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MONOGRAPH

A Primer on Defenses in Section 1983 and Police Liability Civil Actions

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President's Message

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"Once you learn to quit, it becomes a habit."
– Vince Lombardi

Jury trials are democracy in action and its lifeblood. We must strive to promote and protect our jury system as lawyers and citizens. If we quit trying cases it may become a habit that hurts us all.

I recently finished a lengthy jury trial. It was a knock-down-drag-out affair that lasted just under a month. There was very good lawyering on both sides (according to the court) and, at the end of the day, the jury got it right (at least in my view).* The jury wasn't right because it found for my client or saw the evidence the same way I did. The jury was right because it fulfilled the promise of the process. The jury weighed the facts, applied the law, and resolved a conflict between two parties. The jurors did their job as most jurors do (if given the chance). Thus, the system worked as it is designed and intended. The trial was time consuming, exhausting, and my client hated every second of it—right up until the judge read the verdict in its favor.

So what does it mean that the system worked? The jury trial not only resolved this particular conflict, clearly and definitively, but it helped resolve countless others simply because it occurred. Without the clear finality that a judgment at the end of a jury trial brings, there is no urgency for a litigant to work hard to resolve their case. There is no hammer at the end of the road threatening to nail an unbending participant. The promise of this hammer (for one side or the other, neither knowing for sure which) drives the system and reasonable resolution of claims that don't reach trial. The larger civil legal system works because trials happen. Unfortunately, trials are becoming the "white whale," the stuff of legend and lore.

We all know jury trials are too rare these days, especially for those who enjoy them. But more importantly they are too rare for the preservation of a healthy civil court system. Our system without civil jury trials is doomed to fail. A civil defense lawyer without trials is like a high school football player practicing for that Friday night football game that never comes. When you play the game you might take some lumps, but just imagine when you win! Never quit on the game.

As the venerable Vince Lombardi said: "Once you learn to quit, it becomes a habit." Settling a case is not quitting. Settlement is appropriate and preferable to our clients in more cases than it is not. Nevertheless, we as lawyers, particularly IDC defense lawyers, *must always be ready* to try our cases. We must in every case be ready, willing, and able to play the game. The system works because lawyers are capable of trying cases, litigants have faith in the system, and trials happen. This integral part of the system—trial—is being lost to the detriment of us all. The byproduct of a trial system, which brings finality outside the parties' control, is that it drives settlement for litigants who want some control over their own destiny and outcome of their cases. Making the system fair and unbiased strengthens it and makes it work quicker and better for the benefit of all litigants. This is a bedrock principle of the IDC.

The jury system is under attack from self-interested groups that seek to eliminate it or twist it so unrecognizably to their favor that it is not fair to all litigants. The jury system is battered from both extremes of the spectrum. One side would favor no liability ever on those who may be liable, and the other, presses for constant and ever expanding liability on those that are not. These corrupting views are driven by a desire to achieve a particular outcome for self-benefit, not justice. These views are harmful to the health of our system. Litigants fear trial because they are not always perceived as fair, particularly in certain areas of our state.

When litigants, frequently defendants, believe the system is stacked against them, outcomes will be equally slanted and unjust. We know the system is not capable of handling trials for all, or even a substantial portion, of the cases filed. But the fact that any single case may be the one that goes to trial is what makes the system work. Without the potential, the real threat, of a matter being tried—*in a fair process to a fair result*—there is no reason for litigants to be realistic in their negotiations. Where a civil jury system is slanted (or perceived as slanted) reasonable resolution is often hard to achieve. A lack of reasonable resolution because one side either has, or is perceived to have, the upper hand is detrimental to that case and society. It is also a factor in driving business from

The simple truth is, if you are not known as a lawyer who can (or will) try a case, then your clients are probably settling their cases for more than the bottom dollar. It is akin to stepping into the gunfight at the OK Corral having never pulled your gun out before. We must do our part to be ready when the time comes and not allow the rarity of trials make poor preparation a habit.

the areas that are perceived as unjust. We must be ready to lead them through the process with confidence because we have been there and will gladly go there again.

As trials become rarer, so too are actually trial attorneys, to the detriment of the system. Trial attorneys are becoming a thing of the past. It is almost unheard of for young lawyers to actually try civil jury trials and more seasoned lawyers are getting fewer opportunities. How can an attorney appropriately advise a client on the consequences and potential outcomes of a trial if they have never actually been to trial (or at the very least have been only rarely)? As lawyers, this deficiency on our part does a disservice to our clients and the system. Clients over pay (or under recover) because their lawyer is not prepared, willing or capable of taking the case to trial. This is a bad result for everyone. It is a breakdown of the system. And, the breakdown is with us. Lawyers are not holding up our end of the bargain. Lawyers either haven't learned or haven't passed on the trial skills necessary for a participant in an adversarial civil trial system.

What can we do to prevent this lack of trials from becoming a habit? There is a limit to what we can do as lawyers but, having the confidence to play the game comes from experience and preparation. Every case must be prepared for trial from day one as opposed to being prepared for settlement. A case prepared for trial by a lawyer who is known as a capable trial lawyer will undoubtedly settle for a more reasonable number than ones that are not by those who are not. The simple truth is, if you are not known as a lawyer who can (or will) try a case, then your clients are probably settling their cases for more than the bottom dollar. It is akin to stepping into the gunfight at the OK Corral having never pulled your gun out before. We must do our part to be ready when the time comes and not allow the rarity of trials to make poor preparation a habit.

Of course, resolution of cases is often out of our hands and the majority of cases will settle regardless of our preparation and trial skill. Nevertheless, the IDC provides many opportunities for young and experienced lawyers to continue their education and improve their trial skills. We must continue to practice because we know that the game, the elusive trial, will be on the horizon.

In truth, our young lawyers are the key. We must continue to strive to not only better our own individual skills but do everything we can, in our personal practices and our organization, to facilitate the education and training of our young lawyers. A wonderful way for senior lawyers to preserve and hone their own skills is by mentoring and teaching these skills to younger lawyers. Opportunities exist for both through the IDC. The Trial Academy, Deposition Academy, and our mentoring program are only the formal tip of the iceberg. For a young lawyer, the resources of the IDC are invaluable and can provide a head start in their trial practice if time is made for it. Senior lawyers should view this as not only an opportunity to give back to the profession and strengthen the system by teaching others, but also as a way to preserve their good habits.

The IDC will not quit on its goal to preserve and protect the civil jury system. Our members, IDC defense lawyers, must never quit trying cases and must prepare as if they will try cases. We must hone our craft through mentoring and educational opportunities so that none of us are unwilling to take a case to trial. By trying cases and appealing unjust results we can ensure that trial lawyers are not relics of the past. Most importantly, a commitment to trying cases or at least preparing as if a trial will happen, will serve our clients and the civil jury system itself.

* Of course this was the outcome or else I would have picked a different theme for this column like "ADR—Can't we all just get along?" Or "Give peace (mediation) a chance."

Editor's Note

Brad A. Elward
Heyl, Royster, Voelker & Allen, P.C., Peoria

As this volume goes to print, we are moving into the fall season with football, bonfires, Halloween, and cooler weather. By the time the issue arrives in your hands, winter will be on its way and we will be in the midst of the Thanksgiving holiday and beginning the push toward the end of the year. This volume of the *Quarterly* boasts an unusually large number of articles covering a variety of topics that are sure to impact most defense attorneys throughout the state. Hopefully the holidays will give you ample down time to catch up on the law as it continues to evolve.

First up, we have three feature articles. Co-authors David B. Mueller and Brian A. Metcalf of *Cassidy & Mueller P.C.*, provide an in-depth look at significant developments which affect and shape the tort of construction negligence. Jessica Bell of *Heyl, Royster, Voelker & Allen, P.C.*, authored an interesting article on the new and developing trend of temporary transitional employment (TTE) in workers' compensation. TTE is a growing trend across the United States and is hopefully coming to Illinois soon. Finally, Benjamin Wilson of *HeplerBroom LLC*, authored a feature on removal in maritime cases and specifically discusses the recent United States Court of Appeals decision in *Lu Junhong v. Boeing Co*., 792 F.3d 805 (7th Cir. 2015).

Our monograph for this issue focuses on governmental law and provides a primer on the defenses available in Section 1983 and police liability actions. This timely piece was authored by John M. O'Driscoll of *Tressler LLP*, Howard L. Huntington, of *Bullaro & Carton, P.C.*, Dustin S. Fisher, *Judge, James & Kujawa, LLC*, and John F. Watson, *Craig & Craig, LLC*.

Scott L. Howie of *Pretzel & Stouffer Chartered*, authored the Appellate Practice Corner, which provides an excellent overview of waiver, forfeiture and plain error. John P. Heil, Jr., of *Heyl, Royster, Voelker & Allen, P.C.*, wrote a Civil Rights Update discussing the recent Seventh Circuit decision in *Rossi v. City of Chi.*, 790 F.3d 729 (7th Cir. 2015), and addressed whether a "botched" cover-up could constitute a constitutional violation. In the Civil Practice and Procedure column by Donald Patrick Eckler and Matthew Aaron Reddy of *Pretzel & Stouffer, Chartered* the co-authors provide an insightful look at the expanding application of the absolute attorney litigation privilege.

In his Employment Law Update, James Craney of *Lewis Brisbois Bisgaard & Smith LLP*, gives a lengthy discussion of a recent expansion of the NLRB's standard for joint-employer status. James K. Borcia of *Tressler LLP*, penned the Commercial Law column and highlighted the Appellate Court, Second District, decision in *Maglio v. Advocate Health and Hospitals Corp.*, 2015 IL App (2d) 140782, which discussed the viability of a class action suit in a data breach lawsuit against a hospital.

Marking the return of our Ethics Column, author Gretchen Harris Sperry, *Hinshaw & Culbertson LLP*, provides a detailed review of the use of Supreme Court Rule 219(e) to discourage abuse of the voluntary dismissal statute. Co-authors Joseph Feehan and Brad Keller of *Heyl, Royster, Voelker & Allen, P.C.*, focused their Evidence and Practice Tips column on establishing affirmative matters under section 2-619(a)(9) and highlighted the rulings from the recent decision in *Doe v. University of Chi. Med. Ctr.*, 2015 IL App (1st) 133735.

The Insurance Law column discusses when it is or is not appropriate for an insurance company to intervene in an underlying lawsuit. Columnists Michael L. Young and Katie E. Jacobi of *HeplerBroom LLC*, provide an overview of the Seventh Circuit decision in *CE Design Ltd. v. King Supply Co., LLC*, 791 F.3d 722 (7th Cir. 2015). For our workers' compensation practitioners, *Heyl, Royster, Voelker & Allen's* Brad Peterson comments in his Workers' Compensation Law Update on the appellate court ruling in *ABF Freight Systems, Inc. v. Fretts*, 2015 IL App (3d) 130663, wherein the Appellate Court, Third District, held that a circuit court did not have jurisdiction to hear a common law fraud claim relating to workers' compensation benefits.

In our Property Insurance Law column, Catherine Cooke of *Robbins, Salomon & Patt, Ltd.*, provides an interesting discussion of developments in drone law as it relates to property insurance. In this column, she notes that several insurance companies have received FAA approval to test and operate drones for insurance claim administration.

In her Recent Decisions column, Stacy Crabtree of *Heyl, Royster, Voelker & Allen, P.C.*, discusses three interesting decisions from the summer of 2015. One decision, *In re Marriage of Crecos*, 2015 IL App (1st) 132756, discusses motions for substitution of judge and the

impact on the litigation of a void order, while a second case, *McInnis v. OAG Motorcycle Ventures, Inc*., 2015 IL App (1st) 142644, comments on the scope and validity of a covenant not to compete as contained in an employment agreement. Her final case, *Construction Sys., Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, discusses whether a general release extends to a legal malpractice claim as a matter of law.

Writing in the Supreme Court Watch column, Elizabeth D. Kellett of *HeplerBroom LLC*, reports on two cases orally argued during the September Supreme Court term, *Bowman v. Ottney*, No. 119000 (argued September 24), and *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Cent. Ill.*, No. 118955 (argued September 23). *Bowman* dealt with whether a plaintiff has a substitution of judge as of right when the plaintiff voluntarily dismisses her action and the re-filed case is set before the same trial judge, who made substantive rulings in the prior case. *Burke Engineering* dealt with whether an engineer has a right to a mechanics' lien for work done on a project where the project was never completed. Look for reports on these decisions in early 2016.

In her Medical Malpractice Update, Dede Zupanci of *HeplerBroom LLC*, discusses the liability relationships between initial and successive tortfeasors. Writing in the Young Lawyer Division column, Elizabeth Barton of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.*, discussed some of the Young Lawyers events planned for the next year.

As with prior issues, this volume provides a shining example of the writing and analytical talents of our IDC members and an excellent educational opportunity for all practitioners.

Feature Article

Benjamin J. Wilson
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Lu Junhong: The Seventh Circuit Stirs the Waters of Maritime Removals

In *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), the United States Court of Appeals for the Seventh Circuit became the first federal court of appeals to permit removal based strictly on the fact that the plaintiffs' claims were general admiralty claims. Several district courts have allowed maritime removals, but most have declined jurisdiction and remanded. Given the breadth and reach of maritime law in tort actions, the *Lu Junhong* case may have thrown open the doors of more federal courthouses for defendants.

Maritime, or admiralty law, has a long history of shared jurisdiction between federal and state courts. While the federal statute gives U.S. district courts exclusive jurisdiction over maritime cases, the courts have long held that under the "saving to suitors" clause in 28 U.S.C. § 1333(l), federal jurisdiction is in fact concurrent with state courts' jurisdiction. *E.g.*, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 362 (1959). Suitors, or plaintiffs, have had their choice between state and federal court for civil maritime actions, except for specific maritime claims that provide for exclusive jurisdiction in either state or federal court, like a Jones Act claim.

Consequently, maritime cases have not been removable to federal court unless diversity jurisdiction or a separate federal question provides the defendant with an independent basis for removal. *See*, *e.g.*, *Romero*, 358 U.S. at 363. Congress, however, amended the removal statute effective in 2012, and courts have since been grappling with the import of those amendments.

Removal Prior To 2011

Until late 2011, the federal removal statute read as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

— Continued on next page

About the Author

Benjamin J. Wilson is an associate at *HeplerBroom LLC* and practices in complex defense litigation, including asbestos and other toxic torts. He is a member of HeplerBroom's federal practice group. Before joining the firm, Mr. Wilson was a judicial law clerk for the Hon. William D. Stiehl and the Hon. David R. Herndon in the U.S. District Court for the Southern District of Illinois.

> (b) Any civil action of which the district courts have original jurisdiction *founded on a claim or right arising under the Constitution, treaties or laws of the United States* shall be removable without regard to the citizenship or residence of the parties. *Any other such action* shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(a)-(b) (2002) (emphasis added).

In short, paragraph (a) provided that any civil action brought in state court may be removed if the federal district courts had original jurisdiction, except as otherwise provided by Act of Congress. A separate statute, 28 U.S.C. § 1333(1), specifies that federal district courts "have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Reading these statutes together, any civil action within the federal admiralty or maritime jurisdiction should be removable because district courts have original jurisdiction of those cases.

In practice, however, the "except as otherwise expressly provided by Act of Congress" language in § 1441(a) was a stumbling block to removal. That language has been found to encompass paragraph § 1441(b), which identifies two groups of civil actions potentially subject to removal: (1) those "founded on a claim or right arising under the Constitution, treaties or laws of the United States;" and (2) "[a]ny other such action." 28 U.S.C. § 1441(b) (2002).

According to the United States Supreme Court, maritime actions are not "founded on a claim or right arising under the Constitution, treaties, or laws of the United States." *Romero*, 358 U.S. at 367, n. 30; *In re Dutile*, 935 F.2d 61, 62–63 (5th Cir. 1991). Rather, they were among *any other such actions*, which included diversity cases as well. These actions could be removed only if none of the defendants was a citizen of the state in which the action was brought, a requirement known as the "forum defendant rule." 28 U.S.C. § 1441(b).

The resulting oddity from this interpretation is that the removal of maritime and admiralty cases were conditioned on the citizenship of defendants, even though citizenship is a special concern of diversity actions. Indeed, Justice Brennan called it a "gross anomaly" that "an action rooted in federal law [maritime] can be brought on the law side of a federal court only if the diversity jurisdiction, usually a vehicle for the enforcement of state-created rights, can be invoked." *Romero*, 358 U.S. at 397 (Brennan, J., dissenting). Nevertheless, that interpretation of § 1441 has held sway. Maritime cases could be removed only if diversity or some other basis for federal jurisdiction existed.

2011 Amendment

In late 2011, Congress amended paragraph (b) of § 1441 significantly to address diversity jurisdiction, modifying the statute as follows:

> (b) Removal based on diversity of citizenship.
>
> …
>
> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) [diversity of citizenship] of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (2015).

This amendment removes the former "two groups" of cases. Nothing in paragraph (b) provides an exception "as otherwise expressly provided by Act of Congress," and the plain language of § 1441(a) appears to allow removal of maritime and admiralty actions because they are within the original jurisdiction of the federal courts.

District Court Disarray

Over the last three years, more than 50 cases have been removed to federal court based on the amended statutory language.[1] The results have been mixed, with some courts sustaining removal and others remanding the cases to state court. One thing that is apparent from these recent decisions is that a new obstacle has been revealed—the "saving to suitors" clause.

The saving-to-suitors clause states:

> The district courts shall have original jurisdiction … of: (1) Any civil case of admiralty or maritime jurisdiction, "*saving to suitors in all cases all other remedies to which they are otherwise entitled.*

[1] I thank Prof. Arthur A. Crais, Jr., of Loyola College of Law, for sharing his research and providing helpful comments on these cases.

28 U.S.C. § 1333(1) (emphasis added).

In *Romero*, the Supreme Court in discussing the history of concurrent jurisdiction between the state and federal courts, cautioned that the free removal of maritime claims would disrupt "the traditional allocation of power over maritime affairs in our federal system." 358 U.S. at 371. But removal under § 1441 was not the issue in *Romero*, and some federal courts since then have found that the saving-to-suitors clause only preserves the plaintiff's right to certain remedies, including the right to trial by jury, not a right to proceed in state court. *E.g.*, *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981).

Nevertheless, even after the amendment to § 1441(b), district courts that have remanded maritime cases frequently conclude that the saving-to-suitors clause prevents removal. *Gregoire vl Enterprise Marine Services, LLC*, 38 F. Supp. 3d 749, 764 (E.D. La. 2014). One reason is that a plaintiff who brings a maritime or admiralty claim directly in federal court is not guaranteed a trial by jury so, by implication the courts conclude that a maritime case removed to federal court would deny a plaintiff the same right. *See Pierce v. Parker Towing Co. Inc.*, 25 F. Supp. 3d 1372, 1381 (S.D. Ala. 2014). Courts often backstop that argument with the proposition that the federal removal statute is to be strictly construed to resolve all doubts in favor of remand. *Gregoire*, 38 F. Supp. 3d at 764–65. Curiously, some courts decide the issue is too close to call and issue a remand simply because removal is controversial and the removal statute must be strictly construed. *Jimenez v. U.S. Environmental. Services, LLC*, Civil Action 3:14-CV-0246, 2015 WL 4692850, at *4 (S.D. Tex. Aug. 6, 2015).

The Seventh Circuit

Against this backdrop, the Seventh Circuit in *Lu Junhong v. Boeing Co.,* 792 F.3d 805 (7th Cir. 2015) held that cases may be removed solely based on maritime jurisdiction. *Lu Junhong* arose from an Asiana Airlines flight that hit the seawall separating the ocean from runway at San Francisco International Airport. There were numerous injuries, and three passengers died. Several lawsuits were filed in the federal district courts of California and other states. The federal cases were consolidated in multidistrict litigation. Meanwhile, some suits against Boeing were filed in Illinois state court. Because Boeing's headquarters is in Illinois, diversity jurisdiction was not available. Boeing removed the cases to the U.S. district court under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1) and admiralty law, § 1333(1). The district court dismissed the cases for lack of subject matter jurisdiction. The Seventh Circuit, however, granted Boeing's motion for interlocutory appeal and stayed the remand orders.

The Seventh Circuit first found that the cases were not removable on federal-officer grounds. Ordinarily, that might have been the end of the analysis because while federal-officer removals can be appealed, most orders of remand, including those based on diversity and maritime law, cannot. *See* 28 U.S.C. § 1447(d). In a plain reading of § 1447(d), the court found that because the *order* remanding a federal-officer case is reviewable, the court could reach other issues in the same order, including whether the plane crash implicated admiralty jurisdiction. From there, the court then looked to numerous facts in the case—that a plane crossing the Pacific Ocean was "a traditional maritime activity;" that the cause of the accident "likely occurred over the water;" and that a plane *over water* is functionally equivalent to a *vessel on* water—the court found that admiralty applied to the cases under review. *Lu Junhong*, 792 F.3d at 814–16.

With these findings, the court then looked at the issue of removal. Substantially following the reasoning noted above regarding the amended version of § 1441, the court first concluded that § 1441(a) permitted the removal of "any suit over which a district court would have original jurisdiction," which included admiralty jurisdiction. *Lu Junhong*, 792 F.3d at 817. The court was not persuaded by the plaintiffs' argument that admiralty jurisdiction did not provide an independent basis for removal. It noted that the cases cited by the plaintiffs all relied on *Romero v. International Terminal Operating Co*., which involved a prior version of § 1441(b). *Id.* The court noted that the 2011 amendment "limit[ed] the ban on removal by a home-state defendant to suits under the diversity jurisdiction." *Id.*

The court then moved to the saving-to-suitors clause in § 1333(1). It acknowledged the possibility that the saving-to-suitors clause forbids removal without regard to the language of § 1441 but noted that the plaintiffs did not make that argument or discuss. *Id.* at 818. "Perhaps they have left them out because they no longer provide assistance." *Id.* at 817. Surprisingly, the court found it did not need to resolve that question because subject matter jurisdiction existed under admiralty jurisdiction, § 1333(1), inasmuch as the plaintiffs could have brought their cases in federal court, as other plaintiffs in these lawsuits had. The court concluded, if the saving-to-suitors clause allowed the plaintiffs to keep the cases in state court "even after the 2011

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amendment, they are free to waive or forfeit that right—which given the scope of § 1333(1) concerns venue rather than subject-matter jurisdiction." *Id.* at 818. Boeing was entitled to remove the cases. The court has since denied the plaintiffs' petition for rehearing and rehearing *en banc*.

Observations

Although *Lu Junhong* did not answer the question of whether the saving-to-suitors clause prevents or does not prevent removals of general maritime tort actions, the opinion is enlightening for several reasons.

First, many district courts have reasoned that the removal statute must be strictly construed and all doubts resolved in favor of remand. Some have declined to decide the saving-to-suitors question at all and simply remand the case because jurisdiction was unclear. That approach is seriously undermined by *Lu Junhong*. Indeed, the seventh circuit decided several antecedent issues, including whether it had appellate jurisdiction to consider issues other than the federal-officer removal; and whether the plane crash, which occurred on land, involved admiralty jurisdiction at all. Then, instead of resolving all doubts in favor of remand, the court found that the plaintiffs had forfeited a major argument for remand by not invoking the saving-to-suitors clause. The first case the plaintiffs cited, as quoted by the court, discussed the saving-to-suitors clause and *Romero*. *See Oklahoma v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1241 (10th Cir. 2004). The court also did not raise the issue of plaintiffs' potential loss of the right to trial by jury, as feared by some district courts. To some extent, the court required the plaintiff to bear the burden of establishing that removal was improper, rather than requiring Boeing to show that removal was proper.

Second, the conclusion that the removal of a maritime action was merely an issue of venue, not subject matter jurisdiction, and that plaintiffs may waive or forfeit arguments against removal, implies that plaintiffs have a limited time and basis to move for remand. Plaintiffs must bring a motion to remand based on any defects other than subject matter jurisdiction within 30 days of the removal. 28 U.S.C. § 1447(c). But the court *must* remand the case at any time, even *sua sponte*, if the case lacks subject matter jurisdiction. *Id*. Because federal courts do possess subject matter jurisdiction over maritime cases, as explained in *Lu Junhong*, it appears that plaintiffs must bring any motion to remand within the 30 days of the removal to allege other defects, including that the removal might be barred by the saving-to-suitors clause.

Similarly, if jurisdiction is premised on an independent basis for removal that is found wanting under court scrutiny, the presence of a valid maritime claim may save jurisdiction. Indeed, this is exactly what happened in *Lu Junhong* when federal-officer removal was found to be improper. In some cases, the parties fail to establish the requirements of jurisdiction, and the district court or even the circuit court on appeal disastrously finds that jurisdiction was lacking from the beginning. *E.g.*, *DeBartolo v. HealthSouth Corp.*, 569 F.3d 736, 740 (7th Cir. 2009) ("The parties may be content to assume that the district court had jurisdiction to resolve this dispute, but we are not. Subject-matter jurisdiction is not an issue that can be brushed aside or satisfied by agreement between the litigants.") In such instances, a maritime claim could salvage a case.

Nevertheless, removing defendants still face the risk that the seventh circuit or another court of appeals may one day find that the saving-to-suitors clause prevents removal.

Conclusion

The new § 1441(b) no more discusses maritime and admiralty actions than the old one did when it lumped them among "any other such actions," inexplicably conditioning maritime removals on the citizenship of defendants. Neither version of the statute *expressly* provides anything with respect to maritime. Indeed, it required the discernment of the U.S. Supreme Court in *Romero* to decide whether maritime actions were "founded on a claim or right arising under the Constitution, treaties or laws of the United States" or were "[a]ny other such action." 28 U.S.C. § 1441(b) (2002). And even that conclusion drew dissents. Justice Black wrote, "[t]he real core of the jurisdictional controversy is whether a few more seamen can have their suits for damages passed on by federal juries instead of judges. … I believe that federal jurisdiction under 28 U.S.C. § 1331 lies, and a federal jury trial is proper." *Romero*, 358 U.S. at 388 (Black, J., dissenting). The saving-to-suitors clause preserves common-law remedies, including the right to a jury trial. But is it a prohibition on removal "expressly provided by Act of Congress"? The *Lu Junhong* case gives new ammunition to defendants, and we can expect to see more maritime removals and more appeals of this issue.

Legal Ethics

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Using Supreme Court Rule 219(e) to Discourage Abuse of Voluntary Dismissal Statute

In recognition of the principle that a plaintiff controls his lawsuit, a plaintiff also has a virtually unfettered right to dismiss his lawsuit. Voluntary dismissal occurs with some frequency and is handled relatively routinely by the courts. However, it has long been recognized that plaintiffs often misuse the voluntary dismissal statute to avoid adverse discovery rulings. While the Illinois Supreme Court cannot limit the statutory right to voluntary dismissal, it has created a mechanism to curtail such abuses. Illinois Supreme Court Rule 219(e) allows the trial court to impose consequences for such abuses, including monetary penalties and the ability to reimpose discovery sanctions in a refiled case following dismissal. Defense counsel should be aware of this under-utilized procedural device to ensure that plaintiffs' counsel are using voluntary dismissal as it was intended to be used, rather than as an escape hatch to avoid adverse rulings on the eve of trial. By understanding the evolution of the voluntary dismissal statute and Rule 219(e), defense counsel can hold plaintiffs' counsel to their ethical obligation to use voluntary dismissal as it was intended.

History and Background

As originally enacted, section 2-1009(a) of the Code of Civil Procedure provided that a plaintiff could dismiss his lawsuit without prejudice at any time before trial or hearing begins if he gave adequate notice to the defendant and paid statutory costs. Ill. Rev. Stat. 1983, ch. 110, ¶ 2-1009. The statute reflected the common law rule that no jury verdict could be entered in a plaintiff's absence. By practice, if a plaintiff thought that a jury would rule against him, he would simply not appear for the verdict. The court would be forced to nonsuit the case and the plaintiff would be allowed to refile the case to pursue a ruling on the merits. 4 *Illinois Practice* § 42.2 at 340 (1989); *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 307-08 (1984).

Over 25 years ago, the Illinois Supreme Court first noted that "an ever increasing number of plaintiffs are using a section 2-1009 motion to avoid a potential decision on the 'merits' or to avoid an adverse ruling as opposed to using it to correct a procedural or technical defect." *Gibellina v. Handley*, 127 Ill. 2d 122, 137 (1989). The court recognized that the "abusive uses of the voluntary dismissal statute" are an "extreme problem facing our courts." *Gibellina*, 127 Ill. 2d at 136. Nevertheless, given the court's limited power to curtail the misuse of the voluntary dismissal statute, the court called upon the legislature to amend it. *Id.* (citing *Kahle*, 104 Ill. 2d at 307-08).

At the same time, the court also acknowledged that allowing "an unrestricted right to dismiss and refile an action" was "infringing on the authority of the judiciary to discharge its duties fairly and expeditiously," particularly where a defendant's dispositive motion was pending. *Gibellina*, 127 Ill. 2d at 137. In *Gibellina*, the court placed its first substantive restrictions on the use of voluntary dismissal, holding that when a dispositive motion is pending, the trial court may rule on the dispositive motion before addressing voluntary dismissal. *Id*. at 138. This ruling allowed for the possibility that defendants could prevail on the merits without being thwarted by a voluntary dismissal and having to

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defend against the refiled lawsuit. The court later expanded this rule, holding that even when a defendant announces its intention to file a dispositive motion, prompting a voluntary dismissal by the plaintiff, the court may consider the defendant's motion first. *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 67-68 (1990).

While the legislature later codified the *Gibellina* decision in section 2-1009(b), the statute still permitted a virtually unfettered right to voluntary dismissal. This evoked additional commentary from the courts regarding the constraints on their ability to penalize the intentional manipulation of voluntary dismissal. In a lengthy dissent in *Bochantin v. Petroff*, Chief Justice Miller lamented those limitations in the words of United States Supreme Court Justice Felix Frankfurter by observing: "'Litigation is the pursuit of practical ends, not a game of chess.' Faced both with crowded dockets and with diverse demands on scarce resources, the judicial system should be curbing, rather than encouraging, dilatory trial tactics." (Internal citation omitted.) *Bochantin v. Petroff*, 145 Ill. 2d 1, 12 (1991) (Miller, J., dissenting).

In *Crawford v. Schaeffer*, 226 Ill. App. 3d 129, 130 (1st Dist. 1992), the plaintiff voluntarily dismissed his case after his expert failed to give an opinion on causation. While the appeal turned on the issue of proper notice, Justice DiVito, writing for the majority, remarked:

> [W]e are troubled by the prospect of giving our tacit approval to plaintiff's egregious abuse of the voluntary dismissal statute. The record before us leaves little doubt that the catalyst for plaintiff's motion was his realization that after six years, he could not unearth a single expert who would support his claim of negligence.

Crawford, 226 Ill. App. 3d at 136.

In his special concurrence, Justice McCormick was less charitable. He remarked: "Enough is enough. Absurd and unjust results such as this should not be allowed to continue." *Id.* He then called upon the legislature to act on the supreme court's entreaty to prevent abuses of the voluntary dismissal process. *Id.*

Indeed, even when the trial court made specific findings that a plaintiff abused the voluntary dismissal process, there was no recourse. *In re Air Crash Disaster* was a complex, multi-party, multi-jurisdictional case governed by strict discovery deadlines. After the court denied the plaintiffs' requests to extend the discovery period, they voluntarily dismissed the entire case. Despite the fact that the trial court specifically found that "there is no question in my mind that this motion [for voluntary dismissal] has been filed to avoid discovery deadlines and cut-offs," it concluded that it was without authority to deny the motion. *In re: Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 259 Ill. App. 3d 231, 233-34 (1st Dist. 1994).

The appellate court affirmed, noting that the defendants "raised valid concerns about the potentially abusive motives underlying plaintiffs' motion to voluntarily dismiss; however, discovery abuse has not been identified by the legislature or supreme court as a basis for eliminating or restricting the right to nonsuit." *Air Crash Disaster*, 259 Ill. App. 3d at 235. Thus, the trial courts' hands were tied.

The Adoption of Illinois Supreme Court Rule 219(e)

Following these and other relatively impassioned calls to action, the Illinois Supreme Court at last acted to curb the abuse of the voluntary dismissal procedure. Recognizing its inability to place conditions on the statutory right to voluntary dismissal, the supreme court instead created disincentives for misuse of voluntary dismissal through the adoption of Illinois Supreme Court Rule 219(e) (eff. Jan. 1, 1996). Rule 219(e) provides:

> A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

Ill. Sup. Ct. Rule 219(a).

Additionally, the Committee Comments to Rule 219(e) clarify that the rule also "addresses the use of voluntary

dismissals … to avoid the consequences of discovery failures, or orders barring witnesses or evidence." See *Jones v. Chicago Cycle Center*, 391 Ill. App. 3d 101, 114 (1st Dist. 2009).

As the supreme court acknowledged, Rule 219(e) does not limit a party's right to voluntary dismissal, but rather, it alters the consequences of exercising that right and thereby "prevents voluntary dismissals from being used as an artifice for evading discovery requirements." *Morrison v. Wagner*, 191 Ill. 2d 162, 166 (2000). First, Rule 219(e) subjects the offending plaintiff to enhanced monetary penalties by permitting the defendant to recover the cost of its reasonable litigation expenses if the trial court determines that the plaintiff abused the voluntary dismissal process. *Morrison*, 191 Ill. 2d at 166. Additionally, the rule provides that upon refiling of the lawsuit pursuant to 735 ILCS 5/13-217, the trial court must consider the rulings made by the judge in the original case to determine the scope of discovery. *Id.* at 167. Thus, the plaintiff ultimately may be bound by the rulings he sought to evade through the improper use of voluntary dismissal. *Id.*

Consistent with the purpose of the rule, the First District Appellate Court clarified that the rule is aimed at discouraging "those strategic and tactical" voluntary dismissals that have "crossed the line of vigorous advocacy" and have instead had the effect of "undermining the integrity of the judicial system." *Scattered Corp. v. Midwest Clearing Corp.*, 299 Ill. App. 3d 653, 660 (1st Dist. 1998). Accordingly, before ordering the plaintiff to pay the defendant's litigation expenses, the trial court first must make a preliminary finding that the voluntary dismissal involved "some disobedience on the plaintiff's part" that resulted in noncompliance with discovery rulings, akin to the "unreasonable noncompliance" standard applied under Rule 219(c) for discovery sanctions. *Scattered Corp.*, 299 Ill. App. 3d at 658-59.

