IDC Quarterly

The Illinois Association of Defense Trial Counsel

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MONOGRAPH

Life in the ER: The Trauma of the Emergency Exception Defense to Medical Battery

FEATURE ARTICLES

View from the Bench: *Voir Dire* Interviews of Four Illinois Judges

Jury Trials in the Circuit Court for Employment Claims Under the Illinois Human Rights Act and Federal Statutes, for Retaliation and Punitive Damages

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In This Issue

Manuscript Policy

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

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the Association or Editors.

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

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

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President's Message

By: Rick Hammond
Johnson & Bell, Ltd.
Chicago

Legislative Watch

On December 17, 2009, the Illinois Supreme Court was scheduled to release its decision in *Lebron v. Gottlieb Memorial Hospital*, (Consolidated Docket Nos. 105741 & 105745), a closely watched case that decides the issue of medical malpractice damage caps in the state of Illinois. Surprisingly, on the date of the decision, the court announced that its ruling would be delayed. Regardless of the outcome, the IDC is proud to have filed an amicus brief on the defendants' behalf. In that regard, please be assured that we will continue to support our members' efforts and to keep you informed of developing issues that might impact the Illinois defense bar.

On that note, because of the IDC's increased presence in Springfield and involvement with our state's legislature, we have experienced increased costs associated with lobbying. Therefore, we are notifying all members of the following:

> IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. IDC estimates that 8% of your FY 2009-2010 membership dues is not deductible because of IDC's lobbying activities on behalf of its members.

This notice will also be mailed to all IDC members and member firms. Please feel free to contact the IDC office at idc@iadtc.org or 800-232-0169 with any questions.

CLE – Past, Present and Future

Our organization would like to thank **Troy Bozarth** of **HeplerBroom, LLC** and **Howard Jump** of **Jump & Associates** for chairing the ***sold-out*** seminar "**Medicare & Medicaid: Avoiding Post-Judgment and Post-Settlement Litigation**." We also offer our appreciation to **Hinshaw & Culbertson, LLP** for hosting the event at their offices in Chicago. Through the joint efforts of the program's chairs and host, along with the phenomenal presentations of **Daniel W. Farroll** of **HeplerBroom, LLC** and **Bradford Peterson** of **Heyl, Royster, Volkner & Allen, P.C.**, our members were provided with critical information, were given the necessary guidance to handle the new obligations imposed by Medicare, and were provided with a detailed analysis of the Medicare secondary payer law and many of the new amendments created by the Medicare, Medicaid and SCHIP Extension Act of 2007. Due to the overwhelming success of this program, we are pleased to report that we are already working on plans to repeat this seminar at a location convenient to our downstate members.

As of this writing, the **Trial Academy**, sponsored by the IDC, the Defense Trial Counsel of Indiana (DTCI), and the Wisconsin Defense Counsel (WDC), is on the horizon. It continues to be the only trial technique seminar in Illinois, Indiana, and Wisconsin specifically designed for defense attorneys. The Trial Academy is an excellent means of providing "on your feet" experience for lawyers who have limited courtroom and trial experience. Students are provided with investigative materials, statements from witnesses to be used for impeachment, pleadings, deposition testimony, jury instructions and articles on trial advocacy that allow the students to conduct an entire trial. With a ratio of four students to one instructor, every student is guaranteed individual attention during each phase of the trial. Moreover, each student is videotaped while conducting part of the trial and receives a copy of the videotape upon conclusion of the Trial Academy. We encourage our members and member firms to continue to support this program as a means of educating our young trial lawyers.

On February 19, 2010, the Young Lawyers Division of the IDC will host its **First Annual Young Lawyer's Seminar** at the offices of **Hinshaw & Culbertson, LLP** in Chicago. This one-day program will cover topics of interest to newer attorneys including: issues to consider when retaining an expert; technology and its use at trial; enhancing relationships in the legal profession; and rainmaking tips. Drawing on the talents of seasoned lawyers and experts in these related areas, this seminar will be a significant benefit to any attorney that wants to succeed in the profession. Thanks to the Planning Committee: Co-Chairs **Jennifer B. Groszek** and **Dan Connell**, both of **McKenna Storer, LLC**, and to **Nicole Milos** of **Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC**. We would also like to thank **Merrill Corporation**,

Rimkus Consulting Group, and **National City** for their generous support and sponsorship of this program.

The **2010 Claims & Defense Tactics Symposium**, presented jointly by the IDC and the **Illinois Insurance Association** is nearing full bloom. It will blossom at the Chicago Marriott Oak Brook on March 25 and 26, 2010. This program, which is unlike anything we have done in the past, will provide a "nuts and bolts" two-day program on how to effectively litigate and take a multi-million dollar, complex, and document-intensive case to trial. It will also provide in-depth training to the insurance professional on how to effectively manage insurance claims associated with these types of cases. The program also will feature a media consultant who specializes in the public-relations aspect of high profile litigation. The attendees will leave this seminar with dozens of valuable strategies on bringing these types of cases to a successful conclusion.

We have secured a faculty that includes some of the most recognized defense and plaintiff attorneys in the country, along with insurance professionals who routinely manage these types of cases. We are in the process of confirming all of our speakers, but at this point we're proud to announce that the following individuals will be speaking at this event.

Shaun McParland Baldwin — *Tressler LLP*
John W. Bell — *Johnson & Bell, Ltd.*
Jill Berkeley — *Howrey, LLP*
Jim Caitlan — *Kroll Ontrack*
Robert Marc Chemers — *Pretzel & Stouffer, Chartered*
Thomas A. Demetrio — *Corboy & Demetrio*
Maria S. Doughty — *Allstate Insurance Company*
Jonathan Fiegen — *Arthur J. Gallagher & Co.*
J. Ric Gass — *Gass Weber Mullins, LLC*
Alan G. Gregory — *Gregory and Meyer, P.C.*
Jeffrey S. Hebrank — *HeplerBroom, LLC*
Thomas Q. Keefe, Jr. — *Thomas Q. Keefe, Jr., P.C.*
Tony Knight — *Sitrick & Company*
David H. Levitt — *Hinshaw & Culbertson, LLP*
Michael M. Marick — *Meckler Bulger Tilson Marick & Pearson LLP*
Michael T. McRaith — *Illinois Dept. of Insurance (invited)*
Brad Nahrstadt — *Williams, Montgomery & John, Ltd.*
Stephen Newbold — *Country Insurance & Financial Services*
Hope G. Nightingale — *Litchfield Cavo, LLP*
Joseph Postel — *Lindsay, Rappaport & Postel, LLC*
Michael T. Reagan — *Herbolsheimer, Lannon, Henson, Duncan and Reagan, P.C.*
Susan Reinhard — *EMCOR Group, Inc.*
Catalina J. Sugayan, Esq. — *Sedgwick, Detert, Moran & Arnold*
Craig Unrath — *Heyl Royster Voelker & Allen*

This is a **must attend event** for claims managers, defense attorneys, insurance adjusters, general counsels, and in-house attorneys! I should add also that each IDC member registration for this two-day event includes one COMPLIMENTARY REGISTRATION for a client. Thus, not only will the education and speakers be top notch, you will have two days of networking with your colleagues and clients.

Our **Technology Committee**, chaired by **Troy Bozarth** of **HeplerBroom, LLC**, is in the planning stage of a Spring program that will feature experts in the field of social networking and marketing via the Internet. This seminar will provide our members with "soup to nuts" information on individual and law firm marketing via social networking sites like LinkedIn, Twitter, and Martindale-Hubbell Connected, a new professional networking site for legal professionals.

Finally, we are proud to announce that we now offer our members access to fast and convenient electronic continuing legal education programs through FastCLE. Whether you need a full-day seminar or just one or two credit hours, there are numerous seminar topics from which to choose. IDC programs are available in multiple formats – DVDs, Video CDs, Audio CDs, and streaming video (online delivery) – and are available with the click of your mouse. Also, all FastCLE programs include program materials and speaker information – just in case you have questions about the topic or the materials. To learn more, visit our website at idc@iadtc.org or call our offices at 800-232-0169 with any questions.

2010 IDC Annual Meeting

The IDC is heading to Broadway … well, sort of. As a part of our 46th Anniversary and annual meeting celebration, we will head to "Broadway in Chicago" for the Billy Elliot performance at the historic Oriental Theater. Billy Elliot is the 2009 winner of 10 Tony Awards, including Best Musical. This will be a great night for recognizing our association's volunteers and getting together with new and old friends. More information will be on the way in early 2010. Until then, please mark your calendar for June 18, 2010, and make plans to join us for our annual meeting and Billy Elliot.

Kudos and Appreciation

During the holiday season, the **IDC Young Lawyers Division** collected toys that were distributed to needy families. Through their efforts, they added hundred of smiles to the faces of children during this past holiday season. Our sincere thanks and appreciation to the YLD for its time and kind gesture on our organization's behalf.

Open Letter to IDC

By: John O'Brien
President, Illinois State Bar Association

My thanks to Rick Hammond for graciously offering me this opportunity to speak directly to IDC members through the *Quarterly*. Our two organizations (the IDC and ISBA) have a long history of working cooperatively to advance the noble causes of our profession, and I know that Rick shares my desire that these joint efforts continue. I applaud the IDC's long and distinguished history of so ably representing its members' interests.

Many IDC members are also ISBA members, including – as I discuss further below – a significant number who serve in ISBA leadership. For those who are not currently ISBA members, consider this a formal invitation to join 30,000 other lawyers who benefit from membership and participation in their state bar association.

As professional groups go, it's difficult to find a more democratic (with a small "d") organization than the Illinois State Bar Association. This is true of the way ISBA leaders are selected (every member gets to vote) and also is true of the opportunities to fully participate in the deliberations and substantive work of the Association (every dues-paying member is eligible).

Rick has asked me to respond to some of the recent buzz in the defense bar that the ISBA is tilted in the direction of the plaintiffs' bar. As a president of ISBA who practices exclusively in the real estate arena, I have never found this to be the case.

The Illinois State Bar Association strives to represent all areas of the practice, and I think we have done a pretty good job of doing this. The ISBA tries not to shy away from any issue of significance to the Profession. And, when we take a position, we are most effective and representative of our membership when everyone has – and uses – a seat at the table.

It is true that an organization of the ISBA's size, whose membership maintains such a diversity of opinions, will never please everyone at the same time. For example, I know that the recent decision of our 201 member Assembly on the issue of prejudgment interest was a disappointment to a number of IDC members. I can assure you that this position was adopted only after open debate and a vetting process that included an opportunity for input from all constituencies. While this process is seldom perfect, we really do make an effort to be as inclusive as possible.

You might find it interesting that a look at the backgrounds of the five most recent ISBA presidents shows that only one was a plaintiffs' trial lawyer. Others were a big firm commercial litigator, an administrative lawyer, a family lawyer, and a civil defense lawyer. Go back 10 or 15 years and the same ratio would apply. Further, some of the most sought-after assignments in ISBA are held by defense lawyers. Our judicial evaluations committee that reviews supreme and appellate court candidates, for instance, has been chaired in recent years by Paul Bown of Brown, Hay & Stephens, and by Al Sternberg of State Farm. Our Strategic Marketing Committee is chaired by John Bailen of Bruce Dorn. Robert Park of Snyder Park & Nelson chairs our Civil Practice and Procedure Section. Other examples abound in our CLE, legislation and publications committees. We have greatly benefited from the involvement of these terrific practitioners!

Numerically, ISBA membership is dominated by transactional lawyers. A snapshot of the typical ISBA member is a lawyer between 45-50 years old, practicing in a firm of five or fewer lawyers, and involved most likely in trusts/estates or real estate work. Trial lawyers, both plaintiffs and defense, account for perhaps 10 percent of our members.

So why should those of you who are not yet ISBA members accept my invitation to join your state bar? Besides the obvious (a seat at the table), let me describe some benefits members receive: Fast Case legal research, free to every member; ISBA E-Clips, our electronic Illinois and Seventh Circuit case digests sent to every member every workday; CLE programming that is practical and affordably-priced for members; ISBA Mutual, lawyer-owned and managed professional liability insurance; and maybe the most important – the intangible benefit of opportunities to interact with other

About the Author

John G. O'Brien is the president of the *Illinois State Bar Association*. A sole practitioner from Arlington Heights he is the founder and chairman of the Illinois Real Estate Lawyers Association. John serves on the boards of Attorneys Title Guaranty Fund and the ISBA Mutual Insurance Company. He also serves on the MCLE Board of the Supreme Court.

lawyers from across the state, whether professionally or socially.

The profession needs all of us. As for the ISBA, I want you to know how much we need your members' views so that a significant component of the bar is afforded a balanced perspective on issues.

One of the greatest lessons I've learned through my leadership at ISBA is that "plaintiffs' lawyers" may often be adversaries in the courtroom, but that they are just the same as "defense lawyers" in that they are all "trial attorneys."

One of the greatest lessons I've learned through my leadership at ISBA is that "plaintiffs' lawyers" may often be adversaries in the courtroom, but that they are just the same as "defense lawyers" in that they are all "trial attorneys." The vast majority of the time, there are very few issues that our ISBA "plaintiffs' lawyers" brothers and sisters will not constructively discuss and work towards a mutually agreeable solution. And in those situations where there is an agreement to disagree, it is done with civility and grace.

I am sincere in extending this invitation to members of the defense bar. Your membership in IDC reveals you are a joiner, one who believes that individuals, working together, can further the interests of the whole. I invite you to consider that this is your state bar, and we are on the proverbial two-way street: We need each other.

I welcome any comments, complaints or compliments. I can be reached at (847)593-5100 or email me at **jobattny@aol.com**.

Editor's Note

By: William K. McVisk
Johnson & Bell, Ltd.
Chicago

Timing is everything. On the day I write this, the last possible day to complete the column and get the *Quarterly* out, the Illinois Supreme Court issued its long awaited decision in *Lebron v. Gottlieb Memorial Hospital*, Nos. 105741 & 105745 (Ill. Feb. 4, 2010), declaring that legislation enacting caps on non-economic damages in medical malpractice cases was unconstitutional on its face. There has been much speculation among the medical malpractice bar, physician organizations and others concerning the reasons the supreme court delayed its decision, which was originally scheduled to be announced on December 17, 2009, until February 4, 2010. Was it due to concerns that it could derail health care reform in Congress? Was the timing of the primary elections a factor? I certainly have no basis on which to do anything more than speculate. What I do know, though, is that the court's decision to delay the opinion means that this issue has no articles dealing with the decision, because it came out too late. I can assure you though, that the next issue of the *Quarterly* will have a well reasoned analysis of the decision and its impact.

My opening paragraph should not leave you thinking that this issue of the *Quarterly* is lacking. In fact, any defense practitioner should find much of interest in this issue. On the practical side is the inauguration of a new feature in which defense lawyers seek the thoughts of judges from around the state concerning issues of importance to defense attorneys. This column focuses on judges' views of *voir dire*. To create this column, four IDC members interviewed judges from Cook County, and the third, fourth and fifth appellate districts concerning their views. We hope that this column will continue our tradition of providing pragmatic tips as well as scholarly reviews of the law. If you have ideas for issues that

(Continued on next page)

Editor's Note *(Continued)*

we should consider, or wish to help with the column, please contact any member of the committee writing the column, Al Pranaitis, John Robertson, Paul Lynch and me.

More typical of the *Quarterly* are the feature article written by James DeNardo on jury trials for employment law claims and the Monograph, written by Barry Brontine, dealing with the emergency defense to medical battery. Jim DeNardo's article provides a thorough explanation of the various statutory provisions on both the state and federal level dealing with employment claims, and the impact of the Illinois Supreme Court and subsequent First District Court of Appeals decisions in *Blount v. Stroud.* This article is important for anyone who deals with employment discrimination law.

Counsel advising physicians who provide any kind of emergency treatment to patients whose ability to consent is compromised need to know how the courts will treat the physician's decisions when the patient is unhappy about being saved.

Similarly Barry Brontine's Monograph give us an in depth look at the issues relating to medical battery and the legal considerations physicians have when they are faced with life-and-death decisions and unresponsive patients. While most medical malpractice cases will not present a question of patient consent to emergency treatment, this is a problem that emergency medicine physicians must deal with often. Counsel advising physicians who provide any kind of emergency treatment to patients whose ability to consent is compromised need to know how the courts will treat the physician's decisions when the patient is unhappy about being saved. As I was reading Barry's article, which points out that the courts have ruled that the emergency exception to medical battery does not apply if the physician had reason to believe that the patient would refuse treatment if given the opportunity, I kept wondering whether these courts would apply that rule in suicide cases. It is certainly arguable that a suicide patient would not consent to treatment if he or she was awake and capable of consent. Does that mean that emergency treatment for a suicide patient is medical battery?

Medical malpractice defense lawyers will also find Edward Aucoin's column on apparent agency to be important. Ed describes recent decisions on the use of disclosures to avoid a finding of apparent agency for emergency department patients, and the difficulty of ensuring that a disclosure is sufficiently clear to enable a hospital to win summary judgment on the apparent agency issue.

Bill Tribler continues his tradition of providing us with practical and colorful tips, this time focusing on proper pronunciation and its effect on juries. His column also reminds us of the importance of understanding the people of the locale where the trial will take place.

Dave Lewin reports on the evolution of the targeted tender rule in the insurance law column, discussing a recent First District opinion which surprised most insurance coverage lawyers by ruling that an excess "other insurance" clause trumps the targeted tender rule. All Illinois insurance coverage lawyers will watch the evolution of this issue closely.

Brad Ingram's Civil Rights column gives us new information about civil rights law – the extent to which a student at a state university has a federally protected property interest in continuing education – and also illustrates the evolution of the federal notice pleading doctrine after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). As always, defense lawyers must be experts both in the substantive area of law in a case and in the procedural rules.

I also want to highlight the letter from John O'Brien, President of the Illinois State Bar Association. In the last issue of the *Quarterly*, Bill Tribler made a strong case that defense lawyers should join ISBA, despite or perhaps because of its perceived tilt in favor of the plaintiffs' bar. Mr. O'Brien furthers this argument and invites defense lawyers to join the state bar association.

Finally, this issue provides the statements of various candidates running for the IDC Board of Directors. Please take a moment to review these statements and cast your votes. The IDC Board consists of members who volunteer their time and effort to make IDC a strong organization and voice of the defense bar in Illinois.

View from the Bench

Interviews By:
Paul R. Lynch
Craig & Craig
Mt. Vernon

William K. McVisk
Johnson & Bell, Ltd.
Chicago

Al J. Pranaitis
Hoagland, Fitzgerald, Smith & Pranaitis
Alton

John W. Robertson
Robertson, Wilcox & Statham
Galesburg

Voir Dire

Preface

This is the first of what is anticipated to be a series of articles derived from interviews of judges throughout the State of Illinois on various aspects of civil trial practice. For this inaugural article, the topic of *voir dire* was chosen. Four IDC Board members conducted the interviews. Paul Lynch interviewed the Honorable Patrick J. Hitpas from the 4th Circuit. William McVisk interviewed the Honorable Barbara A. McDonald from Cook County. Al Pranaitis interviewed the Honorable Barbara L. Crowder from the 3rd Circuit. John Robertson interviewed the Honorable James B. Stewart from the 9th Circuit. A script of questions was prepared in advance and was generally followed for each interview. The questions and a representative sampling of the judges' answers appear below, after selected vitae of the respective judges.

Vitae

Barbara L. Crowder, Circuit Judge

Judge Crowder's practice prior to her becoming a judge included work as an assistant state's attorney and special public defender and as a general practitioner with a concentration in family law. She has been a judge, sitting in Madison County, for 11 years and has conducted *voir dire* in approximately 40 civil trials.

Patrick J. Hitpas, Circuit Judge

For 20 years before becoming a judge, Judge Hitpas had what he describes as a "general practice, small town practice in Carlyle, Illinois." He handled matters in the areas of real estate, estate planning, probate and civil practice. His civil practice was "about 50% plaintiff, 50% defendant." Judge Hitpas has been a judge for 17 years and has presided over jury selection in approximately 150 civil trials and 230 criminal trials in nine different counties.

Barbara A. McDonald, Circuit Judge

Judge McDonald's initial private practice primarily involved defense of insurance agents and brokers in professional malpractice claims. She then moved to the Office of the Corporation Counsel of the City of Chicago, where she defended a wide variety of tort claims, including medical malpractice cases. Judge McDonald has been a judge for 13 ½ years in Cook County, first in the Municipal Department, then as a jury trial judge in the Law Division where currently she is in the Commercial Calendar Section. Judge McDonald has conducted *voir dire* in over 300 cases.

James B. Stewart, Circuit Judge

Judge Stewart also had a broad general practice prior to becoming a judge. He handled real estate matters, civil litigation and criminal cases. He has presided over jury selection in 50 to 75 trials, both civil and criminal, primarily in Knox County, but also in each of the other five counties in the 9th Circuit.

Use of Supplemental Juror Questionnaires

Q. Do you allow use of written supplemental juror questionnaires? If so, what criteria do you use for determining whether to allow them and how do you handle their use?

Judge Stewart: It depends upon the complexity and seriousness of the case. The more complex the issues and the more serious the case, it tends to justify a supplemental jury questionnaire. I think it saves time but in less serious and less complex cases I think it wastes time. We have a capital litigation case coming up in the next year or two and I fully expect to utilize a supplemental jury questionnaire in that instance.

(Continued on next page)

View from the Bench *(Continued)*

Judge Hitpas: If there is a sensitive matter that a juror really doesn't want to discuss in front of an entire court room of people, I think a supplemental written questionnaire to the jury would work well. It avoids the juror having to disclose things in front of 50 or 60 other people that they would rather not talk about. For example, if they are the victim of some type of crime that perhaps they don't want to discuss in front of everyone, I think it is certainly appropriate in those cases.

Judge McDonald: They would be most appropriate in cases involving sensitive areas of jury questioning or where the attorneys needed to have more information than usual to ascertain juror bias. I would not allow the questions to be argumentative or to unduly comment on the evidence.

Method of Examination of Prospective Jurors

Q. What is your method of examining the prospective jurors—all at once, or a certain number at a time, or some other way? Why do you prefer examining in that way?

Judge Crowder: I do everybody at once. Because when I did jury trials as a practicing attorney, we did four at a time and the problem was you never really got to know so much who you might get to. The reasons that I like questioning the whole bunch at a time is I think it's faster, because the jurors hear the questions the other jurors are asked and they're kind of ready with their answers, and I think it's fairer to the parties. The whole point of the selection process is to get a jury that each party is comfortable with. To see who is ahead gives them a chance to think through how they might want to use their challenges.

Judge Hitpas: The courtrooms I work in traditionally are not large enough that you can question a lot of jurors because the acoustics aren't picking up and that sort of thing. It just becomes unworkable. What I generally do is I seat sixteen in the jury box and place some chairs next to the jury box. I question the entire panel of sixteen. I then turn it over to the plaintiff's lawyer, then the defendant's lawyer to question the same jurors. After the sixteen are questioned, we usually sit and do another sixteen identically the same way. After thirty-two are questioned, we do all the challenges back in chambers and outside the presence of the jurors, doing, obviously first, cause challenges, then going into peremptory challenges. Then at that point in time we do it in panels of four, which I think the rule requires. When we do the panels of four, I have always allowed back striking within the panel of four. I know there are judges that don't, but I do. I allow back striking within the panels until both sides are locked in four.

Restraints on Lawyer Questioning

Q. What restraints, if any, do you place on lawyer questioning during *voir dire*, e.g. time limits, method of questioning, etc.? Why?

Judge Hitpas: I have never given a lawyer a time limit, and it has never been abused. Not unduly. I think some of them got a little long. But, I don't usually give a time limit. I emphasize that I do not want the lawyers to be repetitive of what I have already covered. If they are a little repetitive or want to clarify something, not a problem. The lawyers I know, I don't even have to say this, but the lawyers I don't know, if I'm concerned, I usually tell them you are operating at your own risk anyway. If you get too repetitive, you're going to hurt yourself. So, use your own judgment. I usually never have to stop anyone or do much by way of reining anyone in.

Judge Stewart: I do not really place many restraints on the attorneys other than telling them in advance that I do not want questions to be repetitive, if at all possible. We do not want jury indoctrination as to the facts of the case or the law. Those are fairly common in most instances but as a general rule, especially in civil cases, I believe this is the lawyer's case and they have a stake in a fair trial and they are the ones that will have to make determinations with regard to peremptory challenges or whether to argue a challenge for cause against an individual person so I give quite a bit of latitude.

General Advice about Lawyer Questioning

Q. What general advice about conducting *voir dire* in a civil case would you give to attorneys?

Judge Crowder: It's the time to explore for feelings and attitudes that you worry will override the presentation of what the law is and that's really the whole thing that people are searching for. Everybody comes to court with preconceived ideas. I know we tell them you can't have them, but what we really mean is that you won't unfairly apply those ideas here. Everybody comes in with an outlook, so I think it's fair to make sure that you have explored their attitudes and you try to ask questions from different perspectives to do that. That and my other advice, would be to be personable and try to

really get a feel for the jurors and let them get a feel for you because partly you are looking for somebody that you think will mesh with your presentation style.

Judge Stewart: I would say be prepared. The lawyers that are prepared and have a good idea what kind of juror they are looking for and what kinds of things can cause problems are the ones that can ask the questions most expeditiously and without repeating themselves. Being prepared and being able to conduct *vior dire* in an expeditious way, I believe a jury appreciates it. Jury service is not the first thing a juror volunteers to do if there are other possibilities out there. They are willing to do their duty for the most part but I have found that they don't want to have their time wasted and if attorneys are prepared with regard to their case and the kind of questions they want to ask the juries appreciate that.

Judge Hitpas: From a plaintiff's perspective, I would explore with the jurors whether they have a problem with the plaintiff even bringing a lawsuit. There are jurors who just don't like anyone who brings a lawsuit, especially if they have never had to do it in their family. If I were a plaintiff's lawyer looking for any kind of substantial verdict, I would definitely explore that area. That's a tough area to cover, but I think that they really need to cover it. I think we need to get –we are obviously not allowed to get jurors to so-called "commit" to a verdict – but to get something in the form of a commitment from the juror that if the plaintiff proves everything that's required of the plaintiff, that, yes, they can return a verdict for money damages. There has been a lot of media attention in recent years about lawsuits and I think the plaintiff in a civil case that doesn't at least address that is making a mistake.

If you're a defense lawyer, again, I think I would want to get something close. You can't get an actual commitment, but if you can get something close to a commitment that regardless of how difficult it may be and how sympathetic they may be to a plaintiff, especially in a serious injury case, that if the plaintiff fails to prove the case, they could return a verdict to the defendant, and get something close to a commitment. In general, for both plaintiffs and defendants, I think the most important thing that I have seen over the years is to tailor the jury selection to the case on trial. I think some lawyers try to use the same questions in every case and yes, you can do that, but if the case involves drinking alcohol, I think both the plaintiff and defendant have got to hit that issue on jury selection. If it involves a product, I think they have got to do some discussion of the product, without getting into all the facts of the case. If it involves a chain saw, then I think they probably better inquire about jurors' knowledge of chain saws. I think tailoring it to the particular facts of the case is important for plaintiffs and defendants. I see all the time that it isn't done.

Effective Lawyers

Q. Are there any things that stand out in separating lawyers who are excellent at conducting *voir dire* from those who are not?

Judge Hitpas: The best I have seen are people who have a quality that you probably can't teach. They just have a quality that they are good with people. They can relate to people. They know how to ask a question and it's not offensive to a juror. The good ones just have a knack to be pleasant, likeable, and they never ask a question that embarrasses a juror. [On the other hand,] I think they also have got to use language that the jurors can understand. You know lawyers use one word I hear all the time. Lawyers use the word "subsequent" all the time, and jurors and witnesses don't pick up on what that means.

Judge Crowder: The lawyers that I believe have done a better job are the ones that listen very carefully to what the jurors are saying and sometimes have a follow-up question that is pertinent to the answer. You can tell when a lawyer is really not listening closely because they go on to another question without follow up. Not only can I tell that, but also I believe the jurors can tell that. And if you are asking them a question, presumably it's because you want to know their answer. One way that people know you are listening to them is to look at them when they talk to you.

Injecting Humor

Q. What do you think about attorneys injecting humor into *voir dire*?

Judge Hitpas: I think it is good, if it fits. If it is forced, it just doesn't work. It's got to fit and it can only happen when it does happen.

