition work. Reinersman, on behalf of Madison Services, visited the work site at the beginning of the project merely to inform EGM of the scope of the work and any subsequent visits were to monitor the progress of the work. Reinersman did not direct EGM employees as to the operative details of how to perform their work and did not give any job assignments to EGM’s employees. Joyce, 2007 WL 79438 at *9."
Workers’ Compensation Report

By: Kevin J. Luther
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The Supreme Court of Illinois Considers Statute of Limitations Defense in Repetitive-Trauma Claim

In Durand v. Industrial Comm’n, No. 101109, 2006 WL 2975584 (Oct. 19, 2006), the petitioner filed a claim for benefits pursuant to the Workers’ Compensation Act after she developed carpal tunnel syndrome. The Illinois Workers’ Compensation Commission found that the petitioner’s injury manifested itself more than three years before she filed her claim, and thus the worker’s compensation claim was barred by the applicable statute of limitations. 820 ILCS 305/6(d) (West 2004). The circuit court and appellate court affirmed the denial of benefits. The Illinois Supreme Court reversed the denial and remanded the case back to the Workers’ Compensation Commission for further hearings on other issues.

The petitioner worked for an insurance company as a policy administrator. On January 21, 1998, she informed her supervisor that she noticed pain in her hands several months earlier (in September or October of 1997) and that she believed that the pain was work related. She continued to work and eventually was examined by a physician on August 15, 2000. The physician concluded that the petitioner’s hand and wrist pain was probably carpal tunnel syndrome, and then a referral was made to a neurologist for EMG/NCV testing.

The neurologist examined the petitioner on September 8, 2000, and EMG tests were performed, which revealed very mild or early right carpal tunnel syndrome. The neurologist concluded that the petitioner’s condition was, by history, work related. The petitioner was then scheduled for a Section 12 examination at the request of her employer. The examining physician of the employer concluded that the petitioner did have borderline right carpal tunnel syndrome, but he did not believe that the petitioner’s work duties would cause or aggravate the carpal tunnel syndrome. The examining physician of the employer opined that the petitioner’s condition was not causally related to her work environment.

The petitioner was then seen by an orthopedic physician who examined her on November 29, 2000. This orthopedic treating physician’s impression was the petitioner had bilateral carpal tunnel syndrome, which was developed secondary to her work activity, by the petitioner’s history.

On January 12, 2001, the petitioner filed an Application for Adjustment of Claim with the Illinois Workers’ Compensation Commission asserting that repetitive work duties caused an injury to both hands/wrists. Thereafter, the petitioner was examined by a Section 12 evaluator scheduled by her attorney, who testified that if the petitioner experienced symptoms of numbness, tingling, or pain in 1997, then these symptoms could have been a manifestation of carpal tunnel syndrome in 1997.

At arbitration, the petitioner testified that she never had hand or wrist problems before she worked for the respondent. The petitioner admitted that on January 29, 1998, when she reported her problems to her supervisor, she, in her mind, believed that her condition in September or October 1997 was work related. On redirect examination, the petitioner testified that no doctor in 1997 had diagnosed her with carpal tunnel syndrome. On recross-examination, however, the petitioner testified that in 1997, it was her belief that her condition was due to her work duties.

The arbitrator found in favor of the petitioner. While the arbitrator concluded that the petitioner did experience symptoms of carpal tunnel syndrome well before the date that she filed her claim with the Workers’ Compensation Commission, the arbitrator concluded that the petitioner was not officially diagnosed with carpal tunnel syndrome until she received EMG testing on September 8, 2000. The arbitrator concluded

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that the petitioner’s claim fell within the statute of limitations period.

The employer filed a Petition for Review, and the reviewing commissioners of the Workers’ Compensation Commission reversed the arbitrator’s decision. The Commission noted that during the arbitration hearing, the petitioner stated four times that she experienced pain in her hands and wrists in September or October 1997 and that she believed this pain was work related. Citing long-standing case law that the “accident/manifestation date” in a repetitive-trauma claim is the date when the fact of the injury and its causal relationship to employment was plainly apparent to a reasonable person, the Workers’ Compensation Commission found that the claim was filed outside the three-year limitations period.

The petitioner filed for a judicial review, and the circuit court affirmed the Illinois Workers’ Compensation Commission’s denial of benefits. The appellate court also affirmed the decision. The appellate court determined that Illinois law does not require that a physician must have diagnosed a claimant’s injury or that a physician has opined the injury is causally related to employment. Rather, the appellate court noted that manifestation of a repetitive-trauma injury occurs when the fact of the injury and causation would have become plainly apparent to a reasonable person. Durand v. Industrial Com’n, 358 Ill. App. 3d 239, 244 (3rd Dist. 2005).

The Illinois Supreme Court granted the petitioner’s Petition for Leave to Appeal.

The Illinois Supreme Court reviewed case law and noted that an employee who suffers a repetitive-trauma injury must meet the same standard of proof as an employee who suffers a sudden injury. This means that an employee must still point to a day within the limitations period on which both the injury and its causal link to the employee’s work became plainly apparent to a reasonable person. See Williams v. Industrial Com’n, 244 Ill. App. 3d 204, 209 (1st Dist. 1993). The “manifestation date” is a factual determination for the Illinois Workers’ Compensation Commission to determine. See, e.g., Palos Electric Co. v. Industrial Com’n, 314 Ill. App. 3d 920, 930 (1st Dist. 2000).

The Illinois Supreme Court reviewed several appellate court decisions that considered the appropriate date of accident or manifestation date in repetitive-trauma claims. The supreme court identified an appellate court decision in which it was noted that the “manifestation date” standard remains “flexible.” See Oscar Mayer & Co. v. Industrial Com’n, 176 Ill. App. 3d 607 (4th Dist. 1988). The supreme court also noted that facts must be closely examined in a repetitive-injury case to ensure a fair result for both the faithful employee and the employer’s insurance carrier, citing Three “D” Discount Store v. Industrial Com’n, 198 Ill. App. 3d 43, 49 (4th Dist. 1989).

The Illinois Supreme Court concluded that courts, in considering various factors, have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work duties. It emphasized that a formal diagnosis is not required and that the manifestation date is not the date on which the injury and its causal link to work became finally apparent to a reasonable physician. The court noted that because repetitive-trauma injuries are progressive, the employee’s medical treatment, as well as the severity of the injury and how it affects the employee’s performance, are relevant in determining the objectivity when a reasonable person would have plainly recognized the injury and its relationship to work. Against this legal background, the Illinois Supreme Court determined that it was against the manifest weight of the evidence for the Workers’ Compensation Commission to fix the manifestation date outside the statute of limitations period.

The supreme court acknowledged that the petitioner told her supervisor about wrist pain in September or October of 1997 but emphasized that she did not know what it was at the time even though she believed it was work related. The supreme court determined that the arbitration record suggests that doubt about the injury and its relationship lingered until 2000, when the petitioner’s claim finally necessitated medical treatment. It concluded that a reasonable person would not have known of this injury and its putative relationship to computer keyboard work before that time. The supreme court determined that the petitioner’s claim was timely and stated that it would not penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment.

Many workers’ compensation practitioners are disappointed that the Illinois Supreme Court did not identify a more narrow and specific standard with respect to the identification of the accident date/manifestation date in repetitive-trauma claims. The supreme court has condoned a “flexible” approach for this determination that has been previously embraced by the appellate courts. The determination of the correct manifestation date in repetitive-trauma claims will continue to be factually based, and it appears that there will be no hard-and-fast rule such as the date when the petitioner first receives a diagnosis from a physician or the last date that the petitioner is able to perform work duties.
Commercial Law

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

Fifth District Appellate Court Applies California Law To Class Action Relating To Sales Of Computers Processors In Illinois


In this case the Illinois Appellate Court for the Fifth District recently ruled that California law should be applied to claims relating to the sales of computer processors in Illinois. The plaintiffs were residents of Illinois and Missouri who purchased computers from retailers in Illinois and Missouri or over the telephone from Dell, located in Texas. After purchasing computers that contained Pentium 4 processors, the plaintiffs were disappointed in the performance of the processors and filed a nationwide class action lawsuit against Intel, the manufacturer of the processors. Intel’s principal place of business is California and the group responsible for testing the performance of the processors and advertising was located in California. The plaintiffs’ claims challenged Intel’s advertising campaign that the Pentium 4 processor was vastly superior to the Pentium III processor.

After filing suit, the plaintiffs moved for certification of a class. The trial court ruled that California law was inapplicable, finding that Illinois did not have a legitimate interest in applying California law to adjudicate the dispute, because California did not have “the most significant relationship” with the action. The trial court also denied certification on the causes of action based upon the California statutes. And the trial court ruled that Illinois law could not be applied to a nationwide class and thus class certification extended only to consumers who lived in or purchased a computer with a Pentium 4 processor in Illinois. A joint motion for an interlocutory appeal under Illinois Supreme Court Rule 308 was filed by the plaintiffs and Intel and was allowed by the appellate court.

The appellate court reversed the rulings of the trial court. The appellate court disagreed with the trial court’s analysis of the choice-of-law issue. The appellate court held that California law should be applied. The court reasoned that not only was California home to Intel’s headquarters, but also its marketing and press relations groups were located in California and the advertising campaign at issue was devised and launched in California. Because Intel’s marketing strategy was based upon putting forth a consistent message across all 50 states to convince the public that the Pentium 4 was the best and fastest processor ever and superior to the Pentium III, the court held that California law should be applied under the “most significant relationship” test and relevant factors, as set forth in sections 221 and 6, respectively, of the Restatement (Second) of Conflict of Laws.

The court concluded that California’s interest in Intel’s conduct was the most significant. The court noted that its decision should not be considered a new rule for always applying the consumer fraud law of a foreign state to adjudicate the claims of Illinois residents, but rather was based upon the facts of the case before it. The court remanded the case with directions to the circuit court to apply California substantive law and to reconsider its class certification in light of the applicable California law.

Despite the court’s restrictive wording in the decision, those defending class actions involving consumers purchasing goods from outside of Illinois can expect to see this case used in support of class certification arguments that a uniform law should apply. Time will tell if this decision will be given limited or far-reaching effect.

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.
Professional Liability

By: Martin J. O’Hara
Quinlan & Carroll, Ltd.
Chicago

The Illinois Supreme Court Has Spoken — Section 13-215 Tolls the Statute of Limitations and Statute of Repose for Legal Malpractice Claims

In previous editions of the IDC Quarterly, I have addressed the question of whether section 13-215 of the Illinois Code of Civil Procedure (the “Code”) may toll the statute of limitations and statute of repose contained in section 13-214.3 of the Code. Specifically, I discussed the Illinois Supreme Court’s holding in Morris v. Margulis, 197 Ill. 2d 28, 754 N.E.2d 314 (2001), wherein the court held that the plaintiff had not sufficiently alleged a claim for fraudulent concealment under section 13-215. The Morris court further stated, however, that it need not reach the issue of whether section 13-215 could toll the statute of limitations in a legal malpractice action. That question has now been answered affirmatively by the Illinois Supreme Court in DeLuna v. Burciaga, 223 Ill. 2d 49, 857 N.E.2d 229 (October 5, 2006).