Rule 219(e) does not limit a party's right to voluntary dismissal, but rather, it alters the consequences of exercising that right and thereby "prevents voluntary dismissals from being used as an artifice for evading discovery requirements."

Notably, such a finding has been made under relatively benign circumstances. In *Jones v. Chicago Cycle Center*, the First District held that the trial court need not find that a plaintiff deliberately violated or failed to comply with court orders before seeking voluntary dismissal. *Jones*, 391 Ill. App. 3d at 114. It is enough that the plaintiff in fact misused the voluntary dismissal process to "avoid the consequences of discovery failures," including orders barring it from presenting certain witnesses and evidence. *Id.* Nor is the trial court required to find that a plaintiff's explanation for seeking voluntary dismissal was pretextual. *Id.* at 115. It simply must find that voluntary dismissal was used to avoid negative consequences flowing from the plaintiff's own conduct.

In *Jones*, the plaintiff moved for voluntary dismissal after the court barred him from introducing trial testimony on previously undisclosed medical opinions regarding future medical expenses. *Id.* at 103-04. Following the defendants' subsequent Rule 219(e) motion, the court found that the plaintiff inexplicably failed to disclose that a change in his medical condition might result in voluntary dismissal, despite having many opportunities to do so, and that his motion was filed only after the court barred certain testimony. *Id.* at 104. The court found that, taken together, this was "an even greater abuse within the meaning of [Rule 219(e)] than other sanctionable discovery violations" the plaintiff committed. *Id.* at 113. The court then ordered the plaintiff to pay defendants over $180,000 in costs and litigation expenses. See also *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 328 Ill. App. 3d 255, 271 (1st Dist. 2002) (finding there was "no question" that Rule 219(e) expenses were appropriate where plaintiffs sought voluntary dismissal "to avoid the effects of pre-trial evidentiary rulings based on their own failure to comply with discovery deadlines").

Additionally, *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067 (1st Dist. 2001), illustrates the procedure by which discovery sanctions entered in the original case can be imposed in the refiled case pursuant to Rule 219(e). In *Smith*, the plaintiff was barred from presenting certain evidence and testimony at trial because he failed to make timely and adequate disclosures. *Smith*, 323 Ill. App. 3d at 1071. Two days later, the plaintiff moved to voluntarily dismiss his case, which the court granted. Upon refiling the case under section 13-217, the defendant filed a motion seeking to enforce the orders barring

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certain evidence and testimony entered in the original case. *Id.* The trial court found that the plaintiff's voluntary dismissal "was used solely as a dilatory tactic to avoid the consequences of the sanction orders" and reimposed the discovery sanctions entered in the original case. *Id.* at 1072. The appellate court largely affirmed, noting its "complete agreement with the trial court's finding" that the plaintiff exhibited "unreasonable disregard for the discovery process" in using voluntary dismissal to avoid discovery sanctions. *Id.* at 1074-75.

While there are relatively few published cases discussing Rule 219(e), many of the cases that do exist affirm the trial court's award of litigation expenses on the merits, as discussed above. Rule 219(e) awards have been found improper only on procedural bases, such as where the court denied a motion for voluntary dismissal without first making a finding of misconduct or otherwise impinged upon a plaintiff's right to voluntarily dismiss. See *Morrison*, 191 Ill. 2d at 167 (reversing trial court's outright denial of voluntary dismissal motion); *Scattered Corp.*, 299 Ill. App. 3d at 661 (reversing trial court's award of Rule 219(e) litigation expenses in the absence of misconduct finding); *In re Marriage of Webb*, 333 Ill. App. 3d 1104, 1112 (2d Dist. 2002) (same). Accordingly, in light of the history and purpose of Rule 219(e) and the cases interpreting it, defense counsel should be mindful that Rule 219(e) is a powerful but under-utilized tool that can protect against the flagrant abuse of this virtually unassailable right of voluntary dismissal without prejudice.

Insurance Law Update

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Is It Time for an Intervention? No, Says the Seventh Circuit in *CE Design, Ltd. v. King Supply Co.*

One of the greatest risks a liability carrier faces today is a settlement agreement or consent judgment involving its insured, which has been negotiated solely between the insured and the plaintiff. It seems that more and more frequently, insureds enter into agreements that shield themselves from liability but allow claimants to pursue their liability carrier. These agreements often involve exorbitant amounts of money that far exceed what a claimant would have likely been awarded had the suit proceeded to trial.

Of course, the insured can enter into this type of agreement only after the liability carrier declines coverage. The carrier can avoid this situation entirely by agreeing to provide its insured with a defense. Then, it may control the defense of the lawsuit or claim against its insured, even under a reservation of rights, provided no conflict exists.

Once the carrier declines coverage, however, its options are limited. One potential means of protecting itself from these agreements after declining coverage is to seek to intervene in the lawsuit against its insured. This raises various concerns: it could introduce liability coverage into the lawsuit; it potentially allows the carrier to protect its own interest at the expense of its insured; it may interject somewhat tangential issues into the lawsuit.

Nevertheless, the carrier in *CE Design Ltd. v. King Supply Co., LLC*, 791 F.3d 722 (7th Cir. 2015), tried to do just that. After three years of litigation, the defendant insured's liability carriers moved to intervene into the underlying lawsuit against their insured. Ultimately, the Seventh Circuit prohibited the carrier from intervening in *CE Design* on the grounds that the motion was untimely. The court also hinted at whether such

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intervention could ever be proper, without actually deciding the issue.

Background

CE Design involved a putative class action against King Supply pursuant to the Telephone Consumer Protection Act (TCPA). *CE Design*, 791 F.3d at 723. King Supply had purchased commercial general liability and commercial umbrella liability policies from three carriers, all of which declined coverage for the lawsuit based on exclusions for TCPA claims. *Id.* The plaintiffs settled with King Supply for $20 million, with King Supply being liable for just 1 percent of that amount. *Id.* at 723-24. The remainder was to be pursued from its insurance companies. *Id.* at 724.

After the settlement was reached, but before it had been approved by the district court, the carriers moved to intervene in the lawsuit pursuant to Federal Rule of Civil Procedure 24(a) and (b). The carriers sought to delay approval of the settlement until a decision had been reached in a separate declaratory judgment action regarding coverage. *Id.* Alternatively, if it was found that coverage existed, the carriers sought to intervene to argue that the settlement agreement was collusive and unreasonable. *Id.* The district court denied the motion as untimely. *Id.*

Seventh Circuit Affirms Denial of Motion to Intervene and Hints at Alternatives

After commenting generally on the relationship between a liability carrier and its insured, the Seventh Circuit commented that the carriers' concern that their insured would fail to protect their interests "may seem a strange argument." *Id.* at 725. The court commented that the insured might "be thought to have no duty to mitigate the risk assumed by the insurer." *Id.* Yet, considering the "growing phenomenon" of these types of agreements in insurance coverage litigation, the court noted that insurance carriers understandably have a right to worry about their interests once they decline coverage. *Id.*

Here, however, the insurance carriers should have begun to worry about this situation years earlier, according to the court, when the suit initially was filed. *Id.* Intervention generally must be sought as soon as the intervener has reason to know its interests may be adversely affected by the outcome of the litigation. *Id.* at 726. Because the carriers attempted intervention three years into the litigation would have significantly delayed resolution, the Seventh Circuit held that the district court properly denied the carriers' motion to intervene as untimely. *Id.*

In reaching this decision, the court commented that the carriers could have protected themselves from the $20 million settlement agreement by exercising their right under the insurance policies to control the insured's defense, rather than seeking to intervene three years into the lawsuit. *Id.* According to the court, the few hundred thousand dollars required to defend the suit "would have been a reasonable investment" to protect against the settlement agreement, even if the policies did not provide coverage. *Id.* Most notably, the court commented that "even if the insurers had filed a timely motion to intervene, their interest might well have been deemed too contingent on uncertain events to justify granting their motion," recommending instead that they simply ignore the underlying suit entirely and pursue a ruling of no coverage. *Id.* at 726-27.

In a concurring opinion, Justice Hamilton agreed that the motion should have been denied as untimely, but further concluded that "the insurance companies lacked the sort of interest in the case that would justify mandatory or permissive intervention." *Id.* at 727 (Hamilton, J. concurring). Justice Hamilton commented that individuals and businesses purchase insurance, in part, for the peace of mind that comes from the insurer's duty to defend. *Id.* Once a carrier breaches that duty, the carrier abandons its insured. *Id.* The carrier should not be permitted to protect its interest by intervening in the lawsuit after it has breached its obligation to its insured. *Id.* at 727-28. Rather, the carrier gains an interest in the suit if, and only if, it loses the the declaratory judgment action and is liable to indemnify its insured. *Id.* at 728.

Conclusion

Whether the carrier may intervene in the underlying lawsuit – provided it does so in a timely manner – remains to be determined. Given the *dicta* of the Seventh Circuit's opinion, carriers may face an uphill battle in persuading a court that it should be permitted to intervene. Under Justice Hamilton's view, intervention should be allowed only once it has been determined that the carrier owes coverage and has a sufficiently direct interest in the outcome of the litigation. An insurer's most prudent course remains to defend its insured and control the defense of the underlying lawsuit if there is any chance coverage exists.

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Coming Soon to Your Neighborhood: Flying Insurance Adjustors? Commercial Drone Usage in the Property Insurance Sector

Read any news lately, whether legal or "mainstream," and you have probably noticed there has been a surge in the number of stories reporting on the potential uses of unmanned aerial or aircraft systems (UAS), also known as "drones." From speedy package deliveries to mapping and agricultural purposes, the potential uses for drones are ever-expanding as technology (and imagination) continues to advance. One such use is in the property insurance industry.

Drones have become increasingly attractive to insurance companies for their potential uses in connection with property inspections—from underwriting to inspection of damaged property and estimating costs of repair or replacement. Drones are touted as having potential advantages in catastrophic damage situations where physical access to a hard-hit area may be restricted by debris or by security threats, or when ongoing weather issues restrict claims professionals' abilities to inspect property. In those situations, rather than deploying human resources to the "field" to perform some of these inspections, which may be delayed for any number of reasons and also poses risk to human safety, insurance companies are exploring using drones to gather and compile data and images so they can assess damage remotely by viewing drone-captured images.

Drones have become increasingly attractive to insurance companies for their potential uses in connection with property inspections—from underwriting to inspection of damaged property and estimating costs of repair or replacement.

Several major property insurance companies, including American Family, State Farm, USAA, Erie Insurance Group, Liberty Mutual, and AIG have all recently received approval from the Federal Aviation Administration (FAA) for testing and use of drones in insurance underwriting and claims administration. Though that list is likely to grow, so far, the restrictions imposed by the FAA regulations have severely limited the effective use of drones by insurance companies.

Current State of the Law

Currently, any aircraft operating in the national airspace requires a certificated and registered aircraft, a licensed pilot, and operational approval. The use of drones for *commercial* purposes is technically banned absent express permission from the FAA. Section 333 of the FAA Modernization and Reform Act of 2012 (FMRA) grants the Secretary of Transportation the authority to determine whether an airworthiness certificate is required for a UAS to operate safely in the national airspace system. See Pub. L. 112-95, February 14, 2012, 126 Stat. 11. Therefore, unless you are flying as a hobby or for recreational purposes only, a Section 333 exemption is required.

Obtaining a Section 333 exemption and a civil Certificate of Waiver or Authorization (COA) from the FAA allows authorized parties to perform commercial operations in certain controlled environments. The Section 333 exemption process is viewed as a safe and

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legal process to permit drone operators to pursue entry into the national airspace system, and is intended to discourage illegal operations while improving safety. However, the current restrictions dramatically limit the potential uses for drones by insurers. Such restrictions include: 1) a drone cannot be flown within 500 feet of any structure or vehicle without the permission of the owner or occupant; and 2) the drone may not be operated within 500 feet of a person other than the operator and observer, unless the people within the 500 feet are within a structure that would protect them from debris or injury in the event of a drone crash. These restrictions obviously limit the utility of drones for property inspection purposes.

FAA Regulations on Commercial Drone Use

In February 2015, the FAA issued a Small UAS Notice of Proposed Rulemaking (NPRM) with a 60-day public comment period that closed in April 2015. While the proposed rules seek to change the landscape, the FAA has still not issued a final small UAS rule. Therefore, all current regulations continue to apply, meaning that commercial UAS operators still must petition for and receive a Section 333 grant of exemption.

While the complete proposed FAA rules are complex and lengthy, the following is a summary of some of the main points that have the potential to affect the insurance and other commercial industries:

- Drones may not weigh more than 55 pounds.
- Drones may not fly higher than 500 feet.
- Drones must adhere to a speed limit of 100 miles per hour.
- Operators must be certified, which requires meeting certain requirements (*e.g.* operators must be at least 17 years old, have no drug convictions or physical or mental conditions impairing ability to fly the drone) and pass an aeronautical test at an approved testing location, renewable every 2 years.
- Operators must have visual contact with the drone using human vision not assisted by any device (besides eyeglasses or contacts). Additional "visual observers" may be enlisted to assist with this requirement.
- No person may act as an operator or visual observer for more than one unmanned aircraft operation at a time.
- Drones may be flown no closer than 500 feet below and 2,000 feet horizontal from any clouds.
- Night use is prohibited.
- Drones must be registered with the FAA.

Facing pressure about the stringent requirements for commercial UAS use, the FAA announced in March 2015 a streamlined process for reviewing "Section 333 exemption" filings for use of drones weighing under 55 pounds in commercial operations. The move to expedite the Section 333 approval process and to loosen up some of the restrictions is likely to be of interest to insurers considering the use of drones for property inspection purposes. However, even the loosened restrictions pose issues for insurers. Lightweight drones can weigh less than 5 pounds but the operator must have a pilot license (which can be a recreational or sports pilot's license). A second observer must be present for all flights and the drones must be operated within the sight-line of both the operator and observer.

The Proposed FAA Regulation's Effect on Property Insurers

Perhaps the most significant change with respect to insurers' potential use of drones is the proposed elimination of the requirement that drones remain at least 500 feet from structures, vehicles and people, although drones may not be flown directly over people other than the operator and observer. The proposed regulation requires the operator to take measures to mitigate risk to persons and property in the event of loss of control of the drone.

The proposed UAS regulation creates a separate and even more relaxed set of rules for drones weighing less than 4.4 pounds that fly at low speeds and low altitudes. Operators of these drones would need to obtain a "microUAS" operator certificate from the FAA. Unlike the larger drones weighing up to 55 pounds, microUAS drones could be operated directly over people.

At present, it is unclear when the FAA regulations on the commercial use of small drones will be issued and whether they will be significantly changed from the proposed version based on the comments received, which number in the thousands. However, the FAA is under pressure to create a more favorable regulatory environment for the commercial use of drones, in part because testing and use of small drones is moving to other countries with less restrictive requirements.

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The Future of Insurers' Use of Drones

In the next few years, it is likely that insurance companies' use of drones will move beyond the testing stage to operational use. If the proposed FAA regulations are promulgated with the relaxed requirements for microUAS weighing less than 4.4 pounds, commercial users may begin to favor micro drones. However, it remains to be seen whether microUAS will be able to carry equipment more sophisticated than a camera, given the weight limit. The FAA could also consider creating an intermediate category between drones weighing 4.4 pounds and drones weighing 55 pounds that allows less stringent operation requirements.

Any change in insurer underwriting or claims handling practices could trigger charges that the insurer is treating policyholders and claimants inappropriately. Potential issues arising from insurer use of drones include allegations that a claim was improperly denied due to the failure of the drone to collect necessary information or the misinterpretation of the data by a remote claims center. Privacy considerations are also frequently raised by opponents of drone usage in the commercial context. It is fairly safe to assume that technology will continue to improve, with usage options continuing to expand. However, whether the legal and regulatory hurdles will allow widespread use of drones to make sense for insurers remains to be seen.

Medical Malpractice Update

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The Liability Relationship Between Initial and Successive Tortfeasors

When the independent conduct of two or more persons results in an indivisible injury to another party, each defendant is considered a joint tortfeasor and is both jointly and severally liable for damages. Restatement (Third) of Torts: Apportionment of Liability § E18 (2000). In that situation, the plaintiff may recover the full amount of his damages from any one defendant found liable. Restatement (Third) of Torts: Apportionment of Liability § 10. The question then arises as to whether there is a difference in liability between the original tortfeasor and successive tortfeasors. Does the original tortfeasor truly "buy the negligence" of the subsequent conduct of another party? As with most legal questions, it depends.

In general, when it is determined that the plaintiff suffered separate injuries, the original tortfeasor will be liable for the initial injury as well as any aggravation to that injury, while subsequent tortfeasors will typically be liable only for the damages they caused and not for the original tort. *Gertz v. Campbell*, 55 Ill. 2d 84 (1973). In medical malpractice cases, the same rule applies. *Kolakowski v. Voris*, 94 Ill. App. 3d 404, 412 (1st Dist. 1981). This is based upon the premise that tortfeasors will be liable for reasonably foreseeable consequences of their own negligence, which includes subsequent medical malpractice. *Erickson v. Baxter Healthcare, Inc.*, No. 1:99CV00426, 2001 WL 36275328, at *14 (N.D. Ill. Sept. 28, 2001). If the plaintiff's injury is indivisible, the defendants generally will be found to be joint tortfeasors and contribution applies. *Patton v. Carbondale Clinic, S.C.,* 161 Ill. 2d 357 (1994).

Gertz v. Campbell is the primary cited authority on subsequent tortfeasors in medical malpractice actions. *Gertz v. Campbell*, 55 Ill. 2d 84 (1973). There, a minor pedestrian was standing on the shoulder of a road when he was struck by a car and was injured. He was taken to the emergency room where it was determined that immediate surgery was needed to repair his leg. *Gertz*, 55 Ill. 2d at 86. Pedestrian's mother filed suit only against the driver. *Id*. at 85. The defendant driver then filed a third-party action against the physician who treated the minor's injuries alleging that the physician was negligent in waiting 17 hours to perform leg surgery, resulting in necrotic tissue and leg amputation. *Id.* at 86. Describing the law in Illinois, the court stated that "a person injured through another's negligence can recover from the original tortfeasor not only for the original injury but for any aggrava-

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tion of the injury caused by a physician's malpractice, assuming that there was no want of ordinary care by the injured in the selection of the physician." *Id.* at 88. Further, the court affirmed the trial court's ruling that the driver and physician were not joint tortfeasors, as there was no concert in the two's actions, and neither had control over the others' actions. *Id.* at 89. Therefore, the physician was not liable for the negligence by the original tortfeasor. *Id.*

Gertz, however, was decided prior to the adoption of contribution in Illinois. *Solich v. George & Anna Portes Cancer Prevention Ctr. of Chcago, Inc*., 273 Ill. App. 3d 977 (1st Dist. 1995), and today, original and successive tortfeasors may have the right to contribution if they are found to be joint tortfeasors. *Patton v. Carbondale Clinic, S.C.,* 161 Ill. 2d 357 (1994). Under the Joint Tortfeasor Contribution Act, Illinois defendants have a right to obtain contribution whenever two "or more persons are subject to liability in tort arising out of the *same injury*." 740 ILCS § 100/2 (1990) (emphasis added). Contribution applies equally to joint tortfeasors and concurrent or successive tortfeasors. *Patton,* 161 Ill. 2d at 369. Whether defendants have a right to contribution from joint tortfeasors is not determined by the timing of each party's negligence but whether liability arises from the same injury. 740 ILCS § 100/2. The proper analysis for determining whether the tortfeasors committed the "same injury" does not depend on the timing of the tortfeasors' conduct, but the injury itself. *People v. Brockman*, 148 Ill. 2d 260, 269 (1992). For example, in *Brockman*, the State initiated an action against defendants alleging that their drilling created a water pollution hazard. *Brockman*, 148 Ill. 2d at 269. The defendants in turn alleged that a third-party defendant contributed to the same water pollution hazard by drilling through garbage cells. *Id*. Although the two drilling incidents were separated in time by five years, the court found that a trier of fact could find the conduct of the defendants and the third-party to have produced the same injury to which the Contribution Act would apply. *Id*. at 270.

The right to contribution for joint tortfeasors, whether subsequent or concurrent, exists even if no judgment has yet been entered against any defendant. 740 ILCS § 100/2. In medical malpractice cases where the plaintiff claims separate injuries, which, if found, would eliminate the possibility of contribution, settling parties must be cautious in drafting the release in order to ensure that appropriate consideration was allocated to support the discharge of multiple claims. *Patton,* 161 Ill. 2d at 374. In *Patton*, a minor suffered a transected jejunum following a car accident, which led to peritonitis and caused her to die of septic shock. *Id*. at 360. The administrator of the estate filed suit against the driver of the car, the manufacturer of the car, and, among others, the medical clinic where the decedent was treated. *Id*. at 360, 362. Prior to trial, the plaintiff executed a settlement with both the driver and the manufacturer. *Id.* at 361. It also dismissed other parties, leaving only the medical clinic. *Id*. at 363. Prior to trial, the clinic filed an affirmative defense asserting it was entitled to a setoff from the driver and manufacturer settlements. *Id.*

At trial, the court entered a directed verdict on liability against the clinic for failing to diagnose the transected jejunum, and the jury awarded damages accordingly. *Id*. The trial court found that there were two separate and distinct injuries: (1) the car accident resulting in transected jejunum; and (2) the failure of the doctors to diagnosis transected jejunum. *Id.* at 363-364. The trial court further found that the clinic was not entitled to a setoff and reduction in judgment based on the settlements with the driver and manufacturer because there was not an indivisible injury. *Id.* at 363.

On appeal, the clinic argued that there were not two distinct injuries, but instead that the three parties were joint tortfeasors, and thus the clinic was entitled to a setoff. *Id.* The appellate court affirmed. Upon further appeal, the Illinois Supreme Court agreed that the decedent had suffered two distinct injuries, thus, the parties were not joint tortfeasors, but rather successive tortfeasors. *Id.* at 364. The clinic was therefore liable for the second injury (failure to diagnose) and the driver and manufacturer liable for both injuries (the transected jejunum and failure to diagnosis). *Id.* at 366. Consequently, because the driver and

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manufacturer were also liable for the second injury (failure to diagnose) the clinic was entitled to contribution for the damages from the second injury. *Id.* The court found that the driver's release properly released the driver from fault for both the first and second injury, and thus the clinic was entitled to a setoff for the settlement amount because the release was executed for the second injury. *Id.* at 372. The court also found that the manufacturer's release indicated that compensation was only provided for the first injury, but the manufacturer was released from both injuries, thereby entitling the clinic to a setoff for the amount paid. *Id.* at 373. The court instructed that when attorneys should be cautious to draft the settlements to allocate the appropriate consideration to support the release of multiple claims when two separate injuries exist. *Id.* at 374.

Conclusion

An initial tortfeasor will be liable for the injuries it causes as well as any separate injuries caused by successive tortfeasors. Conversely, if it is determined that the negligence of different parties resulted in the same injury, the defendants are then joint tortfeasors and have the right to contribution. *Patton*, 161 Ill. 2d at 364. Defendants who seek setoff from the plaintiff's prior settlements should review and possibly challenge the release to determine whether the settling party was released from liability for all injuries.

Feature Article

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Temporary Transitional Employment – A New Trend on the Horizon

Imagine, for a moment, that an employee is injured at work and cannot immediately return to his former job due to medical restrictions resulting from the work injury. The restrictions are temporary and at some point, should be lifted as the employee's condition improves, thereby enabling the employee to return to his former job.

We all understand that an employer can offer temporary work to the employee within his restrictions as part of the company's overall return to work policy. This situation offers benefits to both the employer and the employee, ranging from reduced workers' compensation benefits (and thereby reduced premiums) for the employer, to the positive association the employee gets from being productive instead of sitting around home waiting to improve.

But can an Illinois employer offer light duty work through another entity, say, a volunteer entity such as a charity?

Other states have examined this scenario and several have adopted what is referred to as temporary transitional employment (TTE), whereby the employer is permitted to return the employee to light-duty work with another business while the employee's condition heals. At least eight states have already adopted specific TTE or similar programs via statute, while others permit TTE programs based on their workers' compensation statute's current wording. This article discusses the concept of TTE and how Illinois employers might implement such a program given the current language of the Illinois Workers' Compensation Act (Act).

The Importance of Returning an Employee to Work

The issue of returning an employee to work permeates most aspects of a workers' compensation claim. The employee's entitlement to temporary monetary disability benefits hinges on his ability to return to the work force while recovering from the work injury. The ultimate value of the case depends on whether or not that injured worker has returned to the workforce at all, and if so, in what capacity. The employer then, of course, has an interest in both of those issues, so as to mitigate costs both during the employee's active treatment and after treatment at the time of settle-

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ment. Naturally though, the employer has issues to consider other than just the economic aspects.

If the employee's job at the time of the injury is fairly physically demanding or somewhat dangerous, the employer may be hesitant to return the employee to that same position while the employee is still seeking treatment and not 100 percent recovered in an effort to avoid a new injury. Additionally, the employer likely has an interest in promoting a positive work environment and good employee morale by showing they are sensitive to work-related injuries and are willing to work with employees to get them back to work, in whatever capacity that may be.

In consideration of the fact that the Act suggests that its primary purpose is to return an injured employee to the workforce, and with concern for the issues above, defense attorneys have long searched for innovative ways to get an injured employee back to work in some capacity. Cue the development of Temporary Transitional Employment (TTE). TTE, often called "modified duty off-site" (MDOS) and "early-return-to-work" (ERTW) programs, describes a working relationship wherein an injured employee, while still receiving medical treatment for a work injury, is released to return to work with certain restrictions that cannot be accommodated by an employer. In an attempt to return the employee to the workforce, the employer, or insurance company, in many instances, makes arrangements for the employee to work for a third party that can accommodate the individual's restrictions. The relationship usually continues until the employee's restrictions are lifted such that they can return or transition to their pre-injury employment.

These third parties are often not-for-profit organizations or charities such as Goodwill Industries or The Salvation Army, but can be any type of work at all. The arrangement appears ideal on the surface—the purpose of the Act is being satisfied because the employee is returning to the workforce, albeit on a temporary basis, the temporary employer is receiving the benefit of having an employee work without incurring the costs typically associated therewith, and the insurance company is able to reduce the cost of the claim, which would likely also reduce the risk of a potential increase in premiums for the employer—so everyone seemingly wins. In addition, the employee is probably more motivated to cooperate with his medical treatment, be released from care and return to his pre-injury employment when the alternative is working at a not-for-profit instead of sitting on the couch watching daytime TV.

A Case Study

Beginning in 2007, The Ohio State University undertook an interesting study of the impact of TTE. Saddled with $10 million per year in workers' compensation costs, OSU decided to change its approach to disability management and decided to move ill and injured workers to less demanding jobs instead of leaving them at home during recovery and convalescence. Encarnacion Pyle, *Injured OSU Workers Shift to Light Duty as They Heal*, The Columbus Dispatch (Feb. 26, 2008). In just over a year, OSU reassigned some 500 employees to such light-duty jobs, some of which included delivering magazines to patients in the medical center or enforcing the university's no-smoking policy. During this period, OSU was able to avoid workers' compensation payments by paying their employees their regular salaries.

At the end of the program's first year, OSU had saved roughly $4 million—about double what it anticipated—which did not even include the projected savings from reductions in workers' compensation policy premiums due to lower claim payouts. The program also produced a positive effect on the workers, who reported feeling more productive and happier.

Recent Trends on TTE in Illinois

As much as it seems like an ideal consideration, at least two arbitrators have rejected employer TTE programs. In *Adam Kilduff v. Tri-County Coal*, 12 WC 38843, 9 (Nov. 5, 2014), the

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respondent terminated the petitioner's TTD benefits when he failed to show up for a volunteer job located through a vocational rehabilitation counselor. The petitioner had been released with light duty restrictions that the employer could not accommodate. The employer used a vocational rehabilitation expert to place the petitioner in a job that could accommodate his restrictions. However, the vocational expert recommended only volunteer positions. *Kilduff*, at 9. Arbitrator Pulia rejected the employer's argument that it could suspend TTD benefits based on the petitioner's rejection of a light duty job offer since the offer was "not for light duty work with respondent, but rather for volunteer work to be performed for an entirely different employer, where no employer-employee relationship exists between the employer where petitioner will be working and the petitioner." *Id*. at 10.

Arbitrator Pulia further stated that "it is the obligation of the respondent during a period of temporary total disability to provide light duty work for petitioner within its own company, where the petitioner remains under the control and supervision of the employer and not under the direction and supervision of an individual at another employer." *Id*. Arbitrator Pulia acknowledged that although such an arrangement is neither specifically provided for nor specifically excluded statutorily, it is against public policy due to the possible litigation that could result if the employee is injured while working under the direction and control of a person other than their employer. *Id*.

In *Richard Lee v. Fluid Management*, 11 WC 48656 5 (Sept. 6, 2013), Arbitrator Kane relied on the lack of statutory support for TTE as the basis for denying respondent's request to terminate TTD benefits. In further explaining his denial, Arbitrator Kane adhered to a strict interpretation of the case law regarding an employee's entitlement to TTD benefits: the employee had not reached maximum medical improvement and the employer could not provide work within his restrictions, so he was entitled to continued TTD benefits. Although apparently irrelevant, Arbitrator Kane also pointed out the clear bias in the fact that the vocational expert testifying in support of placing the petitioner in TTE was an employee of the employer's insurance carrier, as well as the fact that the TTE offer left many unresolved issues such as liability for potential injuries while working at the TTE, reimbursement of mileage to travel to/from TTE, and other issues specific to the arrangement in that case. *Lee*, at 6.

As evidenced by the arbitrators' decisions in the two cases above, there are a number of arguments against TTE and arbitrators are not yet accepting TTE as valid light duty job offers, which means litigation and litigation costs will increase as attorneys continue to fight this battle. So what can we, as defense attorneys, do to best represent the interests of our clients who are looking to reduce the cost of defending these cases?

In arguing that an employee should be required to accept a TTE position if their employer offers it, there is not much Illinois case law to rely upon. Fortunately, we may look to other jurisdictions to support our position that TTE should be accepted in Illinois.

TTE in Other States

As mentioned previously, at least eight other states have statutory provisions permitting some form of TTE, albeit under differing names. These states include: Arizona (Ariz. Rev. Stat. Ann., § 23-1048 (1995 & Supp. 2011)); California (Cal. Lab. Code § 139.47 (West 2003 & Cum. Supp. 2010)); Colorado (Colo. Rev. Stat. § 8-42-105 (2011)); Iowa (Iowa Code Ann. § 85.33 (2009)); Maine (Me. Rev. Stat. tit. 39-A, § 214)); Michigan (Mich. Comp. Laws § 418.30)); Montana (Mont. Code Ann. § 39-71-105 (2005)); and Washington (Wash. Rev. Code § 51.32.090 (2010)). Nebraska also encourages the return of the employee to gainful employment. *See* Neb. Rev. Stat. § 48-162.01(1).

In Ohio, temporary total disability benefits owed to an employee may be terminated in the event the employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment. *Sebring v. Industrial Comm'n,* 123 Ohio St. 3d 241, 244-45 (Ohio 2009). In *Sebring*, the employee lived and worked in Ohio when he sustained a work related injury. Before completing his treatment, he moved to Wyoming due to his wife's employment transfer. *Sebring*, 123 Ohio St. 3d at 241. Upon presenting a release to return to light duty work and requesting TTD benefits from the Ohio employer, the employee was offered two light duty positions. *Id.* at 241-42. The first position was at the employer's facility in Ohio, which the employee refused, citing his relocation to Wyoming. *Id*. at 242. The second was at a Goodwill Store in Wyoming as part of a TTE program, which the employee also refused. The court found the TTE job in Wyoming to be a bona fide job offer and agreed with the employer's refusal to provide benefits based on the employee's refusal of both offers. *Id*. at 244-45.

In *Gay v. Teleflex Automotive*, No. 3:06-CV-7104, 2008 U.S. Dist LEXIS

24907, *1 (N.D. Ohio Mar. 28 2008), an African-American employee was injured while working and released to return to work with certain restrictions. To accommodate those restrictions, the employer assigned the employee to modified duty off-site work at a local YMCA and advised the employee that his workers' compensation benefits were contingent on his attendance at the TTE. *Gay*, 2008 U.S. Dist LEXIS 24907, at *3-4. The employee brought suit in federal court for racial discrimination, arguing that a Caucasian co-worker was accommodated on-site for more than three years while recovering from her work related injury. *Id*. at *4. In dismissing the employee's claim, the court noted the TTE program was authorized by company policy, that the employee maintained his employment status within the employer, and that he was covered under the employer's labor agreement. *Id*. at *19. The court also pointed out that the employee was paid the same as if he had been working at the employer's facility, he did not lose any material benefits or standing within the employer, and he was not demoted as a result of the assignment. *Id.* While this analysis was applied specifically in that case to show the employee did not have an adverse employment action sufficient to support a cause of action for discrimination, it does shed some light into some factors that a court may consider when determining whether to find a TTE job to be a *bona fide* job offer.