Judge McDonald: I see no reason not to inject humor into *voir dire* as long as it is done in a manner which does not suggest the attorney does not take the case seriously. It is best if the humor appears, and is, spontaneous. Often it helps if the humor is self deprecating, as it helps the jury connect with the attorney as a person.

(Continued on next page)

View from the Bench *(Continued)*

Things that Get Lawyers in Trouble

Q. What types of things get a lawyer "in trouble" with the judge when conducting *voir dire*?

Judge McDonald: Besides violating an in limine order, rudeness is the thing most likely to get a lawyer in trouble.

Judge Hitpas: Embarrassing a juror is probably the most obvious thing. Trying to get into too-detailed of a discussion of the law is going to generally get a lawyer into some trouble.

Judge Stewart: Any time a lawyer crosses the line with the goal of indoctrinating the jury. If they waste time and are repetitive in terms of the questions they are asking, that causes me a problem.

Judge Crowder: Well, if you get into an area that I've already ruled off limits, or get too close to that area, I'm not going to be very happy about that. Or if you criticize the court system. It's fair to ask people how they feel about lawsuits being brought and all of that, but to start out with prefacing that by criticisms of the court system and that people shouldn't get to bring lawsuits in some areas? We are the court system. So I'm not going to be very happy about that either.

Questioning on Sensitive Subjects

Q. Sometimes civil suits involve sensitive subjects, i.e. subjects that are important to selecting jurors, but are very difficult to question jurors about. Do you have any suggestions as to how a defense lawyer can best handle questioning in such situations?

Judge Hitpas: This is a perfect example for a written questionnaire that might only be three or four questions. [Otherwise,] routine questions would be done in open court like we always have, but one or two questions perhaps are so sensitive we would just take every juror back and ask them privately.

When Not to Question

Q. Are there any circumstances under which a defense lawyer should not ask any questions of a particular prospective juror? If so, what are the circumstances?

Judge Hitpas: I would probably engage every juror a little bit as we talked about before. It could be minimal. I think it would be a rare case where I would not talk with them.

Judge Stewart: In those instances where the Court has inquired of the pool, opposing counsel has inquired of the pool and apparently a good enough job was done in soliciting responses that it simply was not necessary. Young attorneys, especially, all think they have to say something but the experienced trial counsel know that they do not have to and in fact, brevity, is often far better in getting to the point.

Judge Crowder: If what has been elicited so far from that juror would give a rational person a belief that the juror is going to be excused for cause and you're pretty comfortable that juror is going to be excused for cause, and if you don't want to gamble [that the juror might say something that poisons the entire panel], you can bring the other attorney up and talk to me in a sidebar. Another thing is if somebody is in a lawsuit currently. He is not going to be on that panel. When the attorneys start asking him questions I tell them to stop. It is wasting time.

Opposing Counsel Going Beyond the Bounds

Q. Is there a particularly effective way for a lawyer to handle a situation where opposing counsel is continually going "over the line" in questioning prospective jurors?

Judge Stewart: The way I handle it is if an objection is made, counsel can either make a formal objection and then approach for a sidebar conference with me, possibly out of the presence of the individuals being questioned or at least off to the side where we can make a record of what is happening, where the lawyer may have crossed the line and deal with it.

Judge McDonald: In situations where the other attorney is continuously going over the line, by improperly commenting on evidence or other improper questioning, opposing counsel should object the first time it occurs and if it occurs again ask for a sidebar.

Internet Searches

Q. Has the availability of the internet affected jury trials? If so, during *voir dire*, how can attorneys most effectively deal with the possible effects of the internet on the trial?

Judge Crowder: Well, of course, the part of the new I.P.I. 1.01 that you read to the jury at the beginning tells them they can't go on the internet, they can't research, they can't use

computers to . . . they can't do any of those things. We make sure we tell them they cannot use the computer system that is available to the public downstairs in this court. We had that happen here.

Mistrials during *Voir Dire*

Q. What types of things are likely to lead to mistrials during *voir dire* and how can lawyers avoid them?

Judge Crowder: Violating an order in limine and continuing to question a prospective juror on a subject where it's pretty clear they have strong feelings about one of the parties. Let's not go too far with that if it looks like cause has already been met.

Judge Hitpas: Strong opinions. If one juror blurts out some very strong opinions, it certainly can lead to a mistrial. Some things are just beyond our control. We do our best to prevent them, but they happen. I will give you an example. I was trying a criminal trial a number of years ago. We had a motion in limine prior to trial that the defendant's prior conviction for manslaughter would be kept out of the trial. The motion was granted. About the third question to the jurors was, "Do any of you know the defendant, Mr. So and So?" A guy raises his hand, and I said, "How is it that you know Mr. So and So?" And he said, "He killed my uncle." Well, that took care of that panel. So some things can't be avoided.

Weeding out Problem Jurors

Q. Do you have any suggestions about how a lawyer can identify the prospective jurors who pose the biggest problems for the positions the lawyer will be advocating during the trial?

Judge Hitpas: I would look to be getting eye contact from the lawyers. I watch jurors all the time, and if they are looking the other direction, and won't look the lawyer in the eye, I would be cautious about that juror.

Judge Crowder: Don't we all wish we could, because that's really why the lawyers question. Short of watching their body language and listening to them, I don't know. I mean some of them are making it pretty clear that they're not overjoyed with one perspective or the other—not to the point that they could not be fair, but sometimes there is body language that I'm not sure people pick up on, such as, the juror looks happier talking to one side or the other.

Rehabilitating Prospective Jurors

Q. Do you have any suggestions for what lawyers should or should not do in attempting to "rehabilitate" a prospective juror whose prior answers might lead to the juror being excused for cause?

Judge Crowder: If you've asked them something and you're worried that the answer they gave or the way they phrased it might have them excused, but you really think that perhaps they weren't listening carefully or they didn't say it the best way, I'd follow up with that.

Judge Hitpas: I rarely think it works. I think you can try, but I think it rarely works. If it is a cause challenge, and a pretty obvious one, I probably wouldn't explore it too much.

Mistakes in Making Challenges for Cause

Q. What mistakes do lawyers make in asking for a juror to be excused for cause?

Judge Hitpas: Well, if it is done in the fashion that I select the jury, I don't think you can really make a mistake. If you are back in chambers, and the jurors don't know who is being asked for cause, I think you can make as many [as you feel appropriate.] I mean, you can certainly ask for too many. I think a lawyer would lose his or her credibility if they wanted to challenge too many for cause.

Judge Crowder: I don't know that I'd say there's any mistake at all if you think the facts are there. We do it outside the jury's presence. I remember days when you picked a jury and you were just pretty much telling the judge in front of them that the person should be excused. That's horrible. We don't do that now. I don't think anybody does it that way. Maybe, but I know I don't. It's all outside the presence of the jury. So if you think there is a basis for cause, a mistake would be made not to ask.

Mistakes in Using Peremptory Challenges

Q. What mistakes do lawyers make in exercising peremptory challenges?

Judge Crowder: I would hate to say that I know better than anybody that is handling their own case. I mean if it's a really big deal and you have challenges left, go for it. But those

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View from the Bench *(Continued)*

are individual calls. You know what you're looking for in jurors. Some people hire consultants for goodness sake. I presume the people that are jury consultants must add something to the mix. But since I never had the experience of using one myself, I couldn't tell you whether I think they're better than the gut level feeling of a lawyer looking a juror in the eye and what they think.

Judge Hitpas: I don't know if there is a mistake to be made necessarily. I think it sometimes is just a feeling you have about a juror or their reaction to questioning. I would look for leaders, whichever side you are dealing with. If someone strikes me as a leader for the plaintiff, and I am the defendant, I am going to use a challenge on that person, and vice versa. So I would look for somebody who would be a leader, whether it be at a school, or a bank, or wherever they work. If they are in a leadership position, they are likely to be a leader on the jury. Those are the ones I would be very cautious of.

Final Thoughts

Q. Is there anything else that I haven't thought to ask you that would be advice you think lawyers ought to hear in terms of picking juries?

Judge McDonald: I disagree with most attorneys about the significance of *voir dire* and do not believe that an attorney can perform a psychological assessment of the prospective jurors to determine which ones are likely to be favorable to the attorney's side. Realistically, the most that can be accomplished is to determine obvious biases, to determine which jurors are likely to identify with the opponent, and to begin developing rapport with the jury. Questions designed to determine bias and to determine which jurors had experiences similar to those of the other side are most appropriate. Also, it is important for an attorney to have a relaxed and friendly demeanor and to stand up while questioning the panel rather than sitting at counsel table.

Judge Crowder: I think it's always helpful if the lawyers looks like they're happy to be there and that this is important to them and that they're not distracted. I know things are going on and there's other stuff and there's this and that but the jury is watching everybody from the moment they walk into the room, every second they're in there. There may be 40 of them, but they're all watching the lawyers at both tables and the clients that are there. I am sometimes surprised to see what I think might not be sending the right message, but it happens. I would just remind everybody that they are "on" every minute.

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Legal Ethics

By: Michael J. Progar
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A Lawyer's Duty to Monitor the Progress of a Case

The most concise rule of the Illinois Rules of Professional Conduct of 2010 consists of only 13 words. Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client." The language of this rule remains unchanged from the previous version of the Rules. The Illinois Supreme Court recently reminded lawyers of the potential consequences stemming from a lawyer's failure to monitor the progress of a case properly.

In *Keener v. City of Herrin*, 2009 WL 3212336, (Ill. October 8, 2009), the Illinois Supreme Court concluded that the plaintiff's notice of appeal was not timely filed, because the circuit court lacked jurisdiction to consider the plaintiff's motion to reconsider. The facts relevant to a discussion of the lawyer's duty of diligence are as follows.

The plaintiff filed a wrongful death lawsuit against a municipality, alleging that the death of the plaintiff's decedent had resulted from the city's negligence. The city filed a motion to dismiss, which was granted, and the court allowed the plaintiff 28 days within which to file an amended complaint. The plaintiff then timely filed an amended complaint, which added two additional counts. The city again filed a motion to dismiss.

On August 8, 2005, the court held a case management conference. The court's docket entry for that date stated: "Attys. present for C.M.C. Rule on motion to dismiss on Sept. 9, 2005. Plaintiff will stand on pleadings." 2009 WL 3212336, at *2

The court's next docket entry was dated September 13, 2005, and stated:

> Pending is defendant's motion to dismiss. The motion is granted and the case is dismissed. Plaintiff has elected to stand on these pleadings so no amendment of the complaint is needed. The cause is dismissed and there is no reason to delay an appeal herein. Clerk to close file.

Id. at *2.

A stamp appearing immediately after that entry in the docket indicated that a judicial secretary was to send a copy of the sheet to all attorneys of record. However, that was apparently never done. The plaintiff's attorney took no further action for more than seven months.

The circuit court ultimately denied the plaintiff's motion to reconsider on August 25, 2006, and affirmed its previous ruling. The plaintiff then filed a notice of appeal within 30 days of the date of that order, on September 18, 2006.

The Supreme Court held that the circuit court's docket entry of September 13, 2005 constituted a final order, from which the plaintiff had 30 days to file a notice of appeal. The plaintiff's motion to reconsider did not comply with the requirements for a section 2-1401 petition, nor did the circuit court's subsequent actions. The Illinois Supreme Court stated, "In sum, it is all too clear that the circuit court's action was nothing more than an attempt to give plaintiff an order from which she could timely file an appeal." *Id*. at *7

The new comments to Rule 1.3 address a number of reasons why a lawyer may fail to act with diligence in representing a client in a lawsuit. Those include personal inconvenience to the lawyer, an excessive work load, and simple procrastination.

In *Keener*, the attorney for the plaintiff apparently was present at the case management conference on August 8, 2005. The court indicated on that date that it would rule on the defendant's motion to dismiss on September 9, 2005. (It ap-

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Legal Ethics *(Continued)*

pears that the court actually ruled on the motion to dismiss on September 13, 2005.)

In the motion to reconsider, the plaintiff's attorney asserted that the parties had requested that the court hold the defendant's motion to dismiss in abeyance while the parties conducted a discovery deposition. However, that assertion is contradicted by the court's docket entry for August 8, 2005.

The docket entry for that date suggests that the court advised the attorneys for the parties that a ruling on the defendant's motion to dismiss was forthcoming. However, in the plaintiff's motion to reconsider, the plaintiff's attorney stated that he did not discover the dismissal of the case until August 7, 2006, nearly eleven moths later. As the Supreme Court stated in its opinion, as of August 8, 2005, "a ruling was imminent, had anyone bothered to check the court file." *Id*. at *5.

This case points out the value of an appropriate diary or tickler system, in which each matter a lawyer is handling has some future date. In *Keener*, an obvious future date to be diaried would have been September 9, 2005, for the court's ruling on the defendant's motion to dismiss. If the court informed the lawyers at the last case management conference that its ruling on the motion to dismiss would be mailed, the matter could have been diaried for September 15, 2005, a week after the court's anticipated ruling date. If the lawyer did not receive the ruling by that date, further inquiry would be required.

Perhaps no less troubling is that after the August 8, 2005 case management conference, the next apparent activity on the case took place on April 7, 2006, when the plaintiff filed a response to the defendant's motion to dismiss. It is not clear why that was done, since the plaintiff's attorney had apparently informed the court at the August 8, 2005 case management conference that he intended to stand on the pleadings.

Interestingly, after the plaintiff filed her motion for reconsideration, the defendant's attorney asked that the case be set for a status hearing. That would suggest that the defendant's attorney might also have been unaware that the case had been dismissed.

The Supreme Court's opinion suggests that more may have been going on in this case than meets the eye. However, it provides a timely reminder for lawyers to pursue the prosecution or defense of lawsuits in a prompt, diligent manner. Rather than relying upon memory, be certain that each pending case has a future diary or tickler date, as well as a plan for resolving it within a reasonable period.

Evidence and Practice Tips

By: Joseph G. Feehan
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Illinois Supreme Court Holds that Expert Testimony is Not Required to Support a Claim for Negligent Infliction of Emotional Distress

In *Thornton v. Garcini*, 2009 WL 3471065 (October 29, 2009), Toni Thornton brought an action for medical negligence and negligent infliction of emotional distress against defendants Dr. Francisco Garcini, Silver Cross Hospital, and individual nurses.

The plaintiff's lawsuit arose out of the death of her son, Jason, who was born prematurely in a breech position at the gestational age of 24 weeks. During childbirth, Jason's head became stuck in his mother's vagina, with the rest of his body outside the vagina. The infant died when the nurses at the hospital were unable to complete the delivery. Dr. Garcini, an obstetrician, arrived at the hospital an hour and ten minutes later.

The plaintiff, as administrator of Jason's estate, brought wrongful death and survival claims against the defendants which alleged medical malpractice. She also brought a claim on her own behalf for infliction of emotional distress.

At trial, Dr. Garcini testified that he initially learned that Ms. Thornton was at the hospital having contractions when he received a call from a nurse at his home at 6:35 a.m. Dr.

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Garcini gave the nurse certain instructions. Thirty-five minutes later, at 7:10 a.m., the infant partially delivered in a breech position. There were nurses present for the delivery, but no physician was present. Jason became entrapped at the neck during the delivery so the nurses called Dr. Garcini again. Garcini instructed the nurses not to deliver the infant unless it could be done easily, because of a risk of decapitation. After being informed of the partial delivery, Dr. Garcini took a shower and then drove to the hospital. The nurses were unable to deliver Jason, and he died before Dr. Garcini left his house. Upon arriving at the hospital, Dr. Garcini delivered the dead infant. The testimony established that Ms. Thornton waited for over an hour, with the deceased infant partially delivered, before Dr. Garcini arrived to complete the delivery.

Ms. Thornton testified about her emotional status as a result of lying in a hospital bed for over an hour with her deceased son partially delivered. The plaintiff testified that there was nothing she could do but "sit there like that with my baby." She further testified that she has these thoughts "all the time" and she has had thoughts of suicide because "it was so horrible and I'm always reminded of that hour and ten minutes that I sat there with him." Plaintiff stated that she became depressed, and could not eat or sleep.

The infant's father and Ms. Thornton's mother testified about the adverse effects that Jason's death and the circumstances of the delivery had on the plaintiff. No expert testimony was presented to support the plaintiff's claim for emotional distress.

At the first trial, the jury found in favor of Dr. Garcini and the nurses on all claims. However, the jury found against Silver Cross Hospital on the emotional distress claim and awarded Ms. Thornton $175,000. The plaintiff filed post-trial motions against all of the defendants. She then settled all of her claims against Silver Cross Hospital and the nurses for $175,000 in return for a release of claims and satisfaction of judgment. The trial court later denied the plaintiff's post-trial motion with respect to Dr. Garcini.

The plaintiff appealed the jury's verdict relating to Dr. Garcini on various grounds, including juror bias and jury instructions issues. The Third District Appellate Court reversed and granted plaintiff a new trial. *Thornton v. Garcini*, 364 Ill. App. 3d 612, 846 N.E.2d 989 (3d Dist. 2006).

The plaintiff then proceeded to trial solely against Dr. Garcini. After the second trial, the jury found in favor of Dr. Garcini on the medical malpractice claims but found him guilty of negligent infliction of emotional distress and awarded damages of $700,000. Dr. Garcini appealed, arguing that Ms. Thornton failed to prove negligent infliction of emotional distress because she did not introduce any expert testimony to support her claim that she suffered emotional distress due to Dr. Garcini's acts or omissions. Specifically, Dr. Garcini argued that the plaintiff failed to introduce expert testimony to establish that her emotional distress was caused by the delay in delivering the deceased infant. Dr. Garcini also contended that he should receive a setoff of $175,000 due to the settlement previously paid by Silver Cross Hospital.

Based on personal experience alone, the jury could reasonably find that the circumstances of this case caused plaintiff emotional distress.

Dr. Garcini argued on appeal that in the case of *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991), the Illinois Supreme Court established that expert testimony is required to prove a claim for negligent infliction of emotional distress. In response, plaintiff contended that the *Corgan* decision established that expert testimony was *not* required to prove emotional distress. In *Corgan*, the Supreme Court primarily held that a plaintiff is not required to prove physical symptoms to support a claim for emotional distress and commented that "jurors from their own experience will be able to determine whether . . . conduct results in severe emotional disturbance." *Corgan*, 143 Ill. 2d at 312. The Third District Appellate Court rejected Dr. Garcini's arguments and affirmed the jury's verdict of $700,000. *Thornton v. Garcini*, 382 Ill. App. 3d 813, 888 N.E.2d 1217 (3d Dist. 2008)

The Illinois Supreme Court also rejected Dr. Garcini's contention that the *Corgan* decision should be interpreted to require expert testimony to prove emotional distress. The *Thornton* court stated:

> We agree with plaintiff that *Corgan* does not require expert testimony to establish emotional distress. The absence of medical testimony does not preclude recovery for emotional distress. Rather, '[t]he existence or nonexistence of medical testimony goes to

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> the weight of the evidence but does not prevent this issue from being submitted to the jury.' (Citation omitted.)
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> Based on personal experience alone, the jury could reasonably find that the circumstances of this case caused plaintiff emotional distress. Plaintiff explicitly testified on her experience of having the deceased infant protrude from her body for over an hour while awaiting Dr. Garcini's arrival. Plaintiff, the infant's father, and plaintiff's mother all testified about plaintiff's behavior and emotional state following the event. The record sufficiently established that plaintiff suffered emotional distress. *Thornton*, 2009 WL 3471065 at *3,*4.

Dr. Garcini also argued that expert proof of causation was necessary because there was more than one possible cause of the plaintiff's emotional distress. Dr. Garcini contended that expert testimony on causation was needed because the plaintiff simultaneously lost her infant and suffered a traumatic event from having the infant protruding from her body until his arrival. Dr. Garcini argued that expert testimony would have explained whether the plaintiff's emotional distress was due to the death of her baby or the events relating to delivering a dead baby. The *Thornton* court rejected Dr. Garcini's arguments by simply proclaiming that "[v]iewing the evidence in the light most favorable to the plaintiff as we must here, the trial testimony established that she suffered emotional distress because of defendant's delay in delivering the deceased baby." *Id.*, at *5.

The *Thornton* court also rejected Dr. Garcini's claim that he was entitled to a setoff of $175,000 due to the settlement reached with the hospital and nurses. The Supreme Court found that Dr. Garcini had forfeited his ability to assert a setoff because he did not raise the issue until he filed a post-trial motion. The *Thornton* court examined Section 2-608 of the Code of Civil Procedure and found that it requires a defendant to assert a claim for setoff "in the pleadings." (735 ILCS 5/2-608) The *Thornton* court suggested that Section 2-608 provides that a setoff may be raised as a cross-claim in the defendant's answer to the complaint. Accordingly, the *Thornton* court rejected Dr. Garcini's request for a setoff because he did not request a setoff until after the conclusion of the trial.

Conclusion

The *Thornton* decision establishes that a plaintiff is not required to introduce expert testimony to recover damages for emotional distress – even where there are other traumatic events which could have caused or contributed to cause the emotional distress. However, the *Thornton* decision does not necessarily preclude a defendant from introducing evidence of the other traumatic events. Further, the *Thornton* ruling does not prohibit a defendant from emphasizing that a plaintiff has not been treated or evaluated by a medical expert such as a psychologist, psychiatrist, or other mental health practitioner.

The* Thornton *case also highlights the importance of filing a timely pleading on behalf of your client which asserts that it is or may be entitled to a setoff.

The *Thornton* case also highlights the importance of filing a timely pleading on behalf of your client which asserts that it is or may be entitled to a setoff. As noted above, the Supreme Court suggested in *Thornton* that a claim for a setoff should be asserted as early as the defendant's initial answer. As a practical matter, settlements are typically consummated several months – or even years – after a defendant files its answer. However, in order to preserve a defendant's right to a setoff, a general claim for a setoff should be included in the defendant's answer. A more specific claim for setoff (which references the amount of any settlements) can be filed after a plaintiff reaches a settlement with one or more parties.

Workers' Compensation Report

By: Brad A. Elward
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Recent Appellate Court Cases Touch on a Diverse Range of Topics

The Appellate Court, Workers' Compensation Commission Division, has been very active in publishing opinions over the past few months. Since our last issue, at least six published decisions have been handed down covering a range of topics from section 19 penalties, to surety bonds, to intoxication, and section 11 exceptions for recreational activities. Other decisions address issues concerning calculation of average weekly wage, the "aggressor defense," and the exclusivity of the federal Longshoreman Act. This column takes a look at these decisions and how they may affect your workers' compensation cases.

Aggressor Doctrine

In *Bassgar, Inc. v. Workers' Compensation Comm'n*, 917 N.E.2d 579 (3d Dist. 2009), the appellate court addressed the so-called "aggressor doctrine," which provides that even if a fight at work is work-related, an injury to the aggressor is not compensable. *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279-80, 811 N.E.2d 684 (2004). The underlying rationale provides that the claimant's own rashness negates the causal connection between the employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. Illinois law has long provided that an injury resulting from a fight between two co-workers involving a work-related issue is considered a risk incidental to the employment and is, therefore, compensable.

In *Bassgar*, the claimant was involved in a fight with his supervisor and was subsequently charged with and convicted of assault and battery in a criminal proceeding. Apparently there were two incidents, one in which the claimant was attacked, and a second wherein he pursued his supervisor. The claimant nevertheless filed for workers' compensation benefits, but his claim was denied by the arbitrator on the ground that his prior criminal proceeding had determined that he as the aggressor. The Commission reversed, but that finding was set aside by the circuit court. On review, the appellate court reinstated the Commission's decision and found that the prior criminal proceeding did not bar his worker's compensation claim because there was no similarity of parties between the two proceedings. According to the appellate court, the criminal conviction was for the second portion of the incident, wherein the claimant pursued the supervisor, who had withdrawn from the incident. The court stated that there was nothing to show that the claimant's criminal proceedings considered the first part of the incident, and that it could not be inferred that the criminal conviction encompassed the entire event. *Bassgar*, 917 N.E.2d at 586. The claimant's battery, it was reasoned, did not relate to the first act of aggression, but the second.

While it is not clear whether the transcript from the criminal proceeding was made available during the workers' compensation trial, it seems odd that the claimant would not have tried to claim self-defense in the criminal action (or at least attempted to explain his actions), which would have included the first incident as well.

Average Weekly Wage

An interesting issue arose in *Washington District 50 Schools v. Workers' Compensation Comm'n*, 917 N.E.2d 586 (3d Dist. 2009), which involved determining the appropriate average weekly wage for a school teacher who worked 39 weeks (a regular school year), but had elected to be paid over the entire 52-week period. The claimant did not work for the district during the summer months but instead worked 30-32 hours a month as a pharmacy technician. The Commission calculated the claimant's average weekly wage as $1,036.32, by dividing her salary of $40,416.48 by the number of weeks

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Workers' Compensation Report *(Continued)*
she actually worked, 30. The school district argued that the average weekly wage should have been $777.24, which it arrived at by dividing the salary by 52 weeks.

Relying on the Arkansas case of *Magnet Cove School District v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003), the appellate court ruled that the claimant's weekly income was based on the date she earned her pay, rather than the date she received her pay. *Washington District 50 Schools*, 917 N.E.2d at 588. Furthermore, the court looked to the language of section 10, which states that, "[w]here the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed." *Id.*; see 820 ILCS 305/10. Thus, the claimant received the $1,036.32 average weekly wage based on her 39 weeks. It might be interesting to know whether this employee was hired pursuant to an annual contract and whether she was a tenured teacher. It seems rather strange to treat a salaried employee on the same level as a construction worker, who truly works and is paid based on the hour. A teacher is typically paid on a yearly basis.

Exclusive Remedy and Longshoremen Claims

One of the most litigated fact scenarios involving the jurisdiction of the Workers' Compensation Commission involves injuries on waterways. In such cases, an issue is often raised as to whether the claim is preempted by the federal Longshore and Harbor Workers' Compensation Act (33 U.S.C. sec 901 *et seq.*), or whether it may proceed as a workers' compensation claim under Illinois law. Such a question is reviewed by the appellate court on a *de novo* basis. In *National Maintenance & Repair v. Workers' Compensation Comm'n*, 2009 WL 3838896 (5th Dist. 2009), the claimant was injured while working on a "plant barge" on the Mississippi River when an I-beam fell on his hand. The testimony showed that the "plant barge" was held in place by mooring lines connected to the shore and a "spud," which was a two-foot-square tube that ran vertically through the barge and into the bottom of the river. Electrical power was supplied to the barge by lines that ran from the shore, and a ramp permitted vehicles to be driven onto the barge. The barge floated on the river, but had no motor or navigational system. While it was possible to tow the barge, it had not been moved since it was put in place five or six years earlier.

The Commission found that the barge was a land-based facility and awarded benefits. On appeal, the appellate court affirmed, finding that, while the injury took place in the course of maritime activities, it did not occur on a navigable body of water. *National Maintenance & Repair*, 2009 WL 3838896, *3 . The appellate court noted that "a watercraft will be considered a vessel within the meaning of the LHWCA so long as it is capable of being used as a means of transportation on water, as opposed to being permanently moored or otherwise rendered incapable of transportation." *Id*. The court concluded that, while the "plant barge" could theoretically be moved by towing it to another location, the evidence revealed that it was permanently moored and, therefore, not a vessel. "Rather, the 'plant barge' is similar to a floating dock permanently affixed to the shore – a structure traditionally considered an extension of land." *Id.* at *4.

Intoxication via Marijuana Usage

On October 20, 2009, the Appellate Court, Workers' Compensation Commission Division, handed down the decision of *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 2009 WL 3417879 (3d Dist. 2009), which considered the defense of intoxication by marijuana. In that case, the claimant, a carpenter apprentice, was injured when he fell from the second floor, through a hole in the first floor, and into the basement of a home under construction. Urinalysis performed at the hospital revealed the presence of marijuana and cocaine. The employer raised the defense of intoxication and obtained a medical opinion concluding that the claimant's drug levels showed a functional impairment due to intoxication. The IME did not opine that the intoxication so impaired the claimant so as to make him unable to perform his duties. The Commission rejected the employer's intoxication defense and found the claim compensable.

The appellate court rejected the employer's argument to adopt a new test for marijuana intoxication. According to the employer, recovery should be denied altogether if scientific evidence established that the claimant was marijuana-impaired at the time of the accident. The appellate court disagreed, noting that the standard on intoxication was well-settled and could not be overturned other than by the supreme court or the General Assembly. *Id.* at *8.