DeLuna presents a strange fact pattern, and one that may ultimately have resulted in the court’s holding. In April 1986, Alicia DeLuna underwent back surgery. During that surgery, Dr. Michael Treister allegedly cut through Alicia’s left iliac artery, causing severe bleeding and loss of blood pressure. Alicia died the following day. Alicia’s husband, Guadalupe DeLuna, retained attorney Eloy Burciaga in April of 1986, to pursue a medical malpractice/wrongful-death action arising from Alicia’s death.

On April 16, 1986, Burciaga filed a lawsuit against Dr. Treister and St. Elizabeth Hospital on behalf of Guadalupe DeLuna acting as the administrator of his wife’s estate. Burciaga intentionally filed the lawsuit without attaching an affidavit from a reviewing health-care professional, as required by section 2-622 of the Code, because he wanted to test the constitutionality of that requirement. However, Burciaga did not inform Guadalupe DeLuna or any of Alicia DeLuna’s children that he was filing the complaint without the required affidavit. Burciaga’s suit against Dr. Treister and the hospital was dismissed for failure to attach a section 2-622 affidavit to the complaint.

Burciaga appealed the dismissal, and the appellate court reversed the dismissal order, holding that section 2-622 was unconstitutional. See DeLuna v. St. Elizabeth Hosp., 184 Ill. App. 3d 805, 540 N.E.2d 847 (1st Dist. 1989). However, the Illinois Supreme Court thereafter reversed the appellate court, upholding the constitutionality of section 2-622. See DeLuna v. St. Elizabeth’s Hosp., 147 Ill. 2d 57, 588 N.E.2d 1139 (1992).

In the spring of 1992, after the Illinois Supreme Court had upheld the constitutionality of section 2-622 in the dismissal on the action against Dr. Treister and St. Elizabeth’s, and as the deadline for the six-year statute of repose for legal malpractice claims approached, Burciaga met with the DeLuna family. During this meeting, Burciaga assured the DeLunas that their medical malpractice case was “going very well.” DeLuna, 857 N.E.2d at 233.

In November 1993, Burciaga filed a new lawsuit against Dr. Treister and St. Elizabeth’s Hospital. This new lawsuit attached the appropriate affidavit pursuant to section 2-622. However, the circuit court dismissed the action against both Dr. Treister and St. Elizabeth’s based upon the dismissal entered in the prior case. In November 1996, the appellate court reversed the dismissals. See DeLuna v. Treister, 286 Ill. App. 3d 25, 676 N.E. 2d 973 (1st. Dist. 1996).

In February 1999, the Illinois Supreme Court affirmed the dismissal of the suit against Dr. Treister, but reversed the dismissal of the claim against St. Elizabeth’s, and remanded the action against St. Elizabeth for further proceedings. See DeLuna v. Treister, 285 Ill. 2d 565, 708 N.E.2d 340 (1999). In March 2000, an attorney who had assisted Burciaga in the

(Continued on next page)
Professional Liability (Continued)

handling of the various appeals sent a letter to Oscar DeLuna, one of the children of Guadalupe and Alicia, informing him that Burciaga had used their medical malpractice action to test the constitutionality of section 2-622, that the medical malpractice action against Dr. Treister had been found to be barred, and that the DeLunas might have an action for legal malpractice against Burciaga. Thereafter, the DeLunas settled with St. Elizabeth’s, and filed an action for legal malpractice against Burciaga.

The circuit court dismissed the DeLunas’ legal malpractice claim against Burciaga, finding that the plaintiffs had failed to adequately allege a joint venture, fraudulent concealment or equitable estoppel. The circuit court found that in the absence of such allegations, the six-year statute of repose set forth in Section 13-214.3(c) barred the action. On appeal, the plaintiffs argued that section 13-214.3(e) tolled the statute of repose for two of the plaintiffs during their minority. In addition, the plaintiffs contended that Burciaga had fraudulently concealed his conduct, thereby tolling the start of the repose period and preventing him from raising the statute of repose as a defense.

The appellate court initially rejected the argument that subsection (e) of section 13-214.3 tolled the statutory period of repose set forth in subsection (c). See DeLuna v. Burciaga, 359 Ill. App. 3d 544, 549, 834 N.E.2d 478, 483 (1st. Dist. 2005). Rather, the court found that the language of subsection (e) of section 13-214.3 tolled only the statute of limitations set forth in subsection (b) of section 13-214.3, but not the statute of repose set forth in subsection (c). However, the court further held that the plaintiffs had sufficiently pled fraudulent concealment and equitable estoppel, and thus held that Burciaga’s conduct precluded him from invoking the statute of repose to bar the plaintiffs’ claim.

On appeal to the Illinois Supreme Court, Burciaga raised a host of arguments in support of his assertion that the plaintiffs’ claim was barred by the statute of repose. Initially, the court addressed whether the tolling provision contained in subsection (e) of section 13-214.3 applied to the statute of limitations, as well as the statute of repose. Subsection (e) of section 13-214.3 provides:

If the person entitled to bring the action is under the age of majority or under other legal disability at the time the cause of action accrues, the period of limitations shall not begin to run until majority is attained or the disability is removed.

735 ILCS 5/13-214.3(e).

Burciaga argued that the term “period of limitations” set forth in subsection (e) unambiguously refers to a “statute of limitations,” and thus tolls only the time period referenced in subsection (b) of section 13-214.3, not the statutory period of repose set forth in subsection (c). Conversely, the plaintiffs asserted that the phrase “period of limitations” refers to both subsections (b) and (c) of section 13-214.3, tolling both time periods until a plaintiff reaches the age of majority. The court noted that a statute of repose differs from a statute of limitations. However, the court further noted that both the legislature and courts have often used the terms interchangeably. Ultimately, after construing various case authority and statutory history, the DeLuna court held that “we conclude that subsection (e) of section 13-214.3 tolls the statute of limitations and repose set forth in subsections (b) and (c).” DeLuna v. Burciaga, 223 Ill. 2d 49, 857 N.E. 2d 229, 239 (Oct. 5, 2006) (emphasis in original).

However, the court’s determination that subsection (e) tolled the statutes of limitation and repose did not fully resolve the matter because the lawsuit was filed more than six years after two of Alicia’s children turned 18. The court therefore addressed the issue of whether section 13-215 applies to the plaintiffs’ claim for legal malpractice. Section 13-215 provides:

If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.


The DeLuna court identified the first question relating to section 13-215 as whether “the legislature intended section 13-215 as a tolling provision or exception applicable to statutes of repose, as well as statutes of limitations.” DeLuna, 857 N.E. 2d at 240. The court held that there would be an “obvious and gross injustice” in a rule that allows the defendant to conceal the plaintiff’s cause of action and then benefit from a statute of repose. Id. at 242. The court thus held that: “[w]e see no reason why section 13-215 should not apply to statutes of repose, including the statute of repose contained in subsection (c) of section 13-214.3.” Id. at 243.

Having determined that section 13-215 was an exception to the statute of repose contained in section 13-214.3(c), the court next addressed whether the plaintiffs had pled sufficient facts to take advantage of section 13-215. The court stated that fraudulent concealment would toll a limitations period if
a plaintiff pleads and proves that fraud prevented discovery of the cause of action. While noting that in general, a plaintiff alleging fraudulent concealment must show affirmative acts by the fiduciary designed to prevent the discovery of the action, cases have also recognized that affirmative acts or representations on the part of the fiduciary are not always necessary. Id. at 245 (citing Hagney v. Lopeman, 147 Ill. 2d. 458, 463, 590 N.E.2d 466, 448 (1992)). In reviewing its prior decisions, the court held that a fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of the cause of action, has fraudulently concealed that action, even without affirmative acts or representations. DeLuna, 857 N.E.2d at 246. Because the attorney-client relationship constitutes a fiduciary relationship, the court then concluded that an attorney who is silent, and therefore fails to fulfill his duty to disclose material facts to a client, has fraudulently concealed that action, even if the attorney doesn’t make affirmative misrepresentations. Id.

Based on that standard, the court found that plaintiffs had sufficiently alleged a fraudulent concealment action against Burciaga. The court noted that plaintiffs had alleged that Burciaga failed to reveal pertinent facts giving rise to the legal malpractice action at various stages of his representation, and had failed to inform plaintiff that he was intentionally filing the underlying medical malpractice action without the requisite section 2-622 affidavit in order to test the constitutionality of the statute. The court also relied upon the plaintiffs’ allegations that Burciaga had affirmatively mislead them when he informed plaintiffs that their case was going well, even after the case had been dismissed.

In addition, the plaintiffs had alleged that they relied in good faith on Burciaga’s reassurances and assertions that the case was going well and, consequently, they did not investigate the status of their case. The court thus held, “We conclude that the plaintiffs’ allegations, if proven, are sufficient to establish Burciaga’s fraudulent concealment of facts supporting plaintiffs’ legal malpractice cause of action.” DeLuna, 857 N.E. 2d at 248.

Finding that the plaintiffs discovered their cause of action against Burciaga when they were informed by his co-counsel that they might have a claim against Burciaga, the court found that the plaintiffs had filed their legal malpractice suit within five years from the time they discovered their cause of action. Accordingly, the Illinois Supreme Court reversed and remanded the matter to the trial court for a trial on plaintiffs’ legal malpractice claim.

DeLuna is important to practitioners who defend legal malpractice claims primarily because it answers certain questions that had previously been left unanswered by the Illinois Supreme Court. Because it is generally beneficial to know the law that will be applied in one’s case, DeLuna is helpful to both the plaintiff and defense bar. However, DeLuna places legal malpractice defendants in a much more difficult position when asserting a statute of repose defense. One colleague has suggested that DeLuna effectively eviscerates the statute of repose for legal malpractice actions. While I would not go that far, there is no question that DeLuna provides a roadmap for plaintiffs seeking to file legal malpractice actions for conduct that occurred more than 6 years prior to the filing of suit. Certainly, defense practitioners can expect significantly more fraudulent concealment claims to emerge as a result of DeLuna.
Amicus Committee Report

By: Michael L. Resis  
SmithAmundsen LLC  
Chicago

During its November 2006 term, the Illinois Supreme Court accepted two petitions for leave to appeal in cases that the Amicus Committee has followed with interest.

1. In Ready v. United/Goedecke Services, Inc., Docket No. 103474, the court will decide whether a defendant who settles with the plaintiff prior to trial is still a “defendant sued by the plaintiff” within the meaning of section 2-1117 of the Code of Civil Procedure. 735 ILCS 5/2-1117 In Ready the appellate court (367 Ill. App. 3d 272, 854 N.E.2d 758 (1st Dist. 2006)), with one justice specially concurring, held that a settling defendant comes within the language of section 2-1117 and its fault should be included for section 2-1117 purposes of fault apportionment. The IDC will ask the Illinois Supreme Court for leave to file an amicus brief in support of the defendant.