New Jersey appears to support TTE programs as well. In *Martin v. Goodwill Industries of S.N.J., Inc.,* No. A-6097-06T3, 2008 N.J. Super. Unpub. LEXIS 1617 (N.J. Super. Ct. App. Div. Apr. 10, 2008), the employee was injured while working for his employer. When the employer could not accommodate the light duty restrictions, arrangements were made for the employee to work light duty at a local Goodwill store. In support of that arrangement, the employer pointed out that TTE helped the employee "remain active while out of work and retain a 'work ethic.'" *Martin,* 2008 N.J. Super. Unpub. LEXIS 1617, at *2.

With respect to TTE, an argument against forcing employees to participate is often a question of liability. For example, if the employee is injured while working at the TTE facility, the argument against TTE suggests there would be a dispute over which employer would be responsible for the injury, potentially leaving the injured employee with significant medical bills while the parties attempt to shift the blame.

The Case for TTE in Illinois

Although TTE is not explicitly provided for in the Act, the statute still provides ammunition to rely on in support of our argument. For example, Section 8(d) discusses wage differentials, which only become relevant when the employee returns to employment earning less than he was at the time of his injury. 820 ILCS 305/8(d)(1). This most often occurs when the employee has secured a different job in a different field and his wages are less than what he was earning at the time of the injury. Typically, the case is then resolved by a settlement representing a portion of the difference between the earnings. That the Act explicitly provides direction on how to handle a situation when the injured worker returns to a job different than his pre-injury employment should be argued when presenting a case in favor of acceptance of a TTE program.

Before discussing permanency and settlement, the Act provides for temporary partial disability (TPD) benefits when an employee is earning less while working light duty than he would be earning if employed in the full capacity of the job. 820 ILCS 305/8(a). The Act specifically contemplates the light duty work that could trigger TTD to be a modified job provided to the employee by the employer "or in any other job that the employee is working." *Id*. An argument can be made that TTE is analogous to both TPD and a wage differential since the Act clearly contemplates an employee returning to the work force at a position other than what he or she was working at the time of injury, both during treatment and after being released from care, and provides direction on how to handle benefits in those situations.

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would be responsible for the injury, potentially leaving the injured employee with significant medical bills while the parties attempt to shift the blame. A comparison can be made to a borrowing/lending employee situation as discussed in 820 ILCS 305/1(a)(4). In a borrowing/lending employee situation, the injured employee is typically "employed" by the loaning employer. Their wages may be paid by that employer and they are typically covered under the loaning employer's workers' compensation insurance. The loaning employer sends the employee to work for the borrowing employer, typically at an off-site location. The borrowing employer directs the employee's work. Defense attorneys should point out the clear analogy of a TTE situation to a borrowing/lending employer scenario, which is specifically contemplated by the Act and attempts to resolve that potential problem.

In a more aggressive manner, consider drafting a contract between all parties—employer, employee, and third-party employer—that outlines the specifics of the employment relationships, *i.e.* who is responsible for compensation, who is providing workers' compensation insurance, and who has liability in the event of an accident. While it can be a slippery slope to create contract liability in the event of a potential, future accident, if all parties enter into the agreement fully aware of the potential risks therein, there is a strong basis to argue that the eventual TTE is legitimate and an acceptable job offer. If the employer uses a vendor to set up the TTE and the same TTE employer is routinely used, a contract outlining those issues could be on hand and available in each instance.

With respect to the specifics of the TTE opportunity, it is likely best if the job hours are the same as the hours the employee worked at his pre-injury job. Likewise, the TTE opportunity should be within the same distance from the employee's house. Asking the employee to drive an hour for TTE when he previously traveled five miles to work, or asking him to work third shift when he was hired for first shift work, will fuel an employee's argument as to why the TTE is unreasonable.

It currently seems unlikely that we will get to a point where TTE will be explicitly provided for in the Act. Because TTE is not contemplated by the Act and has not yet been accepted through case law, employees can, and often do, refuse to participate. The TTE is often a job that is nowhere close to what the injured employee was hired to do, and typically, not anything they have any experience or training in. Employers must continue to offer TTE in cases where the employer cannot (or will not, perhaps) accommodate the employee's return to work restrictions. If the TTE program is not going to be specifically accepted, employers must at least do what they can to have the TTE work be considered a *bona fide* job offer sufficient to suspend benefits if rejected. At this point, the defense bar is just working the case up for trial.

Getting Vocational Experts Involved

One component to consider is getting a vocational rehabilitation expert involved. The Act provides that the employer must provide medical and vocational services to rehabilitate the employee. 820 ILCS 305/8(a). If the employee is released to return to work with restrictions that the employer cannot accommodate, in order to attempt to mitigate ongoing costs, a course of vocational rehabilitation can be started (although admittedly costly itself). The employee's entitlement to ongoing financial benefits then hinges on his cooperation with the vocational rehabilitation process. Consequently, one avenue is to have a TTE program in place that can be used during the vocational rehabilitation process.

There are two ways to go about this. First, have a TTE opportunity be a job lead as part of the vocational rehabilitation. It would be treated just like any other job prospect that has work within the employee's restrictions, meaning benefits can likely be suspended if the employee refuses the opportunity. In that instance, however, if the employee secures employment through vocational rehabilitation, the job would probably not be classified as TTE and would, instead, be a new job independent of the previous employment. The employee could work in that capacity while continuing to seek treatment and then, assuming a release with restrictions that the employer would accommodate, return to his or her pre-injury employment. In that instance, all of the benefits of a TTE situation are present, but because the opportunity was offered through vocational rehabilitation, it would likely not be viewed as TTE and should be more widely accepted.

Alternatively, consider having participation in a TTE job a condition of vocational rehabilitation. For example, the vocational rehabilitation process often involves more than just finding the injured worker a job. It involves preparing them for re-entering the work force through resume building, professional interview skills, educational instruc-

tion, and so forth. Part of that process can be participation in a TTE program while searching for a more permanent, appropriate job. In support of this alternative, you will likely need a vocational expert to testify about the advantages of continuing to be a contributing member of the work force and how it affects future employability.

The Benefits of Networking

Another component of vocational rehabilitation is networking and making connections for potential employment. Working through a TTE program provides an injured worker with the opportunity to make networking connections that the worker can use both during their recovery to remain a functioning member of society and, perhaps, after their release, in both their personal and professional lives. Including TTE with vocational rehabilitation under this method may not alleviate the arguments against the legitimacy of TTE, and we must still need to prepare for litigation if the employee does not participate and benefits are consequently suspended, but it certainly adds to the argument in favor of TTE.

Preparing For Trial, if TTE is Not Accepted

Once it is clear that the employee is not going to willingly participate in TTE, begin to develop your arguments in support of TTE for trial. Consider using a vocational rehabilitation specialist to opine on the benefits of the employee returning to the work force in any capacity. Include factual evidence regarding how extended periods of time away from the work force affect an employee's likelihood of returning to work. Be sure to address the psychological and emotional effects of being removed from the work force for an extended period of time, and how those factors ultimately play into the likelihood of the employee being a productive member of the work force.

Include factual evidence—namely actual sociological/psychological studies—to support your position and do not rely solely on the testimony of your vocational rehabilitation expert alone. In that regard, be sure to prepare your vocational rehabilitation expert for trial. Try to select a neutral expert. At the very least, do not use an employee of the employer or insurance company, or someone associated with them, as the bias is obvious and would reduce your expert's credibility at trial. While it cannot be denied that the vocational expert was solicited by the defense, there are plenty of credible and neutral rehabilitation specialists available for consideration.

Another possibility is to get a medical opinion from a physician who could comment on the need for the injured worker to remain physically active during ongoing medical treatment. It is sometimes implicit in medical records that remaining physically active will promote a quicker and more effective recovery. However, in cases where the worker is unwilling to participate voluntarily in TTE, do not rely on what may be implicit in the medical records and certainly do not rely on what the employee's treating physician may state (unless it is favorable to your position, of course). Instead, consider soliciting an opinion on that issue directly. Employers often solicit an independent medical examination once the employee is released with certain restrictions in order to confirm the need for the restrictions. At the time of that examination, ask the IME physician to comment on the medical benefits of the employee remaining physically active by working. Of course, this suggestion is not applicable in all instances as the restrictions may vary, but a medical opinion addressing the physical benefits of continuing to contribute to the work force is a good tool to consider using in the right factual circumstances.

Similarly, if TTE work is available within the employee's restrictions, consider presenting the potential opportunity to the employee's treating physician. If the physician agrees that the work is within the patient's restrictions, it adds credibility to the job opportunity and support for why the employee should accept it. Of course, the physician could do the opposite and say the employee could not perform that work for whatever reason, so it is important to consider this option only after you have already developed your case in support of the TTE through vocational rehabilitation and/or an independent medical opinion agreeing with the appropriateness of the TTE position.

If all efforts fail and an employee simply refuses to cooperate in TTE, litigation is necessary to attempt to limit the ongoing exposure. For now, defense attorneys have to continue to be creative in soliciting and creating the evidence in support of temporary transitional employment opportunities to be prepared for when litigation does occur.

Supreme Court Watch

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When a Case is Dismissed and Refiled, Can a Court Ever Deny a Party's Motion for Substitution of Judge in the Refiled Case?

Bowman v. Ottney

The plaintiff is the special administrator of decedent's estate who brought a medical malpractice action against a physician and a medical facility. *Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶ 1. The case was assigned to Judge Overstreet and the judge made several substantive rulings in the case. *Bowman*, 2015 IL App (5th) 140215, ¶ 1. The plaintiff then voluntarily dismissed the claim without prejudice pursuant to section 2-1009 of the Illinois Code of Civil Procedure. *Id*. ¶ 2. The plaintiff refiled the case five months later against the defendant physician only. *Id*. ¶ 3. The case was again assigned to Judge Overstreet. *Id.* Pursuant to section 2-1001(a) of the Illinois Code of Civil Procedure, the plaintiff filed to motion for substitution of judge. *Id.* The defendant objected, arguing that the plaintiff's motion must fail because Judge Overstreet made substantive rulings in the action that was voluntarily dismissed. *Id*. Citing the third district's decision in *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, the circuit court denied the plaintiff's motion for substitution of judge. *Bowman*, 2015 IL App (5th) 140215, ¶¶ 4-5. The circuit court then certified the following question for the Illinois Appellate Court, Fifth District's, review—"In a case which had previously been voluntarily dismissed pursuant to 735 ILCS 5/2-1009 and then subsequently re-filed, does the trial court have the discretion to deny a Plaintiff's immediately filed Motion for Substitution of Judge, brought pursuant to 735 ILCS 5/2-1001, based on the fact that the Court had made substantive rulings in the previously dismissed case?" *Id*. ¶ 6.

Reviewing the case under the *de novo* standard, the appellate court answered the certified question in the affirmative and held that "a trial court has the discretion to deny a plaintiff's immediately filed motion for substitution of judge where the court had made substantive rulings in the previously dismissed case." *Id*. ¶ 17. Citing *Schnepf v. Schnepf*, 2013 IL App (4th) 121142 ¶ 30, the Fifth District first noted that "a 'weight of appellate authority' in Illinois has concluded that even in the absence of a substantial ruling, a trial court may deny a motion for substitution as of right if the litigant has had the opportunity to 'test the waters' and form an opinion as to the court's disposition toward his or her case." *Bowman*, 2015 IL App (5th) 140215, ¶ 10. The court also noted that such testing of the waters allows for potential abuse of the venue act. *Id*. ¶ 11 *citing In re Mar-*

Citing *Schnepf v. Schnepf*, the Fifth District first noted that "a 'weight of appellate authority' in Illinois has concluded that even in the absence of a substantial ruling, a trial court may deny a motion for substitution as of right if the litigant has had the opportunity to 'test the waters' and form an opinion as to the court's disposition toward his or her case."

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riage of Kozloff, 101 Ill. 2d 526, 530-31 (1984) (noting concern that a resourceful litigator could keep filing new petitions and requesting changes of venue until he found a sympathetic judge).

Next, the Fifth District recognized a split between the fourth district and the third and fifth districts on this issue. The fourth district has held that the right to substitution of judge is absolute and the trial court has no discretion to consider whether a movant has had the opportunity to "test the waters." *Id*. ¶ 12. The fifth district, however, has looked at the policy behind the rule and had held that a party is not always free to move for a substitution of judge when that party had had the opportunity to "test the waters" because that is improper judge shopping. *Id*. ¶ 13. Likewise, the third district has held that a court may consider all circumstances surrounding pretrial proceedings and may deny a motion for substitution of judge if a party has had the opportunity to "test the waters." *Id*. ¶ 14. Moreover, the third district has held that even where a case is a new action, a motion for substitution of judge can be denied where a party has had the opportunity to "test the waters" in the prior action. *Id*. ¶ 16 *citing Ramos*, 2013 IL App (3d) 120001 ("Our best guess is that the supreme court would not endorse the exercise of the right to voluntary dismissal as an end run around the prohibition against judge shopping.") Therefore, the Fifth District held that because the plaintiff had an opportunity to test the waters with Judge Overstreet, the trial court could deny plaintiff's motion for substitution of judge. *Id*. ¶ 19.

The plaintiff seeks review in the Illinois Supreme Court. First, the plaintiff argues that because the refiled case is a new action and Judge Overstreet did not make any substantive rulings in the refiled case, their right to substitution of judge is absolute and the trial court had no discretion to deny their motion. Second, the plaintiff argues that *Ramos* is an aberration, was wrongly decided, and should not have been relied on by the trial court and Fifth District. Rather, because the original and refiled cases are separate matters, the "test the waters doctrine" is inapplicable. Third, the plaintiff argues that the courts should not have relied on the "spirit of the law" because the statue itself and subsequent case law clearly allow the plaintiff to move for substitution of judge. Finally, the plaintiff argues that the Fourth District's opinion in *Schnepf v. Schnepf* is distinguishable because *Schnepf* involved the continuation of the same case. Here the plaintiff argues, the refiled action was separate and distinct from the previously dismissed matter.

Does an Engineer Have a Right to a Mechanics' Lien for Work Done on a Project if That Project is Never Completed?

Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois

The plaintiff is an engineering company who was hired by one of the defendants to perform engineering work related to a piece of property. *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, 2015 IL App (3d) 140064, ¶¶ 1, 4. The plaintiff allegedly performed this work both prior to and after one of the defendants purchased the property. *Burke*, 2015 IL App (3d) 140064, ¶¶ 1, 4. In connection with the work, the plaintiff filed a mechanic's lien. *Id*. ¶ 4. The plaintiff then brought an action to foreclose a mechanics' lien against several defendants, including the financing bank. *Id*. ¶¶ 1, 4. The defendant bank filed for summary judgment. The trial court granted summary judgment, holding that the plaintiff's work did not improve the land and there was no encouragement or inducement of the plaintiff to do work by the landowner before the land was sold to the defendant developer. *Id*. ¶ 11. The plaintiff appealed.

Reviewing the case under the *de novo* standard, the Illinois Appellate Court, Third District, affirmed the trial court's order because the plaintiff failed to establish that its work improved the property. *Id*. ¶ 18. Justice Lytton dissented, stating that the plaintiff should have a lien for some of the work performed and that the case should be remanded to determine the proper amount of the lien. *Id*. ¶¶ 22, 23. In the majority opinion, the court first discussed the Mechanics Lien Act, which provides that a mechanics lien may be available for a person who contracts to improve a tract of land or contracts for the purpose of improving the tract of land. 770 ILCS 60/1(a); *Burke*, 2015 IL App (3d) 140064, ¶ 15. The definition of the term "improve"

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When evaluating the validity of a mechanic's lien, the court must focus on "whether the work performed actually enhanced the value of land."

is provided in section 1(b) of the Act. 770 ILCS 60/1(b); *Burke*, 2015 IL App (3d) 140064, ¶ 15. Second, the appellate court stated "[t]he purpose of the Act is to permit a lien upon premises where a benefit has been received by the owner *and* where the value or condition of the property has been increased or improved by reason of the furnishing of labor and materials." *Id.* ¶ 17. When evaluating the validity of a mechanic's lien, the court must focus on "whether the work performed actually enhanced the value of land." *Id*. The court noted that only one plat of land was sold and the remainder of the property was untouched until the land development project was abandoned. *Id.* ¶ 18. The appellate court further noted that, while the plaintiff's engineering work may have been required for the development of the land, the plaintiff failed to cite to "any case in which the recording of a final plat as the result of an engineering company's work was found to enhance the value of the land." *Id*. *citing Mostardi-Platt Associates, Inc. v. Czerniejewski*, 399 Ill. App. 3d 1205, 1211 (5th Dist. 2010).

The plaintiff seeks review in the Illinois Supreme Court. First, the plaintiff argues that summary judgment was improper because the engineering work performed did improve the land. The plaintiff notes that the Mechanics Lien Act specifically provides that reference to the term "improve" means to perform "any services or incur any expense as an architect, structural engineer, professional engineer, land surveyor or property manager … ." 770 ILCS 60/1(b). Therefore, "any service" performed by the plaintiff can be the basis for a lien and an improvement does not have to include physical construction. In support of this position, the plaintiff cites to two supreme court cases which held that an architect who creates plans for a building which was never constructed is entitled to a lien. *Freeman v. Rinaker*, 185 Ill. 172 (1900); *Crowen v. Meyer*, 342 Ill. 46 (1930). The plaintiff further argues that their engineering work did in fact provide substantial benefit to the developer. Their work allowed the land developer to obtain financing and municipal approval and enabled one lot to be sold, construction to take place, and sewers and roads to be built.

The plaintiff next distinguishes cases relied on by the defendant and the Third District. For example, in *Mostardi-Platt*, the plaintiff was denied a lien after it provided a feasibility study to an entity that had an option to buy land. Here, however, the plaintiff's work was much more substantial than a feasibility study and was done for a land owner rather than one who had an option to buy land. The plaintiff also noted a concern that the Third District's decision will erase lien rights of architects, engineers and others who perform work for projects that do not go forward.

The plaintiff's second main argument, though not addressed by the appellate court, is that the trial court acted improperly when it found that the former landowner did not "knowingly permit" the contract the plaintiff had with the defendant developer before the defendant developer purchased the land. The plaintiff notes several instances in the former landowner's deposition in which she states that she was aware that the defendant developer was going to contract with the plaintiff for engineering work and that she did not object to this work being done. Likewise, the defendant developer testified that he had a verbal agreement with the former landowner to have some of the engineering work done prior to closing. According to the plaintiff, these facts show that the former landowner "knowingly permitted" the plaintiff to perform engineering services on the property. The plaintiff disagrees with the defendant's argument that the former landowner could not "knowingly permit" the defendant developer to contract with the plaintiff because she did not accept the benefits of the plaintiff's services. The plaintiff argues that there are no reported Illinois cases that impose an "acceptance of benefits" requirement. Rather, "knowing permission" has been found even where an owner had no knowledge of the contract on which a lien was based. Love, Illinois Mechanic's Liens, Second Edition (1950).

Appellate Practice Corner

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Waiver, Forfeiture, and Plain Error

Our adversarial system of justice depends upon the competition between adversaries—not just in the sense of opponents with competing claims and interests, but also in the sense of competing arguments and philosophies. Apart from resolving concrete disputes in which parties may be winners and losers, court proceedings are sometimes the setting for a marketplace of ideas related to the law. This function is particularly important in the reviewing courts, whose decisions comprise the body of common law. Those courts depend on the parties to frame the issues thoroughly enough that the courts, as neutral arbiters, can adequately consider them and render meaningful decisions that will stand as precedent. *Jackson v. Bd. of Election Comm'rs*, 2012 IL 111928, ¶ 34.

In a previous edition, the Appellate Practice Corner addressed the importance of preserving trial errors intended to be raised as grounds for appellate relief. *For the Record: Preserving Issues for Appeal*, 24 IDC Quarterly no. 4, 2014, at 9. This edition addresses the failure to preserve an issue for review—either deliberate, called "waiver," or inadvertent, called "forfeiture"—and what factors may persuade the reviewing court to consider the issue despite such a failure.

Waiver vs. Forfeiture

Though the terms "waiver" and "forfeiture" have often been used interchangeably, they identify different procedural concepts; "[w]hile waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements." *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 320 n.2 (2008). In other words, waiver is something done deliberately, with the intention of giving up a particular argument or remedy. Forfeiture, by contrast, is unintentional—often a failure to do something necessary to preserve an argument or remedy.

Only in recent years have the reviewing courts identified the distinction between the two concepts. Indeed, the supreme court rules governing appellate practice and procedure speak only of "waiver," without using the words "forfeit" or "forfeiture" at all. Rule 341(h)(7), for instance, concerning the content of appellate briefs, provides that "[p]oints not argued [in the appellant's initial brief] are *waived* and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (emphasis added). But though the rule refers to points not argued as being "waived," in recent cases the supreme court has described such omissions as forfeitures. The court held that a plaintiff who failed to adequately develop an argument in its appellate brief had violated this rule, and had therefore "*forfeited* review of this issue." *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36 (emphasis added). Similarly, when a party failed to argue a point in her opening brief and raised it for the first time at oral argument, the supreme court

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Apart from resolving concrete disputes in which parties may be winners and losers, court proceedings are sometimes the setting for a marketplace of ideas related to the law. This function is particularly important in the reviewing courts, whose decisions comprise the body of common law.

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found that she had violated that same rule—and therefore, in the court's words, had "forfeited" that point. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23.

It is not clear when the distinction between waiver and forfeiture emerged, but the supreme court decisions discussing it contain nothing to suggest that it is anything new. See, *e.g.*, *James R.D. v. Maria Z.*, 2015 IL 117904, ¶ 17 n.3; *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 26. At least one court, however, has suggested that the distinction is merely a change in nomenclature with little practical meaning, at least when posttrial motions are concerned: "While the failure to file a posttrial motion in a nonjury case does not limit the scope of the appellate court's review, the failure to file a posttrial motion in a jury cases [*sic*] results in waiver, *which we now call a forfeiture*." *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 32 (emphasis added). Though the reviewing courts have lately been noting this distinction in terminology, they have not held that it makes any significant difference in the consequences, or suggested that either waiver or forfeiture is any more likely than the other to discourage appellate review of an argument.

"Sound and Uniform Body of Precedent" vs. Plain Error

Whether waiver or forfeiture, however, a party's failure to raise an argument does not preclude the reviewing courts from considering it. Unlike a failure to timely file something necessary to an appeal, waiver or forfeiture ordinarily does not impair appellate jurisdiction, and usually does not prevent the reviewing court from addressing an argument or considering an issue despite the complaining party's failure to preserve it. It is a "familiar proposition that waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Jackson*, 2012 IL 111928, ¶ 33 (citing *Daley v. License Appeal Comm'n*, 311 Ill. App. 3d 194, 200 (1st Dist. 1999) and *Hux v. Raben*, 38 Ill. 2d 223, 224 (1967)).

Since neither waiver nor forfeiture precludes review, reviewing courts sometimes elect to consider arguments that have not been properly preserved.

Since neither waiver nor forfeiture precludes review, reviewing courts sometimes elect to consider arguments that have not been properly preserved. In some cases, they have cited a need to maintain the "sound and uniform body of precedent" the supreme court described in *Jackson*. See, *e.g.*, *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 179 (2011) (citing *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438 (2008)). In others, they have applied the plain-error doctrine, finding that a party was so badly prejudiced by an error—usually resulting from an adversary's misconduct—that the error must be addressed and remedied. See, *e.g.*, *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 585 (2d Dist. 1993) (finding statements made in closing argument "were sufficiently prejudicial to plaintiff to warrant review, even though plaintiff did not object to them" or challenge them in posttrial motion). These two justifications for considering arguments that were not preserved correspond to the principal judicial functions of reviewing courts. The concern for consistent precedent reflects a recognition of their role in setting forth the common law. The plain-error doctrine reflects their role in ensuring fairness by correcting mistakes made by lower courts.

Of the two justifications, the importance of precedent is ordinarily a less compelling reason for the appellate court to consider an argument that has been waived or forfeited. While a court may be concerned that a trial court's ruling was at odds with precedent, such a ruling is not itself precedential. Moreover, it was the aggrieved party's burden to preserve the issue for review; if the court believes that the trial court's ruling was contrary to precedent but that the party did not preserve the issue, the court may decline to address that issue. There is little if any precedential effect to a decision not to address an argument, especially if waiver or forfeiture is the reason for not addressing it. Precedent is even less a concern when the appellate court issues a decision as an "unpublished" order under Supreme Court Rule 23—though because the recent online availability of such orders makes it easier to locate them, even such orders have the potential to create mischief and confusion. *See* Ill. S. Ct. R. 23(b) (eff. July 1, 2011).

These considerations may have a considerably different impact in the supreme court, especially if it is a decision of the appellate court that is claimed

to be at odds with the previously existing "body of precedent," and even more so if that decision is a published one that creates a conflict in the law. Likewise, the supreme court may elect to consider an unpreserved issue for the purpose of resolving an existing conflict—or avoiding a potential one—in the decisions of the appellate court. See *O'Casek*, 229 Ill. 2d at 438.

A more compelling justification for considering unpreserved issues is the reviewing courts' function of correcting errors, especially those that are egregious and prejudicial enough to be treated as plain error. An error might not have any meaningful effect on the body of precedent, while still having a significant impact on the parties. If one party has been unfairly prejudiced by another's misconduct, then there is a substantive reason for review even if the procedural requisites have not been satisfied. That concern is heightened when the error implicates conduct that affects the integrity of the judicial system, possibly rising to the level of plain error. The effect of an appellate court's decision may be limited, in the short term, to the parties to the case before it. But addressing and correcting an instance of plain error may also serve a deterrent effect, especially in published decisions, by alerting the bar that some misconduct is so far beyond the pale that it will not be immune to reversal just because an adversary fails to object.

The plain-error doctrine originated in the criminal context and is much more frequently applied there. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375 (1990) (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 103.10 (4th ed. 1984)). In that context, the doctrine allows a reviewing court to remedy a "clear or obvious error" in two circumstances, even when the criminal defendant has failed to preserve the error for review: "(1) where the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009) (citing *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007), and *People v. Herron*, 215 Ill. 2d 167, 178–79 (2005)).

The Illinois Supreme Court first applied the plain-error doctrine in the civil context in *Belfield v. Coop*, 8 Ill. 2d 293 (1956). In *Belfield*, the court expressed concern not only for the parties, but for the judicial system as well:

> If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.

Belfield, 8 Ill. 2d at 313.

Because civil cases do not implicate liberty concerns, the reviewing courts are understandably more reluctant in such cases to address issues that have not been properly preserved. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 856 (1st Dist. 2010) (quoting *Palanti v. Dillon*, 303 Ill. App. 3d 58, 66 (1st Dist. 1991)). Application of the plain-error doctrine to civil cases should be "exceedingly rare and limited to circumstances amounting to an affront to the judicial process." *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 120 (internal quotations omitted). Civil cases applying the plain-error doctrine generally involve "blatant mischaracterization of fact, character assassination, or base appeals to emotion and prejudice." *Fakes*, 2014 IL App (4th) 121100, ¶ 120 (citing *Gillespie*, 135 Ill. 2d at 377).

Given the facts of *Belfield*, it is easy to understand why the supreme court was willing to expand the plain-error doctrine to cover the civil setting. At issue in that case, an appeal of the judgment in a will contest, were several inflammatory remarks made by the plaintiff's counsel in closing argument before the jury. The plaintiff's counsel had characterized the defendants collectively as "thieves," "usurpers," and "defrauders," despite evidence implicating only one of them in any impropriety; impugned the reputation of one of the defendants' attorneys; and praised their own conduct and ethics. *Belfield*, 8 Ill. 2d at 312. In addition, one of the plaintiffs' attorneys, a judge from a neighboring county, told the jury of his "extensive experience" dealing with wills in his own court, and suggested "that there must be something wrong with this will or he would not be in the circuit court representing the contestants." *Id.* The defendants' counsel had not objected to those remarks at trial, and the supreme court acknowledged the general rule that such complaints are not entertained on appeal "unless objection to the alleged prejudicial argument has been made in the trial court, a ruling of the court obtained and the record showing the objection and the ruling preserved." *Id.* But it entertained them nonetheless, holding that it was proper to overlook the aggrieved party's failure to object if "the parties litigant cannot receive a fair trial and the judicial process stand without deterioration." *Id.* at 313.

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Finding that to be the case there, the court reversed the judgment and remanded for a new trial. *Id.*

But while the egregious facts of *Belfield* may have given the court a reason to expand the plain-error doctrine to that civil case, they also set a high bar for applying it to subsequent ones. In *Gillespie*, for instance, the supreme court found that an alleged error did not meet that standard. *Gillespie*, 135 Ill. 2d at 377. The trial court in *Gillespie* had granted the plaintiff's motion for a new trial in his product-liability case; it agreed that he was unfairly prejudiced by the admission of a nurse's note, intended to impeach him but otherwise inadmissible as hearsay, because the defense had not proved up the impeachment by calling the nurse to testify. *Id.* at 371–72. During the trial, however, the plaintiff had neither objected to testimony about the note nor moved to strike it. The appellate court acknowledged that omission, but affirmed the grant of a new trial nonetheless. It concluded that the defense conduct was plain error, and that the plaintiff was entitled to a new trial despite his failure to preserve the error by objecting to it. *Id.* at 370–71.

The supreme court disagreed, holding that the trial court had abused its discretion by granting a new trial, partly because the plaintiff had neither objected to the lack of proof at the time the note was introduced nor moved to strike it later. *Id.* at 371–73. Describing these failures as "waiver," despite circumstances that would probably be called "forfeiture" today, the supreme court examined the appellate court's holding that that the issue involved plain error. *Id.* at 374. But it was unpersuaded by that holding, recounting its own history of strictly applying the waiver doctrine "unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." *Id.* at 375–76 (collecting cases). It summarized those cases, including the seminal *Belfield*, as each involving prejudicial error "so egregious that it deprived the complaining party of a fair trial *and* substantially impaired the integrity of the judicial process itself." *Id.* at 377 (emphasis in original). Though it expressed no view as to whether the admission of the evidence was error at all, the court was unconvinced that it met the standard of plain error, and went on to hold that it had caused the plaintiff no unfair prejudice. *Id.* at 373, 377–78.

Gillespie suggests that prejudice to the aggrieved party is relevant to plain error only insofar as it is extreme enough to damage the integrity of the judicial system as well. This demanding standard makes for an inherent contradiction in nearly any attempt by a party to rely on the plain-error doctrine as a substitute for properly preserving an objection to improper conduct. In order to satisfy the doctrine and persuade a reviewing court to consider an argument not made below, the party must show that the conduct at issue was not just improper, but so egregious that to countenance it would be to jeopardize the adversarial system of justice. Yet the party citing the plain-error doctrine presumably failed to object to such egregious conduct when it occurred. In *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, the court alluded to this contradiction, and was openly skeptical of the defendant's contention that the plaintiff's counsel's remarks in closing argument were so improper and prejudicial that reversal was warranted even without a defense objection at trial: "Bovis does not attempt to explain why the comments were so egregious that they denied Bovis a fair trial or substantially impaired the integrity of the judicial process." *Calloway*, 2013 IL App (1st) 112746, ¶ 101.

Conclusion

As in *Calloway*, any reviewing court can be expected to wonder why, if the conduct really was so far beyond the bounds of decency as to be treated as plain error, the complaining party did not immediately object to it at trial. The party claiming plain error should anticipate that question, and have an answer to it before it is asked. This intrinsic shortcoming in the plain-error doctrine—that it allows waiver and forfeiture to be overlooked chiefly in circumstances where they are least likely to occur—makes it an obvious last resort for those cases in which a party wants to make an argument for reversal but failed to preserve it at the proper time. Because it is often a transparently desperate effort to get a reviewing court to consider something that was not preserved, it usually depends upon the court's discretion and indulgence. Bolstering the plain-error doctrine with an appeal to the court's interest in precedent may better one's chances of getting a waived or forfeited argument reviewed.

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Second District Affirms Dismissal of Class-Action Data Breach Lawsuits Against Hospital

Unfortunately, data breaches are not uncommon. Most of the reported breaches relate to commercial retailers and generally affect consumers' financial information. Yet, data breaches do not always stem from sophisticated computer hackers and do not always implicate financial information. In some cases, the breach results from a criminal act and information such as consumers' health information is exposed. This is the backdrop of the second district's opinion in *Maglio v. Advocate Health and Hospitals Corp.,* 2015 IL App (2d) 140782.

In their counts alleging invasion of privacy, the plaintiffs asserted that Advocate's impermissible and unauthorized disclosure and dissemination constituted an unauthorized intrusion into the plaintiffs' privacy and seclusion, which was highly offensive to them and would be so to a reasonable person. The plaintiffs also alleged that Advocate's intrusion was an invasion of private matters, causing them anguish and suffering.

The Facts

In August 2014, Advocate Health reported the second largest HIPAA data breach to date after four unencrypted laptops were stolen from its facility. The stolen laptops contained social security numbers and protected health information, including medical diagnoses, of 4,029,530 patients. *Maglio*, 2015 IL App (2d) 140782, ¶¶ 3, 6.

Advocate Health was eventually named in class action lawsuits filed by affected patients, one in Lake County and the other in Kane County, which were consolidated on appeal. Two plaintiffs, representing patients affected by the breach, claimed that Advocate Health failed to take the necessary precautions required to safeguard patients' protected health information. The unencrypted laptops were stolen from an unmonitored room that had "little or no security to prevent unauthorized access." *Id*. ¶5. The plaintiffs asserted claims of negligence, violations of the Personal Information Protection Act, the Consumer Fraud and Deceptive Business Practices Act, and invasion of privacy. The plaintiffs did not allege that their personal information was used in any unauthorized manner as a result of the burglary. *Id.* ¶ 1. Instead, they claimed that they had an increased risk of identity theft and/or identity fraud. *Id.* ¶ 9.