Applying the established test of intoxication – that the employer had to demonstrate not only that the claimant was intoxicated, but that the marijuana use was the sole cause of the accident, or that the claimant had departed from the scope of his employment – the appellate court affirmed. In so doing, the court deferred to the Commission, which had rejected the opinions of the employer's expert and which had further

concluded that the claimant's usage could have occurred up to a day and a half prior to the accident. Moreover, the Commission had determined that the hole in the floor through which the claimant fell was not something the general public would have been exposed to, and therefore, constituted an increased risk to the claimant. According to the court, "even if the marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause." *Id*. at *9.

According to the court, "even if the marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause."

Lenny Szarek, Inc. also addressed a series of evidentiary rulings surrounding various questions posed to the claimant concerning his use of marijuana. The court found that questions concerning the affect of marijuana on the claimant on prior occasions as well as a question on whether he smoked marijuana the day prior were irrelevant to what happened on the day of the accident. *Id.* at *7. Moreover, the court affirmed the Commission's refusal to permit questioning as to the claimant's use of marijuana on the day in question, since the claimant had denied smoking that date and his co-worker did not notice anything about the claimant suggesting he was intoxicated or impaired. *Id.*

A Recreational Act or One Inherent in the Employee's Job Duties?

An interesting case involving an alleged recreational activity arose in *Elmhurst Park District v. Workers' Compensation Comm'n*, 2009 WL 3297586 (1st Dist. 2009). In that case, the claimant worked as a fitness supervisor for the Elmhurst Park District. On the date of the accident, he was asked by a fellow worker to participate in a game of wallyball, because the participants (users of the park facilities) did not have enough players. The claimant declined at first, citing not feeling well, but then joined the game, and was subsequently injured. The issue became whether the claimant was participating in a voluntary recreational program, which would bar his claim per the language of section 11. According to that section, "[a]ccidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties, and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof." 820 ILCS 305/11. Section 11 continues, "[t]his exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program." 820 ILCS 305/11.

The parties agreed that the claimant's participation was voluntary, but argued over whether it was recreational. The Commission concluded that section 11 did not bar the claimant's recovery. On appeal, the court applied a de novo standard of review to interpret section 11 and held that the facts of the case showed that the activity, although recreational, was inherent in the claimant's job duties as fitness instructor. According to the court:

> The evidence adduced at the arbitration hearing established that claimant initially declined McElroy's invitation to participate in the wallyball game because he was not feeling well and he had other work to do. However, McElroy persisted in her request and told claimant that absent his participation, the game would be cancelled because there would not be enough participants. Thereafter, claimant decided to "help out" because "he felt [it] was part of [his] job" which was "to promote… different classes and programs." Based on this evidence, we conclude that claimant did not participate in the wallyball game for his own "diversion" or to "refresh" or "strengthen" his spirits after toil. Rather, claimant participated in the game to accommodate respondent's customers. As such, we find that claimant was not engaged in a "recreational" activity as contemplated by section 11 of the Act at the time of his injury. *Elmhurst Park District v. Workers' Compensation Comm'n*, 2009 WL 3297586 *4 (1st Dist. 2009).

The court also declined to give credence to the employer's rules prohibiting participation in activities, noting that the claimant had done so on three prior occasions without sanctions. Moreover, the claimant's written job description stated that his responsibilities included promoting Elmhurst Park District programs.

Finally, the court distinguished its prior holding in *Kozak*

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Workers' Compensation Report *(Continued)*

v. Industrial Comm'n, 219 Ill. App. 3d 629, 579 N.E.2d 921 (1st Dist. 1991), wherein the court denied recovery to an employee who suffered a heart attack while participating in a tennis round-robin tournament conducted to select a tennis team to represent the employer in a national invitational tournament. In that case, the court had stated that section 11 applies if an employee is injured while participating in a voluntary activity regardless of the purpose of the activity. Although the court claimed that its decision in *Elmhurst Park District* was consistent with *Kozak*, it appears that in *Kozak*, the purpose of the activity – competing to make a team which would represent the employer – was irrelevant, while in *Elmhurst Park District*, advancing the employer's purpose of providing Park District programs, was considered relevant.

Section 19 Penalties

In *Reynolds v. Workers' Compensation Comm'n*, 2009 WL 3807542 (3d Dist. 2009), the appellate court affirmed the circuit court's reversal of an award of penalties and attorneys' fees, which had been predicated on the employer's refusal to pay a portion of the underlying alleged TTD and medical. In that case, the claimant injured his neck in the late spring. He underwent an MRI scan, which found internal disc disruption, a radial tear, and a full thickness tear at various levels of the claimant's neck. The claimant was examined by two physicians, who questioned whether his neck problems were caused by the mechanism of injury and whether they might have been the result of a pre-existing degenerative condition. The employer paid some TTD (associated with a neck strain/sprain) and made an advance of PPD benefits on those grounds. The claimant continued to treat through the fall, and at least one objective test, which failed to show any herniation, but revealed degenerative changes.

In December, the claimant underwent further testing and saw an IME, who opined he had a herniated disc and needed surgery. The claimant was immediately examined by an IME selected by the employer, who opined that the condition was not caused by the accident, but rather was degenerative. The Commission awarded section 19(k) and (l) penalties and section 16 attorneys' fees, charging the employer with unreasonable and vexatious conduct in refusing to authorize the medical the treatment and pay additional TTD. *Reynolds*, 2009 WL 3807542, at *4; 830 ILCS 305/16, 19(k), (l).

The appellate court affirmed the trial court's reversal of penalties and fees, noting that the employer's reliance on its IME, coupled with the other medical providers' opinions and concerns "was relatively compelling, even if it did not ultimately persuade the Commission." *Id.* The two company physicians relied upon by the employer had reviewed the original MRI film and the IME had reviewed a report of that film, and relied upon the opinions of the two company physicians. According to the appellate court, no reasonable person could conclude that the employer was not entitled to do so. *Id.* at *5.

Although predominantly an intoxication case, the appellate court also addressed the issue of penalties in *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 2009 WL 3417879 (3d Dist. 2009). There, the court, although affirming the Commission's decision to award benefits and further reject application of the intoxication defense, nevertheless reversed the award of penalties and attorneys' fees, finding that the employer had acted reasonably in believing that the claimant's marijuana intoxication, which had been documented by blood analysis, barred his workers' compensation claim. According to the court, the claimant's urine tests "revealed what it terms 'severe marijuana intoxication' and Leikin's [the employer's IME] opinions were derived from them [the tests]." *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 2009 WL 3417879, *11 (3d Dist. 2009). Similarly, the employer was entitled to rely on its interpretation of two significant alcohol intoxication tests, which seemed to suggest that the claim would be barred. While the appellate court distinguished both cases in its opinion as involving alcohol and not marijuana, "since we had not articulated this distinction with any degree of detail in the past, respondent was not unreasonable in seeking to analogize the present situation to those cases." *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, 2009 WL 3417879, *11 (3d Dist. 2009).

Both *Reynolds* and *Lenny Szarek* are positive cases for employers and reiterate the law that an employer can rely on reasonable medical opinions to deny claims or benefits, even where the medical opinions are contrary to those obtained by the claimant. Moreover, the employer may reasonably rely on the law as it exists at the time the case proceeds.

Surety Bonds under Section 19(g)

We have visited on the topic of surety bonds many times in the past, and the court's recent decision of *Securitas, Inc. v. Workers' Compensation Comm'n*, 2009 WL 4263808 (5th Dist. 2009), reemphasizes precisely why reform is needed in the area of surety bonds. In that case, the Commission set the surety bond at $10,100. The employer filed a review, but its appeal bond was limited to $10,000 and the official capacity of its signatory on behalf of the employer was not stated. The circuit court confirmed the Commission's award and on

appeal, the appellate court dismissed the case for lack of jurisdiction. According to the court, the surety bond as filed was insufficient to confer jurisdiction. The court rejected any application of the substantial compliance doctrine, stating that it applied to scenarios where there were "irregularities in form." The amount of the bond, it declared, "is a matter of substance rather than form." *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 505, 879 N.E.2d 429 (1st Dist. 2007),

To dismiss an appeal where there is a bond filed, albeit $100 short, is to place form over substance. In all likelihood the case involved coverage and there is no true risk of non-payment faced by the employee.

As to the issue concerning the signatory, the court simply pointed to its prior decision in *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 688, 691 N.E.2d 134 (1st Dist. 1998), where it held that the person who signs the surety bond for the employer need not be identified on the face of the bond as an officer of the employer, and stated that it had previously rejected such a requirement. The court did not discuss whether the employer had later provided identification for the bond signatory, as *First Chicago* required. *Securitas* reiterates the need for employers to ensure that they have followed all of the steps necessary to procure a proper bond. Moreover, it highlights why reform in this area is desperately needed. To dismiss an appeal where there is a bond filed, albeit $100 short, is to place form over substance. In all likelihood the case involved coverage and there is no true risk of non-payment faced by the employee. Obviously, the appellate court was simply following the law as it is written; changes must follow from the General Assembly.

Municipal Law

By: Thomas G. DiCianni and Keri-Lyn Krafthefer
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The New Freedom of Information Act

With transparency the latest political buzzword, the Illinois General Assembly overhauled the Freedom of Information Act, 5 ILCS 140/1 *et seq*. ("FOIA"), effective January 1, 2010. The Act provides the primary mechanism for citizens to obtain government documents, subject to enumerated exemptions from disclosure. The new FOIA brings sweeping changes and new challenges to government counsel, both those providing general corporate representation and litigation defense. Significant changes are as follows:

1. Change in the Public Policy. Previously, the Act stated that it "was not to be used to violate individual privacy." The

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Municipal Law *(Continued)*

new statement of FOIA's purpose waters down that caution, which itself underscores the focus of the new Act. P.A. 96-542, Ch. 116, Par. 201 (codified as amended at 5 ILCS 140/1). The policy of the new FOIA is to broaden the Act's reach, creating a presumption that government records are open to inspection or copying, emphasizing that access to public records is a fundamental obligation of government and that compliance with FOIA is a primary duty of public bodies, regardless of fiscal impact. Under the new law, the public body has the burden of proving by clear and convincing evidence that it is exempt from complying with a FOIA request. 5 ILCS 140/1.2.

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2. Public Access Counselor. An attorney within the Attorney General's office will be designated as the "Public Access Counselor." 15 ILCS 205/7(b). The duties of the Public Access Counselor include training representatives of public bodies in FOIA compliance, considering complaints filed by requestors who believe the Act has been violated, and issuing binding and advisory opinions to public bodies on requests and FOIA questions. 15 ILCS 205/7(c). The Public Access Counselor's binding decision on a request is reviewable under the Illinois Administrative Review Law. 735 ILCS 5/3-101 to 3-113.

3. "Personnel Files/Private Information." The new law eliminates an exemption for "personnel files," and keeps but further defines an exemption for "private information" contained within public records. "Private information" is now confined to "unique identifiers," such as social security and driver's license numbers, biometric identifiers, personal financial information, medical records, personal telephone numbers, and the like. 5 ILCS 140/2(c-5). The new Act defines a request for "personal information" exempt from the Act because of a "clearly unwarranted invasion of personal privacy" as one which is "highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(c). In addition, the new FOIA requires that if a public body intends to withhold a record from disclosure based on the "personal information" exemption, it must give the requestor and the Public Access Counselor a written notice of the public body's intent to deny the request or any part of it. The notice must include a detailed summary of the public body's basis for asserting the exemption. The Public Access Counselor must then notify the public body and the requestor within five days after receiving the notice whether further inquiry is warranted, and if so a substantial process is triggered leading to a binding decision by the Public Access Counselor. 5 ILCS 140/9.5.

4. Financial Transactions. The bill removes the existing exemption for draft documents and memoranda relating to a public body's financing and marketing transactions.

5. Settlement Agreements. 5 ILCS 140/2.20. Settlement agreements by public bodies and their employees are now public records, and cannot be shielded from disclosure by a confidentiality clause in the agreement. This may be the most significant change for defense attorneys. When defending governments and public officials, it is not always about the money. The ability to make a confidential settlement often facilitates the willingness of parties to even consider settling a case, particularly where controversial political or policy considerations are involved. The bitter pill of having to settle with an unsavory arrestee because a police officer had to make a difficult judgment is somewhat easier to accept when there is no fear that others arrested for criminal acts will see a prospect for a windfall by filing suit. Also, settlement of an employee's lawsuit is certainly easier without concerns over the impact the settlement could have among the work force. Without question elimination of confidentiality agreement will hamper the ability of defense counsel to settle some difficult cases.

6. Time for Response. 5 ILCS 140/3. The new law changes the time to respond to a FOIA request from seven to five business days, although the public body can request an extension of an additional five business days. If the public body misses the deadline it cannot deny or demand modification of the request for being overly burdensome. It also

cannot charge a fee for copies.

7. "Commercial Purpose" changes. 5 ILCS 140/3.1. Under the new law, public entities must comply with requests submitted for a commercial purpose, but are not limited to five days to respond, and can produce those documents "within a reasonable period considering the size and complexity of the request," up to 21 business days. Where not apparent, the public body may inquire whether the records are sought to advance a commercial purpose, and the Act prohibits a requestor from procuring a public record without disclosing that the use is for a commercial purpose.

8. FOIA Officers. 5 ILCS 120/1.05; 5 ILCS 140/3.5. The Act requires the designation and training of a FOIA officer and ongoing education for those officers. FOIA officers must be identified on the public entity's website, and a list of the entity's FOIA officers must be submitted to the Public Access Counselor. Within six months after the new Act goes into effect, the designated employees and officers must successfully complete an electronic training class administered by the Public Access Counselor, and thereafter must have additional training annually. Every newly designated employee or officer must receive training within 30 days after designation.

9. A formal system for processing FOIA requests. 5 ILCS 140/3.5(a). The new law requires the FOIA officer to note and date the time the request is received; calculate the five day response deadline and note it in writing on the response; keep all documents related to a request until is it complied with or denied; and keep files maintaining all FOIA requests.

10. Electronic Records. If the public body maintains records in an electronic format it must provide them in such a format if requested. 5 ILCS 140/6(a).

11. Fees and Costs. 5 ILCS 140/6(b). Under the new law, public entities may not charge fees for the first fifty pages of standard black and white copies. An illegal fee constitutes a denial of records under the Act. After the first 50 pages, the fee for black-and-white copies thereafter may not exceed 15¢ per page unless the public body can demonstrate that its actual cost of reproduction (excluding personnel costs) is higher. (A fee equal to actual cost may be charged for color copies.) The actual cost of purchasing the recording medium, such as a disc or tape, may be charged for electronic records. The cost of a certified copy is limited to $1.00.

12. "Public Records" Include Records of Contractors. 5 ILCS 140/7(2). Public entities are now required to produce public records that are in the possession of a party with whom the agency has contracted to perform a governmental function. Specifically, municipalities must disclose documents held by "a party with whom the agency has contracted to perform a governmental function on behalf of the public body" and which directly relate to the governmental function.

13. Expansion to Cover E-Mails. 5 ILCS 140/2(c). The bill broadens the definition of "public records" by including "electronic communications," so e-mail and other similar communications are now covered by the Act.

14. Fines. 5 ILCS 140/11(j). If a public body willfully and intentionally fails to comply with the Act, it can be fined $2,500 to $5,000 per occurrence, and a court must award reasonable attorneys' fees and costs to a requestor who prevails in suing to enforce the Act. There is no reciprocal penalty for a requestor who abuses the FOIA process.

15. Appeals. 5 ILCS 140/9.5. Under the new law, all appeals of a denial of a FOIA request go directly to the Public Access Counselor instead of to the head of the public body, as previously specified.

FOIA exemptions can create privileges applicable to litigation. Both Illinois and federal courts have held that the legislature's creation of exemptions from public disclosure under FOIA demonstrates a public policy recognizing a need for confidentiality, which creates a qualified privilege from discovery in litigation. *In Re Marriage of Daniel*, 240 Ill. App. 3d 314, 607 N.E.2d 1255 (1st Dist. 1992); *Doe v. Hudgins*, 175 F.R.D. 511 (N.D. Ill. 1997); *but see People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998) (no deliberative process privilege derived from FOIA exemptions). A qualified privilege allows a court to deny an otherwise legitimate discovery request if the governmental interest in protecting the document from disclosure outweighs the need of the party seeking the discovery to obtain the information. The general policy favoring disclosure and creating increased avenues to challenge a failure of disclosure signals a strong indication that qualified privileges will be strictly construed following the FOIA amendments. Defense counsel must be prepared to show that the policy of open access to government information would not be frustrated by the use of FOIA exemptions to block discovery. Counsel must also be sure to discover whether his or her litigation opponent has stealthily obtained documents through FOIA which could at some time surprisingly surface in the litigation.

Feature Article

By: James P. DeNardo
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Jury Trials in the Circuit Court for Employment Claims Under the Illinois Human Rights Act and Federal Statutes, for Retaliation and Punitive Damages

Background

In 1979, the Illinois Human Rights Act (IHRA) created the Illinois Department of Human Rights (IDHR) and the Illinois Human Rights Commission (IHRC). Claimants could file charges before the IDHR claiming civil rights violations in employment. The IHRC would review IDHR decisions and also adjudicate civil rights "complaints" in evidentiary hearings before an administrative law judge. See 775 ILCS 5/1-103(B)-(D), (Q); 5/2-102; 5/7-101(B); 5/7A-102(C); 5/7B-102(C); 5/7B-103(F); 5/8-103; 5/8A-102(A)-(B) (2000); *Blount v. Stroud*, 232 Ill. 2d 302, 309-10, 904 N.E.2d 1, 6-7 (2009) (*Blount I*).

The IHRA did not authorize private employment suits, and expressly limited the court's jurisdiction. Section 8-111(C) stated: "except as otherwise provided by law, no Court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS 5/8-111(C) (2000); *Blount I*, 232 Ill. 2d at 310. The IHRA gave Illinois courts jurisdiction over the following matters: (1) a petition for temporary relief in the circuit court to include an order or judgment restraining the respondent (775 ILCS 5/7A-104(A)(1) (employment) and 5/7B-104(A)(1) (real estate)); (2) judicial review of a final order of the IHRC in the appropriate Illinois appellate court (775 ILCS 5/8-111(A)(1)); and (3) a civil action in the circuit court for a civil rights violation in a real estate transaction (775 ILCS 5/3-101, *et seq.*; 775 ILCS 5/10-102(A)(1)).

Under the IHRA, punitive damages are not available. See *Blount v. Stroud*, 915 N.E.2d 925, 946 (1st Dist. 2009) (*Blount II*) modified upon denial of rehearing. Actual damages are available. 775 ILCS 5/8A-104(B) (2008). Actual damages under the IHRA include emotional harm and mental suffering. *Szkoda v. Illinois Human Rts. Comm'n*, 302 Ill. App. 3d 532, 545, 706 N.E.2d 962, 972 (1st Dist. 1998); *ISS Int'l Servs Sys., Inc. v. Illinois Human Rts. Comm'n*, 272 Ill. App. 3d 969, 979, 651 N.E.2d 592, 598 (1st Dist. 1995).

Before the 1979 enactment of the IHRA, most claims for unlawful discrimination in connection with employment were brought under Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e. The claimant would file a charge with the local office of the federal Equal Employment Opportunity Commission (EEOC) and then potentially a civil action in the appropriate United States district court. 42 U.S.C. § 2000e-2(a); § 2000e-5(a)-(f). At that time, Title VII did not provide for a jury trial or compensatory or punitive damages. 42 U.S.C. § 2000e-5(g); see also BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 427, 543 (2d ed. 1983 & Supp. 1989). To increase the chances for an award of compensatory and punitive damages, plaintiffs filed along with their federal civil rights action in the district court an Illinois common law cause of action, such as assault, battery, or retaliatory discharge, as a pendent claim under the district court's supplemental jurisdiction. 28 USC § 1367; see also SCHLEI & GROSSMAN, *supra*, Ch. 23. In 1991, Congress amended the federal Civil Rights Act and provided for a jury trial and compensatory and punitive damages in suits brought under Title VII. 42 USC § 1981a(b)(1)-(2), (c). However, compensatory and punitive damages are capped based on the number of employees that the employer employs. 42 U.S.C. § 1981a(b)(3). The maximum amount recoverable is

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$300,000 from employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D).

The IHRA amendments, effective January 1, 2008, now give the circuit court of Illinois jurisdiction over suits for employment discrimination, as defined in the IHRA, including retaliation as defined in the IHRA. A claimant, after filing a charge with the IDHR, has the right to commence a civil action with a jury trial in the appropriate circuit court at various stages of the charge process, under appropriate procedural rules. See 775 ILCS 5/6-101(A); 5/7A-102(B), (D)(3)-(4), (G)(2); 5/8-111(A); 5/8A-104 (2008). Sections 5/8-111(A)(4) and 5/8A-104(b) of the IHRA provide that the circuit court or jury may award, among other damages, actual damages. 775 ILCS 5/8-111(A)(4); 5/8A-104(b).

"Retaliation" was identified as a civil rights violation in the IHRA prior to the 2008 Amendments. See 775 ILCS 5/6-101(A) (2000). Specifically, it is a civil rights violation for a person to retaliate against a person because that person has opposed that which he or she reasonably and in good faith believes to be, among other things, unlawful discrimination or sexual harassment in employment or because that person has made a charge or testified, assisted or participated in an investigation, proceeding or hearing under the IHRA. *Blount I*, 232 Ill. 2d at 310-11.

The circuit court can also exercise jurisdiction over an Illinois common law tort claim arising in an employment setting. The circuit court has jurisdiction if the tort claim is not inextricably linked to a civil rights violation and has an independent basis apart from the IHRA. See *Blount I*, 232 Ill. 2d at 311-14, 904 N.E.2d at 7-9; *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 516-17, 687 N.E.2d 21, 23-24 (1997); *Geise v. Phoenix Co. of Chi., Inc.*, 159 Ill. 2d 507, 516-17, 639 N.E.2d 1273, 1277 (1994). The plaintiff must allege sufficient facts to establish the elements of a recognized tort, such as retaliatory discharge, without reference to the legal duties created by the IHRA. *Blount I*, 232 Ill. 2d at 311-14 (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978); *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 128 (1981); and *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 529, 519 N.E.2d 909, 911 (1988) (recognizing the tort of retaliatory discharge and setting forth the plaintiff's burden of proof)).

The *Blount v. Stroud* cases, decided in January 2009 by the Illinois Supreme Court (*Blount I*), and in October 2009 by the appellate court (*Blount II*), confirm the jurisdiction of the circuit court over causes of action brought by plaintiffs alleging retaliation under both Illinois common law and federal statute (41 U.S.C. § 1981). Both of these causes of action provide for compensatory and punitive damages without caps.

A. Circuit Court Jurisdiction over Employment Claims for Violations Defined in the IHRA

Effective January 1, 2008, amendments to the IHRA created a new venue for a plaintiff to pursue rights and remedies for employment "civil rights violations" defined in the IHRA: the circuit courts of the State of Illinois. The option to file suit in the circuit court is available for those charges filed with the IDHR after January 1, 2008, upon notice by the IDHR at various times during the charge-filing and investigation process at the IDHR. See 775 ILCS 5/7A-102(J); 5/8-111(F). The option is available upon notice:

(1) Within the dates provided by the IDHR via notice mailed within ten days of the date on which the charge was filed, and again no later than 335 days thereafter. 775 ILCS 5/7A-102(B);

(2) After investigation, if the Director of the IDHR determines there is no substantial evidence to support the charge. The claimant must file suit within 90 days of notice. 775 ILCS 5/7A-102(D)(3);

(3) After investigation, if the Director determines that there is substantial evidence to support the charge. The claimant must file suit within 90 days of notice. 775 ILCS 5/7A-102(D)(4); and

(4) If the IDHR has not issued its report within 365 days after the charge is filed, or any such longer period agreed to in writing by all the parties. The claimant must file suit within 90 days of these dates. 775 ILCS 5/7A-102(G)(2).

The venue for a civil action shall be in the circuit court in the county wherein the civil rights violation was allegedly committed. 775 ILCS 5/7A-102(F)(2). The form of the complaint shall be in accordance with the Illinois Code of Civil Procedure. See 775 ILCS 5/8-111(A)(1).

Upon the finding of a civil rights violation, the court or jury may award any of the remedies set forth in Section 5/8-104 of the IHRA, including, among other relief, actual damages, hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay. See 775 ILCS 5/8-111(A)(4); 5/8-104(B).

B. Circuit Court Jurisdiction under *Blount v. Stroud*

In *Blount I*, the Illinois Supreme Court ruled that the circuit court had jurisdiction over the plaintiff 's claims alleging retaliation under both common law and 42 U.S.C. § 1981. 232 Ill. 2d at 314, 328, 904 N.E.2d at 9, 17.

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Jury Trials for Retaliation *(Continued)*

1. Common Law Cause of Action for Retaliatory Discharge

In *Blount v. Stroud*, the plaintiff's common law claim for retaliatory discharge alleged that the employer terminated the plaintiff in retaliation for her refusal to commit perjury in a co-employee's separate federal discrimination lawsuit against the employer and that the employer's conduct violated Illinois public policy. *Blount I*, 232 Ill. 2d at 306, 311, 318-19, 904 N.E.2d at 4-5, 7, 12. The employer argued that the circuit court lacked jurisdiction over the plaintiff's retaliation claims because of the exclusivity provision of §5/8-111(C) of the IHRA. *Id.* at 310-11, 904 N.E.2d at 7. The employer also argued that the plaintiff's claims were "inextricably linked" to a civil rights violation set forth in the IHRA and thus the plaintiff's claim was preempted. *Id.* at 307, 904 N.E.2d at 5.

The Illinois Supreme Court applied the *Geise* and *Maksimovic* cases and held that the circuit court had subject matter jurisdiction over the plaintiff's common law retaliatory discharge claim. *Id.*, at 311-14, 904 N.E.2d at 7-9. The court explained that actions for retaliatory discharge have been allowed where the employee was discharged for refusing to violate a statute, including a statute which makes the commission of perjury unlawful. *Id.* The court held that the plaintiff did not rely upon the public policy embodied in the IHRA to satisfy the elements of her common law tort claim and that nothing in §5/8-111(C) restricting jurisdiction in the circuit court indicated an intent to abolish all common law torts factually related to incidents of retaliation. *Id.* at 313-15, 904 N.E.2d at 9-10.

2. Cause of Action for Retaliation under 42 U.S.C. § 1981

The *Blount* plaintiff's retaliation claim under 42 U.S.C. § 1981 alleged that the employer, an African-American, harassed and intimidated the plaintiff and retaliated against the plaintiff, also an African-American, because the plaintiff supported the Caucasian co-employee in the co-employee's separate federal discrimination suit against the employer. *Blount I*, 232 Ill. 2d at 305-06, 318-19, 904 N.E.2d at 4-5, 12. Section 1981 encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related right. 42 U.S.C. § 1981(a); *Blount I*, 232 Ill. 2d at 318, 904 N.E.2d at 11, citing *CBOCS West Inc. v. Humphreys*, 128 S. Ct. 1951, 1961 (2008).

In *Blount I*, the supreme court ruled that a plaintiff could properly pursue rights and remedies under federal law in the circuit court. *Blount I*, 232 Ill. 2d at 328, 904 N.E.2d at 17. The court's ruling expressly abrogated those prior Illinois appellate court opinions holding that the IHRA was intended to be the exclusive remedy in Illinois for handling claims of employment discrimination and that the circuit court of Illinois had no jurisdiction over federal civil rights claims. See *id.* at 324-28, 904 N.E.2d at 15-17, citing *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that federal courts do not have exclusive jurisdiction over a federal cause of action, because state courts have the inherent authority, and presumptively are competent, to adjudicate claims arising under the laws of the United States, such as the Title VII suit involved in that case).

The supreme court held that the circuit court had subject matter jurisdiction over the plaintiff's federal civil rights claim and the plaintiff was not required, as argued by the employer, to litigate her federal claim in the administrative forum provided by the IHRA. *Id.* at 318-26, 904 N.E.2d at 11-16. The court ruled that the definition of a "civil rights violation" in the IHRA is limited to civil rights violations arising under the enumerated sections of the IHRA and does not include a civil rights violation as defined by, or arising under, federal law. *Id.* at 325-26, 904 N.E.2d at 16. The court went on to hold that even if the facts giving rise to a civil rights violation, as defined by the IHRA, could also give rise to a civil rights violation as defined by federal law, the IDHR and the IHRC administer the IHRA, not federal law, and those administrative entities have no statutory authority to entertain federal claims. *Id.* at 326-27, 904 N.E.2d at 16. The supreme court remanded the case to appellate court for consideration of the defendant's claims of error besides jurisdiction. *Id.* at 330, 904 N.E.2d at 18.