2. In Nolan v. Weil-McLain, Docket No. 103137, the supreme court will decide whether asbestos defendants may introduce evidence that a plaintiff’s injury could have been caused by exposure to asbestos products manufactured by others. In a 2-to-1 decision, the appellate court (365 Ill. App. 3d 963, 851 N.E.2d 281 (4th Dist. 2006)), followed prior case law and held that once a plaintiff satisfies the “frequency, regularity and proximity” test of Thacker v. UNR Industries, Inc., 151 Ill. 2d 343, 603 N.E.2d 449 (1992)), a defendant is presumed to have proximately caused the plaintiff’s injuries. The defendant can rebut that presumption by presenting evidence that (1) the plaintiff was not exposed to its products, (2) the exposure was insufficient to cause injury, or (3) its products contained too low an amount of asbestos to be hazardous. However, according to the prevailing rule, once there is evidence that the exposure was a substantial factor in causing the injury, evidence of other asbestos exposure becomes irrelevant. The dissent in Nolan referred to case law from other jurisdictions and argued that Illinois should not follow a rule that is unique to Illinois. Instead, according to the dissent, Illinois should follow other states and admit evidence of other exposures. The IDC will ask the Illinois Supreme Court for leave to file an amicus brief in support of the defendant.

Since we last reported, the Illinois Supreme Court handed down its decision in Smith v. Illinois Central R.R. Co., Docket No.102060, in which the IDC participated successfully as amicus. In Smith, the Illinois Supreme Court unanimously reversed the certification of a class action in a mass tort personal injury case arising out of a train derailment which had caused the release of toxic chemicals. The Supreme Court looked to federal and out-of-state decisions applying Rule 23 of the Federal Rules of Civil Procedure and held that individual issues of proximate cause and damages predominated over any common issues of fact. The Supreme Court reasoned that there was no single cause of damages to the plaintiffs, and that trials would have to resolve such time consuming issues of whether, to what extent, and to which of the toxic chemicals the plaintiffs were exposed.

Karen L. Kendall, Craig L. Unrath and Brad A. Elward of Heyl Royster Voelker & Allen PC are to be commended for filing the IDC amicus brief in support of the defendant.

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

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About the Author

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

The Defense Philosophy

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

Pompous Language Denounced

I may be kidding myself, but I feel that writing by lawyers has become clearer, simpler and less ponderous than it was a generation or so ago. If so, that is a very good thing.

In The Story of English (Viking 1986), the authors, Robert McCrum, William Cran and Robert MacNeil, close with the following observation about clear and understandable writing:

In a permissive age, we have also generated euphemistic jargon: words and phrases that (in an effort to please) obfuscate, circumnavigate and ameliorate. The White House, describing the invasion (or, as it preferred, “incursion”) of Grenada, referred to a parachute drop as a “pre-dawn vertical insertion.” The nuclear industry has a phrase for things that go wrong all the time: “normally occurring abnormal circumstances.” The world of euphemistic jargon is the world in which “second-hand” cars become “experienced,” a hospital death is “a therapeutic misadventure,” and an airline reports a fatal crash to its shareholders as “the involuntary conversion of a 727.” California appears to be the natural habitat of such usages. In San Jose, the Department of Physical Education became the Department of Human Performance. When, in the late 1970s, spurred into action by various kinds of Plain English campaigns, Presi-

(Continued on next page)

About the Author

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

dent Carter issued an instruction that Federal regulations should be written in Plain English, it was California that took the most dramatic action. The Planning Division of San Mateo County hired a specialist in plain writing whose blue pencil was to change utilize into “use,” inaugurate into “start,” and at this point in time to “now.” (The arguments about “obfuscation” and “exactness” are abetted by the sheer size of the English lexicon: there are always three or four ways to express the same thought.)

These authors have hit on a word that is part of what I consider to have a very pompous and self-important usage—“utilize.” Although the current crop of lexicographers, bowing to the-way-people-speak theory, consider it to be a synonym for “use,” the two words are not really synonymous. The traditional definition of utilize is “to use an object for a purpose for which it is not intended.” For instance, you can use a ball bat to hit a baseball, but you can utilize a ball bat to prop open a window. Now if this misuse does not raise you to fury or at least indignation, at the very least it constitutes the use of a pompous word when a shorter and better word is available.

You might ask what this has to do with you as a trial lawyer. In fact, it has a lot to do with your work as a trial lawyer. You do not write a letter or prepare a brief to show that you know long words. You write that letter or prepare that brief to inform, persuade or convince. The clearer, simpler and more direct your writing is, the more likely it is to inform, persuade and convince.

In his introduction to the 1971 edition of Strunk and White, The Elements of Style (Macmillan, 1971), E. B. White wrote the following about the original edition:

It was Will Strunk’s parvum opus, his attempt to cut the vast tangle of English rhetoric down to size and write its rules and principles on the head of a pin . . . In its original form it was a forty-three page summation of the case for cleanliness, accuracy and brevity in the use of English.

I am a big fan of cleanliness, accuracy and brevity in the use of English. I never want to use a long word when a short word will do. This is part of my personal philosophy that the use of long and fancy words does not impress anyone who is worth impressing. Pompous words certainly will not impress a busy judge who wants to understand what you are saying, not marvel at the extent of your vocabulary.

It works for me. It should work for you.

(Continued on page 74)
Welcome ... New IDC Members

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Association News (Continued)
WICS became the top rated and most watched evening and morning news programs in the Springfield, Decatur and Champaign market.

Prior to her appointment as news director, Susan was the weeknight anchor for 16 years at WICS. She also reported daily, covering crime and courts, business news, and the Illinois General Assembly. She worked with station promotions and served as a spokesperson for the television station.

Susan has served as a board member for many community and statewide organizations including Land of Lincoln Goodwill, The American Heart Association, and Crimestoppers. She has coordinated fundraising and promotional events including telethons and capital campaigns.

Susan is a graduate of Briar Cliff University in Sioux City, Iowa. She is married to Menard County State’s Attorney Ken Baumgarten. They live in rural Petersburg with their eleven year old twins, Kyle and Nicole.

IDC Changes Bylaws

At the January 26, 2007 Special Meeting of the Illinois Association of Defense Trial Counsel, a change to the IDC bylaws was approved. The following are the newly amended bylaws:

ARTICLE III - MEMBERSHIP

Qualifications for Individuals – Any person:
A. Who is a member in good standing of the Bar of the State of Illinois, and;
B. Who is engaged actively in the practice of law, either privately or on behalf of his/her corporate or governmental employer, and;
C. Who is of high professional standing, and;
D. Who devotes a substantial portion of his or her professional practice to the representation of business, corporate, governmental, insurance, professional or individual civil litigants involving tort, contract, insurance, employment, governmental, or business matters, and do not, for the most part, represent plaintiffs in personal injury litigation.
E. The Board of Directors may make such rules, as it shall deem necessary to make effective the intent of these qualifications and to provide for election to membership.

When the practice of a member no longer meets the standards of qualifications for membership, that member shall resign, or his or her membership shall be terminated by the Board of Directors. However, a member may be eligible for emeritus membership status, to be approved by the Board of Directors, if he or she has been a member of the association for not less than fifteen years and has retired from the active practice of law.

Qualifications for Corporate Membership – Any Business or Corporation:
A. Who will support the purpose of the organization as stated in ARTICLE II, and;
B. Who desires to receive the benefits of corporate membership as shall be determined from time to time by the Board of Directors.

Qualifications for Law Student Membership – Any person:
A. Who is currently enrolled in an ABA accredited law school;
B. Who will support the purpose of the organization as stated in ARTICLE II, and;
C. Who desires to receive the benefits of law student membership as shall be determined from time to time by the Board of Directors. Law student members are not entitled to vote on any association matters.

ARTICLE IV – ADMISSION DUES AND FEES

Each individual, corporate and law student member shall pay annual dues for the year for which the member is admitted to membership. Annual dues for all categories of membership shall be fixed by the Board of Directors at any meeting of the board. Annual dues shall become due and payable on or before May 30. The Board of Directors may also fix the fees to be charged for admittance to any event or meeting sponsored by the association.

ARTICLE V – BOARD OF DIRECTORS

The organizing board shall serve as the first Board of Directors of this association and shall stagger the terms of its
members in order to comply with the provisions of this Article. Following the expiration of the terms of the members of the organizing board, there shall be a Board of Directors of eighteen (18) members, elected by the individual members only of the association by written ballot distributed to all individual members not less than 60 days prior to the annual meeting. The terms of office for the elected directors shall be staggered so that six (6) of the directors shall be elected each year, and each director shall serve for a term of three years, beginning with the meeting of the Board of Directors to be held in June of the year of election. A director may be elected to no more than three (3) consecutive terms on the board, but may, if otherwise eligible, again seek election one year after completing such third term.

At any regular meeting, the Board may appoint (a) directors to fill vacancies for the unexpired terms of directors who have left the Board before the end of the terms to which they were elected, and (b) directors with terms of less than three (3) years as needed to maintain staggered terms of office upon an increase in the size of the Board.

Not more than one member of the elected Board of Directors shall be partners or associates, or otherwise practice together in the same law firm.

The Board of Directors shall have full power and authority in the interval between meetings of the association to do all acts and perform all functions which the association might do or perform, except that it shall have no power to amend these By-Laws.

The filing of a nominating petition for election as a director shall constitute a statement by that individual member of his or her availability and commitment to serve actively on the board. All individual members of the association whose principal office is within the state of Illinois are eligible for election to the Board of Directors. Corporate members and law student members are not eligible to serve on the Board of Directors.

If a director shall, without good reason reported to the Executive Director within two days after a meeting, fail to attend three consecutive meetings or four meetings within any six-month period, the Board of Directors, on motion of any director or officer, may by majority vote, request the resignation of such director, and if the director shall not resign, may declare the position vacant and appoint a new director in accordance with the By-Laws.

The Board of Directors shall be representative of all areas of the State of Illinois, and to this end, two Districts are declared: “Cook County” and “Downstate”; no more than four of the six directors elected each year shall office within the same District, and regardless of votes cast, only the four persons receiving the most votes may be elected from within the District. If all individual members filing nominating Petitions are from the same District, only four shall be elected and the board shall seek out and appoint two directors from the other District.

### Membership Dues

At their February 2007 meeting, the IDC Board of Directors approved the following membership dues:

#### Regular Members
- < 3 Years in Practice ..................... $100
- 3-5 Years in Practice ..................... $135
- 5-10 Years in Practice ................... $195
- 10+ Years in Practice .................... $225

#### Governmental Members
- < 3 Years in Practice ....................... $75
- 3-5 Years in Practice ..................... $100
- 5-10 Years in Practice ................... $160
- 10+ Years in Practice .................... $190

#### Law Student Members ............................ $30
The Young Lawyers Division wrapped up the 2006 year with a hilarious evening of bowling at Seven Ten Lounge in Lincoln Park. The YLD hosted their first holiday bowling party on December 19, 2006 at Seven Ten Lounge. The YLD’s challenged a team of IDC Board Members and a team comprised of Insurance Law Committee Members. We knew we were in for it when members of the Board and Insurance Law Committee teams showed up with their own bowling balls! Let’s just say … we choose to not remember the final scores! In any event, all the attendees had a great time mingling, bowling and taking advantage of the bar and appetizer buffet. Un-
fortunately, no one brought a camera, so you’ll have to attend next year to get the best picture.