In their counts alleging invasion of privacy, the plaintiffs asserted that Advocate's impermissible and unauthorized disclosure and dissemination constituted an unauthorized intrusion into the plaintiffs' privacy and seclusion, which was highly offensive to them and would be so to a reasonable person. The plaintiffs also alleged that Advocate's intrusion was an invasion of private matters, causing them anguish and suffering. Additionally, the Lake County plaintiffs included a count asserting intentional infliction of emotional distress. All of the plaintiffs sought class certification, damages, attorney fees, costs, statutory interest, penalties, and injunctive and/or declaratory relief.

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Rulings

The trial court dismissed the plaintiffs' complaint with prejudice pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure, finding that the disclosure of confidential information did not constitute an injury sufficient to confer standing to pursue an action against Advocate Health. *Id.* ¶ 11-15. The trial court also found that pursuant to section 2-615 of the Code, that the complaint failed to state a claim upon which relief could be granted. The trial court found that to state valid claims, the plaintiffs must establish that an injury is "distinct and palpable" and "fairly traceable." *Id.* ¶¶ 20-22.

On appeal, the appellate court affirmed, finding the plaintiffs failed to prove that their information had been used in an unauthorized manner thus, their claims were speculative. The court further noted that the fact that two of the plaintiffs (out of four million) received notification of fraudulent activity, and suffered an actual injury from the breach, did not show that the plaintiffs faced imminent, impending, or a substantial risk of harm because no activity occurred with respect to their personal data. *Id.* ¶¶ 29-31. The court also rejected the plaintiffs' argument that the medical information at issue warranted a finding that the harm is implicit and that an actual injury occurs when a medical professional fails to keep a patient's medical information private. *Id.* ¶ 27.

This is a significant decision in that it breaks from the majority of cases that have found risk of harm was sufficient to confer standing. Because courts across the country are in flux as to whether plaintiffs have standing in data breach cases, this Illinois decision is useful to attorneys who defend these types of cases.

Employment Law

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National Labor Relations Board Broadens the Standard for Joint-Employer Status

The National Labor Relations Board (NLRB or Board) recently revisited and revised its joint-employer standard, broadening the test for determining when employers may qualify as joint employers under the National Labor Relations Act (Act). *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters*, 362 NLRB 186, 2 (2015). In the *BFI* opinion, the NLRB eliminated a long-standing requirement that a joint-employer must *actually* exercise control over employees as a prerequisite to an employer-employee relationship.

To replace it, the NLRB announced a new standard, under which two or more entities are joint-employers of a single work force if they share or codetermine matters governing the essential terms and conditions of employment. *BFI*, 362 NLRB 186 at 15. Significantly, the Board held that it is the *right to control* (whether directly or indirectly) an employee's terms and conditions of employment, in addition to the *actual exercise of control*, that is probative of joint-employer status. *Id*. at 16.

Statutory Framework for Joint-Employer Status

The Act gives statutory employees the right to join labor unions and collectively bargain through representatives of their own choosing. 29 U.S.C. § 157. The Act defines statutory employees broadly to include "any employee." 29 U.S.C. § 152(3). The definition of employees "shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise…." *Id*. Independent contractors are excluded from the Act's broad definition. *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256-258 (1968). When employees wish to be represented for purposes of collective bargaining and their employer declines to recognize the representative, the NLRB may process a representation petition. 29 U.S.C. § 159(c). A wrongful refusal by an employer to collectively bargain with the representatives of *his* employees constitutes an unfair labor

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practice. 29 U.S.C. § 158(a)(5) (emphasis added).

In any dispute over whether an individual is a statutory employee of any particular employer, the NLRB determines whether there is an employment relationship for purposes of the Act. *BFI*, 362 NLRB 186 at 12. In situations involving independent contractors or other contingent-employment arrangements, the Board may be called upon to determine whether the individual is jointly-employed by some other entity for purposes of the Act. In making this determination, the NLRB follows the common-law agency test. *Id.*

The Relationship Between BFI and Leadpoint

BFI owned and operated a recycling facility and solely-employed approximately 60 employees, most of whom worked outside the facility. *Id*. at 2. Inside the facility were four large conveyor belts, or streams, which each carried a different type of recyclable material. Leadpoint provided workers to BFI, known as "sorters," that were positioned beside the streams, sorting through the material as it passed. *Id.* Some of these employees, known as "screen cleaners," also cleaned screens on sorting machines. Leadpoint also provided housekeepers to clean the facility. *Id*.

The relationship between BFI and Leadpoint was governed by a temporary labor services agreement (Agreement), which provided that Leadpoint was the sole employer of the personnel it supplied. *Id.* The Agreement further provided that nothing would be construed as creating an employment relationship between BFI and the Leadpoint-supplied workers. *Id.* BFI and Leadpoint employed separate supervisors and lead workers at the facility and maintained separate human resource departments. *Id.* While BFI did not maintain an HR manager at the facility, Leadpoint provided an onsite HR manager who operated from a trailer outside the facility. *Id*.

As to hiring, the Agreement provided that Leadpoint would recruit, interview, test, elect, and hire personnel to perform work for BFI. *Id*. The Agreement required Leadpoint to ensure that its personnel "have the appropriate qualifications (including certification and training) consistent with all applicable laws and instructions from [BFI], to perform the general duties of the assigned position." *Id*. BFI reserved the right to request that Leadpoint personnel "meet or exceed [BFI's] own standard selection procedures and tests" and Leadpoint was required to take reasonable steps not to hire workers who were previously employed by BFI and deemed ineligible for rehire. *Id.* The Agreement also required Leadpoint to implement drug screening for potential hires and to ensure that personnel remain free from the effects of drug and alcohol and in a condition to perform their job duties for BFI. *Id.*

Leadpoint was solely responsible for counseling, disciplining, reviewing, evaluating, and terminating personnel assigned to BFI. *Id.* at 4. BFI retained the authority to reject any personnel and discontinue the use of any personnel for any reason or for no reason. *Id*. Compensation to the screen cleaners, sorters and housekeepers was paid by BFI. Leadpoint determined the pay rate to its personnel, however, the Agreement set rate caps which could not be exceeded without BFI's approval. *Id*. Leadpoint personnel were not eligible for any benefits provided by BFI. *Id*. While Leadpoint was solely responsible for determining which of its employees worked on each shift, the particular shift schedule was set by BFI without input from Leadpoint. *Id*.

In terms of training and safety, Leadpoint employees received an orientation and job training from Leadpoint supervisors when they begin to work at the facility, and periodically, received substantive training and counseling directly from BFI managers. *Id.* at 5. The Agreement provided that Leadpoint must require its employees to comply with BFI's safety policies, procedures, and training requirements, and for employees working in a "safety-sensitive" position, Leadpoint was required to obtain a written acknowledgement that the worker read, understood, and agreed to comply with BFI's safety policy. *Id.* at 6.

The Arguments in *BFI*

BFI's approximately 60 employees were part of an existing bargaining unit represented by a union, a petitioner in the matter. The union sought to represent approximately 240 full-time, part-time, and on-call sorters, screen-cleaners, and housekeepers who worked at the BFI facility. *Id.* at 3. BFI would not bargain with the union for these individuals, arguing that they were employees of Leadpoint, not BFI. In contrast, the union argued that the individuals in question were employees of Leadpoint and also BFI.

The Regional Director found that under existing authority, BFI was not a joint-employer of the Leadpoint

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employees because BFI did not "share or co-determine [with Leadpoint], those matters governing the essential terms and conditions of employment" for these personnel. *Id.* at 6. The Regional Director based this conclusion on the findings that (a) Leadpoint set employee pay and was the sole provider of benefits; (b) Leadpoint had sole control over the recruitment, hiring, counseling, discipline, and termination of the personnel; and (c) BFI did not control or codetermine the details of the employees' daily work. *Id.* To the extent that BFI directly instructed Leadpoint employees, the Regional Director found that "the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees' daily work." *Id*.

The Regional Director issued a Decision and Direction of Election, finding that Leadpoint was the sole employer of the personnel in question. *Id.* at 1. The union filed a timely request for review of the decision by the NLRB, contending that the Regional Director ignored significant evidence and reached an incorrect conclusion under existing NLRB precedent, and in the alternative, that the NLRB should reconsider its standard for evaluating joint-employer relationships. *Id.* Various *amicus* briefs were filed in support of both sides of the argument.

The NLRB's Historical Joint-Employer Standard

On review, the NLRB observed that before adopting its current joint-employer standard, the Board had generally taken a broader approach to the concept of control. *Id.* at 8. The NLRB retraced the history of the that test for determining joint-employer status, under which the inquiry was whether the employer "share[d] or codetermine[d] those matters governing essential terms and conditions of employment." *Id.* at 8 (quoting *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965)). The NLRB noted that regardless of the wording used, the earlier opinions typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. *BFI*, 362 NLRB at 9. The NLRB did not require that this right be exercised, or that it be exercised in any manner. *Id*. Under those opinions, the Board had found it probative, for example, that employers retained the contractual power to reject or terminate workers, set wage rates, set working hours, approve overtime, dictate the number of workers to be supplied, determine the manner and method of work performance, inspect and approve work, and terminate the contractual agreement itself at will. *Id.* (collecting cases).

The NLRB also noted that its earlier decisions had given weight to a putative joint-employer's indirect exercise or control over workers' terms and conditions of employment. In those decisions, the determining factor was whether the employee exercised "ultimate control" over the employment, not whether the employer would "hover over [workers], directing each turn of their screwdrivers and each connection that they made." *Id.* (citing *Sun-Maid Growers of California*, 239 NLRB 346, 351 (1978)).

In 1982, the Court of Appeals for the Third Circuit handed down its opinion in *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117 (3d Cir. 1982). That opinion appeared to endorse the NLRB's "share or codetermine formulation," explaining:

> The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. …Thus, the "joint-employer" concept recognizes that the business entities involved are in fact separate but that they *share or codetermine those matters governing the essential terms and conditions of employment*.

BFI, 362 NLRB at 10 (quoting *Browning-Ferris*, 691 F.2d at 1123).

In its *BFI* opinion, the NLRB noted that despite the "share or co-determine" formulation having been adopted by the Third Circuit, the Board subsequently took law in a new and different direction. *BFI*, 362 NLRB at 10. Two opinions, *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984), "both decided in 1984, marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgement and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard." *BFI*, 362 NLRB at 10.

The *BFI* opinion then discussed various NLRB decisions from the mid-1980s to the 2000s wherein the Board "im-

plicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status." *Id.* For example, in *TLI*, a contract provided that the putative employer would at all times solely and exclusively be responsible for maintaining operational control, direction, and supervision over the employees. *Id.* (citing *TLI*, 271 NLRB at 803). This type of control would historically have led to a finding of joint-employer status, however, in *TLI*, the NLRB found it irrelevant, absent evidence that the putative employer affected the terms and conditions of employment to such a degree that it may be deemed a joint employer. *BFI*, 362 NLRB at 10. Over the next several years, the NLRB's determination of joint-employer status would continue to focus exclusively upon an actual exercise of control. *Id.* During that timeframe, the Board also required that the control was direct, immediate, and not "limited and routine" in order to support a finding of joint-employer status. *Id*.

The NLRB's Revised Joint-Employee Standard

The *BFI* Board noted that in the modern economy, the diversity of workplace arrangements has changed and that employees are increasingly procured through staffing and subcontracting, or other contingent-employment arrangements. *Id.* at 11. In order to meet the needs of this changing workforce, the NLRB set about revising its joint-employee standard by first reviewing the common-law as it relates to the employment relationship. *Id.* at 13. Under common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised. *Id.* For example, Section 220(1) of the *Restatement (Second) of Agency* refers to a master as someone who "controls or has the right to control" another. *BFI*, 362 NLRB at 13. The Restatement further provides that in determining whether one acting for another is an agent or an employee or an independent contractor, one factor is the "extent of control which … the master may exercise over the details of his work." *Restatement (Second) of Agency*, § 220(2)(a).

Having reviewed this history of the standard and the common-law underpinnings, the NLRB announced its "restated" legal standard for joint-employer determinations, to be applied going forward:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past.

BFI, 362 NLRB at 15.

As to what constitute "essential terms and conditions of employment," the NLRB noted that it will continue to adhere to an "inclusive approach." *Id.* Essential terms and conditions refer to matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Id*. Essential terms indisputably include wages and hours, but other examples include dictating the number of workers to be supplied, controlling scheduling, seniority and overtime, and assigning work and determining the manner and method of work performance. *Id*.

Finally, and importantly, the *BFI* Board held that it will no longer require that a joint-employer actually exercise authority and control over an employee's terms of employment. *Id.* at 15-16. "The right to control, in the common law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." *Id.* at 16.

In a lengthy dissent, two Board members argued that under the new test there would be no predictability regarding the identity of the employer and that test includes no limiting principle. The dissent set out a litany of perceived problems and concluded that under the broadened definitions, many more entities would be deemed statutory employers for purposes of the Act. *Id.* at 38-42. The majority of the Board dismissed these objections, and using the new test, found that BFI constituted a joint employer. *Id.* at 18.

In concluding that BFI was a joint-employer, the majority noted the following as relevant and dispositive facts: BFI possessed significant control over who Leadpoint could hire to work at its facility by imposing standards and requirements such as drug testing; BFI possessed an unqualified right to fire

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In concluding that BFI was a joint-employer, the majority noted the following as relevant and dispositive facts: BFI possessed significant control over who Leadpoint could hire to work at its facility by imposing standards and requirements such as drug testing; BFI possessed an unqualified right to fire or reject a worker at any time, for no reason; and BFI exercised control over the day-to-day work of the employees, by virtue of controlling productivity standards and assigning specific tasks to be completed.

or reject a worker at any time, for no reason; and BFI exercised control over the day-to-day work of the employees, by virtue of controlling productivity standards and assigning specific tasks to be completed. *Id*. at 18-19. Although Leadpoint determined where the workers were positioned, the Board concluded that this was a type of indirect control exercised by BFI. *Id.* at 19. Similarly, BFI specified the number of workers that it required, dictated the timing of employees' shifts, and determined when overtime was necessary. *Id*. Although Leadpoint was responsible for selecting the specific employees who would work during a particular shift, "it is BFI that makes the core staffing and operational decisions that define all employees' work days." *Id*.

Finally, the NLRB majority found significant that BFI plays a role in determining employees' wages. *Id*. Leadpoint determined employees' pay rates, administered all payments, retained payroll records, and was solely responsible for providing and administering benefits, however, BFI specifically prevented Leadpoint from paying its employees more than BFI's employees performing comparable work. *Id.* Additionally, BFI and Leadpoint were parties to a cost-plus contract. The Board noted that while these facts were not necessarily sufficient to create a joint-employer relationship, when coupled with the apparent requirement of BFI to approve employee pay increases, they did become so. *Id*.

Impact of the *BFI* Opinion

The NLRB greatly expanded its definition of a joint employer and in the context of labor relations law, the change is likely to have far-reaching effects. Industries that use employment agencies, independent contractors, or other alternative employment arrangements are certain to see a marked increase in the amount and variety of workers who may now attempt to bargain collectively with employers.

A serious question also exists as to what effect this opinion will have upon other areas of employment law. On the one hand, if this definition of employment relationship is adopted by courts, the floodgates could be opened for litigation in contexts such as employment discrimination, workers compensation, personal injury, and tort law in general. If courts adopt this test, it could expand the scope of vicarious liability in civil courts to a staggering degree. Such a result could also expose franchisors to a great deal of liability that did not previously exist.

On the other hand, it could also be argued that state courts rarely look to NLRB opinions for guidance on an issue, particularly where state appellate law is inconsistent with the NLRB interpretation. While this test could be adopted by other agencies such as the Department of Labor and the Equal Employment Opportunity Commission, and then trickle down through state and local regulations, such a process—even were it to happen—is likely to take time. During that time, it is nearly certain that at least some jurisdictions will attempt to counteract the rule through legislation.

In either case, employment lawyers and in-house practitioners must be familiar with this opinion and prepared to counsel their clients as to its effect upon risk and liabilities moving forward.

Feature Article

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Construction Negligence: Significant Developments Which Affect and Shape the Tort

Construction negligence claims coexisted with and antedate the demise of the Illinois Structural Work Act (the Act) through the Illinois Supreme Court's 1995 decision in *Larson v. Commonwealth Edison Co.,* 33 Ill. 2d 316 (1965). However, negligence causes of action were seldom used while the Act's strict liability provisions were viable. After the Act was repealed, the common law remedy came into focus as the basis for construction injury recoveries from a variety of causes, including many that are wholly unrelated to "scaffolds, hoists, stays, ladders, [or] supports." 740 ILCS 150/1 (West) (1994).

The tort sprouts, grows and takes nourishment from Section 414 of the Restatement (Second) of Torts. The genesis and evolution of Section 414 claims in Illinois have been discussed at length in earlier articles on the subject. **Complexities in Construction Negligence Litigation**, IDC Quarterly Vol. 13, No. 3; **Recent Developments in Construction Negligence: An Update of Complexities in Construction Negligence Litigation**, IDC Quarterly Vol. 14, No. 2; **Premises Liability Exposure in Construction Injury Cases**, IDC Quarterly Vol. 15, No. 1 ; **Continuing Developments in Construction Negligence: A Further Update of Complexities in Construction Negligence Litigation**, IDC Quarterly Vol. 18, No. 2; and **Vicarious Liability In Construction Negligence Cases Misapprehension Leads To Mischief**, IDC Quarterly Vol. 21, No. 3.

For the purposes of this discussion, the basic elements of the tort are summarized as follows:

- As a general rule, one who hires an independent contractor is not liable for torts committed by the independent contractor in performance of the agreed upon undertaking. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19 (1971).
- An exception exists where the hiring party so controls the contractor's work that the latter is not free to decide *how* the work is done. This is the so-called "control" element of the tort from which the hiring party's duty arises. Interpretation of the term "control" as it is used in Section 414, has vexed the courts in a myriad of cases over the last 20 years. Recently, a number of courts have viewed "control" under Section 414 alternately in the context of "vicarious" and "direct" liability. That bifurcation is discussed at length in this article. For the purposes of this elemental summary, focus is upon the concept in its "direct" liability sense.
- Where the requisite "control" exists, a duty is imposed upon the hiring party to exercise that "control" with "reasonable care" as it relates to the "unsafe work condition" or hazardous employment practice.
- "Reasonable care" presupposes that the hiring party knew or had reason to know of the dangerous condition or unsafe work practice.

Unfortunately, the Illinois Supreme Court has not considered construction negligence since its passing recognition of the tort in *Larson*. Consequently, we are left with the disparate perceptions of five appellate districts and six divisions of the first district. Synthesizing those decisions is much like making bricks without straw, the result is difficult to hold together. Nonetheless, some salient

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observations can and should be made in order to prevent the tort from becoming an amorphous creature with neither form nor structure. That possibility is very real given the appellate rejection of the pattern jury instructions which purport to define the claim and its components. *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶¶ 162-179, and *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 86.

This article focuses upon four areas in which recent decisions alternatively: (1) misapprehend and confuse the language and intent of Section 414 and (2) provide guidance as to the nature of construction negligence claims, both conceptually and pragmatically in the real world of "hired out" work.

Section 414 Does Not Create or Contemplate a Vicarious Liability Duty

Since *Cochran v. Sollitt Construction Co.*, 358 Ill. App. 3d 865 (1st Dist. 2005) a number of appellate courts have construed Section 414 as creating or recognizing (1) vicarious liability on the part of the employing party and/or (2) "direct" liability, depending upon the degree of control which is retained. In the authors' view, this duty bifurcation misapprehends the intent of the drafters of Section 414, as discerned from the clear language of **Comment *a*** to that section.

In *Cochran*, the plaintiff was an employee of the HVAC subcontractor and was working on overhead ductwork when he fell from a ladder that was positioned on a plywood board resting on two milk crates. He sued the general contractor on premises liability and construction negligence theories. *Cochran,* 358 Ill. App. 3d at 867. In furtherance of the latter, he claimed that the general contractor had "control" over the work of the HVAC subcontractor by virtue of the prime contract with the owner that made Sollitt solely responsible for safety on the job, including compliance with all applicable state and federal laws and regulations. Using that language, the plaintiff contended that Sollitt had "control," even though it was never exercised, and even though the subcontract delegated that responsibility to the plaintiff's employer. *Id.* at 871.

Since *Cochran*, a number of courts have likewise indulged a construction of Section 414 that presupposes it addresses both respondeat superior and direct liability in construction negligence cases.

The court held that the concept of "retained control" involved numerous factors, only one of which was the contract between the owner and the general contractor. In discussing the proper analysis, it found that Section 414 recognizes two possible theories for liability. The first is mentioned in **Comment *a*** when the "operative detail" which is retained by the defendant is so extensive that the law of agency applies and the independent contractor is therefore viewed as the agent of the general contractor. Alternatively, Section 414 deals with "direct liability" in which the level of control is not so comprehensive as to establish vicarious liability, but is sufficiently extensive to give rise to a duty on the part of the general contractor to exercise reasonable care for the safety of the independent contractor's employees.

Since *Cochran*, a number of courts have likewise indulged a construction of Section 414 that presupposes it addresses both *respondeat superior* and direct liability in construction negligence cases. See, *e.g., Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333 (1st Dist. 2008); *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044 (2d Dist. 2010); *Madden v. F. H. Paschen*, 395 Ill. App. 3d 362 (1st Dist. 2009); *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13 (1st Dist. 2009); *Pekin Ins. Co. v. Roszak/ ADC, LLC*, 402 Ill. App. 3d 1055 (1st Dist. 2010); *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663; *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771; and *O'Gorman v. F.H. Paschen*, 2015 IL App (1st) 133472. As discussed in *Cochran,* the basis for that assumption is the reference in **Comment *a*** to "the relation of master and servant" in the context of retention of "control over the operative detail of doing any part of the work." *Cochran,* 358 Ill. App. 3d at 874. Flowing from that assumption is the further thought that references in **Comment *c*** to control over "methods of work, or, as to operative detail" apply to vicarious liability, leaving a lesser degree of control for the imposition of "direct liability," under that section. Correspondingly, **Comment *b*** with its requirements of reasonable care in the context of known or imputed dangers applies only to "direct liability" inasmuch as vicarious liability makes the employer responsible for the acts and omissions of the contractor without regard to its own neglect.

The author submits that a fair reading of Section 414 and its accompanying comments leaves no room for the thought that the drafters intended to articulate a vicarious liability standard. In fact, the language of **Comment *a*** compels the opposite conclusion. In *Aguirre v. Turner Construction Co.*, 501 F. 3d 825, 828 (7th Cir. 2007), the court discussed the language of Section 414 and determined it did not create a basis for imposing vicarious liability on the general contractor. In that respect, the opinion states:

> The "retained control" theory of negligence liability described in section 414 was adopted by the Illinois Supreme Court in *Larson v. Commonwealth Edison Co.,* 33 Ill. 2d 316, 211 N.E.2d 247 (Ill. 1965). However, some confusion has arisen recently among Illinois intermediate appellate courts regarding whether section 414 states a theory of vicarious liability or direct liability. *See, e.g., Cochran v. George Sollitt Const. Co.,* 358 Ill. App. 3d 865, 832 N.E.2d, 355, 361, 295 Ill. Dec. 204 (Ill. App. Ct. 2005). Although the Illinois Supreme Court has yet to lend its guidance on this issue, we are confident it would interpret section 414 in accordance with its plain language and accompanying commentary, which clearly state a theory of direct liability for a general contractor's own negligence, not a basis for imposing vicarious liability on a general contractor for the negligence of a subcontractor.

Aguirre, 501 F.3d at 828.

As the *Aguirre* court found, the first sentence in **Comment *a*** refers to the principles of vicarious liability which can be found in the Restatement of Agency, §§ 2.04, 7.07, as opposed to describing the circumstances which give rise to a duty in tort law. The purpose of Section 414 is to carve out a "duty" in instances where the control is retained short of that which is required for vicarious liability. *Id.* at 829. Thus, the drafters separated tort law considerations from those which apply to the master and servant relationship. That demarcation is clear in **Comment *b*** which refers to "[t]he rule stated in this Section" in the context of a duty to exercise "reasonable care." The term "Section" is singular and applies to the language of section 414 in its entirety. Thus, consideration of **Comment *b*** in conjunction with **Comment *a*** precludes vicarious liability, inasmuch as exposure under *respondeat superior* principles is wholly derivative and exists without regard to the exercise of reasonable care by the principal. Nor does the fabric of Illinois law, as it has evolved, permit vicarious liability apart from the law of agency and partnership in which the imputation of liability carries with it attendant defining rights and obligations of the parties *inter se*.

"Agency" is a distinct legal theory with its own interrelated rules and principles. As it applies to third party liability, whether in contract or tort, the principal's exposure derives from the conduct or fault of the agent, as opposed to the principal's own acts or omissions. Thus, the principal's liability is vicarious. Because that liability results from the legal relationship of principal to agent, as opposed to conduct of the former, the principal is entitled to indemnification from the agent. *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461 (2008). In this respect, agency law is the antithesis of contribution which presupposes the apportionment of fault.

In 1978, the Illinois Supreme Court recognized the inequity of common law indemnity when it abolished the prohibition against joint tortfeasor contribution. *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1 (1978). The next year, in 1979, the legislature adopted the Joint Tortfeasor Contribution Act (740 ILCS 100/1 *et seq.*). Under that statute, fault is apportioned among the parties who are "subject to liability in tort arising out of the same injury" to the extent that the fault of each contributed to cause any damages which are awarded. 740 ILCS 100/2(a). In the event that one tortfeasor is required to pay more than his "*pro rata* share of the common liability," he is entitled to contribution from the others for the excess. 740 ILCS 100/2(b).

The public policy of fault apportionment which underpins contribution was the death knell of common law or active/passive indemnification. Attempts to preserve common law indemnity in the face of contribution and fault apportionment were consistently rejected, even in the instances where it was clear that the indemnitee did nothing more than fail to discover, warn against or prevent the indemnitor's negligence. *Frazer v. A. F. Munsterman, Inc.*, 123 Ill. 2d 245 (1988).

In *Allison v. Shell Oil Co.*, 113 Ill. 2d 26 (1986) the Illinois Supreme Court had earlier applied the reasoning of *Frazer* to bar a claim for implied indemnity in a construction injury case. There, the owner and subcontractor were sued under the former Structural Work Act and common law negligence for injuries sustained by an employee of Strange & Coleman who fell from a "2 foot by 12 foot board" that his

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In the real world of Illinois tort law, the thought that Section 414 permits vicarious liability apart from fundamental agency relationships is an anachronism that the supreme court rejected 30 years ago.

employer failed to secure. *Allison,* 113 Ill. 3d at 28. The defendants brought a third party complaint against Strange & Coleman for both implied indemnity and contribution. The case was tried on those theories and the jury returned a verdict, *inter alia*, that the defendants "were entitled to indemnification from Strange & Coleman." *Id.* That verdict squarely posed the issue of whether common law indemnity survived the adoption of the contribution statute. Responding negatively, the court limited implied indemnity to its traditional theoretical mooring in cases of vicarious liability, which are actually actions "in *quasi* - contract." *Id*. at 32-33. In other words, the court stated an implied right to indemnification arose in favor of an employer or other party found to be vicariously liable for the negligence of an employee or other party when the employer or other party did not contribute to the injury. *Id*. at 29. However, it then specifically found that with the adoption of comparative fault and apportionment principles "the need for implied indemnity upon an active - passive distinction has also evaporated," succinctly stating, "[a]ctive-passive indemnity is no longer a viable doctrine for shifting the entire cost of tortious conduct from one tortfeasor to another." *Id*. at 35.

Following *Allison* and *Frazer*, it is well accepted that one tortfeasor is liable for the negligent acts and omissions of another tortfeasor *only* in instances where public policy dictates that result based upon the pre-tort relationship of those parties. *Travelers*, 229 Ill. 2d at 472. In other words, imputed liability as a result of a comparison of the conduct of the putative indemnitee and indemnitor no longer exists.

In the real world of Illinois tort law, the thought that Section 414 permits vicarious liability apart from fundamental agency relationships is an anachronism that the supreme court rejected 30 years ago. *Allison*, 113 Ill. 2d at 34. If the putative principal did anything more than hire the subcontractor, it is liable for its own acts and omissions. On the other hand, if the principal did nothing more than hire the purported agent, its liability is dictated and defined by the law of agency, wholly apart from any conduct on its part. *Travelers,* 229 Ill. 2d at 472.

In a Contractual Sense "Control" is Determined From the Agreement Between the Affected Parties

Control in Section 414 cases, including those which recognize vicarious liability, is found conjunctively in: (1) the contractual rights and obligations of the entrusting and the entrusted parties and (2) the exercise of those rights and obligations in performing the contracted work. This portion of the article focuses upon the former, and in particular, upon the debate that has arisen regarding which contract or contracts should be considered.

Section 414 is most commonly, if not exclusively, considered in the context of construction related injuries. In that setting the most frequent scenario involves suit by an injured employee of a subcontractor against the general contractor who allegedly "controlled" the employer's work. Two contracts are involved. First is the agreement between the general contractor and the owner that sets forth the general contractor's obligations to the owner. As it customarily obligates the general contractor to perform all of the work on the job competently and safely, the "prime" contract is the document preferred by plaintiffs to prove "control." *See, e.g., Moss v. Rowe Constuction Co.*, 344 Ill. App. 3d 772 (4th Dist. 2004).

However, the general contractor has usually subcontracted away performance of the specialized work out of which the injury arose. That subcontract traditionally obligates the subcontractor to competently and safely perform its undertaking, including protecting the subcontractor's employees from injury. Understandably, the general contractor prefers to rely upon the subcontract in defining its control of the work. *See, e.g., Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303 (1st Dist. 2004).

Absent express language to the contrary, "control" of a subcontractor's work is determined in a contractual sense from the subcontract which delineates and defines what the subcontractor is to do. Customarily, that agreement also specifies that the subcontractor accepts full responsibility for the safety of its employees. As the following discussion points out, the trend of focusing upon the subcontract has dramatically reduced the evidentiary significance of the prime contract to the point where it carries little or no weight.

In *Martens*, the court interpreted both the prime contract between the owner and the general contractor, MCL, and the downstream subcontract for steel erection with the plaintiff's employer, F.K. Ketler, in the context of "control" under Section 414. In that analysis, the court recognized that MCL "reserved a general right to control construction means, methods, techniques, sequences, procedures and coordination of its work under the contract." *Martens,* 347 Ill. App. 3d at 315. That included responsibility "for initiating and supervising its safety program, which entailed citing contractors for rule and regulation violations, maintaining reasonable safeguards, and designating a safety director whose duty was to prevent accidents." *Id.* at 316. On the other hand, the Ketler subcontract placed control over the steel erection work with Ketler including "contractual control of the supervision and safety of its ironworkers," together with, *inter alia*, the requirement "that Ketler's foreman was responsible for putting the safety rules into practice." *Id.* Comparing the two contracts, *vis a vis*, the responsibilities of each for the safety of Ketler employees, the court had little difficulty in finding that the generalized authority retained by the general contractor did not amount to the type of "control" which is required to trigger a duty under Section 414. Specifically, the court held that the generalized supervisory authority possessed by MCL did not mean that Ketler was controlled as to the manner, means, methods or operative details of its steel erection work. The identical result was reached by the reviewing court in *Shaughnessy v. Skender Construction Co.*, 342 Ill. App. 3d 730 (1st Dist. 2003), where the same type of broad authority was retained by the general contractor, including the general contractor's right to compel compliance with its safety program and in that regard, to monitor the subcontractor's compliance with that program.

Relying on the rationale that the *general* authority vested in a *general* contractor under a *general* contract does not create the type of specific control which is required by Section 414, the *Martens* court reasoned that if the language of the general contract in those cases was sufficient to subject a general contractor to liability under Section 414 "then the distinction in **comment *c*** to section 414 between retained control versus a general right of control would be rendered meaningless." *Martens*, 347 Ill. App. 3d at 316. Thus, it is consistently held that the overall obligations imposed upon a general contractor under its contract with the owner do not give rise to a legal duty in favor of a subcontractor's employees under Section 414 where the subcontract imposes those responsibilities directly and specifically upon the subcontractor. *Rangel v. Brookhaven Constructors Inc.*, 307 Ill. App. 3d 835 (1st Dist. 1999); *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583 (1st Dist. 2002); *Oshana v. FCL Builders, Inc.*, 2012 IL App (1st) 101628, ¶ 26; and *Rogers v. West Construction Co.*, 252 Ill. App. 3d 103 (4th Dist. 1993).

Exceptions to the preceding rule are found in *Moss v. Rowe Const. Co., supra,* and *Moorhead v. Mustang Construction Co.*, 354 Ill. App. 3d 456 (3d Dist. 2004), where the prime contract placed exclusive responsibility for safety upon the general contractor. In *Moss*, the general contract prohibited delegation without the written consent of the owner, IDOT, stating in that regard,"[n]o **portion** of the contract shall be sublet, assigned, or otherwise disposed of except with the written consent of the SHA contracting officer, or authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract." *Moss*, 344 Ill. App. 3d at 774.

In *Moorhead* the prime contract stated that the general contractor, Mustang, "shall be fully and solely responsible for the jobsite safety." *Moorhead*, 354 Ill. App. 3d at 461. When referring to that provision the court found: "[t]he contract **does** not **allow** Mustang to replace its obligation to control the safety of the project." *Id*.