C. *Blount v. Stroud* and Punitive Damages

On remand to the appellate court, the *Blount II* court reviewed the circuit court's punitive damage award of $2.8 million. Punitive damages are available for claims alleging retaliation under both common law and 42 USC § 1981. See generally *Blount II*, 915 N.E.2d 945-46; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 95 S. Ct. 1716, 1720 (1975).

The circuit court, following the conclusion of the evidence, had instructed the jury on a single claim of retaliation predicated on both the plaintiff's "support" for the co-employee's suit (42 U.S.C. § 1981) as well as her refusal to commit perjury (common law). The court gave the pattern instruction on punitive damages (IPI Civil, No. 35.01 (2005 ed)). Following deliberations, the jury returned a verdict in favor of the plaintiff on her retaliation claim. The jury awarded the plaintiff $257,250 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2.8 million in punitive

damages. The court subsequently awarded the plaintiff $1,182,830.10 in attorneys' fees under 42 U.S.C. § 1988. *Blount II*, 915 N.E.2d at 936.

1. Punitive Damages – Common Law

On review, the appellate court restated the rule that punitive damages may be awarded in a common law retaliatory discharge claim where the retaliatory discharge was committed with fraud, actual malice, deliberate violence, or oppression, or when the defendant has acted willfully. *Blount II*, 915 N.E.2d at 938. The appellate court reaffirmed that in reviewing a jury's award of punitive damages under the Illinois common law punitive damages inquiry, relevant circumstances to consider include, but are not limited to, the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Id.* at 939.

2. Punitive Damages – 42 U.S.C. § 1981

Punitive damages are available as a remedy for a cause of action brought under 42 U.S.C. § 1981. *Johnson*, 95 S. Ct. at 1720; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424-25 (7th Cir. 1986) (affirming award for emotional distress and punitive damages); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (affirming punitive damage award of $100,000).

The appellate court also reviewed the punitive damages award under the federal due process standard. Under that standard, the due process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary amounts on a tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property. *Blount II*, 915 N.E.2d at 941. In judging the punitive damage award under the federal due process standard, the *Blount II* court used the guide posts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513, 1520 (2003). *Id.*

Significantly, the appellate court ruled that the fact that damages under Title VII are capped based on the number of employees employed by the defendant, with the highest amount available being $300,000, does not limit punitive damages under Section 1981 unless there is a "huge discrepancy." *Id.* at 946. The appellate court found the amount of punitive damages was not excessive under either the Illinois common law or the federal due process standard, and affirmed the award and judgment for the plaintiff. *Id.*

D. Summary of Employment and Retaliation Causes of Action and Remedies over which the Circuit Court Has Jurisdiction

Thus, under the circuit court's expanded jurisdiction set out in the IHRA amendments of 2008, as well as the circuit court's continued jurisdiction over Illinois common law causes of action and federal statute causes of action, an employee or terminated employee may bring one or more of the following causes of action in the circuit court of Illinois:

(1) Civil rights violations as defined in the IHRA, with an *ad damnum* requesting actual damages (to include emotional harm and mental suffering), hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay;

(2) Retaliation under the IHRA, with an *ad damnum* requesting actual damages (to include emotional harm and mental suffering), hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay;

(3) Illinois common law and retaliatory discharge actions arising in an employment setting where the complaint presents a justiciable matter that has an independent basis for the common law action apart from a duty set forth in the IHRA, with an *ad damnum* including compensatory and punitive damages, without caps;

(4) Retaliation or discrimination cause of action alleging a violation of federal statute 42 U.S.C. § 1981, with an *ad damnum* including punitive and compensatory damages, without caps, and attorneys' fees under 42 U.S.C. § 1988; or

(5) A civil rights violation, including retaliation, under the federal civil rights statute (Title VII of the Civil Rights Act) with an *ad damnum* requesting actual damages, hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and compensatory and punitive damages capped, depending on the number of employees that the employer employs.

Medical Malpractice

By: Edward J. Aucoin, Jr.
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First District Decision Reaffirms *Schroeder v. Northwest Community Hospital* and Poses Serious Challenge to the Traditional *James v. Ingalls Memorial Hospital* Consent Form

In the Fall of 2007, I used this column to discuss the Illinois Appellate Court, First District's decision in *Schroeder v. Northwest Community Hospital*, 371 Ill. App. 3d 584, 862 N.E.2d 1011 (1st Dist. 2007), and the potential impact that decision might have on trial courts faced with claims of an apparent agency in which a *James* consent was present. As you may recall, *Schroeder* was a case in which the First District accepted a plaintiff's argument that he was confused by the language and form of the defendant hospital's disclosure of the independent contractor status of the physicians providing treatment to the patients, which is commonly referred to as a "*James* consent." Over the past two years, the *Schroeder* decision faded somewhat from memory, as there were no subsequent decisions from the Illinois Appellate Court applying what most defense counsel had hoped was a rogue decision by the First District. But, the First District recently reaffirmed *Schroeder* when it handed down its decision in *Spiegelman v. Victory Mem. Hosp.*, 392 Ill. App. 3d 826, 911 N.E.2d 1022 (1st Dist. 2009), thereby requiring defense counsel to once again examine how they approach cases where a *James* consent is present. This decision also provides an excellent opportunity for defense counsel to provide guidance to their hospital clients regarding the proper form for an independent contractor physician disclosure.

In *Spiegelman*, the plaintiff sued to recover for injuries she sustained because of the misdiagnosis of bacterial meningitis during her hospitalization on November 29, 1998. She named emergency room physician, Dr. Murray Keene, his practice group Emergency Specialists of Illinois, P.C., family practice physician Dr. Pedro Palu-Ay, infectious disease physician, Dr. Louise Riff, and Victory Memorial Hospital ("the hospital") as defendants. By the time the verdict of $11,110,000 in favor of plaintiff was handed down, the only remaining defendants were the hospital, Dr. Keene, and Emergency Specialists of Illinois, P.C. *Spiegelman*, 392 Ill. App. 3d at 832. Twice during the trial, the hospital moved for a directed verdict on all issues pertaining to the apparent agency of Dr. Keene, and twice the trial court denied that motion. After hearing the verdict, the hospital brought a motion for judgment notwithstanding the verdict and a motion for a new trial, both of which the trial court denied. *Id.* at 833.

On appeal, the hospital argued that the trial court erred in denying its motion for judgment notwithstanding the verdict because the plaintiff failed to prove: (1) that the hospital held out Keene as its agent; and (2) that the plaintiff justifiably relied on any purported holding out by the hospital. *Id.* at 833. In rejecting those arguments, the First District focused on the one-page consent form titled "CONSENT FOR EMERGENCY TREATMENT"(Consent Form"), which plaintiff admitted to signing prior to any treatment being provided by defendants. *Spiegelman*, 392 Ill. App. 3d at 829. Paragraph 4 of the Consent Form provided:

> I understand that the Emergency Department physician and my attending physician are independent contractors and not agents or employees of VICTORY MEMORIAL HOSPITAL. I further understand that my attending physician may request treatment or diagnostic services (including radiology, anesthesiology, pathology) by other physicians. I am also aware that any other physicians who may be

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> called to attend my care are independent contractors and not employees or agents of VICTORY MEMORIAL HOSPITAL. *Id.* at 829.

The court agreed with the plaintiff's argument that the patient's signature on the *James* consent alone does not defeat the "holding out" element of an apparent agency claim if there is other "holding out" conduct by the hospital. Rather, the First District found persuasive the trial court's reasoning for denying the post-trial motions, where Judge Locallo stated:

> If not for the *Schroeder* case, the Court believes that (*Churkey v. Rustia*, 329 Ill. App. 3d 239, 768 N.E.2d 842 (2002)) and (*James v. Ingalls Memorial Hospital*, 299 Ill. App. 3d 627, 701 N.E.2d 207 (1998)) would have strong positions with respect to what was signed, but because *Schroeder* … acknowledges that when these forms are presented, you have to look at the totality of the circumstances as far as the Court is concerned, and under these circumstances, acknowledgment that confusion can create an issue of fact for the jury to determine in this case,…. that it was not reasonable to assume that because she had signed the form that she knew or reasonably should have known that Dr. Keene was an independent contractor….

Spiegelman, 392 Ill. App. 3d at 836.

According to the First District, the consent form in *Spiegelman*, like the form previously considered in *Schroeder*, was confusing and ambiguous because it "utilized a multipart format and contained various provisions unrelated to the independent contractor disclaimer." *Id.* at 837. Therefore, the court stated that the jury "could rightfully infer that plaintiff was confused as to which doctors were employees of the hospital and which were independent contractors" because the Consent Form: 1) was titled "CONSENT FOR EMERGENCY TREATMENT," 2) contained a signature line that was beneath a separate unnumbered paragraph concerning the release of property, and 3) contained a separate paragraph stating: "I am aware that during my visit to the Emergency Department of Victory Memorial Hospital, hospital employees will attend to my medical needs as may be necessary." *Id.* at 837.

The appellate court reiterated its holding in *Schroeder* that if "there is evidence that the decedent reasonably believed his personal care physician and the consulting physicians were agents or employees of the hospital, a triable issue of fact exists and should be presented to a jury." *Schroeder*, 371 Ill. App. 3d at 593-94, 862 N.E.2d at 1020. The First District further stated there were additional facts in *Spiegelman* bearing upon the element of "holding out" sufficient to support the jury's determination of liability based on apparent agency. *Spiegelman*, 392 Ill. App. 3d at 839.

In order to address the issues presented in* Spiegelman, *counsel should continue to challenge a deponent who states that he or she was confused or was misled by a consent form. Question how the form confused the patient and why the patient did not seek clarification from someone at the hospital. Ask the patient if he or she was confused about any other treatment that was provided during the admission.

While the First District does not specifically identify these additional facts which support a finding that the hospital held out Dr. Keene as its agent, the trial court record contains newspaper advertisements exalting the health care the hospital provided. The trial court record, however, is lacking evidence that the plaintiff actually saw these advertisements, therefore, leading to the logical question of how plaintiff could have relied upon a "holding out" of which he was unaware.

The First District pronounced an "objective standard" for "holding out," stating, "whether [the plaintiff] in fact saw the advertisements is irrelevant." *Id.* at 839. The court then declared, "the advertisements were relevant to the element of holding out – whether the hospital held itself out as a provider of complete medical care." *Id.* at 841.

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The First District also appears to adopt another of the plaintiff's arguments in *Spiegelman,* stating, "[t]he Hospital cannot have it both ways. It cannot advertise it has the best doctors in the community and then tell a jury that there is no evidence that emergency department doctors were its employees." *Id.* at 841. Should a trial court narrowly apply this statement, it is possible that the trial court could bar defense counsel representing hospitals that advertise their services from arguing the independent contract status of their physicians to a jury.

The First District's holding in *Spiegelman* appears to surpass its prior ruling in *Schroeder*; thus, the appellate court has further eroded the effectiveness of the traditional *James* consent in defeating claims of apparent agency for independent-contractor physicians. *Schroeder* adopted the confusing and implausible distinction between confusion due to the actions by a hospital and confusion caused by the disclosure form itself. The *Spiegelman* decision indicates that if a plaintiff testifies that he or she was confused by a consent form disclosure, then the issue of apparent agency must be submitted to a jury.

In order to address the issues presented in *Spiegelman*, counsel should continue to challenge a deponent who states that he or she was confused or was misled by a consent form. Question how the form confused the patient and why the patient did not seek clarification from someone at the hospital. Ask the patient if he or she was confused about any other treatment that was provided during the admission. Also, make sure that you have requested all documents that the patient received prior to admission, which disclose the proper employer of the physician.

If you did not counsel your hospital clients on how to appropriately draft the disclosure forms after *Schroeder*, you should have that discussion now. The independent contractor disclosure statement should be on a separate sheet of paper, rather than included with the other traditional consents and disclosures. It must provide sufficient and clear notification of the physicians' independent contractor status and should be individually signed by the patient or his or her representative. To provide the greatest chance of defeating claims of apparent agency, the disclosure should identify and disclose by name the physicians who have privileges, but are not employees. A paragraph stating that the patient has the right to choose his own physician and refuse treatment from any physician would also be beneficial. Finally, and perhaps most importantly, the hospital clients should train their staff to read the disclosure forms to the patients and answer any questions patients may have regarding the forms.

Insurance Law

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The Illinois Appellate Court for the First District Rolls Back the Targeted Tender Rule

Pursuant to Illinois law, an insured covered by more than one insurer for the same loss has the right to choose one insurer to be primary and have the other remain either off the loss or as excess coverage. This is known as the "targeted tender" rule, or the *Johns Burns* rule. *See Johns Burns Constr. Co. v. Indiana Ins. Co*., 189 Ill.2d 570, 727 N.E.2d 211 (2000). Typically, a targeted tender occurs in a personal injury action arising from a construction accident. The general contractor will require that subcontractors name it as an additional insured under the subcontractors' policies. When an injury occurs arising from the work of a subcontractor, the general contractor will "target" the subcontractor's policy.

In *River Village I, LLC v. Central Insurance Companies*, No. 1-08-3529, 2009 WL 4041944 (Ill. App. 1st Dist. November 20, 2009) the Illinois Appellate Court First District consid-

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ered a relatively routine dispute regarding insurance coverage for a construction project. The First District found that where a contractor attempts to make a targeted tender, the contractor's own policy may still be triggered and liable for the loss. According to the First District, the "other insurance" clauses of both policies must be considered. The First District's decision may substantially limit targeted tenders.

River Village I LLC ("River Village") was a general contractor on a construction project. *Id.* at *2. First Choice Drywall was a subcontractor on that project. *Id*. The subcontract between River Village and First Choice Drywall ("the subcontractor") contained insurance and indemnification provisions, the details of which are discussed below. *Id*. at 2-3.

River Village had insurance coverage through Harleysville. The subcontractor had a Commercial General Liability policy, which typically is a primary policy, through Central Insurance ("Central").

During the construction project, the subcontractor's employee was injured while working on the project. He filed suit against River Village and others. River Village tendered the defense to the subcontractor's insurer and advised its own insurer not to provide defense or indemnity until the subcontractor's policy was exhausted. River Village's intention was to do a targeted tender pursuant to *Johns Burns*.

After Central failed to respond to the tender, River Village brought a declaratory judgment and breach of contract claim against Central. During that litigation, Central requested a copy of the Harleysville policy. River Village refused to produce the policy. The case proceeded to cross-motions for summary judgment. In its motion, River Village argued that it had made a valid targeted tender to Central. In response, Central argued that the Central policy was excess only and as such, there was no proper targeted tender.

The trial judge initially found that the construction contract did intend that River Village was to be an additional insured under the Central policy. *Id.* at 2. However, the trial court found that there was a genuine issue of material fact as to whether the Central policy was primary or excess and on that basis, denied the cross motions.

According to the conventional view of targeted tenders, once the trial court found that the construction contract required River Village to be named as an additional insured, the only remaining issue should be whether River Village took the steps necessary to make the targeted tender. In this case, however, the trial court instead decided that an examination of the insurance policies was necessary to determine whether the Central policy was primary or excess.

Subsequently, the underlying case settled with Harleysville providing the funds. Harleysville was then added to the declaratory proceedings as a party plaintiff. *Id*. The parties again filed cross-motions for summary judgment. During the hearing, the trial court specifically asked about the excess clause in the Harleysville policy and asked why he had not seen that policy. Counsel for River Village/Harleysville advised the trial court that counsel did not believe that the policy was relevant. *Id.* at 2-3. The judge then discussed *Ohio Casualty v. Oak Builders, Inc*., 373 Ill. App. 3d 997, 869 N.E.2d 992 (1st Dist. 2007), which neither party had briefed. *Id*. at 3. That case dealt with mutually repugnant excess clauses. The trial court took the motions under advisement. *Id*. River Village /Harleysville filed a motion supplementing the record with a discussion of *Ohio Casualty*, but still did not provide the court with a copy of the Harleysville policy. *Id.*

According to the conventional view of targeted tenders, once the trial court found that the construction contract required River Village to be named as an additional insured, the only remaining issue should be whether River Village took the steps necessary to make the targeted tender.

The trial court granted Central's motion. It reasoned that because the construction contract was silent as to whether the insurance provided was to be primary or excess, Central's policy had an "other insurance" clause that made it excess. Because Harleysville's policy had not been produced, there could be no issue of mutually repugnant clauses and as a result, the Central policy was excess only. *Id.* River Village/Harleysville brought a motion to reconsider, and for the first time, attached the Harleysville policy. *Id*. The trial court found that it was not new evidence, and refused to consider it. *Id*. River Village/Harleysville appealed the orders granting Central's Motion for Summary Judgment and denying the motion to consider regarding the Harleysville policy. *Id.*

Initially, the appellate court examined the targeted tender line of cases, including *Johns Burns*. *Id*. at 4. According to River

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Village/Harleysville, those targeted tender cases prohibit a court from examining the "other insurance" provisions where a targeted tender has been made. In so doing, River Village/Harleysville argued that where a policy has not been triggered, there is no "other insurance" that would make the "other insurance" clause of the targeted policy relevant. *Id*.

The appellate court rejected the interpretation suggested by River Village/Harleysville that where there is a targeted tender, the "other insurance" provisions are not applicable.

The appellate court rejected the contention that where there is a targeted tender, the "other insurance" clause is not relevant. Relying on *Progressive Insurance Co. v. Universal Cas. Co.*, 347 Ill. App. 3d 10, 807 N.E.2d 577 (1st Dist. 2004), the court found that in response to the targeted tender cases, insurers developed "other insurance" excess provisions in their policies. *Id.* However, *Progressive v. Universal* did not involve a targeted tender. The court stated that there was an "ensuing battle between the doctrine of targeted tender used by an insured to obtain his selected primary coverage and the application of 'other insurance' excess provisions used by insurers to invoke only excess coverage." *Id*.

The appellate court rejected the interpretation suggested by River Village/Harleysville that where there is a targeted tender, the "other insurance" provisions are not applicable. The court did not address the reasoning of *Johns Burns*, in which the Illinois Supreme Court found that where one policy was targeted, the other policy was not "available," and as such, the other insurance provision would not apply. See *Johns Burns*, 189 Ill.2d at 578, 727 N.E.2d at 217, stating, "We agree with that interpretation and conclude that Indiana may not take advantage of the other insurance provisions in its policy. The insurance provided to Burns by Royal was not `available' …. for Burns had expressly declined to invoke that coverage."

The appellate court in *River Village* accepted the notion that where two policies provided concurrent coverage, a targeted tender can be done. The appellate court, however, did not accept that an action by the insured can make those policies concurrent (as opposed to primary/excess). The appellate court noted that an insured "who is covered by multiple or concurrent policies" can select which of those insurers are to respond to a claim. *River Village*, 2009 WL 4041944 at 5. The issue for the appellate court was whether the policies were concurrent, which required it to analyze the "other insurance" provisions. *Id*. The question for the court was whether the policies were concurrent or were primary/excess. The appellate court found that in each case in which a targeted tender was allowed, coverage originated from primary policies. In contrast, where the insurers provided different kinds of coverage, no targeted tender was allowed. *Kajima Construction v. St. Paul Fire and Marine Ins. Co.*, 227 Ill.2d 102, 879N.E.2d 305 (2007); *State Automobile Mutual Ins. Co. v. Habitat Construction Co.*, 377 Ill. App. 3d 281, 875 N.E.2d 1159 (1st Dist. 2007). As such, if the court found one policy to be primary and the other excess, then there could be no targeted tender.

Applying those principles to *River Village I*, the First District rejected River Village/Harleysville's argument and found that the excess clause in the Central policy was relevant. Further, upon review of the Central policy and the construction contract, the appellate court found that the Central policy was excess and that as such, there could be no targeted tender. *River Village* 2009 WL 4041944 at 5-6.

The appellate court started by looking at the "other insurance" clause in the Central additional insurance provision of the policy, which provided:

> 4. Other Insurance – Excess Insurance
>
> * * *
>
> b.2) This insurance is excess over:
> Any other valid and collectible insurance available to the additional insured whether primary, excess contingent or on any other basis unless a contract specifically requires that this insurance be either primary or primary and noncontributing. *Id*. at 2.

The First District noted that the provision here was "similar" to the provision in *State Automobile*. According to the First District, that language was clear and unambiguous. *Id* at 6. The court noted that the policy would be excess except where required by contract. To find that the Central policy is primary, there must be a contract that specifically requires it to be primary. Upon review of the subcontract, the appellate court concluded that it did not specify what type of insur-

ance must be provided. The subcontract merely required the subcontractor to "'indemnify and hold harmless' River Village for any and all claims and 'pay for and maintain' such insurance as agreed to by the parties." *Id.* at 7. Consequently, the subcontract did not require the Central policy to be primary. Therefore, under the other insurance clause, the policy would be excess. Because Harleysville had paid the loss under its policy limits, the Central policy was not triggered.

Regarding the Harleysville policy, the appellate court observed that River Village/Harleysville's counsel had at least three chances to disclose the Harleysville policy. Thus, the First District found that the trial court did not abuse its discretion in refusing to consider that policy. *Id* at 8. Moreover, the First District noted that *Ohio Cas.*, which the trial court raised, included a discussion of "other insurance" clauses in policies held by the same insured. The appellate court strongly implied that the other insurance provision of the Harleysville policy may well have made a difference in the trial court's decision. *Id*.

River Village I potentially may cause a drastic change in the targeted tender rule. The idea of targeted tenders is that two policies exist that might provide coverage. Those policies nearly always contain mutually repugnant "other insurance" provisions. As such, it is difficult to think of a scenario where a conventional targeted tender would be acceptable in light of *River Village I*. While the First District did not foreclose that a contract between the parties may allow for a targeted tender, doing so would require both a contract requiring so and a specific form of additional insured endorsement that makes the policy primary where required by contract. If either the contract or the endorsement was missing, there could be no targeted tender.

Contractors seeking to shift risk through a targeted tender must put the groundwork for that targeted tender in place at the very beginning of a contractual relationship. The construction contract should clearly state that the subcontractor's policy is to provide primary coverage to additional insureds, and further, the contractor must ensure that the subcontractor's policy includes an endorsement making it primary where required by contract.

Finally, the trial court made clear that it viewed the Harleysville policy to be relevant and even provided counsel with case law suggesting why it might be relevant. Nonetheless, counsel for Harleysville chose to ignore the request until after the trial court had ruled. In that scenario, counsel for Harleysville may have been better off giving the court what it requested, which generally seems to be a good idea. It is easier to argue that the documents provided are irrelevant, than to have to explain a refusal to offer documents.

Civil Rights Update

By Bradford B. Ingram
Heyl, Royster, Voelker & Allen
Peoria

No Federal Constitutional Right To Continued Graduate Education: Rule 12(b)(6) Success And Plaintiff's Failure To Meet Notice Pleading Standards

The Seventh Circuit Court of Appeals in *Bissessur v. Indiana University Board of Trustees*, 581 F.3d 599 (7th Cir. 2009) held that the plaintiff had no federally protected property interest in continuing education at Indiana University and confirmed a Rule 12(b)(6) Motion to Dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. The plaintiff failed to allege sufficient facts to raise the plaintiff's right to relief above a speculative level. The court held that a threadbare recitation of the elements of the claim without factual support fails to state a claim upon which relief can be granted.

Factual Background

Khem Bissessur was expelled from Indiana University after receiving poor grades and failing a clinical rotation. The

(Continued on next page)

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Civil Rights Update *(Continued)*
plaintiff claimed he had a protected property interest in continuing education at the University, which was established through an implied contract between the parties. *Bissessur*, 581 F.3d at 601.

The basic legal relationship between a student and a private university or college is a contractual one. A student may be able to establish an implied contract between himself and a university entitling himself to some rights, such as a right to continue education or not to be suspended without good cause.

No Federally Protected Property Interest

The U.S. District Court granted a Rule 12(b)(6) Motion to Dismiss for the plaintiff's failure to identify the promises made by the University to the plaintiff and how the contract was entered into with him.

Bissessur was a former graduate student who claimed a professor refused to let him take an exam resulting in a grade of an incomplete for a course. He also claimed he received two grades of D+ based on arbitrary reasons. He alleged the University refused to allow him to begin his clinical rotations following the poor grades, and he eventually received a failing grade in one rotation, which resulted in his dismissal.

The plaintiff also alleged that professors arbitrarily assigned his grades, did not give him proper feedback, nor inform him of his academic progress. He claimed he was dismissed without proper notice or hearing and alleged violations of his rights to substantive and procedural due process and equal protection, as well as a breach of implied contract. The U.S. District Court dismissed his claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Bissessur v. Indiana University Bd. of Trustees,* No. 1:07-CV-1290-SEB-WTL, 2008 WL 4274451 (S.D. Ind. Sept. 10, 2008).

The Seventh Circuit noted that the district court focused its ruling on the plaintiff's failure to establish a cognizable protected interest in continuing legal education at Indiana University. The court found that a graduate student does not have a federal constitutional right to a continued graduate education, citing the court's decision in *Williams v. Wendler*, 530 F.3d 584 (7th Cir. 2008). The basic legal relationship between a student and a private university or college is a contractual one. A student may be able to establish an implied contract between himself and a university entitling himself to some rights, such as a right to continue education or not to be suspended without good cause. Catalogs, bulletins, circulars, and rules and regulations of the university may be factors available to the student and can become a part of the contract. A property interest subject to a constitutional protection may exist, but to reach such protection, the student must first show that the implied contract establishes an entitlement to a tangible continuing benefit. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972).

A plaintiff must point to an identifiable contract or promise that the university failed to honor in order to establish such an entitlement. Absent evidence of this type of specific promise, the court will not substitute its judgment or "second-guess the professional judgment of the university faculty on academic matters." *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992). The court in *Bissessur* affirmed the district court's conclusion that the plaintiff in this case failed to point to any specific promise that the University made, which established that he had a right of an entitlement to a continuing education.

The plaintiff on appeal did not challenge the U.S. District Court's "solid analysis." The plaintiff argued that his case should not have been dismissed at the motion to dismiss stage and that he should be entitled to discovery so that he could establish the specific promises that were made. He argued that the specific promises establishing his entitlement to continuing education would be unearthed during discovery in various bulletins and flyers.

Failure to Meet Notice Pleading Standards under the Federal Rules of Civil Procedure

The plaintiff also argued he met the notice pleading standards under the Federal Rules of Civil Procedure such that he should survive a motion to dismiss under Rule 12(b)(6). The Seventh Circuit disagreed, and found the plaintiff's complaint failed to contain enough information to state a legally cognizable claim.

The standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and affirmed in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) hold that a complaint stating only "bare legal conclusions" is not enough to survive a Rule 12(b)(6) motion. While a complaint does not need to provide detailed factual allegations, a plaintiff has the obligation to provide the "factual grounds" to his entitlement to relief. This is more than mere labels and conclusions and more than a mere recitation of a cause of action's elements. A complaint must contain the following:

1. Enough facts to state a claim to relief that is plausible on its face;
2. Sufficient facts to raise a plaintiff's right to relief above a speculative level;
3. Claims that have facial plausibility such that upon review of the factual content, the court can draw the reasonable inference that the defendant is liable for the misconduct alleged; and
4. Facts so that the court can match them up with the stated legal claims, in which the court will give the plaintiff the benefit of imagination, so long as the hypotheses are consistent with the complaint. *Bissessur*, 581 F.3d at 602-603.

The court held that Bissessur's complaint fell drastically short of providing the necessary factual details to meet the *Twombly* standard. The plaintiff's complaint did nothing more than state that an implied contract existed with the University, which it breached. The complaint contained no mention of any entitlements the plaintiff had as a result of the relationship with the University and failed to mention any promises the University or its officials had made to him that might have formed the basis of a contract. Bissessur's complaint did not contain sufficient facts to put the University on notice of the basis of his implied-contract claim. Because Bissessur's constitutional claims were derivative from the rights he alleged were promised to him as a part of the implied contract, the necessary facts to support these claims were also absent from the complaint.