The Young Lawyers Division also closed the year with a very successful winter clothing and school supply drive. The school drive was originally set to run for only two weeks in October. However, overwhelming support poured in, resulting in a 2-month clothing and school supply drive. The IDC YLD was featured in the ISBA Bar Journal with a picture of Patrick Stufflebeam from Hepler Broom in Edwardsville, when he dropped off donations collected for the Alton Middle School special education class. Additionally, Jennifer Groszek and Howard Jump were interviewed for the Chicago Daily Law Bulletin, Amicus Curious Column, which featured the YLD’s efforts in donating clothing items to the Sherman School in Englewood (Chicago). Thank you to everyone that participated in the drive by providing clothes, school supplies and monetary donations. Each school was very grateful and the children appreciated all donations.

Each school was very grateful and the children appreciated all donations.

The YLD is growing as we added three new members from Champaign after the Basic Skills Seminar in November. The YLD hosted a reception on November 30 at Timothy O’Tooles in Chicago after the seminar for the attendees. YLD has several events planned for 2007, including a reading program on March 2, 2007 at several elementary schools around the state. The IDC YLD hosted a blood drive competition on January 25, 2007 at Hinshaw Culbertson against the ISBA YLD. The blood drive was a great success with a total of 39 donors. IDC won the competition this year and looks forward to hosting the blood drive again next year.

This issue of the Quarterly includes an article authored by YLD Committee person, Anna Chapman from Moore Strickland & Whitson-Owen on admitting expert evidence of vehicle speed in automobile collisions.

As always, please contact Jennifer Groszek at Jennifer.groszek@guntymccarthy.com if you are interested in joining the IDC Young Lawyers Committee.

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North Central Trial Academy

The Annual North Central Trial Academy was held January 26-27 at the Oak Brook Hills Resort in Oak Brook. In attendance were 44 students from Illinois, Indiana, Wisconsin, Iowa, Minnesota and Missouri.

The Trial Academy is the only trial technique seminar in Illinois, Wisconsin, Indiana and Minnesota designed for defense attorneys. The Academy is an excellent opportunity to get “on-your-feet” experience for attorneys with limited or no trial experience. The next Academy will be held January 25-26, 2008 – please make plans today to join us!
Notice of Election

In accordance with the By-Laws of the Illinois Association of Defense Trial Counsel, an election must be held to fill the vacancies of the following six (6) directors whose terms expire June, 2007.

The following six Directors’ terms will expire at the Annual Meeting, June, 2007:

David M. Bennett, Pretzel & Stouffer, Chicago
Troy A. Bozarth, Hepler, Broom, MacDonald, Hebrank, True & Noce, LLP, Edwardsville
Daniel Cray, Iwan Cray Huber Horstman & Van Ausdal, LLC, Chicago
Matthew Maddox, Quinn, Johnston, Henderson & Pretorius, Springfield
Michael Resis, SmithAmundsen, LLC, Chicago
John Robertson, Stoerzbach Morrison, P.C., Galesburg,

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

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

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

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

Nominations shall be mailed to the attention of Rick Hammond, IDC Secretary/Treasurer at the address shown below, and must be accompanied with the five items listed at the left. All candidates will be featured with their biography, statement and picture in the next issue of the IDC Quarterly, and this same feature will be mailed to the membership with the ballots if more than six petitions are received.

All nominating petitions must arrive at the IDC office no later than Monday, March 19, 2007.

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

Statement of Availability and Commitment Sample

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

Dated this ______ day of _____________________, 2007.

Signature

Nominating Petition Sample

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

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

John Doe (signature)
Jane Doe (signature)
Jack Doe (signature)

Dated this ______ day of _____________________, 2007.
Plan now to join with IDC members and their families on September 20-21 at the IDC Insurance Symposium & Trial Tactics Seminar. Not only will we provide you with timely, informative and exceptional education sessions, this conference will also feature fantastic social events.

You won’t want to miss dinner under the stars at the St. Louis Science Center and Planetarium and cocktails with the penguins and puffins at the St. Louis Zoo.

A great educational and family event, the Insurance Symposium & Trial Tactics Seminar, presented by the Illinois Association of Defense Trial Counsel, will feature something for everyone. Watch your mail for more detailed information and be sure to mark your calendar today to join us at this event.
Special Thanks...

We would like to thank the following companies for participating in our Spring Defense Tactics Seminar on March 9...

Sponsors:
- McCorkle Court Reporters
  Three Star Partner
- ISBA Mutual Insurance Company
  One Star Partner
- Rimkus Consulting Group
  Additional Supporter

Exhibitors
- Edward R. Kirby & Assoc.
- Factual Photo, Inc.
- George E. Rydman & Associates, Ltd.
- McCorkle Court Reporters
- Packer Engineering Inc.
- Records Imaging Service
- Rimkus Consulting Group
- Ruhl Forensic, Inc.
- SEA Limited

Young Lawyers Upcoming Event

Committee members of the Young Lawyers Division will be running in the SHAMROCK SHUFFLE on Sunday, March 25, 2007. There is an 8k run and 5k fitness walk. Anyone interested in joining the IDC-YLD coalition, follow the link below to register:

http://www.shamrockshuffle.com

Once you register for the race, email Jennifer Groszek at jennifer.groszek@guntymccarthy.com. We will be meeting up before the race for pre-race stretching and warm-up, and then after the race for the post-race festivities!

Authors Wanted!

If you are a member of the IDC and have an interesting legal issue on which you would like to write, we’d love to hear from you. Please submit your name, firm, contact information and a brief description of the issue to IDC Quarterly Editor In Chief Joe Feehan, jfeehan@hrva.com or fax: 309-676-3374.

The IDC Quarterly is fantastic publication. The only thing missing is an article from you. Please consider sharing your knowledge and experience by writing for a future issue!

IDC Opens Membership

As mentioned in the IDC Changes Bylaws article (see page 76), IDC membership is now open to law students and attorneys working in government.

We are very excited about this new chapter in IDC history and hope that you will spread the word about the many benefits of IDC to law students and your friends in government. A membership application is included on page 83.
Individuals seeking membership in the Illinois Association of Defense Trial Counsel must meet the following qualifications: Any person (A) who is a member in good standing of the Bar of the State of Illinois, and; (B) who is engaged actively in the practice of law, either privately or on behalf of his/her corporate or governmental employer, and; (C) who is of high professional standing; (D) who devotes a substantial portion of his or her professional practice to the representation of business, corporate, governmental, insurance, professional or individual civil litigants involving tort, contract, insurance, employment, municipal or business matters, and does not, for the most part, represent plaintiffs in personal injury litigation, or; (E) any person who is currently enrolled in an ABA accredited law school; who will support the purpose of the organization, and; who desires to receive the benefits of law student membership shall be eligible to apply for membership in this association.

### MEMBERSHIP DUES

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### APPLICANT INFORMATION – ATTORNEYS & GOVERNMENT ATTORNEYS

First __________________ Middle _______ Last __________________ Suffix _____ Designation ______

Firm or Government Agency ________________________________

Address ____________________________

City _____________ State ______ Zip __________ County ______

Firm or Agency Line __________________ Direct Line ____________ Fax Line ____________

Email __________________________ Website __________________

Principal Area of Practice ____________________________ # of Attorneys in Firm ______

Admitted to the Bar in the State of __________________________ Year ______ Bar # ______

IDC Sponsor Name and Firm __________________________

### APPLICANT INFORMATION – LAW STUDENTS

First __________________ Middle _______ Last __________________ Suffix _____ Designation ______

Law School __________________________

Address __________________________

City _____________ State ______ Zip __________ Anticipated Graduation Date ______

### BIOGRAPHICAL INFORMATION

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

Race ______________ Gender ______________ Birth Date ______________

Home Address __________________________ City __________________________ State _______ Zip ______

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

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

SUBSTANTIVE LAW COMMITTEES

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

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

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

EVENT COMMITTEES

- Spring Defense Tactics Seminar
- Trial Academy
- Fall Conference

ADMINISTRATIVE COMMITTEES

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

MEMBERSHIP COMMITMENT

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

Signed By: ____________________________ Date __________

☐ Enclosed is my check for $

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

Name as it appears on the Card: ____________________________

Billing Address ____________________________

City, State, Zip Code ____________________________

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

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

The Applicability of the Collectibility Defense to a Legal Malpractice Action

James S. Smith III
Andrew C. Seiber
SmithAmundsen LLC
Chicago, IL
Nothing in a lawyer’s professional career may be more dreaded than facing a legal malpractice action, particularly one in which it appears no viable defense exists. However, in spite of a purported error or omission by the lawyer, there remains the opportunity to challenge the plaintiff’s ability to prevail for legal malpractice even if the underlying claim would have been successful from the standpoint of proving liability. Specifically, if a plaintiff cannot prove recoverable damages, the legal malpractice claim should fail. Although not raised frequently due to its limited application, the collectibility defense remains an effective tool when the underlying claim involves an insolvent party. With greater use by defense counsel and a clearer understanding and acceptance by the courts, the collectibility argument could provide professional malpractice defendants with an opportunity to prevail in an otherwise hopeless situation, or at least gain a modicum of leverage in responding to a legal malpractice claim.

Illinois courts, unfortunately, have taken a varied approach to interpreting the collectibility defense and the result has left defense counsel with a lack of specificity in the available case law. The lack of case law may stem from the fact that collectibility is most appropriate in those limited situations involving an underlying claim for monetary damages and an insolvent underlying defendant. Consequently, collectibility is not frequently the subject of an appeal. As a result, the limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be limited case law addressing collectibility may leave defense counsel somewhat perplexed as to how collectibility will be.

On the other hand, in Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C., the Appellate Court for the Fifth District attempted to distinguish collectibility from solvency. In doing so, the court left a confusing picture about what collectibility means when compared to solvency, thus affecting how and when the defense may be applied to a legal malpractice case.

Other Illinois decisions have touched on the issue of collectibility vis a vis damages and those cases provide a basic framework for the collectibility defense. States other than Illinois have also examined collectibility and can provide a useful framework to which defense counsel may refer when preparing a compelling collectibility defense.

The overall question raised by this article is when, and to what extent, the collectibility defense should be raised and how the use of collectibility is currently interpreted by Illinois courts. Namely, in the appropriate setting, collectibility should either preclude a legal malpractice verdict when no chance of recovering damages from an underlying defendant exists, or, limit any malpractice award to damages that would have been collectible. By utilizing the collectibility defense more frequently, the trial and appellate courts may remove discrepancies in the existing law and clearly articulate how collectibility is an integral component to the damages equation in a malpractice action.

I. PROVING DAMAGES IN A LEGAL MALPRACTICE ACTION

It is well known in Illinois that to prove a legal malpractice claim, the plaintiff must plead and prove: (1) the existence of an attorney-client relationship giving rise to a duty; (2) a negligent act or omission by the attorney in breach of that duty; (3) proximate cause (the “but/for” causation that

About the Authors

James Smith, a partner in the Chicago office of SmithAmundsen, is Chairperson of the firm’s Professional Liability Practice Group. He is an experienced trial lawyer who has handled jury, bench, and arbitration matters in both State and Federal court, pending in the counties of Cook, McHenry, Lake, and DuPage. Jim’s extensive litigation and trial experience includes: representation of professionals and business/corporate clients in defense of professional negligence claims, and errors and omissions claims. He has defended professionals including attorneys, architects, engineers, real estate professionals, directors & officers, and doctors and staff at hospitals and nursing homes. Jim graduated from Marquette University with a B.A. in 1986 and from The John Marshall Law School in 1990.