Falling between those cases that rely upon the prime contract to establish a duty on the general contractor's part to the employees of its subcontractors and those that look to the subcontractor is *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663. In *Ramirez*, the court recognized that while the relationship between the general contractor and the employees of a subcontractor is best defined by the contract between those

> Section 414 focuses upon the relationship between the party "who entrusts work to an independent contractor" and the entrusted contractor who is to perform the work.

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parties, the agreement between the general contractor and the owner nonetheless has some probative value. This "middle of the road" approach probably reflects the majority view in which both contracts will be admitted, discussed and argued.

Section 414 focuses upon the relationship between the party "who entrusts work to an independent contractor" and the entrusted contractor who is to perform the work. *Id.* ¶ 120. All too often, litigants and the courts lose sight of the direct nature of that relationship in considering the former's role in performing the overall work of which the entrusted job is a part. The fact that a general contractor agrees to provide the owner with a finished product does not mean that it accepts responsibility for *how* each of its subcontractors does their jobs or for injuries suffered by the employees of those subcontractors in doing their jobs. If the rule were otherwise, then questions of control would be answered by the general contractor's agreement to do the work.

To the contrary, while of some evidentiary value in understanding the overall project, the prime or general contract is subordinate to the subcontract pursuant to which a relevant portion of that work is entrusted by the general contractor to a subcontractor. *Oshana v. FCL Builders, Inc.*, *supra,* and *Ramirez v. FCL Builders, Inc.*, *supra.* Instead of depending upon the overarching obligations accepted by the general contractor in agreeing to do the work, the courts in Section 414 cases focus upon the subcontract between the general contractor and the subcontractor in ascertaining the nature and scope of the work which is entrusted.

Subcontracts Embody the Real World Delegation of Rights and Responsibilities

The rationale that supports the evidentiary priority accorded to subcontracts in construction negligence cases is underpinned by recognition that the specialized work of subcontractors and skilled tradesmen is customarily, if not uniformly, delegated to those with the technical knowledge that is required to perform that work. Thus **Comment *c*** to Section 414 distinguishes between the general contractor's "general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations" and its retention of "at least some degree or control over the manner in which the work is done." The former is inherent in the general contractor's undertaking with the owner. *Kotecki*, 333 Ill. App. 3d at 587. The latter reposes in the specialized skills of the subcontractor which include how to safely perform its work. *Martens*, 347 Ill. App. 3d at 316. As a general rule, the reality of delegation is found in the complementary language of the general contract and the subcontract.

In the former, the general contractor customarily agrees to require its subcontractors to adhere to the same responsibilities toward the owner as the general contractor has undertaken. Each subcontractor then agrees to do so in its subcontract. *Oshana v. FCL Builders, Inc.*, 2012 IL App (1st) 101628 and *O'Gorman v. F.H. Paschen*, 2015 IL App (1st) 133472.

It is well recognized that delegation of specialized areas of the work is consonant with the customs of the construction industry, where it is recognized that each subcontractor and trade brings a different skill to the job. That reality was specially recognized in *Rogers*, 252 Ill. App. 3d at 103, 107, where the court acknowledged that the general contractor was entitled to rely upon the "expertise and experiences" of its subcontractor, *Oshana* involved an ironworker employed by the structural steel erection subcontractor, JAK Ironworks. He sued the steel fabrication contractor, Suburban Ironworks, Inc., whose agreement with the general contractor, FCL Builders, Inc., included both steel fabrication and erection. In referring to the plaintiff's claims as they related to the FCL/Suburban contract the court stated *inter alia*:

> . . . Suburban's scope of work in the initial FCL/Suburban subcontract included both steel fabrication and erection. In that initial subcontract, Suburban agreed to furnish the necessary management and supervision to perform and complete the contract; assumed responsibility to prevent accidents to its agents, invitees and employees; agreed to take all reasonable safety precautions with respect to the work to be performed under the contract; and agreed to maintain at all times a qualified and skilled superintendent or foreman at the site of the work. Plaintiff and FCL contend that those supervisory and safety duties, which Suburban had assumed toward FCL, were not passed on to JAK in the Suburban/JAK subcontract. According to plaintiff and FCL, Suburban was responsible for safety within the scope of its work, and steel erection was

included within that scope. *Othana,* 2012 IL App (1st) 101628, ¶ 24.

In affirming summary judgment in favor of Suburban, the court found:

> In response, Suburban acknowledges that it initially undertook, in accordance with industry custom and practice, contractual responsibility for both the steel fabrication and erection work. However, Suburban, in accordance with the terms of its initial subcontract with FCL, subcontracted out the erection work to JAK, a competent subcontractor, and thereby delegated the supervisory and safety responsibilities attendant to that erection work to JAK.

Id. ¶ 26.

The delegation that is recognized in *Oshana*, and *Rogers*, is in accord with construction custom and practice and is also in line with numerous opinions that support summary judgment in favor of general contractors who have subcontracted all aspects of the work out of which an accident occurs, retaining only the type of general authority which does not trigger a duty under Section 414 of the Restatement (Second) of Torts. *See Steuri v. Prudential Insurance Co. of America*, 282 Ill. App. 3d 753 (1st Dist. 1996) (finding general contractor delegated responsibility for the details of the work to subcontractor); *Moiseyev v. Rot's Building and Development Inc.*, 369 Ill. App. 3d 338 (3d Dist. 2006) (affirming entry of summary judgment in favor of general contractor where it has been shown responsibility for details of the work delegated to subcontractor); *Joyce v. Mastri*, 371 Ill. App. 3d 64 (1st Dist. 2005) (affirming summary judgment in favor of general contractor where subcontractor was contractually responsible for jobsite safety and general contractor took no active role in insuring safety); *Martens*, 347 Ill. App. 3d at 313 (stating that a contractor unknowledgeable about the details of some task usually delegates that work to an independent contractor); *see also O'Gorman v. F.H. Paschen*, 2015 IL App (1st) 133472.

Nor do the provisions of OSHA impose a non-delegable duty on general contractors contrary to Illinois law. As held in *Downs v. Steel & Craft Builders, Inc.*, 358 Ill. App. 3d 201 (2d Dist. 2005), an exception to that effect "would swallow the rule, because no matter what steps defendant would take to shield itself from liability, the OSHA provisions inevitably would pierce defendant's armor, striking a fatal blow that otherwise would be blocked under the theories advanced by plaintiff." *Downs*, 358 Ill. App. 3d at 209.

Synthesizing the preceding authorities in the context of the realities of the multi-faceted construction industry demonstrates the distinction between the general authority vested in the general contractor under the prime contract with the owner and the implementation and effectuation of that authority as it is delegated to the various subcontractors. By that delegation each of the specialized trades is responsible for the "operative details" of its work while the general contractor is obligated to the owner for the finished product.

Reasonable care takes into account the controlling party's actual or constructive knowledge of the hazardous condition or unsafe work practice which caused the injury.

For Liability to Attach the "Controlling" Party Must Have Actual or Constructive Knowledge of the Hazardous Condition or Work Practice

Curiously, the battle lines in construction negligence cases under Section 414 of the Restatement (Second) of Torts are almost always drawn exclusively on the "control" issue. While "control" within the Restatement's meaning of that term is the *sine qua non* before a legal duty arises, a finding of "control" is akin to cocking the hammer on a gun. As set forth in the express language of Section 414, the controlling "employer owes a duty to exercise reasonable care" and is "subject to liability for physical harm to others . . . which is caused by his failure to exercise his control with reasonable care." Thus, the cocked hammer is triggered by the negligence of the defendant in failing to exercise "his control with reasonable care."

Reasonable care takes into account the controlling party's actual or constructive knowledge of the hazardous condition or unsafe work practice which caused the injury. In that respect the

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following language of **Comment *b*** is both instructive and controlling:

> *b.* The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, ***if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.*** So too, he is subject to liability ***if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition***, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so. (Bold italics supplied).

Restatement (Second) of Torts § 414 cmt. B (1965).

The boldly emphasized language in the preceding quotation of **Comment *b*** is intended to highlight the requirement of actual or imputed knowledge of the risk in question as a condition precedent to liability. It is significant to understand that the knowledge which is required to "trigger" the duty to prevent resultant injury is independent of the retained control which permits the defendant to prevent that injury. In this respect the "duty" derived from "control" is remedial as opposed to investigative. That is to say, the drafters of Section 414 do not appear to contemplate an obligation on the part of a "controlling" party to affirmatively investigate or seek out hazardous conditions or unsafe work practices with the objective of preventing them. This is in contradistinction to the mandate under the Structural Work Act that a party "having charge of the work" was obligated to correct any violations of which he "could have known." *Kennerly v. Shell Oil Co.,* 13 Ill. 2d 431 (1958) and *Smith v. Georgia Pacific Corp.*, 86 Ill. App. 3d 570 (3d Dist. 1980).

Whether tied to the overall work or the specific work which caused the injury, "reasonable care" relates to what the defendant "knew or had notice of." *Rangel*, 307 Ill. App. 3d at 838-839. As otherwise expressed, a party having control of the work has preventive and/or remedial responsibilities only as to those hazards of which he has actual knowledge or reason to know. *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269 (1st Dist. 2002). There is no *a priori* obligation to require safe practices or inspect the work of others to insure compliance with safety standards. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351 (4th Dist. 2000).

Appellate decisions under Section 414 have consistently required that a controlling defendant have knowledge of the risk before liability would attach. As succinctly stated in *Cochran*, "[a]ccording to *comment b* to section 414, the general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability." *Cochran,* 358 Ill. App. 3d at 879-80.

In *Rangel,* the plaintiff slipped as he stepped onto the third brace of a drywall scaffold. In affirming summary judgment, the appellate court found *inter alia* the general contractor neither knew nor had reason to know of the unsafe method of performing the work. *Rangel,* 307 Ill. App. 3d. at 389.

Likewise in *Shaughnessy,* the court found that neither the general contractor nor the steel fabrication contractor had either the opportunity or reason to know that the plaintiff would use a defective board "to span the gap between the tower and the ledge of the wall opening." *Shaughnessy*, 342 Ill. App. 3d at 734. In that respect, the court emphasized *inter alia:*

> Moreover, no one from Skender or Garbe saw plaintiff engage in the unsafe practice that led to his injury or even had noticed that plaintiff intended to engage in such conduct. Plaintiff, who was injured on his first day at the jobsite, admitted that he was only on the board for a "fraction of a second" before the board broke and that only his coworker was in the area.

Id. at 739-40.

In *Martens*, the court emphasized the absence of evidence that the defendants were aware or had reason to know that the "work was being done in an unsafe manner before the plaintiff was injured." *Martens,* 347 Ill. App. 3d at 319.

The same result was reached in *Cochran* There, the plaintiff fell from a ladder which he had positioned on a piece of plywood "placed atop two milk crates

set in a drainage pit." *Cochran,* 358 Ill. App. 3d at 868. In affirming summary judgment based upon both the absence of control and lack of knowledge of the hazard, the court stated:

> Here, as noted, Cochran admitted that the unsafe ladder setup created by Anderson's foreman Wesselhoff was in existence for an hour at the most before his injury, which occurred in a relatively remote location in the sub-basement of the hospital. None of Sollitt's "competent persons" had observed the unsafe setup during that short period of time. As we stated in *Rangel,* no liability lies on such facts: "This unsafe method of performing the work, which led to [the plaintiff's] injury, was proposed by [his] employer just hours before the accident. Here, *** there is nothing to suggest that the general contractor knew or had notice of the hazardous method employed within this restrictive time period."

Id. at 880.

The same outcome was compelled in *Calderon,* where the plaintiff, a roofer, fell off a ladder as he was attempting to carry "a 60-pound bundle of shingles to the rooftop." *Calderon,* 381 Ill. App. 3d at 335. The accident took place on a Saturday when the defendant was not present and involved the decision of the plaintiff and his employer not to use a "boom crane" or "conveyor-type apparatus" for that purpose. Recognizing that claims under Section 414 require actual or constructive knowledge of an unsafe work practice or hazardous condition, even if a control-based duty exists, the court stated:

> "[T]he general contractor's knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability." *Cochran,* 358 Ill. App. 3d at 879-80. When a general contractor has an insufficient opportunity to observe unsafe working conditions, then knowledge will not be inferred and direct liability will not ensue. See *Pestka,* 371 Ill. App. 3d at 302-03; *Cochran,* 358 Ill. App. 3d at 880; *Rangel,* 307 Ill. App. 3d at 839.

Calderon, 381 Ill. App. 3d at 347.

Each of the preceding cases involved either a transient condition of short duration or an unusual, if not unique, work practice adopted by the injured employee. Under those circumstances, the defendant would neither know of the risk nor be expected to discover or anticipate it. However, where the condition or practice is either open and obvious or continuous, its ubiquity will be imputed to the general contractor thereby satisfying the knowledge requirement, despite professions of ignorance. In *Ramirez*, the defendant knew that workers would have to manually move rolls of heavy roofing membrane materials because it discontinued the use of ATVs for that purpose. Likewise, in *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, the unprotected window opening through which the deceased masonry laborer fell was an open and obvious hazard of which the general contractor had constructive, if not actual knowledge. In *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13 (1st Dist. 2009), the absence of a straight brace at the top level of a scaffold was a defect which the general contractor actually observed.

Whether or not a defendant had actual or constructive knowledge of the dangerous condition or unsafe work practice, therefore turns upon a nature and duration of the hazard and the contractor's exposure to it. Where the condition or practice is open and obvious or it is actually observed by the defendant's superintendent or project manager, it is no defense that those supervisory employees lacked sophistication to appreciate the hazard. *Diaz,* 397 Ill. App. 3d at 36. On the other hand, where the defendant contractor lacks the opportunity to observe the danger, knowledge will not be imputed and liability will not follow. *Lee v. Six Flags Theme Parks,* 2914 IL App (1st) 130771.

Whether or not a defendant had actual or constructive knowledge of the dangerous condition or unsafe work practice, therefore turns upon a nature and duration of the hazard and the contractor's exposure to it.

In *Lee,* there was no evidence that "Six Flags personnel had any contact with the job site on the date of the incident, knew the platform would be removed, or that [plaintiff] would remove his fall protection gear." *Lee*, 2014 IL App (1st) 130771, ¶ 105. Likewise, in *Madden*, 395 Ill. App. 3d at 364–65, the reviewing court found as a matter of law that the defendant neither knew nor had reason to know that the plaintiff, a high school maintenance worker, would be setting up a screen in proximity to an uncovered orchestra pit. In *O'Gorman*, the plaintiff, an employee of the defendant's masonry subcontractor, stepped on a piece of wood with a nail embedded in it. While extracting the nail he lost his balance and fell through an uncovered roof hatch to the floor below. In affirming summary judgment in favor of the general contractor, the first district *inter alia* held that the defendant neither knew nor should have known of debris on the roof which could or might precipitate the type of injury which resulted. In that regard, the court held:

> In the case at bar, we note that it is not clear whether the nail was even left by Old Veteran employees or the precise day that the nail was left on the roof, as no one testified that he or she was actually present when the nail was left on the roof. Additionally, none of defendant's employees went onto the roof until after plaintiff's accident, when Swart went to the roof to try to locate the nail. Accordingly, in the absence of any evidence as to actual or constructive knowledge of Old Veteran's allegedly unsafe work methods, there can be no direct liability against defendant.

O'Gorman, 2015 IL App (1st) 133472 ¶ 101.

While it is difficult, and sometimes foolish, to synthesize the holdings in a large number of cases for the purpose of distilling a series of rules to serve as guides for future cases, the effort is probably worthwhile where, as here, the same issue is certain to arise frequently in future cases. With the preceding admonitions in mind, the following factors are juxtaposed as significant in determining whether a defendant had or lacked sufficient actual or constructive knowledge of a hazardous condition or unsafe work practice to satisfy the requirements of Section 414:

FACTORS INDICATING ACTUAL OR CONSTRUCTIVE KNOWLEDGE	FACTORS VITIATING ACTUAL OR CONSTRUCTIVE KNOWLEDGE
(1) Creation of the condition or practice;	(1) The defendant did not have a presence on the jobsite while the practice or condition existed;
(2) Defendant actually observed the condition or practice, or\	(2) The defendant was not in the vicinity and had no reason to be in the vicinity of the condition or practice;
(3) The condition or practice was longstanding and/or ubiquitous on the jobsite;	(3) The condition or practice was a singular event of short duration;
(4) There is evidence that the defendant had a supervisory employee or employees in the vicinity of the condition or practice.	(4) The condition or practice was created by the plaintiff shortly before the accident;
	(5) The condition or practice was unique or uncommon in the sense that its existence would not be expected or anticipated by the defendant.

There are undoubtedly other factors which will come to light in assessing the defendant's actual or constructive knowledge of a construction related risk. However, the overarching consideration is the understanding that the defendant's knowledge is an essential element of the plaintiff's case.

Conclusion

Since the Structural Work Act was repealed in 1995, there have been well over 60 reported decisions defining, evaluating, and delineating the boundaries of common law construction negligence under Section 414 of the Restatement (Second) of Torts. Other

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Circuit Court Lacks Jurisdiction Over Common Law Fraud Claims Where Arbitrator Previously Ruled on Fraud Defense

Other than automobile and slip and fall cases, no other area of tort law has come close to the volume of construction related appellate decisions that consider how, when, if, and under what circumstances an injured party may recover from third persons for injuries that were wrongfully caused.

than automobile and slip and fall cases, no other area of tort law has come close to the volume of construction related appellate decisions that consider how, when, if, and under what circumstances an injured party may recover from third persons for injuries that were wrongfully caused. This article and its predecessors attempt to provide a trail through an ever encroaching thicket of opinions that threaten to confound comprehension of the tort and its elements. The present contribution to that effort focuses on four areas that are central to an understanding of Section 414 as it was drafted, and as it has been and should be interpreted in Illinois. Until the Illinois Supreme Court accepts another construction negligence case, and thereby articulates the parameters of the tort, the attempt to synthesize to the law in this area is and must be ongoing.

In *ABF Freight System, Inc. v. Fretts,* 2015 IL App (3d) 130663, the Illinois Appellate Court, Third District addressed the issue of whether the circuit court had jurisdiction to hear common law fraud claims relating to workers' compensation benefits where the arbitrator previously ruled that the employer had not proven that the employee committed a fraudulent act. *ABF Freight*, 2015 IL App (3d) 130663, ¶ 6.

In 2009, Dennis Fretts filed two workers' compensation claims against his employer, ABF Trucking, alleging right shoulder injuries. *Id*. ¶ 3. Fretts was placed on restricted duty and ABF began paying temporary total disability benefits through September 15, 2011. *Id*. On September 15, 2011, ABF conducted surveillance on Fretts, which showed him lifting weights at a local gym. Furthermore, ABF also received information that Fretts was driving and receiving compensation from another trucking company, Havener Enterprises. *Id*. ¶ 4. Thereafter, on May 7, 2012, ABF brought a motion before the Commission for a determination of workers' compensation fraud. *Id*. ¶ 5.

ABF asserted that Fretts made knowing misrepresentations regarding his injuries, made knowing misrepresentations regarding the extent of his shoulder injuries and his ability to work, and was driving for Havener Enterprises. *Id.* ABF further alleged that Fretts made false and material statements regarding the nature and extent of his injuries and physical limitations. *Id*.. On May 14, 2012, one week after ABF filed the workers' compensation motion, ABF also filed a civil complaint alleging that Fretts had fraudulently obtained TTD benefits while receiving compensation from another employer, made material misrepresentations to obtain insurance benefits, and committed workers' compensation fraud under § 25.5 of the Workers' Compensation Act (Act), 820 ILCS 305/25.5. *Id*. at ¶ 7.

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An arbitrator heard ABF's motion in August of 2012. *ABF Freight*, 2015 IL App (3d) 130663, ¶ 6. Fretts admitted that he worked for Havner for a couple of days driving a flatbed and a pickup truck to Louisiana. *Id*. However, the arbitrator concluded that a few days of light duty work did not constitute a stable labor market for purposes of determining TTD eligibility. *Id*. The arbitrator denied ABF's fraud claims, concluding that ABF failed to show any statement by Fretts that was both intentional and fraudulent regarding his working for Havner while collecting TTD. *Id*. The arbitrator also concluded that ABF had not proven by preponderance of the evidence that Fretts committed a fraudulent act. *Id*.

After the arbitrator had issued the decision in the workers' compensation case, ABF amended its circuit court complaint reducing its civil claims to two counts. *Id*. ¶ 8. Count I alleged insurance fraud under the criminal code (720 ILCS 5/17-10.5(e)(1)) and Count II alleged common law fraud for misrepresentation. *ABF Freight*, 2015 IL App (3d) 130663, ¶ 8. ABF dropped the fraud claim brought under § 25.5 of the Act.

Fretts moved to dismiss ABF's amended complaint, arguing that the claim was barred under the doctrines of *res judicata* and collateral estoppel, and further, that the circuit court lacked jurisdiction to hear fraud claims relating to workers' compensation cases. *Id*. ¶ 9. The circuit court dismissed ABF's amended complaint, finding that collateral estoppel barred the claims based upon the arbitrator's written order in the workers' compensation proceeding. *Id*. ¶ 10. The appellate court affirmed, but did not need to address the issue of collateral estoppel as it found that the circuit court lacked jurisdiction to hear the complaint. *Id*. ¶ 21.

The appellate court noted that generally, the circuit courts do not have original jurisdiction in cases involving factual determinations regarding workers' compensation benefits. *Id*. ¶ 16. However, where a question of law exists, the circuit court and the Commission have concurrent jurisdiction. *Id*. ¶ 15. The appellate court then analyzed the jurisdiction issue, noting that the relevant inquiry is whether the issues in the case involve questions of law or factual issues related to the workers' compensation accident, the nature or extent of injury, or potential defenses to the workers' compensation claim. *Id*. ¶ 18. Where the issues raise a question of fact related to payment of workers' compensation benefits, the circuit court's role is "appellate only." *Id*.

The appellate court concluded that the circuit court complaint alleged theories of insurance fraud and common law fraud, which present questions of fact regarding the existence of Fretts' injury and his representations to medical personnel regarding his injury both before and during the workers' compensation proceeding. *Id*. ¶ 19. The appellate court concluded that those are questions of fact, which the Commission is in the best position to address. *Id*. ¶ 19. The appellate court concluded that the arbitrator had properly exercised jurisdiction over the fraud claims, which involved factual issues related to the employee's workers' compensation benefits. Accordingly, the circuit court lacked jurisdiction to hear ABF's fraud complaint. *Id*. ¶ 19.

The appellate court distinguished the case of *Smalley Steel Ring Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 993 (2d Dist. 2008) in which the circuit court was found to have jurisdiction to hear fraud allegations that arose subsequent to an arbitrator's decision. *ABF Freight*, 2015 IL App (3d) 130663, ¶ 20. The appellate court noted that in *Smalley*, the fraud was not discovered until after the workers' compensation decision was entered and the arbitrator had no authority to recall his decision to address the allegations of fraud discovered post-hearing. *Id*. The appellate court then stated that "where evidence of fraud is discovered after the arbitrator's decision, the appropriate forum to address the issue is in the trial court." *Id*.

The ABF decision illustrates the importance of bringing forth all available evidence of fraud during arbitration proceedings. Without a finding of fraud before the Commission the respondent will effectively be barred from seeking common law remedies for fraud.

The possibility remains that a criminal referral for fraud under § 25.5 of the Act could still be prosecuted notwithstanding a contrary decision by the arbitrator. The jurisdictional bar raised in the *ABF Freight* decision should not constitute a bar to criminal prosecution under § 25.5. Furthermore, doctrines of collateral estoppel and *res judicata* should not bar such criminal prosecutions as there would not be an identity of parties in the two proceedings. Practically speaking, however, it would be very unlikely for the fraud unit to make a criminal prosecution referral if the arbitrator and/or Commission did not make a finding of fraud.

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An Equal and Opposite Reaction: The Expanding Application of the Absolute Attorney Litigation Privilege

Counsel representing plaintiffs in actions against lawyers continue to be creative in conjuring new theories to assert against their clients' former attorneys. As a result, the absolute attorney litigation privilege has been expanded to protect defendant lawyers. Claims against attorneys now often include those brought by adverse parties in litigation whom the defendant attorney did not represent, and against whom the defendant attorney had successfully litigated. Courts have expanded the privilege beyond its original protection against defamation lawsuits related to communications made at, or preliminary to, a judicial proceeding. Most recently, in *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, the court found that the privilege applies to any action taken by an attorney in the underlying litigation so long as the conduct is "pertinent" to the representation of the client in the underlying litigation.

Basics of the Attorney Absolute Litigation Privilege

The Restatement of Torts describes the litigation privilege as follows:

> An attorney at law is absolutely privileged to publish *defamatory* matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Restatement (Second) of Torts § 586 (1977) (emphasis added).

On its face, the Restatement only immunizes an attorney when the alleged tortious act was defamation, and only when there is a judicial proceeding. However, Illinois courts have expanded the scope of the privilege to effectuate its important public-policy role.

Nine years ago, this publication featured an article on the expanding attorney's absolute privilege. Adnan A. Arain, *Fraud, Deceit and the Expanding Doctrine of Attorney's Absolute Privilege*, *IDC Quarterly*, Vol. 16 No. 4 (Fall 2006). At that time, the author accurately predicted that the doctrine would continue to expand its application. Recent decisions have noted that the privilege would be meaningless if a party could merely recast its cause of action to avoid the privilege's effect.

Public policy limits the scope of the privilege, but cases continue to apply this public policy in novel settings. The courts have since applied the privilege to communications to a potential adversary that occurred prior to litigation. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 833 (1st Dist. 2006). The privilege has been applied to claims for negligent infliction of emotional distress and breach of contract. *See Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677. Notably, the privilege has very recently been applied to a complaint filed by an attorney's opponents in prior litigation, alleging intentional infliction of severe emotional distress and strict liability for ultrahazardous activity, and seeking punitive damages. *O'Callaghan*, 2015 IL App (1st) 142152.

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Public Policy of Absolute Privilege

An attorney is obligated to zealously advocate for their client. *See* Ill. R. of Prof'l Conduct, Preamble: a Lawyer's Responsibilities (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.") Ours is an adversarial system, likely to create animosity between parties as well as statements and conduct that might otherwise be compensable under tort law. The absolute privilege allows a lawyer to zealously advocate for a client without fear that such conduct will subject the lawyer to potential liability.

To allow attorneys to meet their ethical duties to their clients, the absolute attorney litigation privilege is intended to provide attorneys with "the utmost freedom in their efforts to secure justice for their clients." *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701-02 (1st Dist. 2000) (internal quotation marks omitted) (citing Restatement (Second) of Torts § 586, comment a, at 247). This privilege also encourages and promotes a full and frank consultation between an individual and a legal advisor. *Popp v. O'Neil*, 313 Ill. App. 3d 638, 642-34 (2d Dist. 2000). The privilege also fosters a free flow of honest information to a court or disciplinary tribunal. *Edelman v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165-66 (1st Dist. 2003). Courts have also noted that limiting the privilege could "frustrate an attorney's ability to settle or resolve cases favorably for his client without resorting to expensive litigation or other judicial processes." *Atkinson*, 369 Ill. App. 3d at 833.

Additionally, the mere threat of a lawsuit arising out of a lawsuit may create a conflict between lawyer and client, as the lawyer's zealous advocacy may expose him or her to liability. This second suit, arising out of the lawyer's representation in the first, might put him or her in a position where in order to defend against the derivative suit, he or she might be pressured to disclose conversations made with the client or make the client a witness. The broad discovery rules might additionally require disclosure of attorney work product. With this important concern in mind, especially as of late, Illinois courts have regularly expanded the scope of the privilege to protect attorneys from such claims.

Courts often note the existence of remedies and sanctions within the confines of the original judicial process as an additional rationale for the absolute litigation privilege, which discourages and bars litigation about litigation. *Harris Trust & Savings Bank v. Phillips*, 154 Ill. App. 3d 574, 585 (1st Dist. 1987). As a consequence, courts are reticent to apply the privilege in instances where an attorney is acting as a third party with no connection to the lawsuit. *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶¶ 35-36 (finding the privilege inapplicable under circumstances where there are no safeguards against abuse of the privilege, *i.e.*, where the authorities do not have the ability to discipline the attorney). Courts have also held that "there is no civil cause of action for misconduct which occurred in prior litigation." *Harris Trust*, 154 Ill. App. 3d at 585. Courts therefore insist that parties attempt to redress injuries from misconduct in judicial proceedings in the same litigation through inherent judicial powers such as sanctions. *Id.*

While the absolute privilege originally protected attorneys only from lawsuits for defamation, recent cases have expanded the privilege to other causes of action. In Illinois, the list of legal theories to which the privilege has been applied includes negligent infliction of emotion distress and breach of contract.

Scope of the Absolute Privilege

This area of law is quickly evolving. In order to understand the scope of the privilege, the following must be determined: what causes of action are protected by the privilege; in what setting or forum may the privilege be raised; what is deemed to be relevant to the litigation for purposes of the privilege; whether the privilege covers statements and conduct both before and after the lawsuit; and whether the privilege covers only statements or includes conduct. *O'Callaghan*, 2015 IL App (1st) 142152, ¶¶ 24-31. When determining whether the absolute privilege should be applied to a particular communication or conduct, the courts consider whether the public policy considerations weigh in favor of expanding the privilege. *Popp*, 313 Ill. App. 3d at 642.

While the absolute privilege originally protected attorneys only from lawsuits for defamation, recent cases have expanded the privilege to other causes of action. In Illinois, the list of

legal theories to which the privilege has been applied includes negligent infliction of emotional distress and breach of contract. *Johnson*, 2014 IL App (1st) 122677, ¶ 17. The privilege has also been applied to invasion-of-privacy suits. *McGrew v. Heinold Commodities, Inc.*, 147 Ill. App. 3d 104, 114 (1st Dist. 1986). As noted above, the privilege has been expanded to prevent plaintiffs from circumventing the privilege by pleading alternative causes of action. *Johnson*, 2014 IL App (1st) 122677, ¶ 17 (finding that the privilege would be meaningless if a party could merely recast its cause of action to avoid the privilege's effect).

The privilege has been liberally applied in various settings. The communications must relate to proposed or pending litigation. *Golden v. Mullen*, 295 Ill. App. 3d 865, 870 (1st Dist. 1997). The privilege applies to communications made before, during, and after litigation. *Edelman*, 338 Ill. App. 3d at 165; *see also Stein*, 2013 IL App (1st) 113806, ¶ 33. The privilege extends to out-of-court communications between opposing counsel. *Dean v. Kirkland*, 301 Ill. App. 495, 510 (1st Dist. 1939). The privilege has been found applicable to communications between attorneys representing different parties suing the same entities. *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 317 (1st Dist. 1981). Additionally, out-of-court communications between an attorney and his or her client pertaining to pending litigation are privileged. *Weiler v. Stern*, 67 Ill. App. 3d 179, 183-84 (1st Dist. 1978). Illinois courts have allowed attorneys to invoke the litigation privilege in quasi-judicial proceedings. *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 261-62 (3d Dist. 1981). Furthermore, communications necessarily preliminary to a quasi-judicial proceeding are likewise privileged. *Parrillo, Weiss & Moss v. Cashion*, 181 Ill. App. 3d 920, 930 (1st Dist. 1989).

The courts limit the privilege to conduct that is relevant or pertinent to the litigation at hand. This pertinence requirement is not applied strictly, and the privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation. *Libco Corp.*, 100 Ill. App. 3d at 317. Furthermore, all doubts should be resolved in favor of a finding of pertinence. *Skopp v. First Federal Savings of Wilmette*, 189 Ill. App. 3d 440, 447-48 (1st Dist. 1989). The determination of pertinence is a question of law for the court. *Skopp*, 189 Ill. App. 3d at 447-48. However, "[t]he privilege, while broad in scope, is applied sparingly and confined to cases where the public service and administration of justice require immunity." *Kurczaba*, 318 Ill. App. 3d at 706.

In deciding what conduct or statements are sufficiently related to the litigation, courts will assess the purpose of those statements or actions and decide if it was related to litigation goals. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. The privilege does not cover the publication of defamatory matter that has no connection whatsoever to the litigation. *Kurczaba*, 318 Ill. App. 3d at 702. The privilege is available only when the publication was "made in a judicial proceeding; had some connection or logical relation to the action; was made to achieve the objects of the litigation; and involved litigants or other participants authorized by law." *Id.*

While plaintiffs argue that the application of the privilege may leave litigants without recourse, or allow misconduct to go unchecked, the scope of the privilege is limited by the pertinence requirement. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. Further, an aggrieved party can seek redress from the trial court in the underlying matter for, among other things, sanctions pursuant to Illinois Supreme Court Rule 219(c). *Id*.

The law is also clear that the courts are to weigh the public-policy value of the privilege against the harm to the aggrieved party. Weighing this public policy necessarily requires the court to assess how pertinent the communication or conduct was to the goals of the litigation, and thereby the social importance of that communication or conduct.

> The defense of privilege rests upon the idea "that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."

Edelman, 338 Ill. App. 3d at 164 (quoting W. Keeton, Prosser & Keeton on Torts § 114, at 815 (5th ed. 1984)).

Regardless of how pertinent the contents of the statement are to the litigation at hand, the courts analyze the relationship between the recipient of that correspondence or statement and the litigation. Therefore, a separate issue arises when the conduct or statement was directed at a third party who was not involved in the lawsuit. In general, statements between counsel for the parties in the underlying litigation will be considered pertinent to the litigation, as compared to statements to third parties. *See Dean*, 301 Ill. App. at 510 (holding that out-of-court communications between attorneys are protected). "Discussions between attorneys representing

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opposing parties should not be discouraged," as "[s]uch discussions have a tendency to limit the issues or to settle the litigation, thereby saving the time of the court." *Id.* Notably, the privilege has been applied where attorneys are not in an adversarial relationship with one another. *See Libco Corp.*, 100 Ill. App. 3d at 317 (holding that the privilege applied where an attorney sent allegedly defamatory correspondence to another attorney not involved in the litigation at issue).