The court reaffirmed the fact that the federal court system operates on a notice pleading standard and *Twombly* and its progeny did not change this fact. A defendant is owed fair notice of what the claim is and the grounds upon which it rests. The court relied on *Conley v. Gibson*, 355 U.S. 41 (1957), indicating that it is not enough to give a threadbare recitation of the elements of a claim without factual support. *Bissessur*, 581 F.3d at 603. A plaintiff may not escape dismissal on a contract claim by stating that he had a contract with the defendant and gave the defendant consideration and the defendant breached the contract. This case stands for the proposition that a plaintiff such as Bissessur must include in his pleadings for a claim of breach of contract the identification of the promises the University made to him, how these promises were communicated, what he promised in return, and how these promises created an implied contract.

The court held that Indiana University had no notice of an implied contract or how it supported Bissessur's constitutional claims. The standard stated in *Conley* in 1957 still applies today and Bissessur's claim failed under that test. *Id.* at 603-604.

Complaints must include facts upon which a court could draw a reasonable inference that the defendant is liable for the alleged misconduct.

Conclusion

The court refused to allow Bissessur's complaint to proceed absent factual allegations that would match the barebone recitation of the elements of the claim. The court would not allow a fishing expedition costing the parties and courts valuable time and resources. The *Bissesseur* case stands for the proposition that plaintiffs need to include in their pleadings enough facts to state a claim that is plausible on its face and above a speculative level. Complaints must include facts upon which a court could draw a reasonable inference that the defendant is liable for the alleged misconduct. This case also stands for the proposition that there is no constitutional right to a continuing education, absent specific factual allegations supporting a claim of breach of contract.

Recent Decisions

By: Stacy Dolan Fulco and Katherine K. Haussermann
Cremer, Spina, Shaughnessy, Jansen & Siegert LLC
Chicago

Expert Affidavit

Expert Affidavit was Sufficient Evidence Against Engineers to Withstand Summary Judgment in Construction Design Case

In *Thompson v. Gordon*, 2009 WL 3969619 (2nd Dist. November 19, 2009), the plaintiff, Corinne Thompson filed suit against multiple defendants, including the engineering companies that designed the bridge and traffic interchange in the area where the plaintiff's husband and child died in a motor vehicle accident. *Thompson*, 2009 WL 3969619 at *1. The defendant engineering companies involved in designing the bridge and traffic interchange were Jack E. Leisch and Associates, Inc. and CH2M Hill, Inc. The defendants entered into a written contract for this work in January, 1991. As part of the work, the defendants replaced the median on the Grand Avenue bridge at I-94. In November 1998, a vehicle traveling east on Grand Avenue lost control, hit the median separating eastbound and westbound traffic, vaulted into the air and hit the westbound vehicle in which the plaintiff's family was traveling. *Id*.

The plaintiff filed suit claiming the defendants were negligent in designing the bridge deck without considering or designing a median barrier that would have prevented the accident by preventing eastbound traffic from becoming airborne. *Id.* During discovery, the plaintiff submitted an affidavit from Andrew Ramisch, a civil engineer who had reviewed the litigation materials. *Id.* at *2. He determined that application of "the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services" as laid out in defendants' contract dictated that the defendants consider, submit and design a median barrier to prevent the type of accident that underlies the case. Ramisch also stated that "the standard of care … as it pertained to an assessment for the need of a median barrier for crossover protection was the same whether the design drawings were for a repair or replacement of the bridge deck." *Id.* He opined that the defendants "failed to properly consider and analyze all of the available data provided by their consultants…pertaining to traffic capacities, weave lane failures and decreases in operational service at the interchange" that would result from the overall project. *Id.* Finally, Ramisch indicated that if the design work on the bridge deck had been performed within the standard of care, "more probably true that not" a barrier would have been designed that would have prevented the accident. *Id.*

In the trial court, the defendants filed a motion for summary judgment which was granted. The trial court ruled that based on the contract language, the defendants were hired to remove and replace the road surface without modification of the existing design and they had no duty to assess the median or modify and redesign the median. The trial judge discounted the plaintiff's expert's affidavit because the court focused on the duties laid out in the contract. After granting summary judgment, the judge entered an order making the issue immediately appealable, and the plaintiff then filed an appeal. *Id.*

As noted by the appellate court, the parties' primary dispute centered on whether the defendants breached a duty by failing to consider or design an improved median barrier. *Id*. at *3. Whether a duty exists is normally a question of law, and the answer depends on whether the parties stood in such a relationship to each other that the law would impose an obligation on the defendant to act reasonably for the protection of the plaintiff. *Id.*; *see*, *Raffen v. International Contractors, Inc.*, 349 Ill. App. 3d 229, 233, 811 N.E.2d 229, 233 (2nd Dist. 2004). When a defendant is accused of negligence due to its failure to perform an act allegedly required by a contractual obligation, the existence of a duty will be deter-

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mined by the terms of the contract, and the scope of the defendant's duty will not be extended beyond those terms. *Id*.; *see*, *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 275, 865 N.E.2d 262, 267 (2nd Dist. 2007).

The appellate court indicated that for a court interpreting a contract, the primary objective is to give effect to the intent of the parties. *Id*.; *see*, *Gallagher v. Lenart*, 226 Ill. 2d 208, 232, 874 N.E.2d 43, 58 (2007). The best indication of the parties' intent is the contract's language, given its plain and ordinary meaning. Because words derive part of their meaning from the context in which they are used, a court construing a contract must look at the contract as a whole, by viewing each part of the contract in light of the others. *Id*.; *see*, *Gallagher*, 226 Ill. 2d at 233, 874 N.E.2d. at 58.

In this case the plaintiff argued that the contract imposed a duty on the defendants to consider, and then design, an improved median barrier. The defendants countered by relying on the plain language of their contract, which required them to submit design plans for a bridge deck "replacement." The defendants interpreted the contract's use of the word "replacement" to indicate that their role was limited to submitting designs to recreate the bridge deck exactly as it had existed, rather than submitting designs for an improved or altered bridge deck. The court noted that there was authority to both support and contradict the defendants' interpretation of the work "replacement." *Id*.

The appellate court determined that even though there were conflicting definitions of the word "replacement," once they viewed the contract as a whole they found additional context to clarify the word. *Id*. at *4. In the paragraph directly preceding the bridge deck replacement paragraph, the contract set out that the defendants would prepare plans for "interchange improvements" or "roadway improvements" to an area near the bridge. The court determined that the contrast between the contract's use of the word "improvements" in that section and "replacement" in the section relating to bridge work suggested that the defendants were correct that the parties to the contract contemplated that the defendants would submit plans to rebuild the bridge deck and median exactly as it already existed. *Id*.; *see*, *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 166, 717 N.E.2d 478, 483 (1st Dist. 1999). Therefore, the court agreed with the defendants' interpretation of the word "replacement" as it was used in their contract and concluded that the defendants provided services under a duty to submit plans to replace the bridge deck as it existed prior to the construction project, but also they owed a duty to perform that contractual task using the degree of skill and diligence normally employed by professional engineers. *Id*.

The appellate court next analyzed whether the plaintiff presented any evidence to support her claim that the defendants breached their duty. It determined that the Ramisch affidavit was sufficient evidence to support a potential breach. The court next moved to the question of whether the defendants' actions breached the standard of care. *Id.* The court noted that the contract's articulation of the defendants' standard of care matched the standard of care generally applied to professionals under Illinois law. *Id*. at *5; *see*, *Advincula v. United Blood Services*, 176 Ill. 2d 1, 23, 678 N.E.2d 1009, 1020 (1996). The appellate court went on to note that "in professional negligence cases, unlike negligence actions in general, the plaintiff bears a burden to establish the standard of care through expert witness testimony." *Id*., *citing Advincula*, 176 Ill. 2d at 23, 678 N.E.2d at 1020; *see also*, *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278, 295, 730 N.E.2d 1119, 1130 (2000).

The court determined that the Ramisch affidavit, which stated that an engineer charged with applying the professional standard of care in designing the interchange and replacing the bridge deck would have, in light of the increased traffic in the area, studied and designed an improved median barrier regardless of whether the contract mentioned a median barrier, offered at least some evidentiary support for the plaintiff's position that the defendants breached a professional standard of care by failing to consider or design an improved median barrier. Therefore, taking the record in the light most favorable to plaintiff, the court held that the trial court erred in granting the defendants summary judgment on the ground that they breached no duty in designing the bridge deck. *Id*.

The court noted that there was support for its decision in the First District's opinion in *Billman v. Frenzel Construction Co.*, 262 Ill. App. 3d 681, 635 N.E.2d 435 (1st Dist. 1994). In *Billman*, a contractor overseeing road work, pursuant to previous designs, was charged with negligence after a motor vehicle accident occurred on the allegedly dangerous roadway that the contractor had created. Although the contractor had performed its contractual duties as expressly described, the First District relied on an expert affidavit (which said that a contractor with the defendant's experience would have noticed that the designs were dangerous and would have therefore notified the relevant parties of the defects) to conclude that there was at least a material question of fact as to whether the defendant contractor had breached a duty. *Id.*, *see*, *Billman*, 262 Ill. App. 3d at 686, 635 N.E.2d at 439.

The defendants argued that the Illinois Supreme Court's decision in *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 475 N.E.2d 822 (1985), a case upon which the trial court

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Recent Decisions *(Continued)*
also relied, dictated that the defendant's duties must be confined to those explicitly mentioned in the contract, rather than those implicitly incorporated via the contract's adoption of a professional standard of care. *Id*. at *6.

Even though defendants' contract asked them to submit plans only to replace the old bridge deck and median, Ramisch stated that engineers following the standard of care dictated by the contract would have discovered the problems and thus had a duty to go beyond the specifically mentioned task of replacing the bridge deck and to ensure that the replacement was safe.

The defendants argued that *Ferentchak* forbids the imposition of a duty to consider and then design an improved median, because, like the contract in *Ferentchak*, the contract in *Thompson* did not mention explicitly any such duty. *Id*. However, the appellate court did not read *Ferentchak* so broadly. Rather, the appellate court read the *Ferentchak* decision as relying on the idea that the engineer's contract in that case indicated that the engineer was to have no involvement in setting the foundation levels and in fact the engineer in that case had no involvement in the foundation levels and further had inadequate information to offer any input, thus making it impossible for the engineer to do what the plaintiffs argued he should have done in regard to the foundation. That was not the situation in *Thompson*. In *Thompson*, unlike the engineer in *Ferentchak*, the defendants were charged with designing the median barrier that the plaintiff claims was defective and it was quite possible for the defendants, using the degree of care normally employed by engineers, to discover that the design they were submitting was dangerous. Even though defendants' contract asked them to submit plans only to replace the old bridge deck and median, Ramisch stated that engineers following the standard of care dictated by the contract would have discovered the problems and thus had a duty to go beyond the specifically mentioned task of replacing the bridge deck and to ensure that the replacement was safe. *Id*.

This decision was based on the fact that the defendants' contract required them to employ a professional standard of care in designing a replacement for the bridge deck, and Ramisch's affidavit stood as evidence that the defendants breached that standard of care by not considering or designing an improved median barrier, even though the improved median barrier was not explicitly mentioned in the contract. *Id*. at *7. For these reasons, the appellate court reversed the trial court's granting of summary judgment for the defendants and remanded the case to the trial court. *Id*.

Medical Malpractice

First District Upholds Admission of Testimony of Defendant Doctor's Financial Incentive for Surgery into Evidence

In *Martinez v. Sarmed Elias, M.D. and Bone & Joint Center*, __ Ill. App. 3d __, __ N.E.2d. __, 2009 WL 5125797 (1st Dist. December 28, 2009), the plaintiff, Thomas Martinez, filed a medical malpractice case against defendants Dr. Elias and Bone & Joint Center, alleging that Dr. Elias performed unnecessary procedures on the plaintiff's lower spine. *Martinez*, 2009 WL 5125797 at *1. The jury returned a verdict for the plaintiff and the defendants appealed, arguing, in part, that the trial court improperly denied the defendants' motion *in limine* to bar the admission of evidence of financial motive for surgery. *Id.*

The plaintiff injured his back at work and at the time of the injury the plaintiff had underlying degenerative disc disease at multiple levels of his lumbar spine. After treating with several different physicians, the plaintiff was referred to defendant Dr. Elias, an orthopedic surgeon. Soon after seeing Dr. Elias, the plaintiff had an MRI which revealed degenerative disc disease and mild stenosis at L3-4, L4-5 and L5-S1 along with neuroforaminal narrowing and end plate changes at all three levels. After examining the plaintiff and reviewing the MRI results, Dr. Elias recommended a discogram to confirm the diagnosis and identify the specific sites of pain. A discogram is an outpatient diagnostic procedure where dye is injected into a disc space. The pressure created is intended to reproduce the patient's pain. The procedure is done to determine which disc, if any, is the cause of the patient's pain. *Id.*

Dr. Elias performed the discogram on the plaintiff. Based on the procedure, Dr. Elias concluded the plaintiff had herniated discs at L3-4, L4-5 and L5-S1, with grade five, through

and through, annular tears at the same levels. Dr. Elias recommended that the plaintiff undergo an endoscopic discectomy at L3-4 and L4-5 and an Intradiscal Electrothermal Therapy (IDET) procedure at L5-S1 as soon as possible. The plaintiff followed Dr. Elias' recommendations and had the procedures. Following the procedures, the plaintiff experienced pain in his right leg for the first time. *Martinez*, 2009 WL 5125797 at *2.

The plaintiff next went to see Dr. Francisco Gutierrez, complaining of pain in the lower lumber area, radiating to the posterior area of his right leg. Dr. Gutierrez attributed the plaintiff's symptoms to severe degenerative disc disease at L3-4, L4-5 and L5-S1, producing three levels of bulging discs and severe stenosis. He recommended lumbar fusion surgery to open the disc space, relieve nerve compression and to stabilize the spine. The plaintiff then returned to Dr. Elias who recommended injections to assess his condition but the plaintiff did not follow Dr. Elias' recommendation. *Id.*

Two years later, the plaintiff saw orthopedic surgeon Dr. Thomas Gleason complaining of right lower back and buttock pain radiating down his right leg, causing a limp. Dr. Gleason noted moderate disc space narrowing at L3-4 and L4-5. The plaintiff then underwent an EMG/NCV test and an MRI as recommended by Dr. Gleason. The MRI showed degenerative disc disease with disc space narrowing at L3-4, L4-5 and L5-S1, mild stenosis at L3-4 and L4-5, foraminal narrowing and a compression of the nerves. Dr. Gleason diagnosed the plaintiff with right lumbar radicular syndrome. *Id.*

Prior to trial, the defendants filed a motion *in limine* to bar any reference or argument that economic motivation played any part in the care Dr. Elias rendered to the plaintiff. The trial court denied the motion *in limine* and such evidence was submitted to the jury by way of expert testimony. *Id*. at *1, 2.

Dr. Clarence Fossier was one of the plaintiff's retained experts. He testified that he had performed "thousands of discograms" during his career. He explained that the problem with discography was that 30% of the time the test rendered a false positive so as a result, discograms were considered controversial in the orthopedic field. Dr. Fossier opined that Dr. Elias deviated from the standard of care by performing the plaintiff's discogram because the "vast majority" of orthopedic surgeons would not perform a discogram on their own surgical patients because of the lack of objectivity it creates. Dr. Fossier determined that Dr. Elias' performance of the discogram caused the plaintiff's injury because it resulted in a false positive, leading to Dr. Elias' performance of unnecessary surgical procedures on the plaintiff. Dr. Fossier opined that based on the plaintiff's presentation, no surgical procedures could have relieved his back pain because he did not have a radicular component. Finally, Dr. Fossier determined that the use of the endoscope during the surgical procedure caused the plaintiff's radicular right leg pain. *Id.*, at *3.

Dr. Gary Skaletsky, a neurosurgeon, also testified on behalf of the plaintiff. Dr. Skaletsky opined that it was a deviation of the standard of care for Dr. Elias to perform the plaintiff's discogram where he was the surgeon who would perform any subsequent surgeries. He also determined that Dr. Elias deviated from the standard of care because the diagnostic test of the discogram showed a degenerative pattern that did not warrant surgery. At trial, Dr. Skaletsky attributed the plaintiff's radicular pain to the performance of the two surgical procedures. *Id.*, at *4.

Dr. Anthony Yeung, an orthopedic spine surgeon, testified as the defendants' retained expert. Dr. Yeung specializes in endoscopic spine surgery and co-developed the Yeung Endoscopic Spine System, a series of instruments used in endoscopic spinal surgery. Dr. Elias attended a training course by Dr. Yeung and adopted his system. According to Dr. Yeung, endoscopic spine surgery is going to be the future of spine surgery. He concluded that Dr. Elias conformed to the standard of care and opined that it was within the standard of care for the surgeon that my later operate on the patient to perform the discogram himself. However, on cross-examination, Dr. Yeung admitted that the surgeon who performs the discogram may have a financial interest in recommending surgery based on the discogram's results. He said there is a disagreement among spinal surgeons as to whether the same surgeon should perform both the discogram and any indicated surgery. *Martinez*, 2009 WL 5125797 at *4. Finally, Dr. Yeung admitted that the plaintiff's radicular symptoms were in some way caused by the procedures but stated they were known risks. *Id.*, at *5

The defendants appealed the trial court's denial of their motion *in limine* to bar any reference or argument that economic motivation played any part in the care Dr. Elias provided to the plaintiff. On appeal, the defendants maintained that motive is not an element of a medical malpractice cause of action. In its analysis of this issue, the appellate court first outlined the actual elements of a medical malpractice case. *Id*. To recover damages in a negligence medical malpractice case, a plaintiff must establish: (1) the proper standard of care, (2) a deviation from that standard, and (3) an injury proximately caused by the deviation from that standard of care. S*ee*, *Purtill v. Hess*, 111 Ill. 2d 229, 241-42, 489 N.E.2d 867, 872 (1986). Expert medical testimony is required to establish the proper standard of care and the defendant's deviation from that standard unless the defendant's "negli-

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Recent Decisions *(Continued)*

gence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson." *Martinez*, 2009 WL 5125797 at *5.

The appellate court noted that the trial court denied the defendants' motion *in limine* to exclude the motivation evidence because the court found it was relevant to an issue in this case. "Relevant evidence" is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id. See*, *Wojcik v. City of Chicago*, 299 Ill. App. 3d 964, 971, 702 N.E.2d 303, 309 (1st Dist. 1998).

The appellate court found the tax returns irrelevant because why the defendant physician breached the applicable standard of care was not relevant to the determination of whether the defendant physician breached the standard of care.

In response, the defendants argued that through the plaintiff's two experts and the cross-examination of Dr. Elias's expert, the issue of financial motive "was insinuated into the entire case as both an element of the cause of action itself and the definition of the standard of care." The defendants contended that the error was further compounded because motive became a major theme of the plaintiff's closing argument. *Id.*, at *6.

The appellate court focused its analysis on two cases cited by the parties, *Neade v. Portes*, 193 Ill. 2d 433, 739 N.E.2d 496 (2000) and *Bearden v. Hamby*, 240 Ill. App. 3d 779, 608 N.E.2d 282 (1st Dist. 1992). In *Neade*, the supreme court was presented with the issue of whether, in a complaint alleging medical negligence, the patient had a cause of action for breach of fiduciary duty against the physician for that physician's failure to disclose financial incentives that existed under the physician's arrangement with the patient's HMO. The Illinois Supreme Court ruled that the patient could not bring a claim of breach of fiduciary duty against the physician under those circumstances. *Martinez*, 2009 WL 5125797 at *6; *see*, *Neade*, 193 Ill. 2d at 435, 739 N.E.2d at 498. In making this ruling, the supreme court agreed with the appellate court that the evidence of financial incentives could be relevant at trial, noting "[t]he relevance and admission of such evidence is for the discretion of the trial court." *Id.*; *see*, *Neade*, 193 Ill. 2d at 450, 739 N.E.2d at 505.

In *Bearden*, the First District Appellate Court reviewed a contempt citation for refusal to produce tax returns the plaintiff claimed were relevant to establish the "motive" for the defendant physician's breach of the standard of care. The appellate court found the tax returns irrelevant because why the defendant physician breached the applicable standard of care was not relevant to the determination of whether the defendant physician breached the standard of care. *Id.*; *see*, *Bearden*, 240 Ill. App. 3d at 783, 608 N.E.2d at 285.

In *Martinez*, the plaintiff contended that the financial incentive evidence established the breach of the standard of care because spinal surgeons should not perform and interpret discograms for their potential surgical patients because the presence of financial incentive, regardless of whether it actually motivated the surgeon, destroys the guarantee of objectivity in the discogram. Therefore, the appellate court determined that the evidence of financial incentive directly addressed whether Dr. Elias breached the standard of care, not why. For these reasons, the court found *Bearden* inapposite. *Martinez*, 2009 WL 5125797 at *7.

The appellate court determined that the trial's court's denial of the defendants' motion *in limine* was proper. In doing so, the court explained that the plaintiff based his negligence claim that Dr. Elias deviated from the standard of care in performing the IDET and endoscopic procedures on Dr. Elias's performance and interpretation of the discogram. The plaintiff argued that based on his symptoms, specifically his lack of radicular pain, the discogram could not indicate that the subsequent surgical procedures would relieve his pain. The evidence of financial incentive supported the plaintiff's claim that the surgical procedures were unnecessary. To refute the plaintiff's allegations, the defendants argued the discogram conclusively indicated the procedures were necessary, relying primarily on Dr. Yeung's testimony. In order to allow the jury to adequately assess the parties' varying theories of what occurred, the trial court properly allowed the financial incentive evidence. *Id.*

Lastly, the appellate court noted that the trial court did not abuse its discretion in permitting the evidence of financial motive to be introduced in a limited and specific manner to address the issue of the defendants' compliance with the standard of care. *Id.*

Civil Practice and Procedure

By: *Edward K. Grassé and Christopher D. Willis*
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Taking Control: Attacking Pleadings Claiming a Violation of a Safety Statute as Prima Facie Evidence of Negligence

Increasingly, plaintiffs are alleging violations of state, local, or municipal ordinances within the context of common law negligence suits. As the world, and the laws that govern it, become increasingly complex, the possibilities for alleging ordinance violations as evidence of negligence only multiply. This article examines ways to aggressively defend against such claims, wresting control of the litigation from the plaintiff by establishing the rules of the game in a favorable way at the outset of the litigation.

There is considerable confusion, amongst practitioners and judges alike, on this area of the law. Defense counsel should consider it their first priority to educate the court regarding the full requirements of pleading the violation of a safety ordinance within a negligence claim to ensure that the plaintiff is required to plead an prove every necessary element of the cause of action to recover. Otherwise, it is possible that confusion of the issues will provide a smokescreen by which a plaintiff can evade the requirements of the claim and turn a defective action into a verdict or settlement.

Consider, for example, a case where the plaintiff has alleged in her complaint that your client violated a statute or ordinance. Of course, you can defend the suit on the grounds that your client's conduct did not violate the ordinance. However, the purpose of this article is to provide a guideline for attacking such pleadings on their face, by a motion brought pursuant to 735 ILCS 5/2-615. Accordingly, for the purposes of such a motion, you must assume that your client's conduct, as alleged, did violate the ordinance. But what then?

Step 1: Was the injury proximately caused by the violation?

Even if the plaintiff has alleged that your client violated an ordinance, and that she was injured, the violation of the ordinance must have proximately caused the plaintiff's injury. While proximate cause is ordinarily a jury question, you should carefully analyze this issue to decide whether to challenge the complaint with a § 2-615 motion. Though you may not be able to argue proximate cause directly, there may be issues in the case that will defeat the proximate cause element indirectly. For example, you should consider whether there may be an intervening act or agency which breaks the causal connection and establishes a lack of proximate cause as a matter of law.

In a recent Seventh Circuit decision addressing Illinois law, it was held that any connection between the defendant's conduct (Wal-Mart's alleged sale of bullets to a woman who was not in possession of a Firearm Owner's Identification Card, in violation of an Illinois statute) and the resultant harm (the woman's suicide using the bullets she purchased) was broken, as a matter of law, by the intervening act of the woman in taking her own life. *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 444 (7th Cir. December 1, 2009). Despite the fact that proximate cause is ordinarily a question for the jury, the

(Continued on next page)

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Civil Practice and Procedure *(Continued)*

Johnson court noted that under Illinois law, "suicide [is] an unforeseeable act that breaks the chain of causation required by proximate cause." *Id.* at 444. Accordingly, the plaintiff's complaint was properly dismissed, because the violation of the statute regarding selling ammunition did not make suicide with the illegally purchased bullets foreseeable.

Make sure to analyze all of the facts of your case carefully and determine whether there may be a similar argument available. The law is clear that the alleged violation of an ordinance will not convert an unforeseeable harm to a foreseeable one. Though the cases where this may be an available defense are rare, you should carefully consider whether an argument can be raised that the proximate cause chain has been broken as a matter of law by an intervening act or force.

You will do a great disservice to your clients by answering a complaint without taking the time to research these issues fully and to think creatively about all arguments you could raise. On this issue, nothing ventured is certainly nothing gained.

Step 2: What is the Purpose of the Ordinance that was Allegedly Violated?

Assuming that you cannot find any argument that will defeat proximate cause as a matter of law, your analysis should continue. The next question is a three-part test: 1) was the statute or ordinance designed to protect human life; 2) was the statute or ordinance intended to protect a class of persons to which the plaintiff belongs; and 3) was the statute or ordinance intended to protect from the kind of injury the plaintiff suffered? *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, 434-435, 581 N.E.2d 656, 66 (1991). While this tripartite inquiry into the purpose of the statute may seem confusing and amorphous, it may prove fertile ground for finding a basis for dismissing the plaintiff's complaint. Defense counsel should be both aggressive and creative in addressing these issues.

It is likely that some or all of the information regarding the purpose of the ordinance will be missing from the text of the ordinance. But do not assume that means these are factual questions which you cannot raise in your 2-615 motion. All of these issues are properly questions of law to be addressed by the trial court. *See e.g. O'Neil v. Krupp*, 226 Ill. App. 3d 622, 624, 589 N.E.2d 185, 187 (3d Dist. 1992). Defense counsel should think creatively for ways to prove and argue the purpose of the statute where none is explicitly stated. For example, can you find other ordinances or statutes in other jurisdictions that prohibit the same conduct, but have a more complete explanation of the purpose of the ordinance, or other factors that you can argue by analogy?

Imagine a situation where the plaintiff has alleged that your clients violated a section of a local ordinance requiring dogs to be leashed or fenced. The plaintiff claims that your failure to contain your loose dog violated the ordinance and proximately caused your clients' dog to bite the plaintiff. However, the local ordinance is comprised of several sections, including the "leash or fence" provision. The ordinance enumerates a number of different "purposes" behind the ordinance but does not identify which section is intended to serve which purpose. The purposes include not only preventing injury to people from animals, but also controlling animal population. So how do you muster a convincing argument that the requirement that dogs be fenced or leashed is for pet population control, and not for the prevention of human injury? By finding a similar State statute, where the Illinois legislature has directed that 80% of fines collected for violations are to go to the Pet Population Control Fund, and animals who are found to be repeatedly running at large are to be spayed or neutered. 510 ILCS 5/9. A statute that was otherwise arguably for the protection of people now, in the context you have provided to the court, is no longer a valid basis for a finding of *prima facie* negligence, as it is not the predominate purpose designed for the protection of human life or to prevent the harm the plaintiff suffered.

This is only one example, and obviously the possibilities are as manifold as the types of files that may one day land on your desk. You will do a great disservice to your clients by answering a complaint without taking the time to research these issues fully and to think creatively about all arguments you could raise. On this issue, nothing ventured is certainly nothing gained.

Step 3: Are there Other Defenses or Requirements to the Claim that May Overcome the finding of Prima Facie Negligence?

Even if the two steps discussed above do not yield fruit, you may not be at a loss. Even if the plaintiff has satisfied the requirements for pleading prima facie negligence based on violation of an ordinance, the complaint may still be defective. Any other requirements that would be a part of the cause of action, such as notice requirements, are not satisfied simply by alleging a statutory violation. For example, in a case where a common law action was attempted by alleging a violation of a state statute regarding lead paint in rental housing, the Illinois Supreme Court rejected the notion that, by alleging violation of the statute, the plaintiff did not have to plead and prove that the property owner knew or should have known of the dangerous condition on the premises. *Abbasi ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 394, 718 N.E.2d 181, 185-86 (1999). Alleging that the dangerous condition on the premises violated the local building code also does not do away with the notice requirement in premises liability cases. *Carey v. J.R. Lazzara, Inc.*, 277 Ill. App. 3d 902, 907, 661 N.E.2d 413, 416 (1st Dist. 1996). Though the plaintiff may have properly alleged duty as a result of the violation of an ordinance, that alone will not support a negligence action. You are free to, and should, attack any other deficiencies that would be present whether an ordinance violation was alleged or not.