Andrew Seiler is an associate in the firm’s Chicago office, focusing his practice upon civil litigation, primarily representing clients in the areas of professional malpractice and in catastrophic injury claims with significant monetary exposure. Andrew has specifically represented numerous attorneys in all aspects or professional liability claims, including claims for damages in the handling of an underlying action, for sanctions or discovery related requests. He also represents architects and engineers, insurance professionals, and agents in professional liability matters. His defense work also includes the representation of construction-related entities for serious bodily injury claims or property damages. Andrew earned his B.A. from the University of Illinois at Urbana-Champaign in 1993 and his J.D. in 1996 from the John Marshall Law School.
must be proven); and (4) actual damages that are recoverable in a legal malpractice action. The Illinois Supreme Court recently reiterated the importance of the damages element in a legal malpractice action. In *N. Ill. Emergency Physicians v. Landau, Omahana & Kopka*, the court explained that the injury in a legal malpractice action is not a personal injury, nor is it the attorney’s negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer’s negligent act or omission. For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages. The existence of actual damages is therefore essential to a viable cause of action for legal malpractice. Moreover, unless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer’s part, his cause of action cannot succeed. Thus, unless damages have been incurred by the alleged wrongdoing of the attorney, a cause of action for legal malpractice cannot succeed.

Additionally, damages cannot be speculative or premature. As held in *Lucey v. Law Offices of Pretzel & Stouffer*, damages must be incurred and are not presumed, and the plaintiff must affirmatively plead and prove that he suffered injuries as a result of the attorney’s malpractice. Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists. Note the distinction then between a known case for damages versus the scenario involving a question of whether damages were actually incurred. The former apparently will suffice to state a cause of action for malpractice (assuming other necessary elements are met) and the latter will not.

Despite setting forth what appears to be a clear bar to speculative or uncertain damages, many legal malpractice actions are allowed to proceed based on conclusory facts or insufficient pleadings that fail to set forth actual, recoverable damages. In particular, the failure of a plaintiff to plead specific damages sustained as opposed to damages actually being incurred is significant. When uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative and no cause of action for malpractice can be said to exist. Consequently, an action that fails to plead that damages were in fact sustained is insufficient as a matter of law. If damages were sustained, but the extent of damages is unknown, then the action will likely be allowed to stand. Going further in the damages analysis, the ability of the plaintiff to collect a hypothetical judgment must be considered and argued if it appears that the plaintiff could not meet the burden of proving collectible damages.

**II. DETERMINING WHEN COLLECTIBILITY IS APPLICABLE**

As indicated earlier, the collectibility defense is limited to a number of scenarios. For example, collectibility typically only becomes an issue when the defendant lawyer failed to prosecute an action for monetary damages against an underlying party. Certainly, many, if not most, legal malpractice actions originate from a dispute involving monetary damages (i.e. personal injury cases, contract damages, etc.) as opposed to criminal acts or claims seeking chancery relief. Of those underlying cases seeking monetary relief, the next question, assuming some degree of damages exists, is whether the underlying defendant had the ability to pay a potential judgment. This factor further narrows the field to those cases involving insolvent defendants. Consequently, underlying defendants with liability insurance or other assets will likely not lend themselves to a collectibility defense because they arguably had sufficient assets to satisfy an underlying judgment had one been entered but for the defendant’s omissions or negligent acts.

Therefore, the collectibility defense is most useful when defense counsel is faced with an underlying defendant with neither the financial means nor assets to pay any underlying judgment that would have been entered against him. It is this scenario that most lends itself to a collectibility defense because the malpractice plaintiff arguably will have difficulty ever establishing the damages element of the malpractice claim, i.e. that the plaintiff sustained a monetary loss.

**III. INTERPRETATION OF THE COLLECTIBILITY DEFENSE IN ILLINOIS**

A good place to start with an analysis of Illinois case law on collectibility is *Sheppard v. Krol*. In *Sheppard*, the court utilized a brief, common sense approach to determine that collectibility, in part, defeated a legal malpractice claim. Specifically, the plaintiff charged his attorney with failing to investigate and prosecute a products liability case on his behalf. The plaintiff had been injured when he was standing next to a forklift while the motor was running and the forklift suddenly reversed and struck him. The plaintiff’s malpractice action alleged that the forklift was defective and unreasonably dangerous and the result of a design or mechanical defect. The plaintiff specifically accused the lawyer of failing to ascertain the identity of the forklift truck and of failing to sue the manufacturer or seller of the forklift, among other allegations.

The defendant moved to dismiss the complaint based on

(Continued on next page)
the assertion that the plaintiff could not succeed in the malpractice case because he did not plead that he would have prevailed in the products liability action “but for” the negligence of his attorney. The trial court granted the motion and dismissed the case with prejudice.

The appellate court appropriately assessed whether the plaintiff had pled the “but for” causation by pleading a case for strict liability in a products liability action. The court also noted that plaintiff failed to identify the manufacturer of the forklift, despite the fact there was an attorney-client relationship and a breach of duty owed to the plaintiff. Specifically, the defendant claimed that the plaintiff provided no facts to establish that he could have identified the forklift involved in the accident; that the plaintiff failed to plead “but for” causation and; that the plaintiff failed to allege facts to establish that a judgment against a manufacturer would have been collectible.

The Sheppard court agreed that the plaintiff both failed to show he could have identified the manufacturer and that but for the defendant’s breach, even if the forklift could be identified, that the plaintiff would have prevailed in his products liability action. However, the court also noted that the plaintiff’s inability to prove collectibility of any potential judgment barred his claim. In particular, the court agreed that the plaintiff alleged no facts to “establish that a judgment against a manufacturer would have been collectible.” The court relied in part on the plaintiff’s own argument in the trial court wherein his counsel essentially admitted that they did not know from whom they could recover.

In closing, the court acknowledged the critical role collectibility plays by explaining that, “Illinois law is clear that in a malpractice action, the plaintiff essentially must prove his case within the case. The plaintiff must show that but for his lawyer’s negligence he would have recovered.” The plaintiff could never establish the identity of the unknown manufacturer of the purportedly defective forklift and therefore, he could not show that he was injured by his attorney’s purported negligence because he could never prove he would have established recoverable damages. The Sheppard court closed by noting that “our legal system does not permit liability based on conjecture.”

Thus, while Sheppard did not specifically deal with a judgment proof defendant but rather, an unknown, non-identifiable defendant, the court readily grasped the concept of the proof of damages requirement in a legal malpractice action. In other words, it did not matter that the plaintiff may have been able to prove his lawyer breached his duty of care or even that the forklift at issue was potentially defective. What mattered is that the plaintiff could not prove that he would have been able to causally connect the forklift and his sustained damages to any identifiable defendant. Consequently, in the absence of a financially viable defendant against whom damages could be asserted, the Sheppard court’s analysis was correct because the plaintiff could only speculate as to the identity of the culpable manufacturer.

While the Sheppard plaintiff may be perceived as receiving somewhat of a harsh result, particularly because the inability to identify the manufacturer was potentially due to his own counsel’s omissions, the case highlights the point that collectibility and the ability to prove damages are critical criteria to be assessed when evaluating a malpractice case involving a non-identifiable defendant or insolvent defendant.

Another decision focusing more on the aspect of monetary collectibility is Klump v. Duffus, a Seventh Circuit Court of Appeals case interpreting Illinois law. Klump involved an underlying automobile accident and the defendants’ (lawyer and law firm) purported failure to timely file a lawsuit on her behalf within the applicable two year statute of limitations. The plaintiff filed suit against the defendants and was awarded $424,000, the amount the jury determined the plaintiff would have recovered had a suit been filed on her behalf. The defendants appealed the verdict, based on, among other issues, the argument that the district court erred in precluding the introduction of evidence showing the plaintiff’s inability to collect a hypothetical judgment.

With respect to the underlying accident, the facts revealed that the plaintiff was injured in an auto accident when her vehicle was struck by another vehicle in Illinois. Klump subsequently moved to North Carolina and retained Defendant Duffus to represent her against the Illinois defendant. Duffus ultimately failed to file a lawsuit against the underlying defendant and in turn, was sued by Klump.

At trial, Duffus admitted liability for all damages proximately caused by the underlying accident and based on his failure to timely file suit on the plaintiff’s behalf. The trial court granted Klump’s motion in limine seeking to bar evidence regarding the underlying defendant’s ability to pay any hypothetical judgment even though Duffus possessed evidence showing that the underlying defendant was unemployed, had no assets with which to satisfy a judgment and had only a $25,000 insurance policy with respect to the accident. Thus, the jury awarded damages in favor of Klump without knowing that the underlying defendant had no assets from which to collect a judgment.

On appeal, the Seventh Circuit dedicated a significant portion of the opinion to the issue of collectibility in the context of a legal malpractice case. In particular, the court recognized
that the plaintiff must prove the “case within a case,” in order to show malpractice. Its analysis was made more interesting because Duffus did not challenge the finding that the verdict of $424,000 was what the plaintiff could have been awarded. Instead, Duffus argued that the district court was in error for failing to allow the introduction of evidence relative to the underlying defendant’s ability to ever pay that judgment.

The district court, in making its decision to deny evidence of the ability to pay, based its decision in part on the 1899 case of Goldzier v. Poole. The Goldzier decision was a legal malpractice case wherein the plaintiff claimed his two attorneys failed to appear in court, which resulted in the dismissal of the plaintiff’s case. Suit was filed against the underlying defendant but dismissed when the plaintiff’s attorneys failed to appear in court to prosecute the case. Before another suit could be instituted, the underlying defendant filed for bankruptcy. The plaintiff was awarded a judgment amounting to the hypothetical amount he would have recovered if his lawyers had prosecuted his case to a successful verdict. On appeal, the verdict was reversed and remanded with the direction that it was the plaintiff’s burden to show that the underlying defendant (a foundry) was not insolvent. Specifically, the Klump trial court interpreted one aspect of the Goldzier decision to mean that so long as the underlying defendant is even partially solvent, then the malpractice plaintiff can recover the full amount from the negligent defendant attorneys.

However, the Seventh Circuit in Klump did not interpret the Goldzier decision so narrowly. To the contrary, the justices held that Goldzier only stood for the following proposition:

“[I]n malpractice actions against attorneys who negligently cause their client not to be awarded a judgment to which that client was entitled, the plaintiff must prove that the hypothetical defendant was solvent in order to receive more than mere nominal damages.”

The Goldzier court remanded the decision against the lawyers for a determination of the underlying defendant’s solvency. However, the issue in Klump was to what extent of actual damages is a plaintiff entitled if the hypothetical defendant is only partially able to satisfy a judgment against him. One of the key concepts that struck home in Klump was the “actual injury” phrase utilized in Goldzier. Klump defined “actual injury” as “being measured by the amount of money she [the plaintiff] would have actually collected had her attorney not been negligent.” A plaintiff is to be returned only to the same position she would have occupied had the tort not occurred.