However, when a statement is made to a third party not deemed to have a sufficient relationship to the dispute, the court may deny application of the privilege. *Kurczaba*, 318 Ill. App. 3d at 708 (refusing to extend the privilege to third persons who received a filed complaint, but had no participation or legal interest in the lawsuit). However, the courts have found that some third parties do have a sufficient relationship to the litigation, including a prospective client. *Popp*, 313 Ill. App. 3d at 643

Recently, and in the most recent expansion of the privilege, the Illinois Appellate Court, First District, held that an attorney's conduct, as opposed to written or verbal statements, is protected by the privilege. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. In *O'Callagahan*, the underlying dispute arose out of a complaint filed against a condominium association by a unit owner for the growth of black mold. The underlying lawsuit named the association's counsel as defendants. *Id.* ¶ 4. Ultimately, the majority of the case was dismissed, including the claims against the attorneys. *Id*.

The plaintiffs then filed an action against the attorneys for intentional infliction of emotional distress and strict liability for ultrahazardous activity and sought punitive damages. *Id*. ¶ 8. The plaintiff claimed that the attorneys failed to disclose an expert report regarding the manner in which the mold should have been handled and withheld other information that allowed the attorneys to pursue a non-meritorious defense that prolonged the underlying litigation and further manipulated the testimony of expert. *Id*. Further, the plaintiffs alleged that the defendant attorneys directed a containment barrier be removed which required the plaintiffs to obtain a court order to have the barrier re-erected. *Id*. ¶ 9.

The defendant attorneys filed a motion to dismiss pursuant to Section 2-615 of the Illinois Code of Civil Procedure. *Id*. ¶ 10. The trial court granted the motion to dismiss. *Id*. ¶ 12. In affirming the dismissal, the appellate court found that "[a]lthough Illinois generally follows the restatement, it appears that our supreme court has never expressly adopted [section 586] and all of its language." *Id*. ¶ 27. Therefore, while section 586 of the Restatement references only defamation, the court expanded the privilege to encompass conduct because it furthered Illinois policy to do so. *Id.* (citing *Ripsch v. Goose Lake Ass'n*, 2013 IL App (3d) 120319, ¶ 27). The court noted a trend in the case law on the litigation privilege that policy is furthered by disregarding arbitrary distinctions. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17. Because the conduct alleged against the defendant attorneys all related, or was "pertinent," to the representation of the clients in the underlying litigation, the privilege applied and the case was properly dismissed. *Id*.

Manner to Assert the Privilege

Although a defendant generally must plead an affirmative defense or face forfeiture, this privilege may be raised in a motion. *Fillmore v. Walker*, 2013 IL App (4th) 120533, ¶ 28. The litigation privilege may be raised as an affirmative defense that may be determined in a section 2-619 motion. *Harris v. News-Sun*, 269 Ill. App. 3d 648, 651 (2d Dist. 1995). Additionally, a defendant may properly raise an affirmative defense in a section 2-615 motion if the defense is apparent from the face of the complaint. *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). In *O'Callaghan*, the appellate court held that the privilege was properly raised in a section 2-615 motion, but that it could also have been filed as a section 2-619 motion. In preparing and filing a motion raising the absolute litigation privilege, careful review of *O'Callaghan* should be undertaken to determine under which section, or both, the motion should be brought and whether an affidavit is required.

Conclusion

The absolute litigation privilege should not be seen as a license for attorneys to violate the rules of the court or the Rules of Professional Conduct. In particular, counsel should follow Rules 3.1 (duty to only advance meritorious claims), 3.2 (duty to expedite litigation), 3.3 (candor to the tribunal), 3.4 (fairness to the opposing party), and 3.5 (decorum before the tribunal). What the absolute litigation privilege does provide is a defense to a civil action for statements made and conduct taken by an attorney in litigation. Counsel for plaintiffs will continue to assert an ever-expanding array of claims, and the privilege provides one additional defense in the panoply of defenses available to attorneys.

Recent Decisions

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Error in Denial of Substitution of Judge Voids all Subsequent Court Orders

In *In re Marriage of Crecos*, 2015 IL App (1st) 132756, the appellate court grappled with the question of whether a party in a post-decree proceeding could move for substitution of a newly assigned judge as a matter of right after the newly assigned judge had denied an emergency motion and set a briefing schedule. In the underlying case, Diana Barr-Crecos filed a petition to dissolve her marriage to Gregory Crecos. *In re Crecos*, 2015 IL App (1st) 132756, ¶ 1. The petition was heard by Judge Jeanne Reynolds, who entered an order dissolving the marriage in late 2009. *Id.*

While that case was on appeal, the parties filed post-decree petitions, which were set before Judge Raul Vega. *Id.* ¶ 7. Immediately upon assignment of the case to Judge Vega, Gregory Crecos filed an emergency motion seeking a preliminary injunction for the purposes of enforcing the parties' joint parenting agreement and to preserve the *status quo*. *Id.* Following a hearing on Gregory's motion, on July 16, 2010, Judge Vega ruled the motion was "not an emergency" and gave Diana 14 days to respond or otherwise plead. *Id.* ¶ 8. A hearing date on the petition was also set for August 11, 2010. *Id*.

Prior to the August 11 hearing, Diana filed a motion for substitution of judge as of right based on 735 ILCS 5/2-1001(a)(2). *Id*. ¶ 9. Section 2-1001(a)(2)(ii) provides that "[a]n application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties." 735 ILCS 5/2-1001(a)(2)(ii). Judge Vega denied the motion without stating any grounds. *In re Crecos*, 2015 IL App (1st) 132756, ¶ 9.

Following the filing of a new motion requesting the turnover of certain property, Judge Vega granted most of the relief that Gregory requested and entered a $746,000 judgment against Diana. *Id.* ¶¶ 10-11. Diana subsequently filed her own motion to reconsider related to the judgment, which Judge Vega denied. *Id.* ¶ 11. A wage deduction order was subsequently entered by a different judge as part of a supplementary proceeding. *Id*. ¶ 13. Diana appealed all orders entered in the post decree proceedings by Judge Vega. *Id.*

Upon review, the appellate court found that the motion for substitution was improperly denied, and therefore, reversed the order by Judge Vega thereby requiring the case to be assigned to a new judge. *Id*. ¶¶ 27, 31. The appellate court rejected Gregory's argument that Judge Vega had made a substantial ruling when he denied the emergency motion and set a briefing schedule. According to the appellate court, "[a]n order which sets a briefing schedule or a hearing date is not a substantial ruling because it is not directly related to the merits of the case." *Id*. ¶ 26. The court observed, "because Judge Vega set a briefing schedule but never held a trial or hearing and never expressed his opinion on the relief prayed for in Gregory's motion, Judge Vega made no substantial ruling on the merits of the motion." *Id*. Moreover, the appellate court found that because the order denying the motion for substitution of judge was wrongly entered, all orders that followed were void. *Id.* ¶¶ 28-29. Thus, the appellate court set aside the entry of judgment and wage deduction order. *Id*. ¶ 28.

Justices Split over Two-Year Test for Covenant Not To Compete

In *McInnis v. OAG Motorcycle Ventures, Inc.*, 2015 IL App (1st) 142644, the appellate court refused to enforce a restrictive covenant where the plaintiff, a former employee, had only worked 18 months after entry into the covenant not to compete and where there was no evidence of additional consideration for the former employee's entry into the covenant not to compete.

In *McInnis*, the plaintiff was employed at City Limits Harley-Davidson

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as a salesman from 2009 to October, 2012, when the plaintiff left City Limits to work at another Harley-Davidson dealer in Woodstock, Illinois. *McInnis*, 2015 IL App (1st) 142644, ¶¶ 3-5. The plaintiff worked only one day at the dealer in Woodstock and then asked to return to City Limits. *Id.* ¶ 5. As a condition of his re-employment with City Limits, City Limits required the plaintiff to sign an employee confidentiality agreement which included a non-competition clause prohibiting him from working for another Harley-Davidson dealer within a 25 mile radius of City Limits for a period of 18 months after leaving City Limits. *Id.* ¶¶ 5-6. In May 2014, just 18 months after the plaintiff had signed the employee confidentiality agreement, the plaintiff voluntarily resigned from City Limits and accepted a job with the Harley-Davidson dealer in Woodstock. *Id.* ¶¶ 7, 14. The plaintiff then filed a declaratory action in the circuit court seeking a judicial determination that the non-competition clause was invalid for want of adequate consideration. *Id.* ¶ 15. City Limits filed a counterclaim against the plaintiff and a third-party claim against the Woodstock dealer, and sought preliminary injunctive relief. *Id.*

The circuit court denied City Limits motion for injunctive relief finding insufficient consideration, and also a failure of the defendant to meet the high burden of proof that comes with a request for injunctive relief. *Id.* ¶ 20. In a two-to-one decision, the appellate court affirmed, finding that the 18 month period of employment following execution of the non-competition clause was inadequate for the non-complete clause to be enforceable. In reviewing the law in Illinois, the majority observed that restrictive covenants must be reasonable to be enforceable and "a restrictive covenant is reasonable only if the covenant (1) is no greater than is required for the protection of a legitimate business interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." *Id.* ¶ 26 (citing *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 17). Illinois courts consider the unique factors and circumstances of the case when determining the reasonableness of a restrictive covenant. *McInnis*, 2015 IL App (1st) 142644, ¶ 26 (citing *Millard Maintenance Service Co. v. Bernero*, 207 Ill. App. 3d 736, 745 (1st Dist. 1990)).

However, the majority added, "before even considering whether a restrictive covenant is reasonable, the court must make two determinations: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration." *McInnis*, 2015 IL App (1st) 142644, ¶ 26 (citing *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327, ¶ 13). Absent adequate consideration, even a reasonable restrictive covenant will not be enforced. *McInnis*, 2015 IL App (1st) 142644, ¶ 26.

According to the majority, Illinois courts have repeatedly held there must be at least two years of continued employment to constitute adequate consideration to support a restrictive covenant. *Id.* ¶ 27. Where a case does not involve at least two years of continued employment, courts may look at whether there was any other consideration that, when coupled with the time worked, is sufficient for the purposes of enforcing the restrictive covenant. *Id.* ¶ 36.

Here, the plaintiff had only been employed for 18 months, which fell short of the two-year mark. The appellate court majority found that the circuit court had correctly concluded there was no other consideration offered in exchange for the plaintiff's agreement to enter into the restrictive covenant. In reaching its conclusion, the majority rejected City Limit's argument that their rehiring of the plaintiff constituted the additional compensation. *Id.* ¶¶ 39-40. It further rejected City Limit's argument that additional compensation had been shown because the employer had agreed not to place the plaintiff on 90 days probation, as it did other new hires, and as a result, the plaintiff was entitled to immediate perks and benefits upon the plaintiff's rehire. *Id.* ¶¶ 41-42. The court noted there was no evidence indicating the benefits the plaintiff received any different from that which the plaintiff was receiving prior to his first departure. *Id.* ¶ 46. According to the majority, the evidence supported the circuit court's fact determination that the employment agreement was not supported by adequate consideration and was therefore unenforceable. *Id.* ¶ 49.

Justice Ellis authored a dissenting opinion arguing that the majority had misapplied the law by essentially creating a "bright-line" test at two years. Justice Ellis contended that no case had held as much, and that the two-year rule was merely a reflection of the various case holdings. *Id.* ¶¶ 60-61. Instead, Justice Ellis argued for a case-by-case analysis that would take into consideration "the amount of time plaintiff worked postcovenant, the circumstances under which plaintiff left the job, as well as any other relevant factors in the totality of the circumstances." *Id.* ¶ 56. Moreover, he said, "[i]n this case, given that plaintiff worked postcovenant for what I consider to be a substantial amount of time—18 months—and given that he left of his own accord, I would find that sufficient consideration

exists for the restrictive covenant in this case." "I would reverse the trial court's ruling and remand for consideration of the remainder of the analysis governing restrictive covenants." *Id*. Justice Ellis also believed that the concept of additional consideration in exchange for the restrictive covenant could apply to a newly hired employee. "The salary is whatever they are offered. The vacation time is whatever they are given. The job they are offered is the job they are offered. There is no such thing as a 'raise' when the individual did not have a salary in the first place. They cannot be given 'more' vacation time when they did not have vacation time at all. They cannot be promoted from a position they do not presently hold." *Id*. ¶ 75.

Whether General Release Extends to Legal Malpractice Claim is an Issue of Fact

In *Construction Systems, Inc v. FagelHaber*, *LLC*, 2015 IL App (1st) 141700, the appellate court interpreted the scope of a release to settle an attorney fee dispute and asked whether it also included a potential legal malpractice claim that existed at the time the release was executed. The plaintiff, Construction Systems, was a steel fabrication business that provided material and labor on a construction project and began its work on a building in Chicago. After working on the project for a time, it stopped work due to a failure to receive payments. Construction Systems then retained the law firm of FagelHaber to record its $3,146,000 lien, protect its interests under the Illinois Mechanics Lien Act (770 ILCS 60/1), and to collect payment on the balance owed. *Construction Systems*, 2015 IL App (1st) 141700, ¶¶ 3-6.

FagelHaber performed some legal work and also represented Construction Systems in separate litigation referred to as the "Pinnacle litigation," which also involved Construction Systems' lien, among others. FagelHaber did not, however, serve the mechanics lien on the interested party and did not list Construction Systems on the recorded lien. *Id*. ¶ 8. Construction Systems became dissatisfied with FagelHaber's representation, retained other counsel, and obtained a court order allowing the withdrawal of FagelHaber as counsel. As part of the withdrawal order, FagelHaber was required to turn over its file on the case; however, it did not and stated it would not return the file until the question of legal fees was resolved. At no time did HagelFaber disclose to Construction Systems that it did not serve or properly record the mechanics lien.

As part of Construction Systems' negotiations to resolve the outstanding legal fees following HagelFaber's withdrawal as counsel, the parties executed a general settlement release relating to the fee dispute. The release stated:

> Disputes and disagreements have arisen between FagelHaber and [Construction Systems], including, without limitation, with regard to the Indebtedness. FagelHaber and [Construction Systems] desire to compromise and settle all disputes and disagreements between them, including, without limitation, the payment and satisfaction of the Indebtedness ***.

Id. ¶ 10.

The release then provided details of the settlement with dates and amounts of the payments agreed to by the parties, and noted that "upon receipt of the first payment, FagelHaber would release all remaining documents in the case file." *Id*. The release provided:

> [Construction Systems] *** does hereby fully remise, release and forever discharge FagelHaber *** of and from any and all claims, demands, actions, causes of action, suits, *** existing at the date hereof or hereafter arising, both known and unknown, foreseeable and unforeseeable, *** arising from or in connection with any matter, *** including, without limitation, any Claims in connection with the legal services provided by FagelHaber to [Construction Systems] or the Indebtedness.

Id. While these fee negotiations were being resolved, Construction Systems moved for summary judgment in the Pinnacle litigation seeking to determine the priority of its mechanics lien with respect to a mortgage held by Cosmopolitan Bank. The circuit court denied the motion, finding that notice of lien was not provided to Cosmopolitan. Construction Systems then settled the Pinnacle litigation for $1,825,000. *Id*. ¶¶ 11-12.

Construction Systems filed a legal malpractice claim against FagelHaber

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alleging that as a result of FagelHaber's failure to perfect its lien, it was subordinate to other liens and suffered a loss of $1,321,200. FagelHaber moved for summary judgment claiming that the general release signed by the parties as part of the fee dispute barred all claims relating to both fees and legal services. *Id*. ¶ 13. The circuit court granted the motion for summary judgment, finding that the release barred all known and unknown claims, including those for legal malpractice.

On appeal, the Appellate Court, First District, reversed, finding that a release will not be construed to defeat a valid claim that was not contemplated by the parties at the time the agreement was executed and further finding that general words of release are inapplicable to claims that were unknown to the releasing party. *Id*. ¶ 26 (citing *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991)). According to the court, "[n]o form of words, no matter how all encompassing, will foreclose scrutiny of a release [citation] or prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties." *Construction Systems*, 2015 IL App (1st) 141700, ¶ 26 (citing *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 839 (4th Dist. 1995)). Thus, the appellate court found, "where the releasing party is unaware of other claims, general releases are restricted to the specific claims contained in the release agreement." *Construction Systems*, 2015 IL App (1st) 141700, ¶ 26.

The court further explained:

> Here, although the release was broadly drafted to include phrases such as "without limitation" and general language purportedly barring any claims, "known and unknown," in connection with legal services provided by FagelHaber, the only claim referenced in the release was the outstanding balance owed for legal fees. In fact, "the Indebtedness" is mentioned more than half a dozen times in the release. The release provided that Construction Systems would pay a total of $60,000 in three separate installments of $20,000 each and, in exchange, FagelHaber would release the client file upon timely receipt of the first payment.

Id. ¶ 27.

Moreover, the appellate court noted that FagelHaber was certainly aware after it performed the second tract index search that Cosmopolitan was an interested party at the time the lien was filed and that Cosmopolitan was not included either on the notice of lien or the recorded lien. "Thus, it is likely that FagelHaber either knew or should have known at the time the release was executed that Construction Systems had a potential legal malpractice claim." *Id*. ¶ 28.

As the court noted, there was no indication in the record that FagelHaber ever informed its client of the failure to perfect the lien as against the lender's interest. *Id*. It further noted that "although a law firm crafting a release in an effort to protect itself from all potential claims may have contemplated certain other claims, such an undisclosed intent does not bring those claims within the contemplation of both parties." *Id*. Moreover, where, as here, a fiduciary relationship exists between the parties, "the defendant has the burden to show that a full and frank disclosure of all relevant information was made to the other party." *Id*.

The appellate court pointed out there was "no evidence to suggest Construction Systems contemplated a potential legal malpractice claim at the time the release was executed." *Id*. ¶ 31. In fact, Construction Systems was not satisfied with the progress of the lawsuit filed to enforce its lien and thought FagelHaber was billing excessive amounts. As a result, Construction Systems then retained substitute counsel but, despite a court order to turn over the client file, FagelHaber withheld the file because of a dispute over fees. The court concluded, "[g]iven that FagelHaber's alleged legal malpractice resulted in a claimed loss of $1.3 million, it is highly unlikely that Construction Systems — in exchange for a $20,000 reduction in legal fees — would have agreed to release its legal malpractice claim. There is, at a minimum, a genuine issue of material fact on this point." *Id*.

Given the language of the release and the surrounding circumstances, the court found a genuine issue of material fact existed regarding whether legal malpractice claims were within the contemplation of the parties at the time the release was executed. Therefore, the court held the circuit court erred in granting summary judgment in favor of FagelHaber on the basis of the release. *Id*. ¶ 34.

Civil Rights Update

John P. Heil, Jr.
Heyl, Royster, Voelker & Allen, P.C., Peoria

Botched Investigation or Cover-Up? Either Way, It May Not Be a Constitutional Violation

Cases labeled as "police cover-ups" are common in Section 1983 litigation. They also attract headlines and, potentially, significant verdicts. Sometimes lost in the din, however, is the fact that a "cover-up"—like ineffective policing—does not automatically amount to a violation of a federal constitutional right. The Seventh Circuit's recent opinion in *Rossi v. City of Chicago*, 790 F.3d 729 (7th Cir. 2015), illustrates this point well.

Facts and Procedural History

The allegations in *Rossi* are salacious enough to warrant headlines. James Rossi, the plaintiff, was summoned to meet with Jose Garcia, the president of a trucking company, at the company's office. *Rossi*, 790 F.3d at 732. This made sense to Rossi, since Garcia owed Rossi for some work he had previously performed. *Id.* Unfortunately for Rossi, Garcia's invitation had nothing to do with back pay. Upon his arrival, Rossi was bound with an electrical cord and duct tape and beaten repeatedly by Garcia, Garcia's brother and two other goons. *Id.* He was questioned about the whereabouts of a Bobcat construction vehicle which was missing from the company's yard. *Id.* Three hours into this process, a Chicago police officer arrived at the yard. Although usually a positive sign, on this day it was not. The officer, Catherine Doubek, was Garcia's wife. *Id.* According to Rossi's complaint, Doubek made a dramatic show of removing her badge and allowing the interrogation and beating to continue. *Id.* Rossi further alleged that Doubek assumed the role of lookout and, over the next several hours, used her radio to monitor police activity in the area. *Id.*

Early the next morning, Doubek was the only person guarding Rossi. He managed to dupe her into believing that the Bobcat was hidden on the other side of town. She left him alone to investigate. *Id.* With Doubek on a wild goose chase, Rossi was able to bite through his restraints and escape to a neighbor's house. He was transported to the hospital and the police were notified. *Id.* at 733.

The detective assigned to the case met with Rossi in the hospital and, Rossi alleged, only interviewed him for five minutes. *Id.* During the interview, Rossi told the detective that a Chicago police officer was involved in the incident. He mistakenly assumed that Doubek shared the same last name as her husband, and thus identified her as "Officer Garcia." *Id.* Over the next three days, Rossi learned the identities of each of his assailants. He called the investigating detective but was forced to leave a message. Rossi's message included the name "Catherine Doubek" and Doubek's home address. *Id.* Upon receiving Rossi's detailed message, the detective allegedly did nothing. *Id.* According to the Seventh Circuit's opinion, he failed to confirm through the police database that an Officer Catherine Doubek existed, failed to locate or question any of the suspects, failed to visit the construction yard where the incident took place, failed to look for witnesses, and even failed to return Rossi's phone calls. *Id.* Several weeks later, the detective allegedly filed a report with Officer Doubek's name misspelled, stating that he was unable to find any such person on the police roster. He requested that the investigation be suspended. *Id.* Since a police officer was alleged to have committed a crime, an Internal Affairs investigator reviewed the file as a matter of course. He, too, made little effort and quickly closed the file for lack of evidence. *Id.*

Frustrated by a lack of police assistance, Rossi contacted the media and shared his story. *Id.* Faced with news reports of a police cover-up, the Chicago

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About the Author

John P. Heil, Jr. is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's drone law practice group and is vice-chair of the business and commercial litigation practice group. He also regularly defends complex civil rights cases, *qui tam* actions and catastrophic tort suits in state and federal court. Prior to joining *Heyl Royster* in 2007, Mr. Heil was an Assistant State's Attorney in Cook County for eleven years. He received his undergraduate degree from Bradley University in 1993 and his law degree from Chicago-Kent College of Law, with honors, in 1996. He is a member of the Illinois Association of Defense Trial Counsel, the Federal Bar Association, the Illinois State Bar Association, the Peoria County Bar Association, and the Abraham Lincoln American Inn of Court.

Police Department launched a thorough investigation. Now five months after the incident, most of the physical evidence corroborating Rossi's account was lost. *Id.* Nevertheless, prosecutors were still able to secure convictions against Garcia and his brother for aggravated battery and unlawful restraint. *See People v. Garcia*, 2011 IL App (1st) 102519-U; *People v. Garcia*, 407 Ill. App. 3d 1187 (1st Dist. 2011) (Jose Garcia's conviction repeatedly affirmed in Rule 23 Orders). Officer Doubek was neither charged criminally nor disciplined by the police department. *Rossi*, 790 F.3d at 734.

Rossi sued his assailants, including Doubek, and received a settlement. *Id.* He then turned his attention to the investigating detective and the City of Chicago (the proper party for a suit against the police department). Pursuant to 42 U.S.C. § 1983, Rossi alleged that the detective's failure to investigate interfered with his right to judicial access, a constitutional claim under the First and Fourteenth Amendments. *Id.* He also raised a *Monell* claim against the City, alleging that the inadequate investigation was the result of "a 'code of silence' that shields police officers from investigation and promotes a culture of misconduct among police that contributed to his assault." *Id.* The district court granted summary judgment for the defendants. It also awarded the City its costs as the prevailing party. Rossi appealed both orders. *Id.*

The Seventh Circuit's Analysis

On appeal, Rossi argued that the detective violated his right to judicial access by failing to investigate the crime and by intentionally concealing Officer Doubek's identity. *Id*. The Seventh Circuit first noted that, pursuant to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) and its progeny, Rossi did not have a constitutional right to any police investigation at all. *Rossi*, 790 F.3d at 735. Thus, the real issue was "not whether Rossi's case would have been better had the police conducted a worthy investigation, but whether their failure to do so limited his ability to obtain legal redress to such degree that it constituted a denial of judicial access." *Id.* The court discussed two cases, which represented opposite extremes, to illustrate its analysis.

The first case, *Bell v. City of Milwaukee*, 746 F.3d 1205 (7th Cir. 1984), involved egregious conduct that effectively denied the plaintiff access to the courts. *Rossi,* 790 F.3d at 735. In *Bell*, police officers shot and killed Daniel Bell. They then planted a knife on Bell and fictitiously claimed that Bell had threatened them with it. *Id.* Bell's father timely filed a wrongful death suit against the City in state court, but when an internal investigation cleared the officers of wrongdoing, the father elected to settle his lawsuit for "a meager sum." He refused to accept the check. *Id.* Two decades later (and long after the death of Bell's father), the truth about the officers' conduct finally came to light. *Id.* Bell's family filed a Section 1983 suit, resulting in a jury award of substantial damages. *Id.* On appeal, the Seventh Circuit recognized a constitutional violation for denial of judicial access because the decades-long cover-up "effectively foreclosed the ability of Bell's father to learn the facts of his case and to seek relief for any injury." *Id.* Since the period of limitations on the wrongful death claim ran (and, of course, Bell's father passed away), "the possibility of timely legal redress had been permanently thwarted by the cover-up." *Id.* at 736.

The second case, *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), which also involved a police cover-up, led to a far different result. In *Vasquez*, the plaintiff, a young girl, was wounded in the ear by a shot fired by her intoxicated neighbor, an off-duty police officer. *Rossi*, 790 F.3d at 735. An ensuing police investigation, which the court characterized as "half-hearted," found nothing. *Id.* Soon thereafter, however, a task force comprised of state and federal officials re-investigated the incident and identified the officer as the shooter. The victim was thus able to file a tort action against her neighbor before the limitations period expired. *Id.* The victim's attempt to pursue a Section 1983 case against the original investigators for denial of judicial access was less successful. On appeal to the Seventh Circuit, the court concluded that the delay caused by the purported cover-up, although frustrating to the plaintiff and her family, was not of a constitutional magnitude. *Id.* at 736. Unlike in *Bell*, the cover-up in *Vasquez* did not prevent the plaintiff from receiving legal redress—it merely delayed the process. And, in light of the detailed facts uncovered by the task force, the delay may actually have aided the victim's case against her neighbor. *Id.*

Unsurprisingly, the Seventh Circuit concluded that the facts of Rossi's case more closely resembled those in *Vasquez* than *Bell*. *Id.* As in *Vasquez*, the inadequate police investigation (alleged to be a cover-up) did not so harm Rossi's litigation posture as to preclude adequate relief. *Id.* Crucially, the detective did not

As succinctly stated by the court, "Rossi was not denied judicial access because he knew all of the relevant facts of his case and was free to pursue legal redress at all times."

conceal any facts that were not already known to Rossi. Rossi witnessed the entirety of the underlying criminal activity, and thus, was never dependent upon the detective or other police officials to provide him with additional facts or evidence necessary to prevail in a lawsuit. *Id.* As succinctly stated by the court, "Rossi was not denied judicial access because he knew all of the relevant facts of his case and was free to pursue legal redress at all times." *Id.* Also similar to *Vasquez*, a subsequent "real" investigation—completed late but within the limitations period—effectively buoyed Rossi's suit against his assailants. *Id.* Since Rossi was unable to establish a violation of his constitutional right to judicial access, the detective was entitled to qualified immunity. *Id.* at 737.

Rossi's *Monell* claim against the City fared no better. He argued that the inadequate police investigation was either the product of a widespread practice to allow police officers "to consort with convicted felons despite an official policy prohibiting such associations" or an entrenched "code of silence" in which the police department failed to train officers as to ethical conduct. *Id.* The Seventh Circuit rejected the first theory as a non-starter: no evidence supported the notion of a widespread practice of inappropriate relationships by the police in violation of official policy. *Id.* at 737-38. The court characterized the "code of silence" theory as supported by "serious questions about accountability among police officers." *Id.* at 737. Nevertheless, the facts as developed in this case, at most, tracked the conduct of a couple of individual officers. *Id.* at 738. Under *Monell*, a plaintiff must demonstrate the existence of a "*widespread practice* that permeates a critical mass of an institutional body." *Id.* at 737 (emphasis in original). Rossi failed to do that here. His limited efforts included offering three expert reports from another case. *Id.* at 738. The Seventh Circuit affirmed the district court's rejection of the reports because Rossi failed to disclose them to the defense in accordance with Federal Rule of Civil Procedure 26(e)(2). *Id.* Rossi's other efforts to tie up his *Monell* claim were likewise unavailing, and the court affirmed summary judgment on behalf of the City. *Id.*

Finally, Rossi appealed the district court's decision to award the City its costs, as the prevailing party, pursuant to Rule 54(d)(1). Rossi argued that he was unable to pay the $7,443 award. The Seventh Circuit was unsympathetic in light of Rossi's complete failure to include evidence supporting his claimed financial hardship. It affirmed the district court's order. *Id.*

Conclusion

The *Rossi* decision reminds us that even salacious fact patterns suggesting a cover-up on the part of police officials may not rise to the level of a federal constitutional violation. Without actual harm to the plaintiff's ability to pursue legal redress for his injuries, the conduct of individual officers is of little moment. Practitioners should determine whether the plaintiff was ultimately deprived of his day in court. If, as in *Rossi*, that day was merely delayed, then one can successfully defend a "police cover-up" case predicated on the First and Fourteenth Amendments.

The court characterized the "code of silence" theory as supported by "serious questions about accountability among police officers." Nevertheless, the facts as developed in this case, at most, tracked the conduct of a couple of individual officers. Under *Monell*, a plaintiff must demonstrate the existence of a "*widespread practice* that permeates a critical mass of an institutional body."

Evidence and Practice Tips

Joseph G. Feehan and **Brad W. Keller**
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Establishing an Affirmative Matter Under Section 2-619(a)(9)

In *Doe v. University of Chicago Medical Ctr.*, 2015 IL App (1st) 133735, the Illinois Appellate Court, First District, reversed the dismissal of a complaint under 735 ILCS 5/2-619(a)(9) (1983) (section 2-619(a)(9)). The opinion provides a useful discussion of the general principles of section 2-619 and more specifically, of the principles governing section 2-619(a)(9) motions to dismiss based on the presentation of "affirmative matter."

Facts

The plaintiff in *Doe* was a female phlebotomist at the University of Chicago Medical Center in Chicago. The plaintiff worked the night shift at the hospital. In exchange for working the night shift, and in light of the safety concerns in the area at issue, the defendant hospital made various promises regarding parking, transportation between her vehicle and the hospital, and security assistance in getting to her vehicle. *Doe*, 2015 IL App (1st) 133735, ¶ 6. Among those promises were that the plaintiff would have access to the SafeRide or escort services that the hospital had provided to night shift employees. The hospital had also allegedly promised to provide adequate parking in close proximity to the hospital, well-lit parking and walking areas, and security desks manned by security personnel at all times of night so that plaintiff could request these services. *Id.* ¶¶ 5-7.

At around 9:00 p.m. on February 16, 2009, the plaintiff was leaving work and wanted assistance in reaching her vehicle, which was parked several blocks away. She went to a security desk in the hospital to request a ride or escort, as she claimed had been instructed to do, but found no one there or in the vicinity. Eventually, she decided that no security was there to assist her and proceeded to her vehicle. As she was making her way to her vehicle, she was beaten and raped. *Id.* ¶ 8.

Procedural Background

The plaintiff filed suit against the hospital and the University of Chicago following the incident. Her complaint included a claim that the defendants had voluntarily undertaken a duty to provide assistance to plaintiff in getting her safely to her vehicle from work, and had failed to do so on the night of February 16, 2009. It also included a claim that the promises from the defendants established a contract that defendants breached when not complying with those promises. *Id.* ¶ 11.

Thereafter, the defendants filed a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(9), complete with an affidavit from their director of safety. *Doe*, 2015 IL App (1st) 133735, ¶ 2. The defendants claimed that the plaintiff had not requested security assistance on the night at issue, that she could have done so by personal phone or emergency phone, and that they had not promised the plaintiff that security would be present at the security desk that she visited that night on a 24-hour basis. The director of safety was later deposed on these issues. *Id.* ¶¶ 13-14, 22.

The plaintiff thereafter responded to the defendants' motion to dismiss, arguing that the defendants had merely offered information contradicting the factual allegations of her complaint. She argued that the defendants had not provided any "affirmative matter" under section 2-619(a)(9) that defeated her claim. She further filed an affidavit stating that the allegations of her complaint were true, that she had been instructed to request a SafeRide or escort at a security desk, and that she had not been told to

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request a SafeRide or escort by phone (and actually had been affirmatively told not to do so). *Id.* ¶¶ 24-26.

Following the hearing on defendants' motion to dismiss, the court granted the defendants' motion and dismissed the case. The plaintiff then filed a motion to reconsider, which was also denied. *Id.* ¶¶ 28-32.

The hearing on the motion to dismiss was addressed in detail in the first district's decision. At the hearing, the trial court judge had made it clear that he was treating the defendants' motion as a motion for summary judgment because section 2-619 is analogous to a motion for summary judgment. The trial court judge then, on numerous occasions, pressed the plaintiff's attorney regarding what evidence there was to support the allegations of voluntary undertaking. The trial judge made it clear during his comments that he did not feel an evidentiary record for the promises alleged in the complaint had been established. *Id.* ¶¶ 28-31.