Epilogue: What if you lost your motion to dismiss?

Even if none of the steps discussed above result in a valid basis for dismissal of the complaint, do not assume that your client will ultimately be liable to the plaintiff. Even if the plaintiff pleads and proves that your client violated an ordinance, liability is not definitively established: the defendant may prevail by showing that he acted reasonably under the circumstances. *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, at 434-435, 581 N.E.2d 656, 661 (1991). And perhaps equally important, raising these issues at the outset of the litigation may force the plaintiff into amending to allege facts that will ultimately be difficult to prove, putting your client in a better position for summary judgment proceedings, trial, or settlement negotiations. By attacking the complaint early, aggressively, and creatively, you can take control of the litigation and ensure that your client's rights are fully protected under the law.

Supreme Court Watch

By: Beth A. Bauer
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On September 30 and November 25, 2009, the Illinois Supreme Court allowed Petitions for Leave to Appeal in the following civil cases of general interest.

Ready Part 2: Should The Trial Court Give a Sole Proximate Cause Instruction Although the Settling Defendants are Excluded from the Verdict Form?

***Ready v. United/Goedecke Services, Inc.*, Gen. No. 108910, First District No. 1-04-1762**

The plaintiff sued the defendants for wrongful death as a result of a construction accident. In the original lawsuit, the trial court entered judgment in favor of the plaintiff, but also found that the decedent was 35% contributorily negligent. The appellate court reversed the jury's verdict based upon the trial court's application of 735 ILCS § 5/2-1117, the joint liability statute.

The Illinois Supreme Court reversed the appellate court's ruling regarding §2-1117 and affirmed the appellate court's

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Supreme Court Watch *(Continued)*
ruling that the defendant had waived the issue of damages. Additionally, the Illinois Supreme Court, upon rehearing, remanded the case to the appellate court "for a decision on United's claim that the jury should have been instructed on sole proximate cause." *Ready v. United/Goedecke*, 232 Ill. 2d 369, 385, 905 N.E.2d 725, 735 (2009).

After remand, the appellate court reversed and remanded this matter to the trial court for a new trial. The appellate court determined that the defendant's sole proximate cause argument contained two elements: "the circuit court's exclusion of evidence regarding the conduct of the settling defendants, and the circuit court's refusal to instruct the jury on sole proximate cause." *Ready v. United/Goedecke Services, Inc.*, 393 Ill. App. 3d 56, 58, 911 N.E.2d 1140, 1142 (1st Dist. 2009). On the first argument, the appellate court found that the trial court's error in excluding evidence of the settling defendants' conduct was not harmless. Thus, it remanded the case for a new trial. As to the second argument, the Illinois Appellate Court, First District stated, "[b]ecause we have determined that a new trial is in order, we need not address United's contention that the circuit court erred when it refused United's jury instruction on sole proximate cause." *Ready*, 393 Ill. App. 3d at 60, 911 N.E.2d at 1144.

The plaintiff argues to the Illinois Supreme Court that the appellate court erred in disregarding the supreme court's mandate. According to the plaintiff, the only issue before the appellate court was to determine whether the trial court abused its discretion in denying the defendant's sole proximate cause instruction. Further, the plaintiff asserts that according to *American Nat'l Bank v. The Pennsylvania R.R. Co.*, 40 Ill. 2d 186, 193, 238 N.E.2d 385, 388-89 (1968), the appellate court lacked authority to take any action that did not comply with the mandate of the Illinois Supreme Court. The plaintiffs contend that the appellate court's order remanding the case for a new trial is outside the scope of its authority and is void for lack of jurisdiction.

Further, the plaintiffs allege that the appellate court erred in failing to find that the defendant waived the issue of whether the trial court abused its discretion in denying the defendant's sole proximate cause instruction. The plaintiff argues that the defendant failed to preserve her argument regarding a tendered jury instruction on sole proximate cause because the defendant provided no reason to the trial court that the tendered instruction should be given, citing *Brown v. Decatur Mem'l Hosp.*, 83 Ill. 2d 344, 350, 415 N.E.2d 337, 339-40 (1982). The plaintiff asserts that the defendant failed to provide the trial court any meaningful reason why a sole proximate cause instruction should have been given or any factual basis as to why either of the settling defendants was allegedly the sole proximate cause of the occurrence.

Should Illinois Courts Look Beyond the Underlying Complaint to Determine Whether a Duty to Defend Exists?

Pekin Insurance Co. v. Wilson,
Gen. No. 108799, Fifth District 5-07-0571

Mr. Johnson filed a three-count complaint against Mr. Wilson, alleging that Mr. Wilson had assaulted him with a steel pipe and knife in October 2002 and threatened to shoot him. In January 2004, Mr. Johnson encountered Mr. Wilson in a Wal-Mart store where Mr. Wilson allegedly brandished what appeared to be the handle of a pistol and threatened again to shoot Mr. Johnson. Those common facts were incorporated into each of the three counts of the complaint for intentional acts, intentional infliction of emotional distress, and assault ("the underlying complaint").

Mr. Wilson tendered the defense of the underlying complaint to the plaintiffs in this declaratory judgment action, Pekin Insurance Co. ("Pekin") and Farmers Automobile Insurance Association ("Farmers") (collectively "the insurers"). Pekin had issued Mr. Wilson a commercial general liability policy ("CGL"), and Farmers had issued him a homeowner's liability policy.

In April 2005, both of the insurers alleged in the declaratory judgment action that they were not obligated to defend Mr. Wilson in the action involving the underlying complaint. The insurers argued that the allegations in the underlying complaint were for intentional acts, and not negligence. Both insurers alleged that their policies required them to defend only against allegations of bodily injury "caused by an 'occurrence'" – a term that each policy defined as an "accident." Similarly, the insurers stated that the policies excluded coverage for bodily injury that is "expected or intended from the standpoint of the insured." Accordingly, neither policy applied to Mr. Wilson's conduct. Unlike the Farmers' homeowner's policy, the Pekin CGL policy also provided that the exclusion did not apply to "bodily injury resulting from the use of reasonable force to protect persons or property." *Pekin Ins. Co. v. Wilson*, 391 Ill. App. 3d 507, 512, 909 N.E.2d 379, 383 (5th Dist. 2009).

Later, Mr. Johnson amended the underlying complaint to add a fourth count which incorporated the same factual allegations about the altercations between Mr. Johnson and Mr. Wilson, but characterized Mr. Wilson's acts as negligent.

It asserted that Mr. Wilson failed to adequately use tools of his employment in a safe manner, failed to properly maintain tools and knives in a protective manner, and failed to use tools for their intended purpose.

Consequently, the insurers amended their complaint for declaratory judgment, arguing that the new count for negligence did not affect Wilson's coverage. In response, Mr. Wilson filed a counterclaim against the insurers, alleging breach of contract and statutory bad faith under Section 155 of the Illinois Insurance Code. Both claims were premised on the insurers' denial of his tender.

Although Pekin agrees with the Fifth District's finding that the allegations of the underlying complaint came within the intentional acts exclusion, Pekin argues that the Fifth District erred in finding that Mr. Wilson's own counterclaim triggered coverage under the self-defense exception.

The trial court granted the insurers' motion for judgment on the pleadings. The trial court expressly concluded that neither insurer had any duty to defend Mr. Wilson because their policies did not apply to the claims against him. Further, the trial court dismissed Mr. Wilson's counterclaim against the insurers.

On appeal, the Illinois Appellate Court for the Fifth District agreed with the insurers that the allegations in the underlying complaint were predicated on intentional misconduct, and therefore, fell within both policies' exclusions for intentional acts. *Pekin Ins. Co.*, 391 Ill. App. 3d at 512, 909 N.E.2d at 386. The Fifth District further held, however, that Pekin had a duty to defend because the counterclaim, which alleges self defense, gave effect to the self-defense exception. Thus, Pekin had a duty to defend Mr. Wilson.

Although Pekin agrees with the Fifth District's finding that the allegations of the underlying complaint came within the intentional acts exclusion, Pekin argues that the Fifth District erred in finding that Mr. Wilson's own counterclaim triggered coverage under the self-defense exception. Pekin argues to the Illinois Supreme Court that the Fifth District's decision joins an existing conflict between the First and Second Districts of the Illinois Appellate Court over whether a court may consider pleadings other than the underlying complaint in determining an insurer's duty to defend. According to Pekin, the Second District has held that a trial court must look only to the underlying complaint to determine whether there is a duty to defend. *National Union Fire Ins. Co. v. R. Olson Constr. Contractors, Inc.*, 329 Ill.App.3d 228, 235, 769 N.E.2d 977, 982 (2nd Dist. 2002). Conversely, the First District permits the consideration of pleadings other than the underlying complaint, expressly disagreeing with the Second District's analysis in *National Union*. *American Economy Ins. Co. v. Holabird & Root*, 382 Ill.App.3d 1017, 1034-35, 886 N.E.2d 1166, 1181 (1st Dist. 2008).

Additionally, Pekin asserts that the Fifth District's decision creates a conflict among those cases that permit other pleadings to be considered by requiring the courts to consider a pleading filed by the party seeking coverage. Pekin argues that even the First District, which allows consideration of other pleadings in evaluating the duty to defend, has squarely rejected the notion that it may look to a pleading filed by the party seeking to establish coverage for itself. *National Fire Ins. of Hartford v. Walsh Constr. Co.*, 392 Ill. App. 3d 312, 322, 909 N.E.2d 285, 293 (1st Dist. 2009); *American Economy Ins. Co. v. DePaul University*, 383 Ill. App. 3d 172, 180-81, 890 N.E.2d 582, 590 (1st Dist. 2008). As such, Pekin avers that the Fifth District has created an additional conflict that requires the review of the Illinois Supreme Court.

Finally, Pekin argues that the Fifth District's decision has established two different standards by which the court may measure whether specific provisions of its policy applies. Regarding the intentional acts exclusion, the Fifth District applied the appropriate standard to determine whether an insurer has a duty to defend its insured from a lawsuit; a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy. *See Valley Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 363, 860 N.E.2d 307, 314 (2006), *citing Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 107-08, 607 N.E.2d 1204, 1212 (1992). According to Pekin, instead of applying that standard to the self-defense exception to the intentional-acts exclusion, the Fifth District instead espoused an undefined and lower standard, which is contrary to Illinois law, for invoking the self-defense exception.

Health Law

By: Roger R. Clayton, Mark D. Hansen and Jesse A. Placher
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What Every Litigator Needs to Know About the HITECH Breach Notification Rules

The Health Information Technology for Economic and Clinical Health Act ("HITECH") was enacted as part of the American Recovery and Reinvestment Act of 2009. Section 13402 of HITECH imposes certain notification requirements upon entities covered by the Health Insurance Portability and Accountability Act ("HIPAA"), Public Law 104-191.Specifically, HITECH requires HIPAA-covered entities, defined in 45 C.F.R. 160.103, and their business associates to provide notification when breaches of unsecured protected health information occur. When a breach occurs, business associates of HIPAA-covered entities must inform the covered entities of any breach. Covered entities must then notify the individuals whose information has been breached or is reasonably believed to have been breached.

What Constitutes a Breach?

Pursuant to HITECH, a breach occurs when there is an unauthorized acquisition, access, use or disclosure of unsecured protected health information that compromises the security and privacy of the information. "Unsecured" protected health information is information that is still accessible. If a covered entity has technology or methodology that makes the information secured, meaning that it is inaccessible, unreadable and indecipherable, there is no need for notification. Examples of securing protected health information include encryption of electronic information and shredding of hard copy materials.

Also, if the information that has been disclosed does not contain harmful information, resulting in no risk of injury to the patient, there is no need for notification. To determine whether the information would be detrimental to the individual, a "harm threshold" must be met. The "harm threshold" is determined by a fact-specific risk assessment of the unauthorized information. The main factor to consider in the risk assessment is whether the identity of the individual can be determined from the information; if not, there is no risk of harm to that person. Likewise, if the individual can be identified, but the services cannot, there is likely no injury. The covered entity should also take all possible mitigation actions to ensure the information is destroyed by the unautho-

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rized receiver or not viewed and returned by the unauthorized receiver. If the covered entity is positive that the information was destroyed or not viewed and returned, notification is unnecessary.

Exceptions to a Breach

There are three exceptions to a breach under HITECH. The first applies to workforce members of the covered entity when the disclosure was made in good faith, within the scope of the disclosing individual's authority and does not result in any further violation. For example, if one employee of the covered entity accidentally receives a piece of mail with confidential information, shreds the mail without reading it, and notifies the person who gave it to her, the exception would apply. As such, there is no obligation to notify.

The second exception applies to inadvertent disclosures from one person authorized to view the information to another also authorized to view the information, but with less authority. Both persons need to be employed by the covered entity or be business associates, such as a physician with staff privileges and a nurse employee of a hospital. An example might include when an employee who does billing for the hospital and may view only limited portions of a patient's information, receives the entire medical chart from a doctor who may view the entire record. In this situation, the doctor has full authorization and the billing clerk has limited authorization. The doctor and billing clerk both have some level of authorization under the same covered entity, so if the billing clerk does not review the material, there is no breach.

The third exception involves situations in which the covered entity has a good-faith belief that the unauthorized person who received the information could not have reasonably been able to retain such information. For example, the mailing of a patient's examination results to the wrong person, but the mail being returned unopened by the post office.

Notification Requirements

When a breach occurs, the HIPAA-covered entities must notify the individuals without unreasonable delay, and no later than 60 days. The time for notification begins to run upon the discovery of a breach. A covered entity's employee's knowledge of the breach will be imputed to the covered entity, while a business associate will need to notify the covered entity for it to be considered to have knowledge. It is important for a covered entity to impose strict reporting requirements on its employees, and to determine who is considered a business associate rather than an employee.

Covered entities should provide written notice to the individual, or next of kin if deceased. If the matter is urgent, an entity may also notify the individual by telephone. If there are ten or more people whose information has been breached, the covered entity should notify by a conspicuous posting on its website or in media print or broadcasting. If five hundred or more people are affected, the covered entity must give notice to a prominent media outlet within its state or jurisdiction. A HIPAA-covered entity must also notify the Secretary of the Department of Health and Human Services if there has been a breach of information of five hundred or more people. Finally, the entity must annually notify the Secretary of all breaches.

The notifications should include: 1) a brief description of the breach, including the date of the breach and date of discovery of the breach, 2) the type of public health information involved, 3) steps that the individual should take to protect himself, 4) a brief description of what the entity is doing to investigate and mitigate the breach, and 5) contact procedures for the individual to get in touch with the covered entity. The notification should also be written in "plain language."

Non-Covered Entities

The Federal Trade Commission ("FTC") also has a health breach notification rule that applies to entities not covered by HIPAA. For instance, a public health relation vendor may provide services on his own and through a covered entity. If a breach is made by this vendor, he will need to notify the covered entity for HITECH purposes, but will need to provide individual notice to his private clients under the FTC Rule. The FTC breach notification requirement guidelines are similar to those imposed under HITECH, and can be found at 16 C.F.R. §318.1-318.9.

Conclusion

Willful violations of any provision of HIPAA, including breach notification requirements, are punishable by a minimum fine of $10,000, up to $50,000 per violation. Therefore, as counsel for covered entities, it is imperative to advise your clients to create and enforce notification requirements to avoid costly penalties.

E-Discovery

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Seventh Circuit Announces E-Discovery Pilot Program

The judges of the Seventh Circuit recently announced that they were commencing the first phase of an e-discovery program that will run from October 1, 2009 through May 1, 2010. According to the court, the goal of the principles announced as part of the program is "to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2)." Seventh Circuit Electronic Discovery Pilot Program, *Statement of Purpose and Preparation of Principles*, p. 9 (October 1, 2009). The principles are intended not just to call for cooperation but to motivate cooperative exchange of information on evidence preservation and discovery. They do so "by providing guidance on preservation and discovery issues that commonly arise and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court." *Id.* In addition to the foregoing, the principles provide guidance on e-discovery education.

The principles set forth in the pilot program provide several helpful particulars, including the following:

- **Cooperation.** Principle 1.02 addresses the zealous representation excuse for obstructionist behavior. It states that "[a]n attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner."
- **Proportionality.** Principle 1.03 calls for the proportionality standard set forth in F.R.C.P. 26(b)(2)(C) to be applied in each case when formulating a discovery plan. That standard allows a party to object to discovery requests where the burden or expense outweighs the likely benefits of the discovery considering such things as the resources of the party and the amount in controversy. In order to further the application of the proportionality standard in discovery, Principle 1.03 states that "requests for production of [electronically stored information (ESI)] and related responses should be reasonably targeted, clear, and as specific as practicable."
- **Meet and Confers.** Principle 2.01 states that prior to the initial status conference with the court, "counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case." Among the issues to be discussed are (1) the identification of relevant and discoverable ESI; (2) the scope of discoverable ESI to be preserved by the parties; (3) the formats for preservation and production of ESI; (4) the potential for conducting discovery in phases; and (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under F.R.C.P. 502. Principle 2.01 further requires any disputes regarding ESI to be brought to the court's attention at the initial status conference or "as soon as possible thereafter."
- **E-Discovery Liaison.** Principle 2.02 recognizes that the meet and confer process will be aided by the participation of an e-discovery liaison. In the event of a dispute concerning the preservation or production of ESI, each party is required to designate an individual to act as an e-discovery liaison for purposes of meeting, conferring and attending court hearings. The liaison, who can be an attorney, a third-party consultant, or an employee of the party, must be pre-

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Bradley C. Nahrstadt, a Partner at *Williams, Montgomery & John, Ltd.* in Chicago, focuses his practice on the defense of high stakes products liability, premises liability, insurance bad faith and commercial claims. Mr. Nahrstadt has litigated cases involving a wide variety of products, including fine grinding machines, silicone breast implants, dietary supplements, automobile axles, hydraulic automotive lifts, hydraulic jacks, brakes, clutches, child safety seats, chemical floor wax strippers, signal components, genetically engineered corn, rewinders, pharmaceuticals, thermal oxidizers, gravimetric feeders, welding rods and contact lens solution. Mr. Nahrstadt has served as regional counsel for a national testing laboratory and currently serves as regional counsel for a large consumer of welding rods, a leading optical manufacturer and a major brake and clutch manufacturer. He is a graduate of Monmouth College (Summa Cum Laude) and the University of Illinois College of Law (Cum Laude) and currently serves as a member of the Illinois Association of Defense Trial Counsel Board of Directors.

pared to participate in e-discovery dispute resolution, be knowledgeable about the party's e-discovery efforts, have reasonable access to those who are familiar with the party's electronic systems and capabilities, and have reasonable access to those who are knowledgeable about the technical aspects of e-discovery.

In the event of a dispute concerning the preservation or production of ESI, each party is required to designate an individual to act as an e-discovery liaison for purposes of meeting, conferring and attending court hearings.

- **Preservation.** Principle 2.03 disfavors broad requests for preservation and encourages the exchange of specific information to help determine appropriately specific preservation agreements. The principle spells out specific and useful information to include in preservation requests, as well as the type of information to be included in a response to a preservation request.
- **Scope of Preservation.** Principle 2.04 covers the scope of preservation. According to this principle, "[e]very party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control." Principle 2.04(b) requires a party who is seeking information about the other party's preservation and collection efforts to confer with the other party before initiating such discovery. Principle 2.04(c) requires the parties and counsel to come to the initial meet and confer conference prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that each party is seeking. Principle 2.04(d) enumerates the types of information that would not ordinarily be preserved, including "deleted," "slack," "fragmented," and "unallocated" data.
- **Identification of ESI.** Principle 2.05 encourages the parties to discuss potential methodologies for identifying ESI for production. Topics for discussion may include any plans to (1) eliminate duplicative ESI; (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and (3) use key word searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.
- **Production Format.** Principle 2.06 provides that counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI. This principle further states that "ESI and other tangible or hard copy documents that are not text-searchable need not be made text searchable." Presumably this principle means that scanned paper documents do not need to be processed through optical character recognition software prior to production.
- **Education.** Principle 3.01 sets forth a judicial expectation that all judges, counsel and parties to litigation will become familiar with the fundamentals of ESI discovery. To that end, the judges who adopt the principles contained in the pilot program expect all counsel who appear in front of them to familiarize themselves with the federal rules governing electronic discovery, the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure and the principles which comprise the pilot program. Principle 3.02 further states that judges, attorneys and parties to litigation should "also consult The Sedona Conference publications relating to electronic discovery, additional materials available on web sites of the courts, and of other organizations providing educational information regarding the discovery of ESI."

In addition to setting forth these guiding principles regarding the discovery of ESI, the pilot program materials contain a highly detailed proposed standing order relating to the discovery of electronically stored information. A complete copy of the pilot program materials can be found on the web site of the Seventh Circuit Bar Association: www.7thcircuitbar.org.

Product Liability

By: James W. Ozog and Brian J. Benoit
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Confronting Plaintiff's Expert With the Theory of the Case

The concept illustrated by *Henry v. Panasonic Factory Automation Company*, 917 N.E.2d 1086 (Ill. App. 4th Dist. 2009) is simple: a theory that a product is unreasonably dangerous in design must be supported by expert testimony. Its simplicity notwithstanding, the decision handed down by the Illinois Appellate Court, Fourth District provides an important analysis into how to evaluate whether the plaintiff has met his or her burden in proving the elements of a product liability claim.

On June 30, 2004, Keith and Sue Henry filed a two count complaint against Panasonic sounding in strict products liability for special and general damages sustained by Keith Henry and loss of consortium. The complaint arose out of an incident which occurred while Keith Henry was working at the TRW Automotive Plant in Marshall, Illinois. Part of Mr. Henry's duties included operating a piece of machinery sold to TRW by Panasonic called an MSH. An MSH is a high speed placement machine that was used to assist TRW in the manufacture of safety systems for automobiles. At the time of the incident, Mr. Henry had entered the MSH in order to observe and adjust the cutter. While inside, the MSH was turned on by Mr. Henry's colleague, which activated the "z carriage" and injured Mr. Henry. According to Panasonic's statement of uncontested material facts in support of its Motion for Summary Judgment, which were adopted by the plaintiffs, Mr. Henry asked his colleague, Julie Price, to turn on the power to the MSH while Henry remained inside to determine whether the cutter was working properly.

The record indicated that an individual can determine whether the cutter is functioning properly without entering the MSH while the cutter is operating. To do so, the operator would need to adjust the cutter while the power is off, step outside the MSH, turn on the power and listen to whether the cutter is functioning correctly.

The plaintiffs' complaint alleges that the MSH was unreasonably dangerous because: "1) it did not have a proper safety guard; 2) the safety gate did not prevent the machine from operating; and 3) it did not have a safety device to prevent injury to the operator." *Henry*, 917 N.E.2d at 1092.

The plaintiffs' response to Illinois Supreme Court Rule 213(f) interrogatories identified Dr. Charles Roberts as an expert to provide testimony that the machine was unsafe. Specifically, Dr. Roberts' opinion was that "the design of the MSH was inherently dangerous because the adjustment of its cutters 'invites' the operator into the machine to observe the cutter bar" and because "an operator was required to remain in the area of the z carriage of the MSH while it was running in order to observe the cutter." *Id.* at 1089.

At deposition, Dr. Roberts was asked if it would change his opinion regarding the product's unsafe nature if "it were 'possible to adjust the cutter, step outside the machine, turn the machine on, and watch it or listen to it to see if it was operating correctly.'" *Id.* at 1090. Dr. Roberts acknowledged that if it were possible, the machine would not be unsafe. *Id.* The statement of undisputed material facts stated that the operator did not need to enter the machine to determine whether the cutter was functioning properly. *Id.* Accordingly, the condition around which Dr. Roberts' testimony was based did not exist.

The trial court granted summary judgment in favor of Panasonic on the grounds that the plaintiff lacked expert tes-

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timony to support the theory that the product at issue was defective. The trial court's decision was supported by the decision in *Baltus v. Weaver Division of Kidde & Co.*, 199 Ill. App. 3d 821, 557 N.E. 2d 580 (1st Dist. 1990). In *Baltus*, the court granted summary judgment in favor of the manufacturer where the manufacturer successfully barred plaintiff's experts. There, the plaintiff had failed to disclose his experts and the manufacturer submitted affidavits from professional engineers stating that the transmission jack that allegedly caused the plaintiff's injuries was not defective.

On appeal in *Henry*, the plaintiffs argued that Dr. Roberts' expert testimony "established a *prima facie* case that the MSH was unreasonably dangerous." *Henry*, 917 N.E.2d at 1092. Dr. Roberts' testimony however, that the MSH was unreasonably dangerous because the design invited or required the operator to remain inside the machine to determine the adjustments made the cutter were effective, was contradicted by the defendant's statement of uncontested material facts.

The court cited *Baltus*, stressing the importance of expert opinions in products liability cases. The *Baltus* court stated that "[p]roducts liability actions, however, often involve specialized knowledge or expertise outside the layman's knowledge. Manufacturing negligence resulting in an unreasonably dangerous product seems particularly appropriate for expert opinion." *Baltus v. Weaver*, 199 Ill. App. 3d at 834, 557 N.E.2d at 588. The *Baltus* court compared the products liability scenario to a medical malpractice action, stating:

> Both types of cases involve specialized knowledge that bear directly on the standard of care in the community. While some instances of medical malpractice need no expert opinion that a doctor has fallen below the standard of care (such as a case in which an instrument is left in the patient after surgery), expert opinion usually is required to aid the jury in determining that the pertinent standard of care has been breached.

Henry, 917 N.E.2d at 1091-92, quoting from *Baltus*, 199 Ill. App. 3d at 836, 557 N.E.2d at 589. It is worth noting that in *Baltus* the plaintiff unsuccessfully attempted to substitute his own knowledge about purchasing and using transmission jacks for expert testimony.

In *Henry*, the failure of the plaintiffs' expert to testify about any specific defect rendered his opinion useless. While the complaint alleged defects other than the one that Dr. Roberts testified about, the defects in the complaint were not supported by expert testimony. In fact, at deposition, Dr. Roberts was asked whether he had an opinion regarding the MSH as to whether: "1) it did not have a proper safety guard; 2) the safety gate did not prevent the machine from operating; and 3) it did not have a safety device to prevent injury to the operator." About each, which were separate allegations in plaintiff's complaint, Dr. Roberts replied that he had no opinion. *Henry*, 917 N.E.2d at 1092.

Dr. Roberts' deposition testimony that the MSH would not be dangerous if the operator did not need to enter the machine to determine whether the cutter was functioning properly, coupled with his lack of an opinion as to any other alleged defect dealt the plaintiff's case a fatal blow. Disclosing an expert and failing to provide an opinion that any element of the product is defective is tantamount to not offering expert testimony.

Henry v. Panasonic **– In Practice**

What immediately jumps out about this case is Dr. Roberts' lack of knowledge about the product. While the *Henry* case may be on the rarer end of the spectrum regarding an expert's ill-preparedness, it raises important issues about the preparation of experts. Just as juries need education about complex products cases, experts may need some information in order to adequately apprise themselves, their clients, and the jury about how the product functions internally and in the workplace.

- A product is not rendered defective where a malfunction only exists in a laboratory setting. In order to adhere to the scientific method, hypotheses must be tested. If an expert's theory is that a product is unreasonably dangerous for consumer use, the product must be tested as a consumer would ordinarily use the product. Underwriters Laboratories, "UL" for instance, sets forth specific standards highlighted on its website at http://ulstandards infonet.ul.com, for categories of products to which a product must adhere before obtaining UL certification. While Illinois does not adhere to the heightened evidentiary standards set forth in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (U.S. 1993) and *Federal Rules of Evidence* §702, an expert's credibility can be damaged in front of a jury if he or she did not test the product as it was operating at the time of the alleged incident.
- Use the expert's failure to opine on specific defect theories to dismiss portions of the plaintiff's complaint. The *Henry* and *Baltus* cases require that a defect theory sounding in products liability must be supported by expert testimony where expert testimony would assist the jury.