Under the Klump court’s analysis, assuming Klump’s counsel had timely filed suit, she would have obtained a $424,000 judgment against a defendant who had no means to pay. Thus, hypothetical damages over and above what Klump could have collected were not properly considered to be a portion of her “actual injury,” and awarding her those damages would have resulted in a windfall at her attorney’s expense. Therefore, based on the reviewing court’s strict interpretation of damages, the trial court’s decision holding that a plaintiff is entitled to the full amount of an underlying judgment if she can prove that the hypothetical defendant was able to pay only a portion of that amount, was reversed. The court felt that its interpretation of Goldzier was not only consistent with other Illinois decisions (citing to Sheppard v. Krol), but also the majority of courts outside of Illinois that had interpreted collectibility. Based on this review of the relevant collectibility law, the Klump court rejected the notion that a defendant has the burden of proving the uncollectibility of a judgment, and instead held that the burden is more properly placed on the plaintiff to prove the amount she would have collected from the original tortfeasor. The court closed its analysis of collectibility by stating that “if Klump could not have collected a full judgment from [the underlying defendant], then Duffus’s [sic] negligence did not injure her in that amount; she simply could not lose what she could never have had.”

While Klump appears to specifically spell out how collectibility should be interpreted under Illinois law, another Illinois decision brought the concept of solvency into the equation and makes the collectibility less clear. In Bloome, cited supra note 2, the Appellate Court for the Fifth District attempted to distinguish collectibility from solvency. Bloome involved an underlying medical malpractice action in which the defendant doctor maintained medical malpractice insurance in the amount of $2,000,000. Of particular concern in the appeal was whether the trial court erred in allowing the judgment to exceed the stipulated amount of damages the plaintiff could recover. The defendants, citing to Sheppard v. Krol, claimed that the judgment could not exceed the agreed to stipulation of damages. The court, relying on its interpretation of Goldzier v. Poole, determined that collectibility could not be equated with solvency. Going further, the Bloome court determined that a plaintiff, per Goldzier, does not have to prove collectibility since to require evidence of collectibility injects elements of proof in a legal malpractice case that are neither relevant nor necessary and could unnecessarily complicate and lengthen the trial. Thus, in attempting to show that the

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plaintiff was not entitled to recover over and above the stipulated amount of damages, the defendants drew the court into an analysis of collectibility where it likely was not appropriate insofar as the defendant at issue had insurance and a career as a doctor. Not surprisingly, the court held that the trial court did not abuse its discretion relating to the verdict being in excess of the stipulation, and also appeared to say that so long as a defendant is solvent, i.e. the underlying defendant is working and has insurance, then the solvency requirement is satisfied and the collectibility analysis is unnecessary.56

Regrettably, the resulting picture in Illinois is that the Bloome and Klump decisions are directly at odds over the meaning of the opinion issued over 100 years ago in Goldzier. Further prosecution and use of the collectibility defense will be required before a more complete picture develops as to how collectibility will be interpreted.

Nonetheless, a strict reading of the damages requirements as set forth by the multitude of Illinois decisions dealing with legal malpractice requirements should in and of itself address the purported distinction between solvency and collectibility, if any even exists. The underlying threat in all legal malpractice cases, as even acknowledged by the Bloome court,57 is that the plaintiff cannot be put in better position than would otherwise have been possible. To remain true to the Illinois Supreme Court’s holding in N. Ill. Emergency Physicians, damages must be affirmatively established by the aggrieved client.58 By removing the requirement of plaintiffs to prove collectibility, the cornerstone of the damages element in legal malpractice cases is eroded to the point it can become meaningless, particularly if the burden is improperly shifted to the defendant attorney.

Consequently, collectibility should remain a necessary component of any legal malpractice action, with the burden properly on the plaintiff to prove not only that he was injured as a result of his attorney’s actions, but also that he could have collected from the underlying defendant.

IV. PRACTICAL ASPECTS OF THE COLLECTIBILITY DEFENSE

How then, based on the applicable law, can collectibility best be used to defend legal malpractice allegations? In practice, the decision to be made about asserting a collectibility defense depends, as mentioned earlier, upon whether the appropriate setting exists, i.e. whether a potentially insolvent defendant exists from whom monetary damages were being sought. If so, then a consideration must be made at the outset whether such a motion to dismiss could be brought under Sections 2-619 or 2-615 of the Illinois Code of Civil Procedure, depending on the available evidence. If the plaintiff fails to plead in the action that he has suffered damages, or that he could have recovered a hypothetical award, then at a minimum a Section 2-615 motion should be considered insofar as the plaintiff must specifically plead and prove damages to successfully state a cause of action for malpractice.59

A Section 2-619 motion would obviously require documents to support the position that collectibility bars the plaintiff’s claim. For example, an affidavit of the underlying defendant attesting to his lack of personal financial assets, deposition testimony, bankruptcy filings, tax statements and employment records among other documents, may suffice to establish a Section 2-619 argument that shows that even if the plaintiff could state a case against the defendant attorney, the plaintiff could never meet the damages requirement.60

If a dismissal motion in lieu of an answer is not successful or appropriate, then a summary judgment motion may also be viable depending on the nature of the factual testimony. Certainly, based on the relevant case law, it is not entirely clear what level of evidence is needed in order to prevail with the collectibility issue and the response will largely depend on the reception of the respective court. However, by utilizing the case law defining the damages element of legal malpractice, in conjunction with the favorable case law explaining collectibility, a strong argument can be made, and preserved for appeal, that the inability of a plaintiff to prove recoverable damages would defeat his cause of action.

In some situations, defense counsel may have to defend against attempts by plaintiffs to avoid collectibility altogether prior to trial, or attempt to shift that burden to the defendant. For example, in Graefe v. Connolly, the court denied the plaintiff’s motion in limine seeking to shift the burden of proving collectibility to the defendant, finding that plaintiffs properly have the burden of proving collectibility as part of the burden to prove proximate cause and damages.61

The factual information that should without a doubt be included in any motion or brought out at trial would be any indica of uncollectibility, including, among other things, the plaintiff’s own admission that he is uncertain as to whether he could have recovered any award and, even better, the underlying defendant’s admissions that he had no assets at the relevant time period such that he could not have ever paid any judgment, supported by financial documents.

It may be necessary to establish that uncollectibility was relevant to a certain time frame, i.e. when a judgment may have been anticipated. The “relevant time period” issue has not been defined in Illinois, although common sense dictates that it likely would be at the time a hypothetical judgment may have been entered. In New York, one disappointing deci-
sion holds that the defendant attorney must bear the burden of establishing the relevant time frame for collectibility. Illinois decisions, as a whole, do not at this point appear to take such a position, nor would it be appropriate to shift the burden. However, the issue of the time period may be a necessary analysis to any motion insofar as defense counsel must try to convince the court that at least as of the time a judgment may have been awarded against an underlying defendant, collectibility would have been impossible if not highly questionable.

Lastly, in the absence of a dispositive motion on the issue, raising collectibility as an affirmative defense may be appropriate in the absence of any clear cut path dictating specifically when it can or should be raised. Furthermore, considering that some courts may bar evidence on collectibility in the absence of an affirmative defense, it is better to use caution and raise the argument as part of any answer or other affirmative defenses.

CONCLUSION

Collectibility, while limited in its application to those situations involving insolvent defendants (otherwise known as “judgment proof” defendants), is a viable defense to an otherwise damaging legal malpractice action. The touchstone of any legal malpractice case is that in order for a recovery to be proven, the plaintiff must plead and prove that “but for” the defendant attorney’s mistakes or omissions, he would have been successful in the underlying litigation. This requirement of proof ensures that a plaintiff does not receive a windfall simply because his attorney happened to carry insurance or have other assets when the underlying party was in fact void of financial assets. The only alternative would allow plaintiffs to recover a greater amount from their counsel than they stood to gain in the underlying case. Should plaintiffs benefit from a second bite at the apple, so to speak, simply because their own counsel is better off financially than the intended underlying party?

A plaintiff in a legal malpractice action must show that not only would he have successfully prosecuted the underlying action if not for his attorney’s actions, but also would have been able to recover any judgment or hypothetical award. This method ensures that a plaintiff is no better off in the legal malpractice action than he would have been if the underlying action had been successful. Additionally, utilizing the terms “collectibility” or “solvency” is in essence to find a distinction without a difference. Specifically, the plaintiff must submit evidence of both a solvent defendant (i.e. a defendant with means to pay a judgment), and a collectible judgment (i.e. a judgment from which the plaintiff could have expected to recover).

Unfortunately, collectibility is being assaulted in numerous courtrooms across the country. The case law refusing to apply the collectibility requirement to a plaintiff’s burden appears to stem from a misunderstanding of the “case within a case” concept, specifically including the requirement that damages, constituting a part of the plaintiff’s fundamental elements of proof, be proven to exist and be collectible. The decisions holding to the contrary appear to stem more from an apparent intent to ease the plaintiff’s burden rather than based on the relevant law.

Collectibility, being one important aspect of a plaintiff’s damages burden in a legal malpractice action, must remain the plaintiff’s burden. With further use and application of the collectibility analysis to legal malpractice defenses, Illinois courts will be compelled to reconcile the existing case law and uphold the requirement that plaintiffs, in order to satisfy the damages element, show that any hypothetical award would have been collectible.

Endnotes
1 Klump v. Duffus, 71 F.3d 1368, 1374 (7th Cir. 1995)
5 Id.
6 Id.
7 Id. at 307
8 Id.
10 Id.
11 Id. at 355
12 N. Ill. Emergency Physicians, 216 Ill.2d at 306
14 Id. at 255
15 Id. at 256
16 Id.

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Forsyth & Forsyth, 280 A.D.2d 79, 82, 720 N.Y.S.2d 654, 656

Payne v. Lee, "the amount of the judgment and that the judgment was collectible "; (holding that a required element of a plaintiff's malpractice claim is

"legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation...and that any judgment which could have been recovered would have been collectible."); (Overruled for unrelated reasons in Chandris, S.A. v. Yanakakis, 668 So.2d 180 (1995); Haverer v. Rice, 511 N.W.2d 279, 285, (S.D. 1994) (holding that a required element of a plaintiff’s malpractice claim is “the amount of the judgment and that the judgment was collectible”); Payne v. Lee, 686 F. Supp. 677, 678 (E.D. Tenn. 1988); McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 82, 720 N.Y.S.2d 654, 656 (N.Y.A.D., 2001).

See, e.g., Fernandes v. Barrs, 641 So. 2d 1371, 1374, (1st Dist. 1994) (Holding that “the general rule is that the client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation...and that any judgment which could have been recovered would have been collectible.”) (Overruled for unrelated reasons in Chandris, S.A. v. Yanakakis, 668 So.2d 180 (1995); Haverer v. Rice, 511 N.W.2d 279, 285, (S.D. 1994) (holding that a required element of a plaintiff’s malpractice claim is “the amount of the judgment and that the judgment was collectible”); Payne v. Lee, 686 F. Supp. 677, 678 (E.D. Tenn. 1988); McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 82, 720 N.Y.S.2d 654, 656 (N.Y.A.D., 2001).