First District's Analysis

On appeal, the first district reversed the trial court's dismissal of the plaintiff's complaint finding that the claims were not negated by the alleged "affirmative matter" presented by the defendants. *Id.* ¶ 64. The court also explained that the trial court had erred by considering the section 2-619 motion the same as a summary judgment motion. *Id.* ¶ 48.

Discussion of Application of 735 ILCS 5/2-619(a)(9)

In its opinion, the appellate court discussed the general principles associated with section 2-619 motions. The court explained that a section 2-619 motion admits the legal sufficiency of the complaint, but asserts a defense that defeats the claims therein. Further, the court deciding a section 2-619 motion is to accept all well-pled facts as true and is to draw whatever inferences may be reasonably drawn in favor of the plaintiff. *Id.* ¶ 35.

"Affirmative matter" must do more than refute a well-pled fact in plaintiff's complaint. "Affirmative matter," instead, either negates an alleged cause of action completely or refutes certain conclusions that are unsupported by allegations of fact contained within or inferred from the complaint.

Section 2-619(a)(9) motions are brought when a defendant believes the plaintiff's claim is barred by other "affirmative matter" avoiding the legal effect of or defeating the claim. A defendant has the burden of establishing that the "affirmative matter" stated defeats the plaintiff's claim. Once the defendant has met that burden, the burden shifts to plaintiff to show that the defense is unfounded or requires resolution of a material fact. *Id.* ¶ 37.

What constitutes "affirmative matter" is often a subject of debate. "Affirmative matter" must do more than refute a well-pled fact in plaintiff's complaint. *Id.* ¶ 39. "Affirmative matter," instead, either negates an alleged cause of action completely or refutes certain conclusions that are unsupported by allegations of fact contained within or inferred from the complaint. *Id.* ¶ 38. The court expounded on this discussion by explaining that the difference between proper and improper section 2-619 motions is typically explained by references to "yes but" and "not true" motions. A "not true" motion merely refutes a well-pled allegation in a complaint, and is not a proper section 2-619 motion. *Id.* ¶ 40. On the other hand, a "yes but" motion accepts the well-pled allegations of the complaint but asserts a defense that nevertheless defeats the claim made therein. *Id.* ¶¶ 38-41.

Finally, the court commented on the similarities and differences between a section 2-619 motion and a motion for summary judgment. *Id.* ¶ 42. It explained that with both types of motions, a finding that there is a genuine issue of material fact precludes judgment for the moving party. Further, under both types of motions, if the moving party puts forth sufficient evidence to entitle it to judgment, the burden shifts to the non-moving party to counter that evidence. *Id.* However, importantly, the motions are different in that a party may not rely solely on the complaint to oppose a motion for summary judgment. In contrast, in a section 2-619 motion, the well-pled allegations of the complaint are at issue

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and the question is whether a valid cause of action exists under the complaint. *Id.* ¶¶ 42-43.

Application to Case

After establishing the legal principles associated with section 2-619(a)(9) motions, the first district focused on the application of those principles to this case.

The appellate court first explained that the trial court had erred in treating the defendants' motion as one for summary judgment. *Id.* ¶ 48. The trial court had not only repeatedly demanded an evidentiary foundation for allegations in the complaint, but had also told counsel that they were "not at the pleading stage." *Id.* The court felt this was error, stating that the plaintiff was in fact at the pleading stage, and that, at most, she was required to counter the evidence presented in the safety director's affidavit and deposition (assuming it was in fact "affirmative matter"). *Id.* ¶¶ 48-50.

The appellate court then moved on to consideration of whether the evidence presented by the defendants was "affirmative matter" under section 2-619(a)(9). The defendants had presented evidence that the security guard desk at issue had not been manned since 1990. They had further presented evidence that the plaintiff did not request an escort or SafeRide on the night of the accident and could have done so through her cell phone, a security phone, or an emergency phone nearby. *Id.* ¶¶ 51-55.

As to the evidence that the security guard desk had not been manned since 1990, the defendants argued that it provided proof that defendants would not have promised the plaintiff that all security desks would be manned throughout the night. The appellate court explained that the evidence did nothing to change the fact that the plaintiff had in fact alleged that such a promise was made to her and that the court was required to accept that allegation on a section 2-619 motion. *Id.* ¶ 52. To this end, the court explained that the defendants had only provided evidence contradicting a well-pled allegation of plaintiff's and had not alleged "affirmative matter." *Id.* ¶¶ 51-52.

As to the evidence regarding the availability of nearby phones, the court again explained that the evidence only refuted the plaintiff's allegations regarding the promises made to her. *Id.* ¶ 53. The plaintiff alleged that she was promised she could make an in-person request and the fact that the defendants provided evidence she could have made one by phone did nothing to negate her allegation. *Id.* ¶ 54. It further explained that a section 2-619 motion is not the place to argue one party's version of the alleged promise against the other party's version. *Id.* ¶¶ 53-54.

[T]he court found a genuine issue of material fact existed regarding the scope of the promises made to plaintiff by defendants. The court found that because defendants had not presented affirmative matter under section 2-619(a)(9), the burden had never shifted to the plaintiffs. The court went on to claim that even if the burden had shifted, the plaintiff created a question of material fact through her affidavit ...

On these bases, the court found a genuine issue of material fact existed regarding the scope of the promises made to plaintiff by defendants. *Id.* ¶ 55. The court found that because defendants had not presented affirmative matter under section 2-619(a)(9), the burden had never shifted to the plaintiff. *Id.* ¶ 56. The court went on to claim that even if the burden had shifted, the plaintiff created a question of material fact through her affidavit, which stated she had actually been told she could not use a phone to contact security. *Id.* ¶ 55.

Conclusion

Section 2-619 motions, and more specifically what constitutes "affirmative matter" under section 2-619(a)(9), are frequently misunderstood. The *Doe* case provides an interesting and informative discussion of the principles associated with such motions. It is useful to any defense attorney considering a dispositive motion under that section.

Young Lawyer Division

Elizabeth K. Barton
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago

Young Lawyer Division: Looking Forward to Another Great Year!

First, I would like to recognize my predecessor, Greg Odom of *Hepler-Broom*, for his outstanding efforts this past year. He was recognized this summer as an IDC Rising Star, and he certainly proved himself worthy of the title. Under his leadership, the Young Lawyer Division (YLD) continued to make meaningful contributions to the IDC and legal community as a whole. Greg successfully organized events such as the elementary school mock trial program, continuing legal education programs, and social and charitable events. As the baton is passed to me, I will strive to maintain his level of enthusiasm and dedication to the YLD.

I have recently been reflecting on my experience with IDC, and I remember attending my first YLD event (at The John Marshall Law School in Chicago) two years ago. I signed up to be a member the very next day because I had been wildly impressed with the YLD members' level of professionalism, teamwork, and effort. At that time in my life, I was an associate at a new firm and a parent of a toddler. For obvious reasons, I had concerns about time management, work-life balance, and whether I would really have enough time to actively participate in YLD. That evening, however, I met passionate young lawyers with schedules just as busy as mine who had somehow found the time to meaningfully participate in YLD events.

I frequently hear from young lawyers that they simply do not have enough time. They have the best of intentions and want to participate, but between billable hour requirements, families, and (hopefully) a social life, young lawyers find it difficult to carve out time for bar associations. After all, the time spent at YLD events most likely does not count toward your billable hour requirement, and we have such little free time. However, I have found over the last two years that being a part of the YLD and IDC in general has so many benefits.

When I can, I explain to these busy young lawyers that the IDC is not like any other bar association. IDC is wonderful community of bright and dedicated attorneys who practice all over the state. The biggest draw for me is that it is a group of attorneys focused on defense work and litigation. The benefit to being a part of this narrowly tailored organization is that you are surrounded by people who understand you and your practice, so when you meet someone new at an IDC event, you already have plenty in common. The members are available to discuss and impart advice on difficult cases or clients, educate you on current issues facing the Illinois defense bar, and most importantly, help build your network. Taking the time to build and cultivate a network is one

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> [M]y message to all young lawyers is to find an hour or two every week to really invest in your professional self and your career. I encourage you to find ways to participate and really get to know people around you because you never know how that person will benefit your career. You can easily find these opportunities within the YLD.

About the Author

Elizabeth K. Barton is an associate with the Chicago office of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.*, where she is a member of the firm's litigation group. Her practice is focused on defending government entities in civil litigation, with a primary emphasis in the defense of Section 1983 allegations of police misconduct. Ms. Barton received her J.D. from The John Marshall Law School and her undergraduate degree from the University of Iowa, with honors. Ms. Barton is a member of the IDC Young Lawyers Division.

of the most important things a young lawyer can do.

So, my message to all young lawyers is to find an hour or two every week to really invest in your professional self and your career. I encourage you to find ways to participate and really get to know people around you because you never know how that person will benefit your career. You can easily find these opportunities within the YLD.

One last point I would like to make is that even though as young lawyers we are still beginning our careers, we must remember to mentor new graduates and newer associates. Be a leader, and encourage them to come with you to events. After all, someone probably did that for you, so it is important pay it forward!

In closing, what can YLD members look forward to this year? We have lots of exciting events planned for this year. Our goal is to host quarterly YLD social events and find creative ways to incorporate charitable donations into the events. We already had a great "Back to School" event on September 9. Through adoptaclassroom.org, we raised money for the 4th and 5th grade classes of Ruiz Elementary School in Chicago, who were seeking reading materials, including books, magazines and even a Kindle Fire. It was a great event, and we were able to make a substantial donation for the students.

The YLD also has a few continuing legal education seminars that are in the early planning stages. We encourage all IDC members to volunteer and participate in events.

The YLD also has a few continuing legal education seminars that are in the early planning stages. We encourage all IDC members to volunteer and participate in events. If you are interested in sharing some of your valuable time, reach out to me. We're looking forward to yet another successful year for YLD.

Association News

Baker-Seal, Russell and Samuelson Appointed to IDC Board of Directors

The IDC Board of Directors appointed three new members to the Board recently.

Denise Baker-Seal of *Brown & James, P.C.* in Belleville was appointed to serve as a Director at Large. Ms. Baker-Seal's term will expire in June 2016.

Denise joined *Brown & James, P.C.*, in 2000. Her practice has focused on employment cases, as well as catastrophic injury cases. She frequently represents employers and other businesses, including product manufacturers, truck lines and property owners. A life-long resident of central Illinois, Denise also participates as an arbitrator in the St. Clair County (IL) and Madison County (IL) mandatory arbitration program. Prior to entering private practice, Ms. Baker-Seal served as the Judicial Law Clerk to the Honorable Lewis M. Blanton, U.S. Magistrate Judge for the U.S. District Court for the Eastern District of Missouri. Ms. Baker-Seal is the Chair of the IDC Employment Law Committee. She is admitted to practice in Illinois and Missouri, as well as the U.S. Court of Appeals for the Seventh Circuit and several U.S. district courts in IL and MO.

Ian J. Russell of *Lane and Waterman LLP*, Davenport, was appointed to fill the unexpired term of William K. McVisk, who was elected IDC Secretary Treasurer in June. Mr. Russell's term will expire in June 2017.

Ian joined *Lane and Waterman LLP* in 2005 and focuses his practice primarily in commercial and civil litigation, medical malpractice defense, personal injury, intellectual property, election law, and aviation matters. He also has experience in general business counseling and media law. He represents clients in both Iowa and Illinois state and federal courts.

Ian is an AV rated attorney and a past President of the Iowa State Bar Association Young Lawyers Division. He was named a Super Lawyers Great Plains Rising Star for 2014. He is currently representing the Seventh Judicial District of Iowa at the Iowa Bar Association Board of Governors. He was recently appointed by the Iowa Supreme Court to serve on the Commission on the Unauthorized Practice of Law. He is a member of the Iowa State Bar Association, Defense Research Institute, American Bar Association, Illinois State Bar Association, Iowa Defense Counsel, Iowa Association of Justice, and the Illinois Association of Defense Trial Counsel.

Ian is active in the Quad Cities and Eastern Iowa community, previously serving as President of the Friends of the Davenport Library and currently serving as a board member of the Downtown Davenport Partnership Board and of the Ronald McDonald House Charities of Eastern Iowa and Western Illinois. He also currently serves as the campaign treasurer for a United States congressional campaign.

Ian received his B.A. from Lawrence University. He received his J.D. with distinction from the University of Iowa College of Law. He resides in Bettendorf, Iowa.

Benjamin J. Samuelson of *Betty, Neuman & McMahon, P.L.C.*, Davenport, was appointed to serve as a Director at Large. Mr. Samuelson's term will expire in June 2016.

Ben is a partner at *Betty, Neuman and McMahon* who has maintained a civil litigation practice in western Illinois

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and eastern Iowa for fifteen years. The broad civil litigation practice includes an increasing emphasis on defending medical and hospital negligence plus a wide variety of cases in both states including construction litigation, dram shop claims, products liability and commercial disputes. After earning bachelor of art degrees in economics and religion from the University of Iowa in 1997 he earned a J.D. from Loyola University Chicago in 2000. Following graduation from law school he returned home to the Quad Cities to practice.

He sits on the Rock Island County Bar Association Board of Managers and serves on multiple boards including the Public Interest Law Initiative (PILI) for the 14th Judicial Circuit and Moline Soccer Club. In 2013 he received the Thomas L. Kilbride Award from the Rock Island Bar Association for *pro bono* work.

IDC Attends DRI Annual Meeting

Members of IDC recently attended the DRI Annual Meeting in Washington, D.C. Attending were President **Troy Bozarth**, *HeplerBroom LLC*, President Elect **Mark Mifflin**, *Giffin, Winning, Cohen & Bodewes, P.C.*, First Vice President **Michael Resis**, *SmithAmundsen LLC*, Secretary/Treasurer **Bill McVisk**, **Johnson & Bell, Ltd.**, Past President and DRI State Representative **David Levitt**, *Hinshaw & Culbertson LLP*. IDC Past President **Steve Puiszis**, *Hinshaw & Culbertson LLP*, IDC Young Lawyers Division Chair **Elizabeth Barton**, *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer*, and IDC Executive Director **Sandra Wulf** were also in attendance. IDC members participated in the SLDO (State and Local Defense Organization) programming.

This year's speakers included retired general and former U.S. Secretary of State Colin L. Powell and former U.S. Secretary of State Madeleine K. Albright.

Notice of Election

In accordance with the Bylaws of the Illinois Association of Defense Trial Counsel, an election must be held to fill the vacancies of the following six (6) directors whose terms expire in 2016.

The following six Directors' terms will expire at the Annual Meeting in June 2016.

Laura K. Beasley
Joley, Oliver & Beasley, P.C.
Bruce Dorn
Bruce Farrel Dorn & Associates
Jennifer K. Gust
Resolute Management, Inc. – Midwest Division
Paul R. Lynch
Craig & Craig
Donald J. O'Meara, Jr.
Pretzel & Stouffer, Chartered
Scott D. Stephenson
Litchfield Cavo LLP

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

All individual members of the Association are eligible for election to the Board of Directors unless otherwise excluded by the Bylaws. Corporate, Educator, and Law Student members are not eligible to serve on the Board of Directors.

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

No more than two voting members of the combined Executive Committee and Board of Directors shall be partners or associates or otherwise practice together in the same law firm.

The filing of a Nominating Petition for election as a director shall consist of:

- The Nominating Petition. Each individual nominated must be supported by the signatures of three (3) members in good standing.
- A statement by that member of his ***availability and commitment to serve actively*** on the board.
- A head and shoulders photo (high resolution jpg format, preferred).
- A short biography (1-2 paragraphs maximum).
- A statement of no more than 200 words on why you 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 must be sent electronically to IDC Secretary/Treasurer William K. McVisk, *Johnon & Bell, Ltd.,* at mcviskw@jbltd.com and IDC Executive Director Sandra J. Wulf, CAE, IOM at idc@iadtc.org **Nominations must be accompanied with the five items listed above.** All candidates will be featured with their biography, statement of candidacy and picture in the ***IDC Quarterly***, and this same feature will be sent to the membership if more than six petitions are received.

All nominating petitions must be received by **Tuesday, March 1, 2016.**

All candidates who have filed a complete nominating petition are eligible to receive an electronic copy of the IDC membership listing, 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 _____, 20__.

_____
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 _____, 20__.

IDC Presents Deposition Academies

We would like to thank the many individuals and organizations that participated in our first Deposition Academies. From Collinsville in September to Naperville in October, these individuals and companies worked very hard to ensure the success of our event.

Academy Chair

Tracy Stevenson — *Robbins, Salomon & Patt*

Faculty

James D. Ahern — *Cassiday Schade LLP*, Chicago
Denise Baker-Seal — *Brown & James, P.C.*, Belleville
Laura K. Beasley — *Joley, Oliver & Beasley, P.C.*, Belleville
Jeremy T. Burton — *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.*, Chicago
James L. Craney — *Lewis Brisbois Bisgaard & Smith LLP*, Edwardsville
Brian T. Henry — *Pretzel & Stouffer, Chartered*, Chicago
J. Dennis Marek — *Ackman, Marek, Meyer, Tebo and Coghlan, Ltd.*, Kankakee
R. Mark Mifflin — *Giffin, Winning, Cohen & Bodewes, P.C.*, Springfield
Nicole D. Milos — *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*, Chicago
Eric W. Moch — *Johnson & Bell, Ltd.*, Chicago
Bradley C. Nahrstadt — *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.*, Chicago
Patrick W. Stufflebeam — *HeplerBroom LLC*, Edwardsville

Thank You!

Special thanks to our Academy Sponsors and Exhibitors

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RGL Forensics
Rimkus
S-E-A

— Continued on next page

Welcome

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

Douglas R. Allen
Skawski Law Offices, LLC,
Oak Brook

Jessica Bell
Heyl, Royster, Voelker & Allen, P.C., Peoria

Dan T. Corbett
O'Halloran Kosoff Geitner & Cook, LLC, Northbrook

Sheina R. Franco
HeplerBroom LLC, Edwardsville

Ryan Frierott
Goldberg Segalla LLP, Chicago

Christine R. Frymire
Robbins, Salomon & Patt, Ltd.
Chicago

J. Patrick Herald
Baker & McKenzie LLP, Chicago

Daniel J. Klopfenstein
Quinn, Johnston, Henderson, Pretorius & Cerulo, Springfield

Caroline L. Olson
O'Connell, Tivin, Miller & Burns, LLC, Chicago

Megha Shah
Greensfelder, Hemker & Gale, P.C., Belleville

John Suermann, Jr.
HeplerBroom LLC, Edwardsville

After Hours Receptions















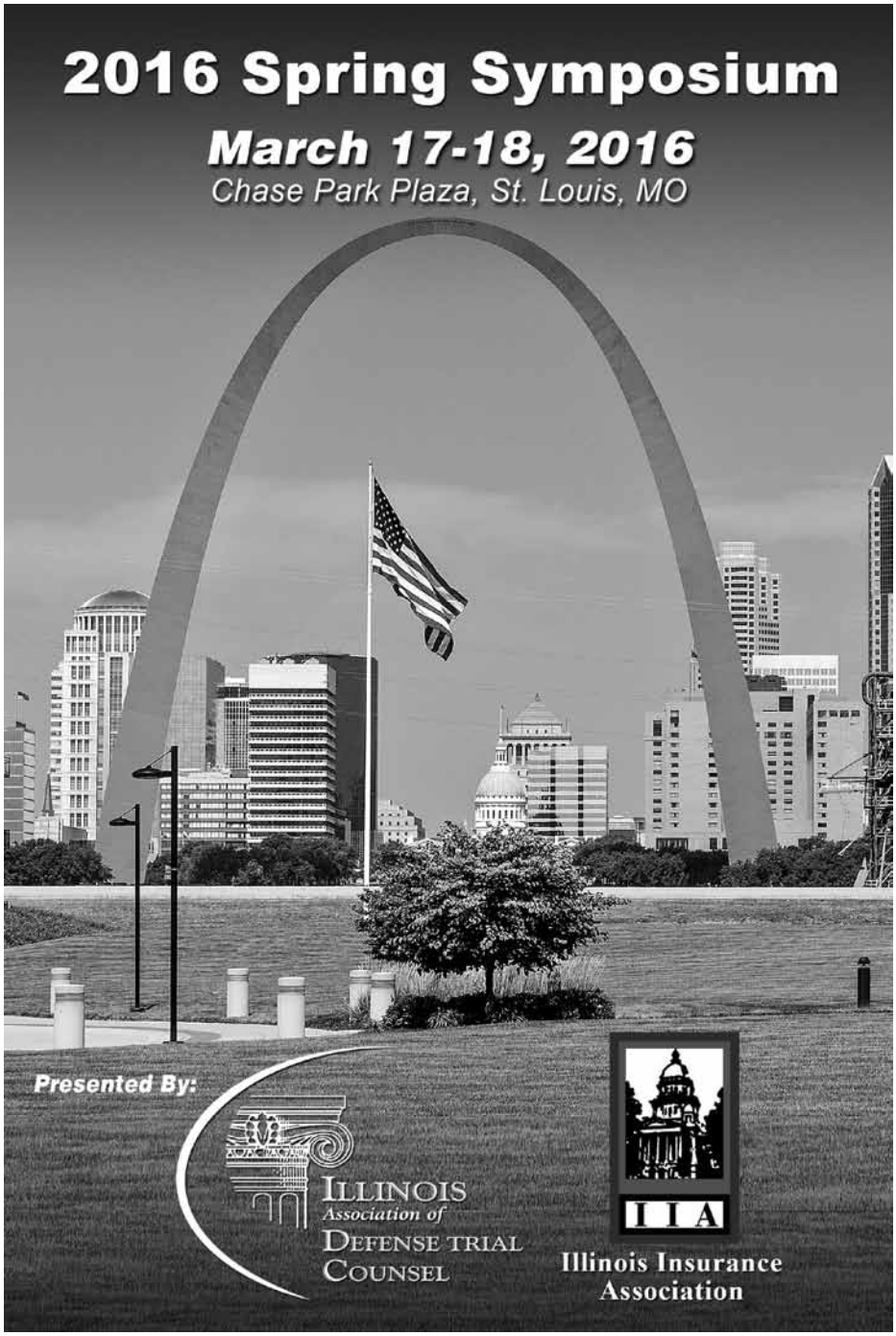

Where can you find exceptional programming designed specifically for today's defense counsel? Where can you go to get prepared to face the law practice of tomorrow? To the 2016 Spring Symposium, that's where!

The 2016 Spring Symposium will be flush with content relevant to today's (and tomorrow's!) defense practice. From drone litigation to medical presentations in the courtroom to the effective use of technology to updates on issues in tort and insurance law—the 2016 Spring Symposium has it (and much more) covered.

But don't think that the Spring Symposium will be just about education…we will host what we expect to be an unforgettable evening with our ***Backcourt Bash***! What the heck is a Backcourt Bash, you ask? Well, it's just the greatest kickoff for the NCAA Division 1 Basketball Tournament you've ever seen. Okay, that may be a bit of an exaggeration, but it will be a fantastic, fun event for you to mix, mingle and watch some college hoops with your friends and colleagues.

Symposium Leadership

Troy A. Bozarth
HeplerBroom LLC
2015-2016 IDC President

Joshua Johnson
Country Insurance & Financial Services
2016 IIA Chairman

Events Committee

Jeremy Burton, Chair
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.

Gregory W. Odom, Vice Chair
HeplerBroom LLC

Denise Baker-Seal
Brown & James, P.C.

James P. DuChateau
Johnson & Bell, Ltd.

Kate Jacobi
HeplerBroom LLC

Cecil E. Porter
Litchfield Cavo LLP

Patrick W. Stufflebeam
HeplerBroom LLC


Chase Park Plaza Hotel

SCHEDULE

Thursday, March 17, 2016

6:00 – 10:00 pm **Backcourt Bash** — *Chase Park Plaza*

Friday, March 18, 2016

8:30	Opening Remarks
8:30 – 9:30	**Attack of the Drones—Update on Emerging Litigation** Presentation by: **John Heil**, *Heyl, Royster, Voelker & Allen, P.C.*
9:30 – 10:15	**Updates: Tort & Insurance Law**
10:15 – 10:30	Refreshment Break
10:30 – 11:30	**Medical Program with Doctor/Economist**
11:30 – 12:30	Lunch
12:30 – 1:30	**Medical Presentations in the Courtroom**
1:30 – 2:15	**Technology at Trial** Presentation by: **Hon. Barbara Crowder**, *Illinois Third Judicial Circuit Court*; and **Patrick W. Stufflebeam**, *HeplerBroom LLC*
2:15 – 2:30	Refreshment Break
2:30 – 3:30	**Once More Into the Breach—Data Breach Litigation** Presentation by: **Bradley C. Nahrstadt**, *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.*
3:30 – 4:30	**Technical Quandaries: New Challenges Involving Data Breaches and Rules of Professional Conduct** Presentation by: **Todd C. Scott**, *Minnesota Lawyers Mutual Insurance Company*

BACKCOURT BASH

> Backcourt (băk′kôrt′): the half of the court that a team defends.
> Bash (băsh): Slang | n. A celebration; a party.

Join the IDC at the ***Backcourt Bash***, as we celebrate the kickoff of the NCAA Division 1 Men's Basketball Tournament! Come to the Bash expecting to witness some great college basketball and network with some of the best "Backcourters" and raise money for a local charity.

Continuing Legal Education Credit

The program has been approved by the Illinois MCLE Board for 6.5 hours of continuing legal education (CLE) credit. We will apply for 1.0 hours of Illinois professionalism credit.

We will apply for the following CLE credit in other states:
Indiana 6.5 CLE; 1.0 Professionalism
Missouri 7.8 CLE; 1.2 Professionalism
Wisconsin 7.8 CLE; 1.2 Professionalism

SYMPOSIUM SPONSORSHIP

Please contact the IDC office at idc@iadtc.org or 800-232-0169, to secure one of the following sponsorship opportunities:

THREE-POINTER $1,500
This package includes full registration for FIVE, plus FOUR additional tickets to the Backcourt Bash, plus display of your firm/company logo on seminar materials, signs and the IDC website, as well as recognition at the event, on social media and in the *IDC Quarterly*.

JUMP SHOT $1,000
This package includes full registration for THREE, plus THREE additional tickets to the Backcourt Bash, plus display of your firm/company logo on seminar materials, signs and the IDC website, as well as recognition at the event, on social media and in the *IDC Quarterly*.

LAY UP $750
This package includes full registration for TWO, plus ONE additional ticket to the Backcourt Bash, plus display of your firm/company logo on seminar materials, signs and the IDC website, as well as recognition at the event, on social media and in the *IDC Quarterly*.

— Continued on next page

Registration

Full registration for the Symposium includes the Backcourt Bash, Symposium materials, Continuing Legal Education Credit, lunch and refreshment breaks. Individual tickets may be purchased for the Backcourt Bash.

Private Practice Attorneys

TEAM PACKAGE
(Buy Two Tickets, Get One Free)
Members $590
Non-Members $790

INDIVIDUAL TICKET
Members $295
Non-Members $395

Judges and Insurance or Corporate Professionals

TEAM PACKAGE
(Buy Two, Get One Free) $200

INDIVIDUAL TICKET.....$100

BACKCOURT BASH ONLY....$100

Refund Policy

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

100% Refund – Through Feb. 19
50% Refund – Feb. 20 – Mar. 4
No Refund – Mar. 5 – 18

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

Questions?

Phone: 800-232-0169
Fax: 866-230-4415
Email: idc@iadtc.org

REGISTRATION

2016 Spring Symposium

March 17-18 ■ Chase Park Plaza, St. Louis

Attendee Name: _____

Email: _____

Attendee Name: _____

Email: _____

Attendee Name: _____

Email: _____

Organization: _____

Address: _____

City, State, Zip Code: _____

Phone: (_____) _____

Special Dietary/Accessibility Needs: _____

_____

REGISTRATION	AMOUNT
Private Practice Attorneys	
_____ IDC Members TEAM PACKAGE (Buy Two, Get One Free)	$ 590
_____ IDC Members Individual Ticket	$ 295
_____ Non-Members TEAM PACKAGE (Buy Two, Get One Free)	$ 790
_____ Non-Members Individual Ticket	$ 395
Judges and Insurance or Corporate Professionals	
_____ TEAM PACKAGE (Buy Two, Get One Free)	$ 200
_____ Individual Ticket	$ 100
_____ **BACKCOURT BASH only**	$ 100
TOTAL AMOUNT	

Payment Information (Do Not Fax or Email Credit Card Information)

❑ My check, number _____ is enclosed for $ _____ .

❑ Please charge $ _____ to my: ❑ Visa ❑ MasterCard ❑ AmEx

Card Number: _____ Exp. Date: ____ / ____ Security Code: _____

Name as it appears on credit card: _____

Credit Card Billing Address: _____

Please complete this registration form and return it as soon as possible to:
Illinois Association of Defense Trial Counsel ■ PO Box 588 ■ Rochester, IL 62563-0588

Illinois Association of Defense Trial Counsel

MEMBERSHIP APPLICATION

Membership in the Illinois Association of Defense Trial Counsel is open to Individuals, Corporations, Educators, and Law Students. For a list of qualifications, visit www.iadtc.org or phone the IDC office at 800-232-0169. Applicants shall be admitted to membership upon a majority vote of the Board of Directors.

I am (We are) applying for membership as a(an) (Select Only One):

Individual Attorney, in practice:
- ❍ 0-3 years ($100)
- ❍ 4-5 years ($150)
- ❍ 6-9 years ($225)
- ❍ 10+ years ($250)

Governmental Attorney, in practice:
- ❍ 0-3 years ($75)
- ❍ 4-5 years ($100)
- ❍ 6-9 years ($160)
- ❍ 10+ years ($190)

Corporation, with:
- ❍ 1-2 Affiliates ($250)
- ❍ 3-5 Affiliates ($500)
- ❍ 6-10 Affiliates ($750)
- ❍ 11-15 Affiliates ($1,000)
- ❍ 16-20 Affiliates ($1,500)

- ❍ **Student** ($20)
- ❍ **Educator** ($75)

Individual 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 _____

Area of Practice _____ # of Attorneys in Firm _____

IDC Sponsor Name and Firm _____

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

Home Address _____ City, State, Zip Code _____

Home Phone _____ Alternate Email Address _____

Corporate Applicant Information

Corporation Name _____ Business or Service Provided _____

Address _____ City, State, Zip Code _____

Phone _____ Fax _____ Website _____

On a separate sheet of paper, please list all individuals who are to be affiliated with this Corporate Membership. Be sure to include Name, Address (if different than the corporate address), Phone, Fax, and Email Address for all affiliates.

Educator and Law Student Applicant Information

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

Law School _____ Anticipated Graduation Date _____

Address _____ City, State, Zip Code _____

Email Address _____ 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 _____

Free DRI Membership

In addition to joining the IDC, you can take advantage of the DRI Free Membership Promotion! As a new member of the 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. Event and Administrative Committees are generally small committees and members are often appointed by the Board of Directors. Substantive Law Committees are responsible for writing the Monograph for the *IDC Quarterly* and may submit other Feature Articles. Committees keep abreast of current legislation and work with the IDC Legislative Committee, as warranted. Committees also serve as a resource to seminar committees for speakers and subjects and, if and when certain issues arise that would warrant a specific "topical" seminar, the committee may produce such a seminar.

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

Substantive Law Committees

- ❍ Commercial Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Local Government Law
- ❍ Tort Law

Administrative Committees

- ❍ Events
- ❍ Legislative
- ❍ Membership
- ❍ Young Lawyers

Event Committee

- ❍ Events

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:

- ❍ As an **Individual Attorney**, 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.
- ❍ As a **Corporate Member**, we will support the purpose and mission of the Association.
- ❍ I am currently a **Professor** or **Associate Professor** of law at an ABA accredited law school.
- ❍ I am currently a **Student** 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
4-5 years in practice..... $25
6-9 years in practice..... $55
10+ years in practice..... $75

Please Note: IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. The IDC estimates that 2.5% of your dues are not deductible because of the IDC's lobbying activities on behalf of its members.