Employment Law

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Plaintiff Fails to Maintain Retaliatory Discharge Claim Based on Public Policy of "Patient Safety"

In *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 911 N.E.2d 369 (2009), the Illinois Supreme Court held that the plaintiff, Mark Turner, failed to maintain a retaliatory discharge claim against his former employer, Memorial Medical Center ("Memorial"). The court held that Turner did not sufficiently allege the existence of a clearly mandated public policy that had been violated upon his termination, and thus affirmed the dismissal of his claim.

In September 2006, the Joint Commission on Accreditation of Healthcare Organizations ("the Joint Commission") performed an on-site survey of Memorial. An independent, not-for-profit organization that establishes various health-care standards, the Joint Commission evaluated Memorial's compliance with those standards and other accreditations, in order to determine whether Memorial could continue to receive accreditation. Failure to maintain accreditation would result in Memorial's losing of federal funding.

Memorial used a computer charting program that allowed electronic charting of a patient's file. The Joint Commission standard was that charting was to be performed immediately after a patient received care. Memorial's respiratory therapy department, however, merely required that charting be performed at some point during a respiratory therapist's shift.

Plaintiff Turner was a trained and licensed respiratory specialist. He had worked at Memorial, a community hospital, since 1983, and consistently performed excellent work. On September 28, 2006, a surveyor with the Joint Commission asked Turner to speak with him at a meeting, which Memorial's vice-president of patient care services attended. At the meeting, Turner truthfully reported the deviation of Memorial's practice from the Joint Commission's standard regarding electronic charting. He further advised that he believed that the deviation jeopardized patient safety. On October 4, 2006, Memorial discharged Turner.

Turner subsequently filed a complaint with the Illinois circuit court, alleging common-law retaliatory discharge against Memorial. In order to sustain such a claim, Turner had to allege that (1) Memorial discharged him; (2) that the discharge was in retaliation for his activities; and (3) that the discharge violated a clear mandate of public policy. *Turner*, 233 Ill. 2d at 500, 911 N.E.2d at 374. Turner alleged in his complaint that his discharge was in retaliation for advising the Joint Commission of Memorial's deviation from the electronic charting standards. He further alleged that the discharge violated public policy relating to patient health and safety. More specifically, he alleged that his discharge violated the public policy that encourages employees to report actions that jeopardize patient health and safety.

Memorial filed a motion to dismiss the complaint, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, for failure to state a claim upon which relief could be granted. The circuit court granted the motion, and a divided appellate court upheld the dismissal. The Illinois Supreme Court allowed Turner's petition for leave to appeal.

In its opinion, the court reaffirmed that Illinois generally is an at-will employment state, which allows an employer to discharge an employee for any reason or for no reason. *Turner*, 233 Ill. 2d at 500, 911 N.E.2d at 374. A recognized exception to the general rule, however, arises where the discharge is unlawfully retaliatory. The cause of action for retaliatory discharge, however, is limited and narrow. *Palmateer v. Int'l*

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Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). An essential element of the cause of action is the violation of a clearly mandated public policy. Although there is no precise definition of the term, public policy generally can be found in the State's constitution, statutes, or judicial decisions. It concerns what is right and just and affects the citizens of the State collectively. *Id.* at 130, 421 N.E.2d at 879. Further, the court held that whether a public policy exists and whether that policy is undermined by the employee's discharge are questions of law for the court to resolve. *Turner*, 233 Ill. 2d at 501-02, 421 N.E.2d at 374-375.

The court explained that the tort of retaliatory discharge is meant to achieve a proper balance between the interests of an employer in operating a business efficiently and profitably, the interest of the employee in earning a livelihood, and the interest of society in having its public policies carried out. *Id.* at 502, 421 N.E.2d at 375. Thus, where there is no clearly mandated public policy, the employer has the right to terminate employees at will. Because the exception to the at-will rule is narrow, the danger is that evaluating public policy with generalized concepts of fairness and justice could result in an elimination of the at-will doctrine itself. The term "clearly mandated public policy" implies that the policy is recognizable simply because it is clear. An employer should not be exposed to liability under a generalized public policy standard that is too general to provide specific guidance and so vague as to be subject to different interpretations. *Id.* at 502-503, 421 N.E.2d at 375. Citing several cases, the court gave the following examples of insufficient allegations of public policy: the right to marry a co-worker; product safety; promoting quality health care; and the Hippocratic Oath. *Id.* at 503, 421 N.E.2d at 376.

In *Turner*, the court noted that the plaintiff alleged only two sources of the proposed clear mandate of public policy: the Joint Commission's standards and the Medical Patient Rights Act, 410 ILCS 50/0/01 *et seq*. The court found that neither source set forth a specific public policy, much less a clearly mandated public policy. *Id.* at 507, 421 N.E.2d at 378.

With respect to the Joint Commission's standards, the plaintiff alleged that the Joint Commission's role was federally recognized as an important component in assuring patient safety, and that it had certain standards and criteria regarding electronic patient charting. Specifically, one standard required electronic charting to be done immediately after a patient received care, so as to enhance patient care and safety. The court, however, noted that no Illinois law or administrative regulation directly required immediate bedside charting of patient care. The standards are not Illinois law, and thus are not representative of the public policy of the State of Illinois. Detrimentally, the plaintiff failed to recite or even to refer to a specific standard in support of his allegation. Consequently, the court found that the allegation failed to set forth a specific public policy in order to support a claim for retaliatory discharge. *Id.* at 505, 421 N.E.2d at 376-377.

With respect to the Medical Patients Rights Act, the plaintiff argued that Section 3 of that Act, 410 ILCS 50/3, established the right of each patient to receive care consistent with sound nursing and medical practices. The court noted that the mere citation to a statutory provision is insufficient to state a cause of action for retaliatory discharge. Regardless, the court did not read Section 3 to establish a clearly mandated public policy of patient safety, as that section is concerned with record confidentiality only. It did not deal with record timeliness, which was the gist of the plaintiff's complaint. *Id.* at 505, 421 N.E.2d at 376. Therefore, the plaintiff failed to set forth a clearly mandated public policy that was violated by his discharge.

Although the court agreed that good medical care by hospitals is in the public good, the court reasoned that it does not follow that all health care employees should be immune from the general at-will employment rule simply by reporting on issues that they feel are detrimental to health care. The court again reiterated the need to adhere to a narrow definition of public policy, in order to maintain the balance among the previously enumerated recognized interests. Thus, employees would be secure in knowing that their jobs are safe if they exercise their rights according to a clear mandate of public policy. Employers will know that they are able to discharge their at-will employees for any reason or for no reason, unless they act contrary to public policy. Finally, the public interest in the furtherance of public policy, the stability of employment, and the elimination of frivolous lawsuits is maintained.

The court concluded that the general concept of "patient safety," by itself is inadequate to justify finding an exception to the general rule of at-will employment. Therefore, the court held that the plaintiff failed to sufficiently plead the existence of a clearly mandated public policy, and affirmed the dismissal of the claim. *Id.* at 508, 421 N.E.2d at 507.

Professional Liability

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Exclusive Federal Jurisdiction Over Certain Legal Malpractice Claims

A number of years ago, I was retained to represent a law firm sued for legal malpractice based on the firm's alleged failure to timely secure patent protection in Asia for technology invented by the plaintiff. Although the law firm had timely sought patent protection in the United States, the ability to seek patent protection for the technology in Asia was lost because the filing in Asia was late. Upon receiving the assignment, my first question was whether I could remove the case to federal court.

My rationale for wanting to remove the case to federal court had nothing to do with the potential jury pool for the case, or the speed with which the case would progress in federal court compared to state court. Rather, my concern was that no matter which judge was assigned the case in state court, there was a very high probability that the judge would have no experience with patent related litigation. Knowing that the case would involve questions of causation and damages relating to the alleged loss of patent protection, it was my belief that having the case in federal court would better ensure that the case was heard by a judge who had some experience handling patent related cases. However, at that time, there was no case law in Illinois addressing whether state courts have jurisdiction over legal malpractice claims that involve underlying questions of patent law, or whether jurisdiction rests exclusively in the federal court for such claims. As a result of a recent decision by the Illinois Appellate Court First District, practitioners now have some guidance on this issue. *See Premier Networks, Inc. v. Stadheim and Grear, Ltd.*, 2009 WL 3762952 (1st Dist. Nov. 10, 2009).

In *Premier*, the plaintiff was the owner of patent number 4,303,805 (the "805 Patent") for a system which amplifies telephone signals transmitted by individual telephones to telephone companies' central offices. The plaintiff believed that Lucent Technologies ("Lucent") was infringing on the 805 Patent. The plaintiff therefore retained the law firm of Stadheim and Grear, Ltd. (the "Stadheim firm") to prosecute a patent infringement action against Lucent. The Stadheim firm filed the suit on behalf of the plaintiff and against Lucent in the United States District Court for the Northern District of Illinois.

Lucent denied that it infringed on the 805 Patent. Lucent asserted that the plaintiff's system coupled the receiver and the transmitter of the telephone to the telephone lines while Lucent's system did not couple the receiver and transmitter, but instead used independent connections for those items. The district court granted summary judgment for Lucent finding no patent infringement. The Seventh Circuit Court of Appeals affirmed, holding that the plaintiff failed to rebut Lucent's evidence that its system did not couple the receiver and transmitter.

Thereafter, the plaintiff filed suit against the Stadheim firm alleging legal malpractice. The plaintiff alleged that the Stadheim firm had failed to utilize scientific evidence given to it by the plaintiff that would have rebutted Lucent's claim by establishing that Lucent's system also had a substantial amount of coupling of a telephone's transmitter and receiver to telephone lines. The plaintiff asserted that the Stadheim firm's failure to use this evidence constituted a breach of the standard of care. The plaintiff further alleged that but for this breach, the plaintiff would have prevailed in its claim against Lucent.

The Stadheim firm moved to dismiss the legal malpractice claim on the basis that the state court had no jurisdiction over the case. The Stadheim firm asserted that exclusive ju-

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risdiction rested in the federal court because substantive matters of patent law would necessarily have to be determined. The trial court agreed, and dismissed the plaintiff's claim for legal malpractice.

On appeal, the *Premier* court identified the issue as follows:

> Thus, the issue before us, apparently novel to the appellate court of this state and most other states, is whether a legal malpractice action, ordinarily cognizable in state court, must yield to federal jurisdiction when the malpractice action necessarily requires a substantial resolution of patent law issues in order to resolve the underlying case upon which the legal malpractice is based.

Id. at *5. The court began its analysis by recognizing "the principle that the federal court has exclusive jurisdiction over patent cases, pursuant to the United States Constitution and federal statute." *Id*. at *6 (citations omitted). Importantly, the United States Supreme Court has held that this exclusive jurisdiction is not limited only to direct patent claims, but "also extends to cases in which the plaintiff's right to relief necessarily depends on the resolution of a substantial question of patent law." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808-09 (1988).

The *Premier* court then analyzed cases from three other state court jurisdictions that had considered the issue of whether jurisdiction rested exclusively in federal court for a legal malpractice claim that involved the determination of a question of patent law. *See*, *TattleTale Portable Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP*, 2009 WL 790314, (Ohio Ct. App. March 26, 2009); *Lockwood v. Sheppard, Mullin, Richter & Hampton*, 173 Cal. App. 4th 675 (2009); *New Tek Manufacturing, Inc. v. Beehner*, 369 N.W.2d 359 (Neb. 2005). In *New Tek*, the court held that the federal court did not have exclusive jurisdiction over the plaintiff's legal malpractice action because there was no issue of patent infringement that had to be decided in the legal malpractice action. The *New Tek* court held that the patent issue therefore was only incidental to the case.

Conversely, in both *TattleTale* and *Lockwood*, the courts found that the resolution of the plaintiffs' legal malpractice claims would necessarily require the trial court to determine substantial questions of patent law. The issue in *TattleTale* was whether the lawyer committed legal malpractice by failing to ensure that maintenance fees were paid to the United States Patent and Trademark Office and by failing to seek revival of the patent. The issue in *Lockwood* was whether the lawyer committed legal malpractice by making misrepresentations in obtaining a patent reexamination. The courts in *TattleTale* and *Lockwood* determined that because the legal malpractice claims involved substantial questions of patent law, exclusive jurisdiction over the claims rested in the federal court.

If the "case within the case" requires a determination of substantive issues of patent law, jurisdiction rests exclusively with the federal court.

Upon reviewing these decisions from other state court jurisdictions, the *Premier* court held that the federal court had exclusive jurisdiction over the plaintiff's claim against the Stadheim firm. The court held, "we are persuaded that in the case before us, in which the issues of legal malpractice are necessarily inextricably bound to determinations of substantive issues of patent law, jurisdiction rests exclusively with the federal court." *Premier*, 2009 WL 3762952 at *6. Accordingly, the court affirmed the trial court's dismissal of the plaintiff's legal malpractice claim.

The *Premier* court's holding thus provides guidance to practitioners with respect to determining whether a legal malpractice case involving an underlying patent issue is removable to federal court. If the "case within the case" requires a determination of substantive issues of patent law, jurisdiction rests exclusively with the federal court. If, however, a patent issue is only incidental to the "case within the case," it is likely that jurisdiction will be found to rest in state court. Stated otherwise, merely because the underlying representation involved a patent matter is not necessarily sufficient to trigger exclusive federal jurisdiction. The attorney seeking to remove a legal malpractice action to federal court pursuant to *Christianson* must be able to show that the legal malpractice action will require a determination by the court of specific substantive issues of patent law that must be decided by the federal courts. Practitioners should use *Premier*, *TattleTale* and *Lockwood* as guidance regarding the types of patent issues that are sufficient to trigger exclusive federal court jurisdiction.

Property Insurance

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When It Snows Your Client May Not Want to Shovel

In the summer of 2009, when most people in Chicagoland were not contemplating injuries resulting from slip and falls on snow or water, the Illinois Appellate Court, First District ruled on two cases related to the natural accumulation rule, its defenses and the obligations of common carriers, landowners and business owners with respect to snow, water, and ice found on or about their property. This article will provide a brief overview of these cases and the standards the courts continue to follow when a natural accumulation is at issue.

What Is a "Natural Accumulation?"

A natural accumulation is an accumulation of snow, ice, or water which occurs naturally, not resulting in or from runoff created by the property owner or another person. To survive a motion for summary judgment, the plaintiff must present sufficient evidence to permit a trier of fact to find that the defendant was responsible for an *unnatural* accumulation. *Bloom v. Bistro Restaurant Ltd.*, 304 Ill. App. 3d 707, 710, 710 N.E.2d 121 (1st Dist. 1999). Once it is determined that there is water, snow, or ice upon the property, the plaintiff must present some evidence that the water, snow, or ice was anything other than a natural accumulation or that the defendant caused or aggravated the accumulation of water. *Kittle v. Liss*, 108 Ill. App. 3d 922, 925-26, 439 N.E.2d 972, 974 (3d Dist. 1982). The plaintiff may also satisfy its burden by establishing through evidence or testimony that his or her injury resulted from an artificial or unnatural accumulation of water or from a natural condition aggravated by the property owner or operator. *Roberson v. JC Penney Co.*, 251 Ill. App. 3d 523, 528, 623 N.E.2d 364, 367 (3d Dist. 1993).

Under the natural accumulation rule, property owners and business operators have no duty to remove the tracks or residue left inside the building by customers who have walked through natural accumulations outside the building. The courts have also ruled that there is no duty to warn of wet, snowy, or icy conditions on or about the property since business owners and operators are not liable for failing to remove natural accumulations. *Walker v. Chicago Transit Authority*, 92 Ill. App. 3d 120, 123, 416 N.E.2d 10, 13 (1st Dist. 1980). This rule holds even if that natural accumulation remains on the property for an unreasonable length of time. These cases and others have formed the cornerstone of Illinois law in this area.

Two Statutes Are At Issue; Which Prevails?

In August 2009, the Illinois Appellate Court, First District, in the case of *Reed v. Galaxy Holdings*, 394 Ill. App. 3d 39, 914 N.E.2d 632 (1st Dist. 2009), contemplated the ramifications of tracking snow and water indoors along with the ramifications of a business owner's minor remedial measures. Under Illinois law, a business owner is required to keep all means of ingress and egress clear. In *Reed*, the plaintiff slipped entering a laundromat as she stepped off a floor mat placed in the only entryway by the business owner. The plaintiff alleged that her injury was due in part to the position of the floor mat and that the owner was negligent for failing to establish a safe means of ingress to the building. The trial court granted defendant's motion for summary judgment.

Relying upon *Roberson*, the *Reed* court held that under the natural accumulation rule, a property owner is not required to remove tracks or residue left inside a building by a customer or customers who have walked through a natural accumulation outside. The court further held that even if that natural accumulation remains on the property for "an unreasonable length of time," liability cannot attach. *Kellermann v. Car City Chevrolet Nissan, Inc.*, 306 Ill. App. 3d 285, 288, 713 N.E.2d 1285, 1288 (5th Dist. 1999).

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.

One distinguishing element of the *Reed* case is that the property owner placed mats inside the sole entryway of the laundromat, which became saturated with water. The plaintiff claimed that the placement of the mats turned the natural accumulation into an unnatural one because the area where the mats were placed was the sole means of ingress and egress to the store and the owner did not properly maintain this area. The court rejected this argument, holding that it was irrelevant to the legal analysis if the sole mode of ingress or egress is over or through a natural accumulation of water.

The duty of a business owner to provide a safe manner of ingress and egress does not, of itself, obviate the natural accumulation rule. Liability may only be imposed if a business owner voluntarily assumes a duty to remove a natural accumulation and then undertakes the duty negligently.

The duty of a business owner to provide a safe manner of ingress and egress does not, of itself, obviate the natural accumulation rule. Liability may only be imposed if a business owner voluntarily assumes a duty to remove a natural accumulation and then undertakes the duty negligently. Under the voluntary undertaking doctrine, a property owner will only be liable for voluntarily removing a natural accumulation if he performs the undertaking duty in a negligent manner. *Tzakis v. Dominick's Finer Foods*, 356 Ill. App. 3d 740, 746, 826 N.E.2d 987, 992 (1st Dist. 2005). The *Reed* court went even further and stated that the act of placing two mats at the entryway did not create a greater duty upon the defendant to remove any and all remainder of the natural accumulation which was upon its premises. The plaintiff admitted she fell on the floor, not the mats, and there was no evidence that the defendant failed to maintain the mats with reasonable care. Thus, the defendant could not be liable for plaintiff's injuries resulting from slipping on the natural accumulation on the floor.

Once there is sufficient evidence to establish that the water was tracked in from the outside, the defendant owes no duty to the plaintiff. In *Reed*, there were no facts showing that the defendant negligently laid the mats in question, or that the mats caused the plaintiff's injury by the manner in which they were placed on the floor. The natural accumulation rule remained applicable and liability could not attach as a matter of law.

Does a Duty to Exercise the Highest Degree of Care Trump the Natural Accumulation Rule?

In May 2009, the Illinois Appellate Court, First District reviewed a case involving a common carrier and the natural accumulation rule. In the case of *Krywin v. Chicago Transit Authority*, 391 Ill. App. 3d 663, 909 N.E.2d 887 (1st Dist. 2009), the plaintiff injured her leg when she stepped from a Chicago Transit Authority (CTA) train onto an outdoor platform and slipped and fell on ice. The court was faced with determining whether the CTA, as a common carrier, owed a duty to exercise the highest degree of care consistent with the practical operation of its conveyance which took precedence over the natural accumulation rule. It is well established that the duty of a common carrier continues until the passenger has left the carrier and the place where the passengers are discharged. *Sheffer v. Springfield Airport Authority*, 261 Ill. App. 3d 151, 154, 632 N.E.2d 1069 (1994).

In *Krywin*, the CTA had hired a worker whose duties included removing snow and ice from elevated platforms and spreading sand on the platforms. However, the employee had not been on duty for the several days prior to the incident in question. Further, it was obvious that the platform was icy other than under a small canopy area. It was further undisputed that the plaintiff fell on ice as she exited the train car and stepped on the platform.

The jury returned a verdict in favor of the plaintiff on both the negligence and willful and wanton counts. The defendant appealed the trial court's denial of the Transit Authority's motion for directed verdict, asserting that the higher duty owed by a common carrier to its passengers does not obviate the natural accumulation rule. The Illinois Appellate Court, First District overturned both counts of the trial court's ruling based on prior precedent.

As to the negligence count, the court held that the natural accumulation rule prevailed over the CTA's duty of the highest care. To require a common carrier to remove natural accumulations, but not a landowner or business owner would be anomalous to the prior holdings of the First District. The

(Continued on next page)

Property Insurance *(Continued)*

court also looked to *Wasserman v. CTA*, 190 Ill. App. 3d 1064, 547 N.E.2d 486 (1st Dist. 1989), to determine the nature and extent of a common carrier's duty. While *Wasserman* arguably imposed a duty on a common carrier to clean up natural accumulations of snow, in this instance, the court determined it would follow the same analysis used in *Sheffer* and *Serritos v. CTA*, 153 Ill. App. 3d 265, 505 N.E.2d 1034 (1st Dist. 1987). The *Sheffer* court had held that the heightened duty of a common carrier exists because a passenger is completely reliant on the common carrier during passage. When a passenger alights from the carrier, however, the *Sheffer* court concluded that the dangerous ice which may be encountered is analogous to that ice which a party may encounter while walking across a parking lot. Under *Serritos*, a business owner, including a common carrier, has no duty to remove or take other precautions against dangers inherent in natural accumulations of snow and ice. The *Krywin* court determined that the plaintiff had failed to offer any proof that the accumulation was created by the CTA. Thus, the accumulation was a natural one to which no liability could attach.

The court also considered the willful and wanton allegation in its analysis. The court considered the impracticality of requiring the CTA or common carrier to search for the "safest, cleanest, driest place in which to allow passengers to alight." Completing the balancing act required in analyzing willful and wanton activity, the *Krywin* court found that the magnitude of the burden of guarding against an injury such as a slip and fall on a natural accumulation, would be so impractical as to defeat the purpose of the common carrier altogether.

Conclusion

In light of the above, it appears that the Illinois Appellate Court is standing squarely on its prior holding that once a finding of fact is made that an accumulation is natural (as opposed to unnatural or aggravated by the defendant), liability may not attach. The natural accumulation rule has been found to apply even to a common carrier which has the highest duty to protect its passengers, as well as to business owners who may attempt partial remediation of tracked snow, water, or ice. As long as there is no showing that the defendant aggravated the condition of the natural accumulation, liability cannot attach regardless of the duties imposed by law or statute with respect to safe ingress and egress. Based on these two new cases, it just may be best to leave the shoveling alone this winter!

Appellate Practice Corner

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

Tips on Preparing for Oral Argument

Although the true impact of an oral argument on the outcome of an appeal is debated by many, there is one point upon which legal scholars and appellate justices generally agree – a poor oral argument can lose your appeal. As statistics go, most judges confess that oral argument alters their opinion in only five to ten percent of the cases. Given that low percentage, it is imperative for counsel to place his or her best foot forward and to be as prepared as possible to address the court and anticipate questions that might be directed your way. As has been acknowledged by many legal writers, "the essential foundation for the oral argument is the advocate's preparation." Roach, Robert M., *Oral Argument Before the Texas Supreme Court: Goals, Preparation, and Presentation*, 17th Annual Advanced Civil Appellate Practice Course, p. 4 (Sept. 2003). This article will suggest some new ways to look at preparing for your oral arguments and will make the actual task of arguing the case an easier and more rewarding experience. After all, preparation is the key to success.

About the Author

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

In the beginning …

Having received the notice from the appellate court setting the case for oral argument in thirty days, where do you begin your argument preparation? The first step is obvious – reread the underlying order or decision, the parties' briefs, and the significant cases cited within the briefs. Most practitioners read the briefs starting with the first through the last; however, an appreciable number start with the reply brief and move backwards. From this review, your strongest and weakest points should be apparent.

The next step is to do limited additional research, even if it is just a simple cite check, to ensure that the authorities cited are still good law. If a new decision has been handed down since the last brief, file a motion for leave to cite additional authority and provide a copy of the additional authority to the court and opposing counsel.

From these readings and review of the cases you can then prepare a working outline of the argument, identifying the true issues in dispute and the primary supporting grounds. This working outline, which may consist of several typed pages, can then be paired down to a few pages and finally reduced to a single page of key points. Having already prepared this detailed working outline, you will, by the time of argument, have an intimate understanding the case.

One further word is warranted in preparing your oral argument outline, and that is the importance of developing a theme for your argument. You should always strive to create a new theme independent from that of the appellate brief, which captures the essence of the appeal and can be easily and quickly communicated to the court in a few sentences. Formulating a theme often involves asking yourself, "what is this case truly about?," "why should I win?" and "what permits me to win?" It is often important to see how your case fits within the overall area of law in which your case arises. Developing a theme helps in many respects. It provides a basic organization for the oral argument and it makes it more interesting and memorable to the court.

Quick Preparation Pointers

The following pointers are self-explanatory, but often overlooked in our haste to fully prepare for oral argument.

- Have a mastery of the procedural posture of the case, how the case got to the appellate court, as well as the jurisdictional basis.
- Thoroughly understand the record on appeal and, if necessary, have a short list of key record citations handy.
- Read all significant cases and prepare a two or three sentence list of key recognition facts, the court's ruling, and how it is distinguishable or applicable to your case.
- Be able to identify your "best case" or explain why there is not one.
- Understand the policy implications of a ruling in your favor or what might happen if the court refuses to follow your advice.
- Outline what you can and cannot concede at the argument.
- Prepare to cut to the quick and not waste time on ancillary matters.
- If you have a business client, know your client's business.
- Plan to make the best of your first 90 seconds.

Court questions are your friend. You should spend as much as one-half of your preparation time anticipating the questions that might be asked by the court.

Preparation for Court Questions

Court questions are your friend. You should spend as much as one-half of your preparation time anticipating the questions that might be asked by the court. Once accomplished, you should not only work through your answers but also anticipate what new questions might spring from your answer, and how to address those as well. Always try to think two or three questions ahead of your answer. You can bet that the court will. That being said, you should not only anticipate questions for their substantive value and potential for your case, but also as to how a flurry of questions will impact your argument.

In predicting possible questions, keep these avenues of inquiry in mind:

- What rule of law do I want from the court?
- What will this ruling mean in other cases? What are the practical consequences of a ruling in my favor?
- Does the court have the power to grant the relief re-

(Continued on next page)

Appellate Practice Corner *(Continued)*

quested consistent with prior case law, statutes, and the standard of review?

Anticipating potential questions is only the beginning. Once this list is created, develop a simple and commonsense response.

Finally, you should always enter an oral argument with at least two potential versions of your argument – one that anticipates a "cold" bench, which asks little or no questions; and one that anticipates a "hot" bench, which asks many questions. You must be prepared to respond to your court and not let questions negatively impact the substance of your position.

What Do I Take To Orals?

The answer to this question depends on the significance of your case and your level of comfort. While we all aspire to go to the podium without notes, it rarely happens even by the most experienced practitioners. For smaller cases, a simple one-page outline of key points will almost always suffice. This can be supplemented with a page of key record cites or case blurbs where needed. Keeping the reference materials short will force you to look at the court and not dwell on your notes. A copy of the underlying order and your marked brief can rest at the edge of counsels' table. For larger cases, consider a three-ring binder where you can include a short and medium outline, all of the significant case and record citations, a copy of a relevant statute, and the underlying order. This binder should indexed and tabbed for easy access under pressure. In no event should you waltz into the courtroom with banker's boxes of files.

Over the years I have witnessed a variety of means for formatting argument notes. Some practitioners use numbered index or note cards, each with a point explained. These cards are then shuffled depending on the questions asked or the point being discussed. Other attorneys use individual sheets of paper, at times color coded for easy indexing, while others simply write out the intro and conclusion and outline the argument with key words or phrases. Legal pads should be avoided, as they can often be disruptive and many podiums do not accommodate the flip-page format, let alone the oversized 8½ by 14-inch pads. In the end, you should experiment to see which method is most comfortable for you.

Should I Hold Mock or Moot Arguments?

While the decision to conduct moot arguments is a personal decision, it is more often driven by the importance of the case and what is at stake. While I personally do not like to moot an argument – a good oral argument is very fluid and more often than not never resembles the moot argument, and the moot argument is thus of little benefit – there are some clients that insist upon them. If a moot argument is held, set aside at least an entire afternoon and make several "runs" at the case. You first should simply present the argument in its entirety and without questions. This permits the audience to respond to the overall substance and to offer a critique of its merits. The second effort should be timed, starting at 30 minutes and then 20 minutes, and include questions. This run-through allows you to gauge how much information you are able to present during the allotted time and with court input.