Klump v. Duffus, 71 F.3d 1368, (7th Cir. 1995)

Goldzier v. Poole, 82 Ill. App. 469, 1899 WL 1587 (1st Dist. 1899)

Klump, 71 F.3d at 1374

See, e.g., Lindeman v. Kreitzer, 7 A.D.3d 30, 35, 775 N.Y.S.2d 4, 8-9 (N.Y.A.D. 1 Dept. 2004). Lindeman not only holds that the defendant bears the burden of proving uncollectibility as a mitigating factor, but also that the defendant establishes the relevant time frame of uncollectibility.

See, e.g., Lindeman, supra, and Paterek v. Petersen & Ibold, 2006 Ohio 4179, 2006 Ohio App. LEXIS 4127 (11th Dist. 2006). Compare with, however, Olivaes v. Macias, 2003 Tex. App. LEXIS 9423 (4th Dist. 2003), and Garretson v. Harold I. Miller, 99 Cal. App. 4th 563, 568-569, 121 Cal. Rptr. 2d 317 (3rd Dist. 2002) (holding that California follows the majority rule, which is that a plaintiff must prove not only negligence on the part of his or her attorney, but that careful management of the case-within-a-case would have resulted in a favorable judgment and collection of same).
THE IDC MONOGRAPH:

Legal Malpractice v. Breach of Fiduciary Duty: Determining the Proper Remedy

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In one respect, the initial pleadings in legal malpractice claims in Illinois are no different than the initial pleadings in any number of other causes of action. Plaintiff’s counsel will often include in the complaint as many causes of action as possible, even though the pled facts do not support each cause of action. By doing so, attorneys often overload the complaint in an attempt to set forth permutations of every conceivable claim, under the mindset that if one count is good, then two counts must be better. The most common example of an ancillary cause of action that accompanies a legal malpractice claim is that for breach of fiduciary duty. These two claims are often conflated by plaintiff’s counsel despite the fact that they are distinct causes of action. In actions sounding in legal malpractice, or the more generalized “professional negligence” as it relates to attorneys, it is incumbent upon defense counsel to analyze the oft-pled ancillary count of breach of fiduciary duty to determine whether it is ultimately duplicative of the malpractice count. With respect to the interplay between legal malpractice and breach of fiduciary duty, a body of case law in Illinois has evolved which more clearly defines these two seemingly related, yet independent, causes of action.

This paper will illustrate the distinctions between causes of action for legal malpractice and breach of fiduciary duty and will provide guidance to the practitioner as to when motions may be brought to distill the claims made against an attorney. Additionally, this paper will examine the Illinois case law which assists defense counsel in the task of dissecting a cause of action to discern when the pleading of these two causes of action is duplicative. This analysis not only serves the important role of dismissing a duplicative cause of action, but also allows counsel to identify a plaintiff’s themes and relevant evidence in support of his or her case.

I. Defining Legal Malpractice and Breach of Fiduciary Duty Claims

In an action for legal malpractice in Illinois, a plaintiff must allege and ultimately prove four elements: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission that breached that duty; (3) proximate cause that establishes that but for the attorney’s negligence, the plaintiff would not have suffered an injury; and (4) damages.1 In a legal malpractice case, the existence of an attorney-client relationship is typically, but by no means always, a relatively easy element to ascertain early in the investigation of the claim. The attorney-client relationship is a fiduciary relationship that exists as a matter of law.2 At least one appellate court has theorized that because the relationship between an attorney and client is a fiduciary relationship, in effect any alleged malpractice by an attorney also evidences a simultaneous breach of trust.3 However, the court further noted that it does not mean that every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty.4 Such a result would render the causes of action indistinguishable.

In order to properly state a cause of action for breach of fiduciary duty, it must be alleged that: (1) a fiduciary duty exists between the parties; (2) that the fiduciary duty was breached; and (3) that such breach proximately caused the injury of which the plaintiff complains.5 As set forth above, the fiduciary duties owed by an attorney to a client exist as a matter of law. These duties owed are without regard to the specific terms of any contract or engagement.6 Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty, and good faith in both the discharge of contractual obligations to, and professional dealings with, a client.7 When an attorney places personal interests above the interests of the client during the course of representation, the attorney is in breach of his or her fiduciary duty by reason of this direct conflict.8 Such a breach gives rise to an action on behalf of the client for proximately-resulting damages.9

II. Asserting Claims for Both Legal Malpractice and Breach of Fiduciary Duty

When defense counsel reviews a complaint alleging both legal malpractice and breach of fiduciary duty, it must be determined whether there are distinct facts alleged that support both causes of action, separate and independent of the other.

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In the case of *Calhoun v. Rane*, the plaintiff alleged that the defendant attorney failed to represent him before the Illinois Industrial Commission in regard to injuries that arose from his employment. The defendant allegedly allowed the petition to be dismissed for want of prosecution, failed to vacate said dismissal or otherwise reinstate the plaintiff’s claim, and then failed to inform his client that the claim had been dismissed. Further, two and one half years after the dismissal of the complaint, the defendant allegedly wrote a letter to his client asserting that the complaint was still pending and, in fact, that there was an offer to settle.

In addition to a count alleging professional malpractice, the plaintiff included counts alleging a breach of fiduciary duty and willful and wanton misconduct. The trial court dismissed the cause of action for breach of fiduciary duty and the plaintiff appealed, arguing that the breach of fiduciary duty count was a separate and independent cause of action from the count alleging professional malpractice. The appellate court acknowledged that Illinois has recognized that an injured plaintiff may plead separate counts alleging both professional malpractice and a breach of fiduciary duty. However, because the language of the plaintiff’s allegations in the breach of fiduciary duty count was virtually identical to that in the professional malpractice count, the court found the action for breach of fiduciary duty was not distinct from the malpractice action, and therefore, was properly dismissed by the trial court.

The *Calhoun* opinion is instructive as to the issue of defense counsel’s ability to have a breach of fiduciary duty count dismissed where the breach of fiduciary duty count simply mirrors the facts of a professional negligence claim. It was in *Calhoun* that the concept of the potential for duplicity between causes of action for legal malpractice and breach of fiduciary duty gained solid footing. Prior to *Calhoun*, the Appellate Court, First District had held, in the case of *Coughlin v. SeRine*, that a former client’s causes of action against his attorney, sounding in both legal malpractice and breach of fiduciary duty, were properly pled.

In *Coughlin*, the plaintiff engaged the defendant attorney for representation with respect to determining the plaintiff’s rights and obligations under a stock redemption agreement. Part of their agreement was that the attorney would receive a bonus, to be agreed upon by the parties, if there was a satisfactory solution. Following the resolution of the matter, the attorney’s fees were paid except for the alleged bonus. The attorney sued his former client, and was served with a counterclaim in return, in which the former client ultimately alleged counts for professional malpractice and breach of fiduciary duty, in addition to counts for accounting, breach of contract and fraud, with each of these counts related to the alleged charging of excessive fees by the attorney. The entire complaint was dismissed at the trial court level, and the appellate court reviewed the dismissal, determining simply whether the facts stated were sufficient, as a matter of law, to support the cause of action and to permit the counterclaim to proceed. The case was remanded, allowing both the counts of professional malpractice and breach of fiduciary duty to stand, with the court opining that the pleadings satisfied each of the elements of the causes of action.

The opinion in the *Coughlin* case lacked any type of in-depth analysis as to whether or not simply overcharging a client is a sufficient basis for a malpractice claim. Based on the opinion of the court and the relative lack of analysis on this issue, there did not appear to have been argument by the defendant that the two counts were duplicative. Further, the court did not appear to be troubled by the reality that the factual basis of both counts was the alleged overcharging of the client.

The Appellate Court, First District has provided one of the more interesting pieces of analysis on the interplay between causes of action for legal malpractice and breach of fiduciary duty at the end of its opinion in *Metrick v. Chatz*, decided after both *Coughlin* and *Calhoun*. This analysis could be considered *gratis dictum*, as arguments regarding the dismissal of the plaintiff’s count alleging breach of fiduciary duties were waived. Yet, the court considered the count in conjunction with an existing count for legal malpractice. It was noted that one could argue that all breaches of fiduciary duty on the part of an attorney in the representation of a client amount to legal malpractice; however, the court was “unwilling to concede that all negligence on the part of an attorney in the rendition of legal services rises to the level of a breach of fiduciary duty.” The court noted that errors by attorneys may render them liable to clients for any resulting damages, but this “mere negligence is a far cry from a breach of fiduciary duty.” A distinction was outlined between allegations that an attorney erred, and allegations that an attorney was unfaithful, dishonest, acting in bad faith or acting with a conflict of interest. As the factual allegations supporting the original cause of action for breach of fiduciary duty in that matter simply mirrored the allegations of the negligence counts, these counts did not rise to the level of a breach of fiduciary duty.

Since *Coughlin*, Illinois courts appear to have altered their approach to analyzing motions to dismiss when both malpractice and breach of fiduciary duty have been pled. More scrutiny has been applied to the specific actions alleged against the defendant attorneys. Courts have re-directed their deliberations towards a consideration of whether the facts alleged support a claim for malpractice or for breach of fiduciary duty.

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ervations from solely ascertaining whether each of the elements of both counts was properly pled, to analyzing the specific facts pled by the plaintiff in an attempt to discern the gravamen of the complaint. In drawing attention to the specific actions alleged of the defendant attorney in support of each count, defense counsel can frame the arguments in a motion to dismiss to inform the court that the counts are duplicative. Consequently, in conducting a more pointed analysis of the alleged conduct of the defendant attorney, a court can then make a more informed decision as to whether the alleged conduct fulfills the elements of each cause of action.

While Illinois courts have begun to provide a more pointed factual analysis in deciding motions to dismiss in legal malpractice cases, there are still some decisions that do not follow this pattern. In Hanumadass v. Coffield, Ungaretti and Harris, the Court began its analysis by noting that claims against attorneys for breach of fiduciary duty, breach of contract and negligence were all included “within the rubric of legal malpractice.”30 The Hanumadass case involved a plaintiff physician who sued the law firm that represented him and seven additional medical malpractice defendants in litigation arising from the death of a patient at Cook County Hospital.31 The plaintiff alleged that after settling the medical malpractice case, the defendant law firm breached its duties of competent representation, undivided loyalty and providing representation that constituted a reasonable degree of care and skill by failing to perform a number of different actions, including failing to inform the plaintiff of the settlement for approximately eight months.32 The plaintiff went on to allege that he suffered noneconomic damages including loss of reputation, embarrassment, health and state of mind.33 The issue analyzed by the appellate court was one of legal malpractice as a contract action or tort action and the damages recoverable under each. Thus, the term “legal malpractice” was loosely used in that matter, not as a synonym for professional negligence (as most courts and practitioners use the term), but as an overarching term incorporating all causes of action against attorneys by their clients in an effort to analyze what types of damages are recoverable.

While the Hanumadass court indicated that breach of fiduciary duty and negligence belong under a larger umbrella of causes of action that could all be called “legal malpractice,” the court in Majumdar v. Lurie34 took a step in the opposite direction, attempting to further distinguish the two causes of action. In Majumdar, the court made the next logical step beyond the framework set forth in the dicta in the Metrick decision. It was noted in Metrick that the factual allegations did not rise to the level of breach of fiduciary duty, and therefore, it was appropriate to dismiss that cause of action while the cause of action for legal malpractice was allowed to proceed.35

The Majumdar case involved a physician who was a shareholder and director of a professional medical corporation. While still a shareholder, officer and director, the plaintiff contacted the defendant attorneys and requested that they represent him in forming a medical corporation independent of the first corporation, Bel-Austin.36 The defendants did so, and Amalendu Majumdar, M.D., S.C. (AMSC) was incorporated, with the corporate purpose of engaging in the unrestricted practice of medicine—the same purpose as contained in Bel-Austin’s articles of incorporation.37 The plaintiff became the sole shareholder, officer and director of AMSC.38 Through AMSC, he eventually began seeing patients outside of his relationship with Bel-Austin, and Bel-Austin’s other shareholder, Dr. Bruce Zummo, then used the defendant attorneys— as corporate counsel for Bel-Austin—to send a letter to the plaintiff, outlining a proposed acquisition of the plaintiff’s interest in Bel-Austin.39 Using other counsel, the plaintiff ultimately filed a cause of action against Bel-Austin and Dr. Zummo, who then responded with their own action against the plaintiff, alleging that he breached his fiduciary duty as an officer and director of Bel-Austin by engaging in direct competition and diverting fees from it to himself.40

After that case ended with the plaintiff paying a settlement and assigning all of his Bel-Austin stock to Zummo, the plaintiff brought a cause of action for legal malpractice and breach of fiduciary duty, as well as breach of contract, against the defendant attorneys for failing to advise him of his fiduciary duties and failing to advise him of his conflict of interest in incorporating AMSC.41 In determining if the trial court’s granting of the defendant’s motion to dismiss was proper, the Appellate Court, First District cited Metrick to note that not all legal malpractice actions rise to the level of a breach of fiduciary duty.42 It then went on to emphasize that the plaintiff pled the same operative facts in support of both the actions for legal malpractice and breach of fiduciary duty and further alleged that the same actions of the defendant attorneys resulted in the same injury to the client. Therefore the court found that the actions were identical and the breach of fiduciary duty count was dismissed as duplicative.43

As in Majumdar, the court in Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd also dismissed a count of breach of fiduciary duty as duplicative of a count of legal malpractice.44 The Fabricare Equipment Credit Corp. case involved the corporate plaintiff filing its cause of action against the defendant attorneys due to alleged legal malpractice and breach of fiduciary duties in their representation of the plaintiff with regard to the negotiation of a non-compete agree-
ment and subsequent litigation involving the non-compete agreement. In each of these cases, it was the breach of fiduciary duty claim that was ultimately dismissed. In Fabricare Equipment, the court cited Majumdar as the basis for its dismissal of the breach of fiduciary duty claim with the rather simple analysis that if the operative facts supporting the breach of fiduciary duty claim were the same as those supporting the legal malpractice claim, the breach of fiduciary duty claim is then duplicative and must be dismissed. What was missing in each of these opinions was any analysis of whether the actions alleged arose to the level of breach of fiduciary duty either in addition to, or in lieu of, the malpractice claim. Reviewing these cases through the lens of the language in Metrick, it appears that these cases involved relatively simple issues regarding errors by the defendant attorneys, and were not examples of attorneys who were unfaithful, dishonest or self-dealing.

III. A Breach of Fiduciary Duty is Above and Beyond Legal Malpractice

The cases thus far examined primarily deal with factual situations in which plaintiffs allege failures in the defendant attorneys’ representation of their interests, including a failure to prosecute a case (Calhoun), a failure to inform (Hanumadass), a failure to advise or disclose (Metrick and Majumdar), and a failure to investigate (Fabricare Equipment). These allegations are all within the ambit of the attorneys’ professional legal performance. If successfully proven, all would be examples of legal malpractice, as the actions amount to negligence due to the fact the attorneys’ actions failed to meet the standard of care required. A breach of fiduciary duty, though, rises above the realm of simple negligence in the representation of a client, and may be more appropriately characterized as misconduct. Perhaps the most all-encompassing manner in which to describe the actions or omissions that would rise to the level of breach of fiduciary duty is that of an attorney who acts in his or her own self-interest in lieu of the interest of the client.

In the course of their professional dealings, an attorney who places personal interests above the interests of the client is in breach of their fiduciary duty by reason of that inherent conflict. In Doe v. Roe, the plaintiff retained the defendant attorney to represent her in a divorce action. According to her complaint, the defendant coerced the plaintiff into an intimate relationship with him while the dissolution proceedings were ongoing. When the plaintiff’s former husband walked in on the plaintiff and her attorney in a compromising position in her home, he was outraged and later claimed that he would not continue to pay any of the plaintiff’s attorney’s fees. According to the plaintiff, the defendant attorney ultimately declined to pursue the plaintiff’s right to seek reimbursement of her attorney fees from her former husband out of fear of personal embarrassment and potential professional discipline. The court found that on so doing, the defendant placed his own self interest above the interests of the client.

The Appellate Court, Second District encountered similar factual allegations regarding an intimate relationship between an attorney and client in Kling v. Landry, and sought to clarify the First District’s decision in Doe by noting that the intimate relationship between attorney and client in and of itself was not actionable conduct. Rather, the violation of the fiduciary duty would lie in making the legal representation contingent upon an intimate relationship, compromising the client’s interests as a result of the relationship or using information obtained in the representation of the client which would suggest...
that the client might be unusually vulnerable to the suggestion of such an intimate relationship.54

An additional, and perhaps more common, example of improper self-interested action by an attorney is that of fraudulent or excessive billing. Such actions clearly violate the fiduciary duty owed to the client.55 In Cripe v. Leiter, the allegations of the attorney were that he billed outrageously excessive and unreasonable fees that bore no relationship to the actual time spent in representation of the plaintiff.56 Fraudulent charging by an attorney is an unmistakable example of placing the interests of the attorney before the interests of the client.

IV. Ensuring that the Correct Cause of Action is Applied to the Factual Allegations

There has been an evolution in the analysis conducted by Illinois courts in cases involving the causes of action for legal malpractice and breach of a fiduciary duty to a point where there appears to be an unstated litmus test, that if met, would allow for the co-existence of these two causes of action. Based on the opinions to date, a reasonable recitation of this yet-unspecified litmus test appears to be as follows: If the factual allegations and damages are duplicative and do not rise to the level of unfaithfulness, dishonesty, bad faith, conflict of interest or self-dealing, then Illinois courts will reject the breach of fiduciary duty claim, as the factual allegations must then in some manner illustrate an error on the part of the defendant attorney in the discharge of his or her duties while representing the client. If, on the other hand, the factual allegations are duplicative and rise to the level of misconduct, dishonesty or self-interest, then breach of fiduciary duty is the appropriate cause of action, as the allegations would illustrate ethical misconduct or a pattern of behavior that is beyond simple error or negligence in the legal performance. The third option is for both causes of action to stand, albeit due to a more stringent analysis than that applied in Coughlin. Illinois courts have found that it is possible to plead separate counts alleging both professional negligence and a breach of fiduciary duty.57 But the same operative facts and the same injury to the client cannot be alleged in support of each.58 The aforementioned third option would have to support a breach of fiduciary duty claim with operative facts revealing misconduct by the attorney, in addition to separate and distinct operative facts that also reveal errors or negligence related to the legal work conducted by the attorney in the representation of the plaintiff.

While this third “option” is yet to have been illustrated by an Illinois court, it is interesting to note that the most convincing example of such an analysis was set forth by the United States District Court for the Northern District of Illinois in the unreported opinion of Eckmann v. Diedrich.59 While this decision carries no weight in Illinois because it is not reported and it is a federal court’s interpretation of Illinois law, the analysis is applicable, if only as an illustration. Interpreting Illinois law as set forth in Majumdar, the federal district court properly noted that when the same operative facts support actions for legal malpractice and breach of fiduciary duty resulting in the same injury to the client, the actions are identical and the latter should be dismissed as duplicative. Eckmann was found not to be such a case. In that matter, the plaintiff alleged that the defendant committed legal malpractice by failing to fully inform the plaintiff of her rights to proceed under the settlement in a suit brought by her against a school district that was negotiated by the defendant, as well as by negligently miscalculating the amount owed to her in her settlement.60 Additionally, the plaintiff alleged that the defendant breached his duty of loyalty (i.e. fiduciary duty) when he wrongfully retained for himself portions of the settlement checks to which he was not entitled.61 The operative facts pled were closely related, yet there were facts that would indepen-
dently fulfill the elements of each cause of action. Despite its status as an unreported federal case interpreting Illinois law, \textit{Eckmann} provides an example of how these two independent, but related, causes of action may co-exist.

\textbf{V. Conclusion}

While there is undisputedly a relationship between the causes of action for legal malpractice and breach of fiduciary duty, the defense practitioner must be aware that they are two separate and distinct causes of action. Each requires operative facts that support its own elements independent of the other. The key to dismissing the duplicative cause of action is to initially focus on the factual allegations, regardless of the theory of recovery pled by the plaintiff. In ascertaining the nature of the factual assertions made against the defendant attorney, the proper remedy or remedies should become apparent. Illinois courts’ analysis of the relationship between these two causes of action has evolved to the point where a well-argued motion to dismiss, supported by a small number of key decisions, can demonstrate to a trial court that a complaint is improperly pled, and potentially result in the court eliminating a plaintiff’s cause of action early in the proceedings.

\textbf{Endnotes}


3 \textit{Calhoun}, 234 Ill. App. 3d at 94.

4 \textit{Id}.


7 \textit{Kling}, 292 Ill.App.3d at 336.

8 \textit{Id}.


10 \textit{Calhoun}, 234 Ill. App. 3d at 91.

11 \textit{Id}.

12 \textit{Id}. at 92.

13 \textit{Id}.

14 \textit{Id}. at 93.

15 \textit{Id}. at 94.

16 \textit{Id}.


18 \textit{Coughlin}, 154 Ill. App. 3d at 514-515.

19 \textit{Id}. at 511.

20 \textit{Id}. at 512.

21 \textit{Id}. at 513.

22 \textit{Id}.

23 \textit{Id}.

24 \textit{Id}. at 514-515.


26 \textit{Metrick}, 266 Ill. App. 3d at 656.

27 \textit{Id}.

\textit{(Continued on next page)
Id.


Hanumadass, 311 Ill. App. 3d at 96.

Id. at 97.

Id. at 98.


Metrick, 266 Ill. App. 3d at 656.

Majumdar, 274 Ill. App. 3d at 268-269.

Id. at 269.

Id.

Id.

Id. at 268.

Id.

Id.

Id. at 273-274.


Fabricare Equipment, 328 Ill. App. 3d at 787.

Fabricare Equipment, 328 Ill. App. 3d at 787.


Doe, 289 Ill. App. 3d at 123.

Id. at 119.

Id. at 121.

Id.

Id.

Kling, 292 Ill. App. 3d at 337.

Id.


Cripe, 184 Ill.2d at 189.

Calhoun, 234 Ill. App. 3d at 95.

Fabricare Equipment, 328 Ill. App. 3d at 791.


Id.

Id.
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