In most cases, however, an intense discussion of the case with the trial attorney or another attorney in the office will more than suffice. During this rehearsal, it is important to speak openly about your case and to have your partner quiz you on the more difficult aspects of the case. Indeed, this informal method of preparation often produces the most conversational "argument." In a recent case, I conducted my normal oral argument preparation, followed by a three hour in-person conversational argument rehearsal with my client and two other attorneys in my office. We discussed in detail the argument structure, rehearsed answers to selected questions, and ensured that the responses thereto did not lead us into dark waters. The benefits from this session were immeasurable.

Regardless of the rehearsal method, always keep in mind that the best oral arguments are those which are flexible and have meaningful spontaneity. Both are the direct result of preparation and a complete mastery of the facts and the applicable law.

Other Considerations – The Procedural Posture of the Case

Another significant question to consider pre-argument is how the procedural posture of the case might affect your presentation. In other words, does the structure of my oral presentation change depending on whether I am the appellant or appellee? As strange as it may seem, whether we are the appellant or appellee *does* affect how we should present our arguments to the appellate court.

For appellants, the goal is to convince the court that the underlying decision is wrong. Easier said than done; however, doing so effectively means addressing your arguments to the governing standard of review. For example, how was the circuit court's ruling an abuse of discretion? What evidence shows that an opposite result is clearly apparent? If

the review is *de novo*, what legal grounds support granting your requested relief? Regardless of your standard, prepare an introductory comment that brings the case together into a two or three sentence recapitulation that embodies both what the case is about and makes a pitch for why reversal is warranted.

An appellee often stands in a quite different position. Obviously this is not necessarily true where the issue is being reviewed *de novo*. There, the court is addressing the issues anew and is not locked into any level of deference to the finder-of-fact or the discretion of the trial judge. However, for all other cases, the appellee's approach to the oral argument must be both flexible and able to adapt to the issues raised by your opponent or by the court during your opponent's argument. A recent visit to the appellate court revealed a surprising number of appellees who forged ahead with a prepared script, oblivious to the openings that had been created by their opponent's argument or by the court's questioning. Imagine the impact of walking to the podium and saying to the court, "I'd like to begin by addressing the court's last question to my opponent" or "My opponent's argument has conceded a critical point that I'd like to expand upon in my argument."

Utilizing this approach can be invaluable. Indeed, ignoring these opportunities runs the risk of bringing the argument to a standstill. For example, if the court is very interested in the issue concerning the admission of a particular piece of evidence, do not go to the podium and begin by reintroducing yourself, your client, and regurgitating a "law-school-like" overview of your argument. Go directly to the issue of concern. The appellee in a case has the advantage of the momentum created by the appellant's argument or through the court's pushing of a particular point. That momentum should not be wasted.

As appellee, you should have a sufficient command of your case so that you can adapt your argument to your opponent and panel, changing the order or emphasis on various points, or using a question or comment from which to launch your attack. Moreover, it must also be remembered that in some cases, such as those governed by the manifest weight of the evidence standard, the appellee's job is not as much to address the arguments raised by opposing counsel as much as it is to demonstrate that the record supports the jury or Commission's findings. For example, in a review of a Workers' Compensation Commission decision where the Commission has found a claim compensable and awarded benefits, the standard of review is whether that decision is against the manifest weight of the evidence. In other words, for the appellate court to reverse the Commission's decision, an opposite result must be clearly apparent.

In such a case, the approach for oral argument as an appellee should be to show the appellate court that the Commission's decision is supported by at least some evidence in the record. Moreover, the evidence supporting reversal must be overwhelming, rather than simply demonstrating that another conclusion is possible. Likewise, it does not matter if the appellate court would have reached a different conclusion. So long as there is some evidence in the record to support the Commission's decision, that determination should be affirmed. This same process applies to any question determined by the fact-finder, whether the Commission or a jury.

The appellee in a case has the advantage of the momentum created by the appellant's argument or through the court's pushing of a particular point. That momentum should not be wasted.

While this last discussion crosses the line between preparing for oral argument and the actual argument, counsel cannot be ready to take advantage of these opportunities unless he has adequately prepared and can take a flexible approach to the argument. Preparation requires planning and reexamining our positions and, on occasion, conceding a position in order to advance to the true issue in dispute.

In closing, oral argument is like any other high-level competition – success comes from time-consuming and thorough preparation. And while success may not always take the form of an appellate victory, we can at least rest assured that we gave our client the best presentation of his or her case and that we gave the appellate court something to consider. As former Washington Redskins head coach George Allen observed: "Winning is the science of being totally prepared."

Amicus Committee Report

By: Michael L. Resis
SmithAmundsen LLC
Chicago

In *Keener v. City of Herrin,* Docket No. 107658, 2009 Ill. LEXIS 1322 (Oct. 8, 2009), the Illinois Supreme Court held that the trial court was without jurisdiction to hear the plaintiff's motion to reconsider a dismissal in the defendant city's favor when the plaintiff's attorneys did not receive notice of dismissal and the time for appeal had expired. The Supreme Court concluded that the trial and appellate courts improperly characterized the relief requested by the plaintiff as having been granted under §2-1401 of the Code of Civil Procedure, 735 ILCS 5/2-1401, when the trial court vacated the dismissal, then dismissed the action all over again. The IDC appeared as an amicus in support of the city on the substantive issue of whether a municipality can be held liable for willful and wanton conduct under the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/101, *et seq*., when it released an 18-year old woman who had been arrested and taken into custody for underage consumption of alcohol. By vacating the appellate court's judgment, *Keener v. City of Herrin,* 385 Ill. App. 3d 545, 895 N.E.2d 1141 (5th Dist. 2008) and dismissing the appeal, the Court did not have occasion to address the substantive issue.

James L. DeAno of *DeAno & Scarry, LLC* is to be commended for his efforts in preparing the amicus brief on behalf of the IDC in support of the city.

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

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Although 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.

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.

The Defense Philosophy

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

On Pronunciation

When I was six years old, for reasons that I have never understood, I was sent to be tutored by a woman who taught "cultured" speech. I decided that this was a bad idea when I went to school after the first session saying "cawn't" instead of "can't." That pronunciation earned me the scorn of my fellow first graders and caused me to refuse to return to the diction lessons. The diction lesson left me with a well-tuned ear for pronunciation, but the real-world application encouraged me to avoid saying and doing things that would cause my classmates to conclude that "he is not our kind of guy."

This rule applies to trial lawyers. A trial lawyer should seek to bond with the jurors and to convince them that he or she is a person who shares their background and values. As there are people who do not have a high opinion of lawyers, and some of those people wind up on juries, it is very important not to give the impression that you not consider yourself to be somehow superior to the members of the jury.

I have always felt that, in order to achieve this goal, a lawyer must avoid pronunciations that sound like affectations. Although they are often the correct pronunciation, they grate on the ears of too many jurors to ever be used before a jury. I have three examples.

Either/neither: The "cultured" pronunciations are "eye-ther" and "nigh-ther." However, the average educated person in the Midwest says "ee-ther" and "knee-ther." The danger in using the "cultured" pronunciation is that the jurors may get the impression that the lawyer is part of a self-appointed cultural elite and not someone with whom they can identify.

Aunt: This word seldom comes up at trial, but it must be handled very carefully when it does. Most people pronounce it "ant," as in the insect. The other pronunciation, "ahnt," comes off as an affectation and can serve to create a wall between the lawyer and the jurors.

Status: This word is very difficult for me. I always say "state-us," which is the preferred pronunciation. However, most people say "statt-us," and I use that pronunciation in court. While this is not as extreme as the first two examples, I think that it is best to play it safe and say "statt-us."

The pronunciation of place names is very touchy, and you should get local input before you appear in an unfamiliar area. For instance, Joliet is pronounced "Joe-lee-et." The other pronunciation, "Jolly-et," is not only **not** favored, but also was banned in 1939 by a Joliet ordinance that has since been repealed. The same is true with Marseilles. The local pronunciation is "Marr-sails," and you risk stern disapproval if you call it "Marr-say."

Regional pronunciations must also be considered. I grew up among people who call a small stream a "crick." No one downstate will hold it against you if you say "creek," but you must never, ever, use "crick" in Chicago or its suburbs. Likewise, do not go downstate and call a vacant lot a "prairie," as is common in some parts of Chicago.

The key to all this is to be careful to pronounce words in a way that will not jar the jury. Even if you take great care, I "cawn't" say that you will not make a mistake, but such care will make it less likely that you will build that wall between you and the jury.

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.

Young Lawyers Report

By: Jennifer B. Groszek
McKenna Storer, LLC
Chicago

We would like to thank ***Merrill Corporation, Rimkus Consulting Group,*** and ***National City*** for their support of the Young Lawyers Seminar. Their support is greatly appreciated. The YLD would also like to thank its wonderful speakers.

Thank you:

- **Rimkus** expert, **Scott Howell**, presenter on "Practical Considerations When Retaining an Expert."
- **Paula Giovacchini**, **Gio Group**, presenter on "Understanding Your Work Style to Enhance Your Relationships with Clients and Colleagues."
- In-house counsel from **U.S. Foods**, **Lynn Watkins-Asiyanbi** and **Boeing Company's Chekisha Mitchell**, panel on creating and maintaining relationships with in-house counsel.
- **Merrill Corp.'s**, **Steve Seltzer**, presenter on "Use of Depositions and Technology at Trial."
- **Jeff Hebrank**, partner with **Hepler Broom**, presenter on "Making connections and building business as a Young Lawyer" for contributing to the seminar.

The YLD continues to offer monthly meetings with speaker presentations for CLE credit. This spring will feature speakers regarding Green Building, using social websites to create business and increase your network and more on business development. The Annual Blood Drive will take place in June this year. Details on spring meetings and the blood drive will be sent out soon.

Thanks goes out to all those who participated in the YLD's fall winter clothing drive and the holiday toy drive. Both collections were a success.

If you are an IDC Attorney practicing 10 years or less, or you are a law student, you are automatically in the Young Lawyers Division. Join the YLD Committee to get more involved in the IDC. If you are interested in receiving more information about the YLD Committee, please contact YLD Chair, Jennifer Groszek at **jgroszek@mckenna-law.com**.

About the Author

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

Welcome

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

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Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago
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Seth Letterman Ellis
Mulherin, Rehfeldt & Varchetto, P.C., Wheaton

Robert Joseph Finley JD
Hinshaw & Culbertson LLP, Chicago
Sponsored by: David Levitt

Margaret Martha Fitzsimmons
Schuyler, Roche & Crisham, P.C., Chicago
Sponsored by: Chuck Cole

Anthony P. Hahn JD
Hostak, Henzl & Bichler, S.C., Racine, WI

Mark Allen Hooper JD
Cray Huber Horstman Heil & VanAusdal LLC, Chicago
Sponsored by: Jim Horstman

Ryan Timothy Johnson
Schuyler, Roche & Crisham, P.C., Chicago
Sponsored by: Chuck Cole

John M. Kelly
Adler Murphy & McQuillen LLP, Chicago

Danice Kern
The John Marshall Law School

Amanda J. Kimble
Best, Vanderlaan & Harrington, Chicago

Michael J. Linneman
Johnson & Bell, Ltd., Chicago

Aimee Karen Lipkis
Cray Huber Horstman Heil & VanAusdal LLC, Chicago
Sponsored by: Daniel Cray

Erica Suzanne Longfield
Gunty & McCarthy, Chicago
Sponsored by: Jennifer Groszek

Michael P. McBride
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

Lisa S. Meyer
Eimer Stahl Klevorn & Solberg LLP, Chicago

Clare J. Quish
Schuyler, Roche & Crisham, P.C., Chicago

Katherine M. Rahill
Jenner & Block, Chicago

Tanner Hammond Shultz
University of Dayton

Scott B. Sievers
Office of the Illinois Attorney General, Springfield

Christopher Slick
Tribler Orpett & Meyer, P.C., Chicago
Sponsored by: David Lewin

Frank E. Valenti
Sedgwick, Detert, Moran & Arnold LLP, Chicago

Undray Wilks
McGuireWoods LLP, Chicago

Shevonn K. Willis
Tressler LLP, Chicago

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 will expire at the Annual Meeting in June of 2010:

David M. Bennett, *Pretzel & Stouffer, Chartered*
Troy A. Bozarth, *HeplerBroom, LLC*
Margaret M. Foster, *McKenna Storer*
Paul R. Lynch, *Craig & Craig*
Michael Resis, *SmithAmundsen, LLC*
John Robertson, *Robertson, Wilcox & Statham, P.C.*

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

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

1. The nominating petition. Each individual nominated must be supported by the signatures of three (3) members in good standing.
2. A statement by the nominee of his or her ***availability and commitment to serve actively*** on the board.
3. A black-and-white photograph from the shoulders up (jpg format, preferred).
4. A short biography, or summary of qualifications, of the nominee.
5. A statement by the nominee of no more than 200 words on why he or she should be elected to the Board of Directors.

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

Nominations shall be mailed to IDC Secretary/Treasurer, Aleen Tiffany at Aleen R. Tiffany, P.C., 620 N. Route 31, Unit G, Crystal Lake, Illinois 60012. A complete copy must also be emailed to IDC Executive Director Sandra J. Wulf at idc@iadtc.org. **Nominations must be accompanied with the five items listed above.** All candidates will be featured with their biographies, statements of candidacy and photographs in the next issue of the ***IDC Quarterly***. A copy this portion of the ***IDC Quarterly*** will then 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 **Thursday, April 1, 2010.**

All candidates who have filed a complete nominating petition are eligible to receive a CD-ROM 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 _____, 2010.

_____
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 _____, 2010.

Association News

Holiday Reception

Thanks to HG Litigation for sponsoring the IDC Holiday Reception

HG Litigation

Special thanks to our Medicare & Medicaid Seminar Host, Hinshaw & Culbertson LLP, who so graciously opened their office to our members for this important seminar.

HINSHAW

& CULBERTSON LLP

2009 Medicare & Medicaid Seminar: Avoiding Post-Judgment and Post-Settlement Litigation

We would like to thank the following individuals for their time and energy in producing the Medicare & Medicaid Seminar:

Planning Committee

Troy A. Bozarth — *HeplerBroom LLC*

R. Howard Jump — *Jump & Associates, P.C.*

Speakers

Daniel W. Farroll — *HeplerBroom LLC*

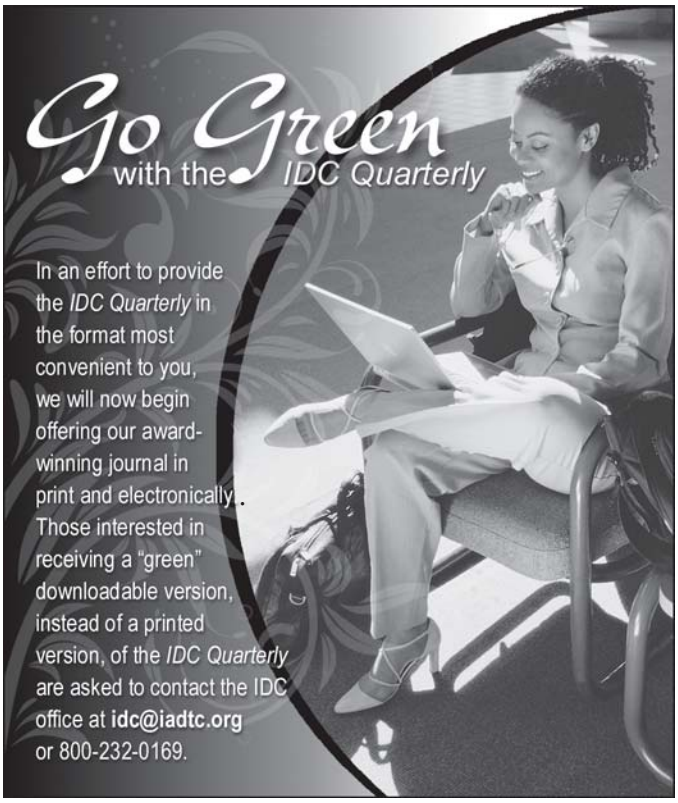
Bradford Peterson — *Heyl, Royster, Voelker & Allen, P.C.*

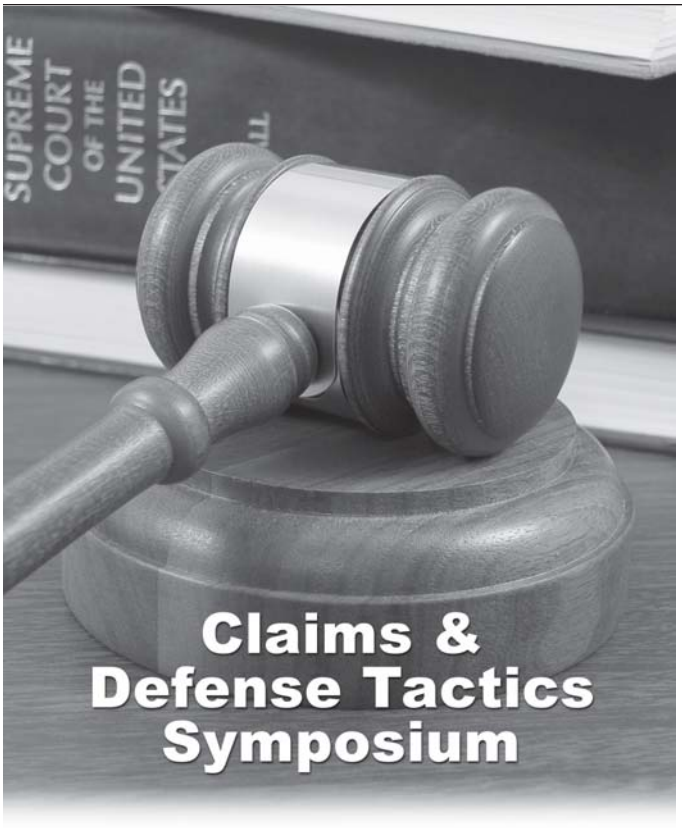
Host

HINSHAW

& CULBERTSON LLP

Were you unable to attend the Medicare & Medicaid Seminar? No worries. Visit, **www.iadtc.org** and click on the "Education" tab then "Online CLE" to order your DVD, CD or online streaming video of this program.





March 25 - 26, 2010

Chicago Marriott Oak Brook
1401 West 22nd Street • Oak Brook, IL

Presented By:

Illinois Association of Defense Trial Counsel

Illinois Insurance Association

Rick Hammond
Johnson & Bell, Ltd.
IDC President

William Shepherd
State Farm
IIA President

Symposium Leadership

Maria Doughty — *Allstate Insurance Company*
Rick Hammond — *Johnson & Bell, Ltd.*
R. Howard Jump — *Jump & Associates, P.C.*
Richard Lenkov — *Bryce Downey & Lenkov, LLC*
Karen Melchert — *CNA*
Stephen Newbold — *Country Insurance and Financial Services*
John O'Driscoll — *Tressler LLP*

Presentations

- Trends in High Exposure and Complex Tort Litigation
- The First 60 Days: Analyzing the Insurer's Immediate Concerns for a First Party Property Claim and a Third Party Liability Claim
- Examining the Issues Faced by the Third-Party Claims Handler
- Evaluating the Excess Carrier's Rights and Obligations
- Managing Claims Cost
- Controlling Discovery – An Insurer's Perspective; Corporate General Counsel's Perspective
- Effective Management of the Document Intensive Case
- Ethical Concerns and Maintaining Privilege in Joint Defense Efforts
- Examination of Post-judgment Issues
- Issues that Affect the Settlement of Complex Litigation Cases
- Managing Your Message and the Media during a High Exposure Case
- Taking the High Exposure/Complex Case to Trial — Bringing It Together For Trial

Featured Speakers

Shaun McParland Baldwin — *Tressler LLP*
John W. Bell — *Johnson & Bell, Ltd.*
Jill Berkeley — *Howrey, LLP*
Jim Caitlan — *Kroll Ontrack*
Robert Marc Chemers — *Pretzel & Stouffer, Chartered*
Thomas A. Demetrio — *Corboy & Demetrio*
Maria S. Doughty — *Allstate Insurance Company*
Jonathan Fiegen — *Arthur J. Gallagher & Co.*
J. Ric Gass — *Gass Weber Mullins, LLC*
Alan G. Gregory — *Gregory and Meyer, P.C.*
Jeffrey S. Hebrank — *HeplerBroom, LLC*
Thomas Q. Keefe, Jr. — *Thomas Q. Keefe, Jr., P.C.*
Tony Knight — *Sitrick & Company*
David H. Levitt — *Hinshaw & Culbertson, LLP*
Michael M. Marick — *Meckler Bulger Tilson Marick & Pearson LLP*
Michael T. McRaith — *Illinois Department of Insurance (invited)*
Brad Nahrstadt — *Williams, Montgomery & John, Ltd.*
Stephen Newbold — *Country Insurance and Financial Services*
Hope G. Nightingale — *Litchfield Cavo, LLP*
Joseph Postel — Lindsay, Rappaport & Postel, LLC
Michael T. Reagan — *Herbolsheimer, Lannon, Henson, Duncan and Reagan, P.C.*
Susan Reinhard — *EMCOR Group, Inc.*
Catalina J. Sugayan, Esq. — *Sedgwick, Detert, Moran & Arnold*
Craig Unrath — *Heyl Royster Voelker & Allen*

(Continued on next page)

Continuing Legal Education Credit

We will apply for the following CLE credit.

	Day One Only *March 25*	Day Two Only *March 26*	Both Days *March 25 and 26*
Illinois	6.5	5.75	12.25
Indiana	6.5	5.75	12.25
Missouri	7.8	6.9	14.7
Wisconsin	7.8	6.9	14.7

Seminar Fees

	Both Days	One Day	Reception Only
Attorneys ***(Includes One Complimentary Client Registration)***			
IDC Members	$400	$250	$75
Non-Members	$550	$400	$75
Governmental Attorneys	$100	$50	Complimentary
Insurance or Corporate Representatives	$100	$50	Complimentary
Judges & Law Students	$50	$25	Complimentary
Vendors	$400	$200	$50

Registration for this event includes Symposium materials, Continuing Legal Education Credit, access to our Exhibit Hall, refreshment breaks, two luncheons, a reception and great networking opportunities.

Refund Policy

Refunds must be requested in writing and will be made according to the following schedule:

Full Refund Through March 5, 2010
50% Refund March 6 – 10, 2010
No Refund March 11 – 25, 2010

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

Can't Attend?

Following the conference the IDC will offer this program for purchase on video CD-ROMs, audio CDs, MP3-CDs, and DVDs. Contact the IDC office at **800-232-0169** or **idc@iadtc.org** for more information.

Sponsorship Opportunities

Sponsorship Opportunities for this event are currently available. Please contact the Illinois Association of Defense Trial Counsel at **800-232-0169** or **idc@iadtc.org** for more information.

Please complete this registration form and return it as soon as possible to the Illinois Association of Defense Trial Counsel at: PO Box 3144, Springfield, IL 62708-3144

Questions?

Phone: 800-232-0169
Fax: 217-585-0886
Email: idc@iadtc.org

Claims & Defense Tactics Symposium

March 25 - 26, 2010 • Chicago Marriott Oak Brook

Attendee _____ Member ID _____

Badge Name _____

Firm _____

Address _____

City _____ State _____ Zip _____

Direct Line _____

Fax Line _____

Email _____

ARDC Number IL: _____ MO: _____

IN: _____ WI: _____

Special Dietary/Accessibility Needs _____

I will attend: ❑ **Both Days** ❑ **Thursday** ❑ **Friday**

Guest Name _____

Company _____

Address _____

City _____ State _____ Zip _____

Direct Line _____

Fax Line _____

Email _____

Special Dietary/Accessibility Needs _____

I will attend: ❑ **Both Days** ❑ **Thursday** ❑ **Friday**

Registration

❑ Private Practice Attorneys — IDC Members ..... $ _____

❑ Private Practice Attorneys — Non-Members ..... $ _____

❑ Governmental Attorneys ..... $ _____

❑ Insurance & Corporate Representatives ..... $ _____

❑ Judges & Law School Students ..... $ _____

❑ Vendors ..... $ _____

Total Amount Due $ _____

Payment Information

My check, number _____ is enclosed for $ _____

Please charge $ _____ to my:

❑ Visa ❑ MasterCard ❑ AmEx ❑ Discover

Card #: _____

Exp: ____ / ____ Card Security Code: _____

Name as it appears on card: _____

Credit Card Billing Address: _____

IDC **Illinois Association of Defense Trial Counsel**

MEMBERSHIP APPLICATION

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

MEMBERSHIP DUES	<3 Years In Practice	3-5 Years In Practice	5-10 Years In Practice	10+ Years In Practice
Attorneys	$100	$150	$225	$250
Governmental Attorneys	$75	$100	$160	$190
Law Students	$20			

APPLICANT INFORMATION – ATTORNEYS & GOVERNMENTAL ATTORNEYS

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Firm or Government Agency _____

Address _____

City _____ State _____ Zip Code _____ 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 _____

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

Home Address _____ City, State, Zip Code _____

Home Phone _____ Alternate Email Address _____

APPLICANT INFORMATION – LAW STUDENTS

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Law School _____ Anticipated Graduation Date _____

Address _____ City, State, Zip Code _____ Phone _____

Alternate Address _____ City, State, Zip Code _____ Phone _____

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 _____

In addition to joining the IDC, you can take advantage of the DRI Free 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 Free DRI Membership!

(Application continued on next page)

Illinois Association of Defense Trial Counsel

COMMITTEE INVOLVEMENT

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

SUBSTANTIVE LAW COMMITTEES

Substantive Law Committees Substantive Law Committee responsibilities include, but are not limited to the following: 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
- ❍ Committee on Judicial Independence
- ❍ Membership
- ❍ Diversity
- ❍ Legislative
- ❍ Young Lawyers
- ❍ *IDC Quarterly*

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 _____ Date _____

MEMBERSHIP INVESTMENT

Membership Dues ..... $ _____

Voluntary Political Action Committee Donation * ..... $ _____

Total Amount Due ..... $ _____

* **Recommended Amount:**
<3 years in practice $15
3-5 years in practice $25
5-10 years in practice $55
10+ years in practice $75

PAYMENT INFORMATION

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

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

Name as it appears on the Card: _____

Billing Address _____ City, State, Zip Code _____

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

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

Illinois Association of Defense Trial Counsel

MEMBERSHIP BENEFITS

- **Annual Spring Seminar in Chicago**, the Defense Tactics Seminar, featuring speakers on topics of current interest to the civil defense bar and law updates on areas of law of interest to our members. The seminar is attended by members and business representatives from all parts of the state;
- **Annual Trial Academy**, at which trial skills, tactics and techniques are taught by experienced members of the civil defense bar. Open only to member-sponsored attendees;
- **The *IDC Quarterly***, our law review quality publication on current legal topics and matters of interest to our members and our individual clients and the business community we represent;
- **Regular newsletters** from our substantive committees focusing on legal topics of interest in civil practice, employment, municipal, products liability, business, medical liability, professional liability, and insurance;
- **Topical seminar**s presented by our substantive committees for those members practicing in specific areas;
- **Legislative liaison** to the Illinois General Assembly for the civil defense bar;
- ***Amicus curiae* briefs** in appellate cases of significance and importance to the civil defense bar;
- **Position papers and monographs** prepared for presentation and publication on current issues of legislation affecting civil litigation;
- **Support for and participation in the National Association of State and Local Defense Groups**, held in conjunction with the Defense Research Institute, Inc.;
- **Searchable Online Member Database**;
- **Political Action Committee** incorporated under the name: Defense Trial Counsels' Political Action Committee.

HISTORY OF THE IDC

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

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

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

PURPOSE OF THE IDC

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

STATEMENT OF CORE VALUES

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

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

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ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

2010 CALENDAR *of Events*

- **March 25 - 26, 2010** — **Claims & Defense Tactics Symposium**
  Presented by the IDC and Illinois Insurance Association
  Chicago Marriott Oak Brook • Oak Brook, IL
- **April 27, 2010** — **Board of Directors Meeting / Springfield Reception**
  Executive Mansion • Springfield
- **May 14, 2010** — **Social Networking Seminar**
  Offices of the Chicago Bar Association • Chicago
- **May 21, 2010** — **Executive Committee and Board of Directors Meetings**
  Chicago
- **June 18, 2010** — **Annual Meeting and Broadway in Chicago Event**
  Chicago

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
LAW • EQUITY • JUSTICE