Payment Information

— Do Not Fax or Email Credit Card Information —

❍ Enclosed is check # _____ in the amount of $ _____ . ❍ Visa ❍ MasterCard ❍ AmEx

❍ Please charge Credit Card # _____ in the amount of $ _____ Exp. Date ____/____

Name as it appears on the Card _____ Card Security Code _____

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, if you have any questions, please contact the IDC office at:

Illinois Association of Defense Trial Counsel
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.iadtc.org

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CALENDAR
of Events

- **December 10** — **Executive Committee Meeting** • Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd. • Chicago
- **December 10** — **Holiday Party** • Lloyd's Restaurant • Chicago
- **December 11** — **Board of Directors Meeting** • Heyl, Royster, Voelker & Allen, P.C. • Chicago
- **January 15** — **Insurance Seminar** • Hinshaw & Culbertson LLP • Chicago
- **January 21** — **Executive Committee Meeting** • Location TBA • Chicago
- **January 22** — **Board of Directors Meeting** • Location TBA • Chicago
- **February 18** — **Executive Committee Meeting** • Location TBA • Chicago
- **February 19** — **Board of Directors Meeting** • Location TBA • Chicago
- **March 17** — **Backcourt Bash** • Chase Park Plaza • St. Louis, MO
- **March 18** — **Spring Symposium** • Chase Park Plaza • St. Louis, MO

THE IDC MONOGRAPH:

A Primer on Defenses in Section 1983 and Police Liability Civil Actions

John M. O'Driscoll
Tressler LLP, Bolingbrook

Howard L. Huntington
Bullaro & Carton, P.C., Chicago

Dustin S. Fisher
Judge, James & Kujawa, LLC, Park Ridge

John F. Watson
Craig & Craig, LLC, Mattoon

A Primer on Defenses in Section 1983 and Police Liability Civil Actions

Police misconduct and accusations of misconduct by officers have come to the forefront of the national media. The internet is replete with officers behaving badly, from the humorous "don't tase me bro" to the solemn "I can't breathe" movement.[1] As social media has expanded its influence, public perception of the police officer has increasingly moved towards a right or wrong perspective of the position. A brief overview of defenses for police liability cases is timely, and serves as a stark reminder that applying black and white rules in a landscape of gray is difficult, if not impossible.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[2]

Congressional authority to regulate state action arises primarily from the Fourteenth Amendment to the United States Constitution. Section 1983 has been enacted pursuant to that power. Essentially, Section 1983 has become the principal enforcement mechanism for the Fourteenth Amendment itself.[3] The Fourteenth Amendment specifically includes due process and equal protection guarantees. Further, most of the first

About the Authors

John M. O'Driscoll is a partner based out of *Tressler LLP's* Bolingbrook and Chicago offices. His practice includes representing companies and individuals in business disagreements and providing general counsel services to local governmental bodies such as municipalities, school districts, library districts and park districts. Mr. O'Driscoll handles day-to-day government operations issues as well as a wide variety of areas such as business litigation, breaches of contract, construction issues, employment disputes, ordinance violations, "sunshine laws" compliance, internet defamation, and complex litigation. He has been selected for inclusion in *Illinois Super Lawyers*® for 2012 and 2013 and in *Illinois Super Lawyers Rising Stars*® from 2008–2011. He has also been recognized as a "Leading Lawyer" by the *Leading Lawyers*® Network. He has received the Illinois Association of Defense Trial Counsel's President's Award and also the Meritorious Service Award for his outstanding service as co-chair of the IDC Commercial Litigation Committee. He is the Chair of the IDC's Local Governmental Law Committee. John is co-author of the Municipal Litigation chapter of the *Illinois Municipal Law Series* and co-author of the Park District chapter of *Illinois Special District Series* published by the Illinois Institute for Continuing Legal Education.

Howard L. Huntington is a partner at *Bullaro & Carton, P.C.* in Chicago. He focuses his practice on construction, product liability, commercial, business, public entity, civil rights, and transportation litigation. He has defended a wide variety of high-stakes matters in Illinois and Indiana. He serves on the IDC Local Government Committee and is a member of various other associations, including Defense Trial Counsel of Indiana. Mr. Huntington has defended municipalities and public entities in Title VII discrimination cases, Section 1983 public employee cases, employment contract, and other matters in both Illinois and Indiana. He received a B.A. in political science from the University of Illinois at Urbana-Champaign and his J.D. from Chicago-Kent College of Law. He is AV rated by Martindale-Hubbell.

Dustin S. Fisher is an associate at *Judge, James & Kujawa, LLC*. Mr. Fisher concentrates his practice on civil litigation defense and has successfully defended municipalities, school districts, park districts, housing authorities, and railroads in a wide variety of cases including premises liability, sexual abuse defense, section 1983 actions, FELA, defamation, administrative reviews, and insurance coverage.

John F. Watson is a Partner with *Craig & Craig, LLC* in the Mattoon office. Mr. Watson graduated with a Bachelor of Science in Mechanical Engineering from Bradley University in 1990 and received his Juris Doctorate, with Honors, from The John Marshall Law School in 1993. During law school, Mr. Watson served as an Associate Editor for The John Marshall Law Review. Mr. Watson's fields of practice include general civil litigation, medical malpractice defense, municipal liability defense, insurance coverage and insurance law, intellectual property and criminal defense litigation.

eight amendments to the United States Constitution also apply to the states by virtue of the Fourteenth Amendment and the "incorporation" doctrine.[4] Therefore, any municipal action that improperly interferes with constitutionally protected rights may give rise to a Section 1983 action.

The Fourteenth Amendment prohibits the government from (a) depriving any person of "life, liberty, or property, without due process of law" (Due Process Clause) and (b) denying any person equal protection of the laws (Equal Protection Clause).[5] While most Section 1983 litigation directed against municipalities springs forth from these two clauses, a growing number involve the First Amendment (freedom of speech), the Fourth Amendment (freedom from unreasonable search and seizure), the Fifth Amendment (Takings Clause), and the Eighth Amendment (cruel and unusual punishment).[6]

Immunities

In order to shield public officials from personal liability for their official acts, the courts have recognized certain immunities. There are two types of official immunity under Section 1983: absolute immunity and qualified immunity. Absolute immunity is a form of legal immunity for government officials and employees that confers total immunity from civil liability so long as those individuals are acting within the scope of their duties. Qualified immunity protects public officials from liability for damages if his or her actions did not violate clearly established rights that a reasonable person would have known. Absolute immunity differs from qualified immunity in that it does not require additional circumstances to be met before shrouding the government official with immunity. Both types of immunities must be pled as affirmative defenses.[7]

Individuals who have been sued pursuant to Section 1983 may raise the defense of absolute or qualified immunity. Such immunities are limited to damages claims only and do not extend to Section 1983 actions for declaratory or injunctive relief.[8] However, immunity defenses may not be asserted by the municipality itself.[9] Rather, a municipality may be held liable under Section 1983 only if the deprivation of a constitutional right was the result of a municipal "custom or policy."[10] When a public official is sued in her official capacity only (*i.e.,* damages will be assessed against the municipality and not the official personally), immunity defenses are not available.[11]

Absolute Immunity

In general, absolute immunity covers judicial and prosecutorial actions.[12] However, a prosecutor is not entitled to absolute immunity for actions that are "investigative and unrelated to the preparation and initiation of judicial proceedings."[13]

Persons acting pursuant to judicial orders have absolute immunity.[14] Therefore, governmental witnesses are absolutely immune from damages liability based on their testimony.[15] The Court of Appeals for the Seventh Circuit even extends absolute immunity to allegedly perjurious testimony of governmental witnesses, such as police officers.[16]

Until recently there was a conflict in the circuits that had arisen out of two Supreme Court cases on the applicability of absolute immunity where police officers perjure themselves in a grand jury proceeding. In *Briscoe v. LaHue,*[17] the Court held that law enforcement officers enjoyed absolute witness immunity from civil liability for perjured testimony that they provided at trial. Alternatively, in *Malley v. Briggs,*[18] the Court held that law enforcement officials were not entitled to absolute immunity when they acted as complaining witnesses to initiate a criminal prosecution by submitting a legally invalid arrest warrant.

In *Rehberg v Paulk,*[19] the Supreme Court announced the bright line rule that a grand jury witness, such as a law enforcement officer, has absolute immunity from any Section 1983 claim based on the witness' testimony, even if perjurious.[20] *Rehberg* involved a Section 1983 case against an investigator who, as a complaining witness, testified falsely before three different grand juries each of which had indicted plaintiff on charges which were subsequently dismissed.[21] The *Rehberg* court expressly extended to grand jury witnesses, including police officers, the same immunity that had previously been enjoyed by witnesses at trial.[22] It reasoned that the justifications for granting absolute immunity in both situations are the same: a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence.[23]

Qualified Immunity

Qualified immunity is a defense available to any government official while performing discretionary functions of their public office. Even though it is not a traditional affirmative defense, it is by far the most commonly asserted and litigated defense by police officers in civil rights litigation.

Broadly defined, qualified immunity protects police officers from liability for actions thought to be reasonably lawful

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at the time such acts were performed. From a practitioner's point of view, the result is a two part test: (1) whether the facts show that the police officer violated a constitutional right of the plaintiff; (2) whether that constitutional right was clearly established at the time of the alleged violation.[24] This is a legal determination, with the Supreme Court of the United States stating that, should a case go to trial, qualified immunity defenses are effectively lost.[25] It should be noted, however, that circuit courts have found various mechanisms to allow juries to effectively determine qualified immunity. [26]

As an immunity, rather than a true affirmative defense, it is the plaintiff's burden to prove that the constitutional right was "clearly established" at the time of the alleged incident.[27] To do so, once qualified immunity is raised by a police officer defendant, the plaintiff must produce factual allegations to overcome the immunity.[28] Thus, the question of qualified immunity regularly turns into a battle of legal precedent and previously published fact patterns to determine whether a "clearly established" constitutional right was violated.[29]

For a police defendant, the first question to be answered is what constitutional right is alleged to have been violated. While the traditional fact pattern alleges a violation based upon the Fourth or Fourteenth Amendments of the Constitution of the United States (such as improper search and seizure or excessive force), plaintiffs are more frequently invoking actions sounding in violations of the First Amendment. For example, a recent incident in Texas, involving a woman who was allegedly pulled over for a traffic violation that later escalated into an arrest, illustrates the interplay between the First, Fourth, and Fourteenth Amendments.[30]

Sandra Bland, according to news accounts, was pulled over for failing to signal while changing lanes.[31] Once pulled over, Ms. Bland and a Texas trooper engaged in an increasingly hostile conversation over whether Ms. Bland would put out her cigarette. After Ms. Bland indicated that she would not extinguish the cigarette, the trooper ordered her out of the vehicle. Ms. Bland refused and repeatedly asked if she was under arrest.[32] The trooper, after warning Ms. Bland, attempted to pull her from the vehicle and ultimately pointed his Taser at Ms. Bland to get her to comply with his order.[33] Once out of the vehicle, the Trooper appeared to struggle with Ms. Bland while attempting to restrain her in handcuffs. Audio recordings of Ms. Bland's voice have her indicating that the Trooper "slammed" her face into the ground.[34]

In this highly publicized incident, the first prong of qualified immunity is tested—were the constitutional rights of Ms. Bland violated? If so, which constitutional right? The law is well settled that an officer may order the driver[35] or passengers[36] out of a vehicle for almost any reason without any violations of the Fourth Amendment. But the First Amendment likely would prohibit the trooper from retaliating against Ms. Bland for her lawful refusal to extinguish her cigarette. Thus, while it is unlikely the trooper violated Ms. Bland's rights under the Fourth Amendment, a potential question could arise as to whether the Trooper's intent behind the order for Ms. Bland to step out of her car was retaliatory and thus a First Amendment violation.[37]

Assuming that a constitutional violation is properly alleged by a plaintiff, the court must then determine whether that right was "clearly established" at the time the officer committed the violation. Hindsight is precluded, and the determination must be made based upon what the officer should have known at the time. This of course begs the question—what does it mean to be "clearly established?" The Supreme Court has answered this somewhat cryptically, stating:

> "[C]learly established" for purposes of qualified immunity means "that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[38]

Practically speaking, this often translates into a question of why the officer was wrong. Reasonable mistakes as to law, or facts, are provided immunity under this defense.[39] A recent Illinois Supreme Court case depicts the dynamics of a mistake of law, although in a slightly different circumstance. In *People v. Gaytan*,[40] a police officer pulled over a vehicle due to it having a trailer hitch attached to the vehicle which minimally obscured the rear license plate. At that time, the Illinois Vehicle Code prohibited any materials which would "obstruct the visibility of the plate."[41] Upon approaching the vehicle the officer smelled marijuana, and ultimately discovered a diaper bag containing the illegal drug. Defendant Gaytan moved to suppress the evidence of the discovered drug under a theory that the traffic stop was

an unconstitutional search and seizure under the Fourth Amendment.[42]

The Illinois Supreme Court agreed with defendant, finding that the officer stopping the vehicle for the trailer hitch was doing so outside the scope of the Illinois statute prohibiting any license plate obstruction. However, and although this was not a qualified immunity case, the court held that the mistake by the officer was a "reasonable mistake of law."[43] Interestingly, one of the issues our supreme court held as determinative was the issue whether any reported appellate court decisions had discussed the trailer hitch as a potential mechanism for the license plate obstruction provision of the motor vehicle code.[44] As there had been no previous opinion interpreting that fact scenario, it was objectively reasonable for the officer to believe the trailer hitch slightly obscuring a portion of the license plate violated the statute.[45]

Mistakes of fact also give rise to qualified immunity, as long as the mistake was reasonable. Although as with any qualified immunity case, the scenarios facing a police officer may be endless, one of the more common "mistake of fact" fact patterns involve partial or incorrect information used to issue a warrant. For instance, the case of *Aboufariss v. City of DeKalb*[46] illustrates how a mistake of fact can still give rise to the immunity.

In *Aboufariss*, the plaintiff was a father who was accused of abducting his own child by his former wife.[47] According to plaintiff, this trip was arranged with his ex-wife and he had followed all of the conditions for travelling with his daughter pursuant to the divorce decree. The plaintiff's former wife informed police that plaintiff did not let her know he was taking their daughter out of state, and that plaintiff may be taking her to the country of Morocco. During the initial investigation, police officers allegedly identified information contradicting the totality of the ex-wife's allegations. For example, although she indicated that she had no information as to where her ex-husband had taken their daughter, police found the address and phone number provided to her by the plaintiff.[48] Additionally, the investigating officer learned of plaintiff's scheduled return flight back to Chicago within the next several days. Notwithstanding this contradictory information, the officer called Boston-area police and indicated that he was working on an arrest warrant for the plaintiff under the child abduction statute. The officer then obtained an arrest warrant, with plaintiff alleging that complaint for arrest warrant left out all of the contradictory information identified in the investigation.[49] An arrest warrant was issued, and plaintiff was arrested at the Boston airport where he remained incarcerated for 10 days. Subsequently, a trial court would dismiss the criminal complaint against the plaintiff for lack of probable cause.[50] Plaintiff thereafter brought a Section 1983 suit for damages naming, among others, the investigating police officer. In the civil case that followed, the Illinois Appellate Court, Second District ruled that the officer was protected by qualified immunity, even if the investigating officer was mistaken in the facts used to obtain the warrant.[51] The court held that outside of a deliberate attempt to deceive the trial court any mistake in believing the ex-wife's version of the story was an objectively reasonable mistake.[52] Moreover, the subsequent investigation and finding of no probable cause was of no value in determining the objective reasonableness of the officer's actions at the time the arrest warrant was issued.[53]

Related to the mistake of fact prong of qualified immunity is the heavily litigated "arguable probable cause" standard which is typically associated with false arrest claims. An officer has probable cause when, at the moment the decision is made, the facts and circumstances within [the officer's] knowledge and of which [an officer] has reasonably trustworthy information would warrant a prudent person believing that the suspect had committed or was committing an offense.[54] The existence of probable cause is an absolute bar to recovery

An officer has probable cause when, at the moment the decision is made, the facts and circumstances within [the officer's] knowledge and of which [an officer] has reasonably trustworthy information would warrant a prudent person believing that the suspect had committed or was committing an offense. The existence of probable cause is an absolute bar to recovery under Section 1983 for false arrest or false imprisonment.

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under Section 1983 for false arrest or false imprisonment.[55] However, even if a "prudent person" would not believe a suspect had committed or was committing an offense, the officer would have qualified immunity when "arguable probable cause" existed. For example, the Supreme Court of the United States held that secret service officers were entitled to qualified immunity when they arrested the author of a note which under one unfavorable interpretation threatened assassination of the president.[56] In doing so the Supreme Court noted:

> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued.[57]

Few cases involving a police defendant do not involve qualified immunity. The protection the immunity affords officers is broad but is difficult to apply. From a litigator's view, the immunity is heavily fact dependent and based on the descriptions of events after any mistake may have occurred. Qualified immunity continues to resist the application of bright line rules, and provides a unique challenge for any defense attorney.

Statute of Limitations

Section 1983 does not have its own statute of limitations and so is "deficient" within the meaning of 42 U.S. § 1988. Under that statute, where federal law is deficient, federal courts apply the relevant law of the forum state.

In *Wilson v. Garcia,*[58] the Supreme Court held that Section 1983 claims are most akin to personal injury actions. In the interest of uniformity and certainty with respect to the limitations period for Section 1983 claims, the Court held that the appropriate limitations period would be the same as for personal injury actions in the forum state. In Illinois, the two-year personal injury statute of limitations is applicable to Section 1983 claims.[59]

Federal law determines the date of accrual, *i.e.*, when all of the elements of the action are present.[60] The statute of limitations begins to run when the plaintiff knew or had reason to know of the injury.[61] In certain cases, for example where the plaintiff with a prior conviction which might be implicated by a successful Section 1983 damages action, accrual occurs when the conviction is overturned or vacated.[62]

DeShaney and "State-Created Danger" Doctrine

The Supreme Court has cautioned against an expansionist approach in the area of substantive due process. The Court has said that "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," and urged that courts must "exercise the utmost care whenever . . . asked to break new ground in this field."[63] Despite devastating facts at issue before it, the Supreme Court demonstrated such restraint when it declined to expand the boundaries of substantive due process law in the case of *DeShaney v. Winnebago County Department of Social Services*.[64] *DeShaney's* general proposition is well-known; the Constitution does not give rise to any obligations on the part of state and local governments to protect individuals, to rescue individuals, or to provide government services. The Supreme Court rejected the Section 1983 claim of a severely beaten boy who was not protected by a county's Department of Social Services when he was returned to and left with his abusive father, despite ongoing evidence of harm, stating, "[a]s a general matter, . . . we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" because the clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security.[65] However, *DeShaney* has been interpreted to have, perhaps indirectly, left the door open for what is known as the "state-created danger" doctrine.[66]

The *DeShaney* Court recognized an individual's substantive due process right to reasonable safety and security and also acknowledged a corresponding affirmative duty of the state to provide care and protection to particular individuals as follows:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. … The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the

Eighth Amendment and the Due Process Clause.[67]

The *DeShaney* Court expounded that the Due Process Clause imposes this affirmative duty on the state only in limited contexts. That duty is triggered by the involuntary restraint against an individual's freedom to act on his own behalf, such as by "incarceration, institutionalization, or other similar restraint of personal liberty" and is not triggered by the "State's knowledge of the individual's predicament or from its expressions of intent to help him."[68] In finding the state and its employees could not be held liable on the facts of the case, the *DeShaney* Court explained the state had not, by its actions, placed the boy in a more dangerous position:

> While the State may have been aware of the dangers that [the boy] faced in the free world, **it played no part in their creation, nor did it do anything to render him any more vulnerable to them**. That the State once took temporary custody of [the boy] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.[69]

Some circuits have found that the "deprivation of liberty" creates a "special relationship" between the state and the individual such that it imposes on the state an affirmative duty under the Due Process Clause to protect those it has rendered defenseless, separate and apart from the state's duty not to inflict harm. However, the Seventh Circuit has found the two classes of cases to be "functionally the same" for "in both classes of case the victim is safe before the state intervenes and unsafe afterward."[70] To determine whether the plaintiff can complain under the Fourteenth Amendment of a failure to protect a plaintiff is required to show: (1) the state, by its affirmative acts, created or increases a danger faced by an individual; (2) that such failure on the part of the state to protect an individual from such a danger is the proximate cause of the injury to the individual; and (3) the state's failure to protect the individual must shock the conscience.[71]

The duty not to harm is illustrated by *White v. Rochford*[72] (a pre-*DeShaney* case), where police arrested a driver, but left his child passengers stranded in the driverless car, thus placing them in peril for the consequences of which the police were held liable under Section 1983.[73] In *Reed v. Gardner*,[74] the Court of Appeals for the Seventh Circuit held that police violate due process by arresting the driver of a car and leaving its keys in the hands of an intoxicated adult, who then endangers third parties.[75] In *Reed*, the drunk driver crossed the center line while speeding and plowed into another car, killing one of its occupants.[76]

The "key question" in determining whether or not the "affirmative conduct" requirement is satisfied is "what actions did the state actor affirmatively take, and what dangers would the victim otherwise have faced?"[77] "When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence."[78] The doctrine also protects individuals against placing someone who already faces danger in even greater peril.[79] In other words, a government official must effectively throw the private individual "into a snake pit."[80]

Mere negligence cannot support a claim alleging a violation of a plaintiff's substantive due process rights.[81] There is no "affirmative act" when a government official allows a dangerous situation to develop or continue without intervention—even if the official affirmatively chooses not to intervene.[82] For example, the police were not liable where an interventionist riot control plan was implemented one day, but then a passive plan was imposed the next day, allowing mass violence to continue in a contained area.[83] Dismissal was likewise proper where plaintiffs alleged that the city failed to prevent a co-worker's shooting spree, even after receiving a call from the plant manager reporting a threat of violence to plant employees.[84] Relatedly, some courts have found there is also no constitutional duty to warn of a known danger. For example, in *Saenz v. Heldenfels Brothers, Inc.*,[85] summary judgment was affirmed where the police officer knew a particular driver was intoxicated but refused to pull him over and ordered another officer not to pull him over.[86] Minutes later, the driver collided with another vehicle and killed its occupants. In *Pinder v. Johnson*,[87] denial of summary judgment was reversed where the police had actual knowledge of violent threats made by a former boyfriend against his former girlfriend. The police told her that they would lock him up, did not do so, and permitted the former boyfriend to burn down her house killing her children.[88]

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While the examples are not numerous, it is possible for a plaintiff to adequately show a "state-created danger" yet lose on the basis of the "shocks the conscience" element. For example, in *Matican v. City of New York*,[89] the plaintiff participated in a police sting. Subsequently, the target of the sting confronted the plaintiff, said "you ratted me . . ."[90] and slashed his face. The plaintiff alleged that the police planned the sting in a manner that would lead the target to learn about the plaintiff's involvement. The court found that such conduct constituted a "state-created danger."[91] However, as the officers designing the sting had "two serious competing obligations" [plaintiff's] safety and their own" the officers' conduct did not shock the conscience, and the court affirmed summary judgment.[92]

Lawsuits Initiated By Prisoners

In Section 1983 cases brought by a prisoner confined in jail, prison or any correctional facility, the Prison Litigation Reform Act (PLRA) provides some additional protections for defendants–and some additional burdens for plaintiffs.[93] One of those additional burdens is the exhaustion of administrative remedies.[94] Exhaustion under the PLRA provides that no action shall be brought by a prisoner "until such administrative remedies as are available are exhausted.[95] The PLRA requires "proper exhaustion."[96] This means is that a prisoner must "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court."[97]

To explore the exhaustion requirement, counsel must first determine what administrative remedies were available. Most prison systems will not have a money damages remedy available; but even if some type of "injunctive" relief is allowed under a general grievance procedure, then the administrative structure is satisfied from the prison's perspective.[98] However, some courts have recognized that exhaustion is not required where a grievance program is available but does not provide the type of remedy sought.[99] But first and foremost, one should look to a standard administrative grievance program adopted by the state or the prison system that sets forth a process and certain deadlines to reporting issues.[100]

Such a dismissal might occur on the court's own motion, or through the "merit review" process in *pro se*.[101] The PLRA provides that the "court shall on its own motion or on the motion of a party dismiss any action . . . [that] is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."[102] The order of events where there is a question regarding exhaustion of administrative remedies prior to a trial on the merits is generally as follows: (1) the district court conducts a hearing on exhaustion and permits discovery relating to the exhaustion as deemed appropriate; (2) if the judge determines that the prisoner did not exhaust his administrative remedies, then the judge must determine whether (a) the plaintiff has failed to exhaust available administrative remedies, and if so then he must go back and exhaust; or (b) although he has not unexhausted administrative remedies, the failure to exhaust was to no fault of his own (for instance where a prison official prevents a prisoner from exhausting his remedies), and so he must be given another chance to exhaust; or (c) the failure to exhaust was the prisoner's fault, in which event the case is over; finally, (3) if the court determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by-or even informed of-any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.[103] Once a prisoner has been "'reliably informed by an administrator that no remedies are available'" then the prisoner is "not required to 'exhaust further levels of review.'"[104]

Additionally, if the prisoner had no opportunity to comply with the administrative remedy, then a failure to comply will not defeat a claim.[105] Even though exhaustion is clearly a defense that can be raised by motion early in the case, it should not be considered an affirmative defense which will be tried to a jury. The seventh circuit has reviewed whether "debatable factual issues relating to the defense of failure to exhaust administrative remedies" are entitled by the Seventh Amendment to resolution by a jury and determined that this issue should not go to the jury.[106] The court compared the factual issues presented in the affirmative defense of exhaustion of administrative remedies to other judge-made factual determinations such as those regarding subject-matter jurisdiction, personal jurisdiction, and venue, and reasoned that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter or right ... within the meaning of the Seventh Amendment."[107] The court further stated, "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to."[108] However,

there may be times where is it appropriate to raise exhaustion as an affirmative defense in the pleadings. Although the general rule is that this issue will be determined early on by the court, it may be that written or oral discovery develops favorably to the defense on this issue and it can be once again raised in a pretrial motion for summary judgment.

Preclusive Effect of Prior Court Decisions

Federal police misconduct lawsuits are often preceded by related criminal litigation in state or federal courts. These prior proceedings can trigger preclusive concepts of *res judicata* and collateral estoppel.[109] Where a Section 1983 case follows state court proceedings, 28 U.S.C. 1738 mandates that judicial proceedings of any court of any state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . .."[110] Consequently, state law applies to determine any preclusive impact of prior state proceedings.[111] For prior federal court litigation, federal preclusion principles control.[112]

Res judicata (claim preclusion) can be used to bar a plaintiff's entire claim where there is a prior final judgment between the same parties rendered on the merits, and based on an identical cause of action.[113] In such cases, *res judicata* may be invoked to bar the litigation of all matters which had been raised or could have been raised in the prior proceeding.[114] Further, state administrative proceedings also may have preclusive effects.[115] For example, the Supreme Court in *United States v. Utah Construction & Mining Co.* noted the following:

> [W]e hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," . . . federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.[116]

Collateral estoppel (issue preclusion) prevents re-litigation of a particular issue of fact or law where the issue is identical to an issue decided in the prior litigation on the merits.[117] However, collateral estoppel will not prevent re-litigation of an issue in a Section 1983 case if there was not a full and fair opportunity to litigate that issue in the prior case.[118]

Also, the Supreme Court in *Heck v. Humphrey* held that there is no cause of action under Section 1983 for a claim which would call into question the validity of a prior criminal conviction, unless and until that conviction has been invalidated.[119] While the *Heck* doctrine will bar civil rights cases in some circumstances, it will toll the statute of limitations for the period of time that the plaintiff was under sentence of conviction for cases in which the cause of action did not accrue before the conviction. However, the Supreme Court in *Wallace v Kato*[120] found that merely pending charges were insufficient to bar a civil rights action. Thus, the statute of limitations that would otherwise accrue was not tolled during the pendency of charges, unless state law would require tolling.

Finally, it should be noted that in some jurisdictions, district attorneys agree to dismiss criminal charges in exchange for the complainant's promise not to sue the police. Some courts have refused to enforce such release agreements. *Town of Newton v. Rumery*[121] examined these agreements and rather than instituting a blanket prohibition, allowed courts to examine them on a case by case analysis of the voluntariness of the agreement, any evidence of prosecutorial misconduct and the public interest.[122]

Conclusion

Defending police officers, correctional officers and other governmental officials from civil liability is a constant reminder that demanding or expecting perfection in the execution of their duties can be the enemy of the good work that these officers and public officials do on a daily basis. No matter whether the incident or alleged harm originates from a traffic stop, as a result of a state mandated action, or where the alleged injured party was already in prison government officials are charged with executing and enforcing often murky laws with endless possibilities in terms of fact patterns. It is incumbent upon defense counsel to explore all of the possible defenses that can be asserted to protect or immunize these public officials, whether those defenses are asserted during the course of pre-trial proceedings or as a factual issue to be presented at trial to the jury. To this end, defense counsel must be dedicated to keeping abreast of the old and new precedents nationwide, and developing the skill to place those defenses before the court or the men and women of the jury.

(Endnotes)

[1] *See* Monica Hesse, *Aiming to Agitate, Florida Student Got a Shock*, Wash. Post (Sep. 19, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091802115.html (last visited Aug. 30, 2015); *also see* Vivian Yee, *'I Can't Breathe' Is Echoed in Voices of Fury and Despair*, N.Y. Times (Dec. 3, 2014) http://www.nytimes.com/2014/12/04/nyregion/i-cant-breathe-is-re-echoed-in-voices-of-fury-and-despair.html (last visited Aug. 30, 2015).

[2] 42 U.S.C. § 1983 (1996).

[3] *See Mitchum v. Foster,* 407 U.S. 225, 242 (1972).

[4] *See Duncan v. Louisiana,* 391 U.S. 145, 148 (1968).

[5] U.S. Const. amend. XIV, § 1.

[6] *See Richter v. Village of Oak Brook*, No. 01 C 3842, 2003 WL 22169763, at *1 (N.D. Ill. Sept. 19, 2003) (plaintiff alleged that defendants violated 42 U.S.C. § 1983 based on deprivations of his First and Fourteenth Amendment rights.); *also see Farmer v. Brennan*, 511 U.S. 825 (1994) (an Eighth Amendment case involving a convicted prisoner). The Court of Appeal for the Seventh Circuit has held that the same standard applies in Fourteenth Amendment cases involving pretrial detainees. *Tesch v. Cnty. of Green Lake*, 157 F.3d 465, 473 (7th Cir. 1998); *also see Zarnes v. Rhodes*, 64 F.3d 285, 289-90 (7th Cir. 1995) (utilizing the "subjective recklessness test" in an excessive force case under the Eighth Amendment involving a convicted prisoner); *also see Velez v. Johnson*, 395 F.3d 732, 735 (7th Cir. 2005) (the prisoner "was a pretrial detainee at the time of the assault; therefore, his claim arises under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment.").

[7] *See generally*, *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Gomez v. Toledo,* 446 U.S. 635, 639-640 (1980);

[8] *Bolin v. Story,* 225 F.3d 1234, 1240 (11th Cir. 2000); *Powell v. Irving,* 684 F.2d 494, 498 (7th Cir. 1982).

[9] *Owen v. City of Independence, Mo.,* 445 U.S. 622, 653 (1980).

[10] *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 818-819 (1985); *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658, 691 (1978).

[11] *Owen,* 445 U.S. at 652.

[12] *Buckley v. Fitzsimmons,* 509 U.S. 259, 269 (1993) (prosecutorial immunity); *Stump v. Sparkman,* 435 U.S. 349, 359 (1978) (judicial immunity); *Reed v. Village of Shorewood,* 704 F.2d 943, 952-953 (7th Cir. 1983) (mayor acting as liquor control commissioner).

[13] *Smith v. Power,* 346 F.3d 740, 742 (7th Cir. 2003).

[14] *Henry v. Farmer City State Bank,* 808 F.2d 1228 (7th Cir. 1986).

[15] *Kalina v. Fletcher,* 522 U.S. 118, 133 (1997).

[16] *See Curtis v. Bembenek,* 48 F.3d 281 (7th Cir. 1995) (officer's testimony at preliminary hearing and hearing to quash arrest and suppress evidence absolutely immune).

[17] *Briscoe v. Lattue,* 460 U.S. 325 (1983).

[18] *Malley v. Briggs,* 475 U.S. 335 (1986).

[19] *Rehberg v Paulk*, 132 S. Ct. 1497 (2012).

[20] *Rehberg*, 132 S. Ct. at 1507.

[21] *Id*. at 1501.

[22] *Id*. at 1506-07.

[23] *Id*. at 1499.

[24] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)

[25] *Pearson, 555 U.S. at 232.*

[26] *See for example*, *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996) (*rev'd* on other grounds)

[27] *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir. 1990)

[28] *Clash v. Beatty*, 77 F.3d 1045, 1047 (7th Cir. 1996).

[29] *Clash*, 77 F.3d at 1047.

[30] David Montgomery, *Texas Trooper's Behavior Called 'Catalyst' in Sandra Bland's Death*, N.Y. Times, (July 30, 2015), http://www.nytimes.com/2015/07/31/us/texas-troopers-behavior-called-catalyst-in-sandra-blands-death.html?_r=0 (last visited Aug. 30, 2015).

[31] Montgomery, *Texas Trooper's Behavior*, *supra,* note 30.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)

[36] *Maryland v. Wilson*, 519 U.S. 408 (1997)

[37] *See for example*, *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013).

[38] *Wilson v. Layne*, 526 U.S. 603, 614-615 (1999)

[39] *Pearson v. Callahan*, 555 U.S. 223 (2009)

[40] *People v. Gaytan*, 2015 IL 116223.

[41] 625 ILCS 5/3-413(b) (2015).

[42] *Gaytan*, 2015 IL 116223, ¶ 2.

[43] *Id.* ¶¶ 42-52.

[44] *Id.* ¶ 5.

[45] *Id.* ¶ 38.

[46] *Aboufariss v. City of DeKalb*, 305 Ill. App. 3d 1054 (2d Dist. 1999).

[47] *Aboufariss*, 305 Ill. App. 3d at 1056-1057.

[48] *Id.* at 1056.

[49] *Id.* at 1057.

[50] *Id.*

[51] *Id.* at 1065-66.

[52] *Id.*

[53] *Id.*

[54] *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999).

[55] *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 713-14 (7th Cir. 2013).

[56] *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

[57] *Hunter*, 502 U.S. at 229.

[58] *Wilson v. Garcia,* 471 U.S. 261, 276 (1985).

[59] *Johnson v. Supreme Court of Illinois,* 165 F.3d 1140 (7th Cir. 1999); *Kalimara v. Illinois Dep't of Corrections,* 879 F.2d 276 (7th Cir. 1989); *Farrell v. McDonough,* 966 F.2d 279 (7th Cir. 1992).

[60] *Savory v. Lyons,* 469 F.3d 667 (7th Cir. 2006); *Hileman v. Maze,* 367 F.3d 694 (7th Cir. 2004).

[61] *United States v. Kubrick*, 444 U.S. 111 (1979)

[62] *Heck v. Humphrey*, 512 U.S. 477 (1994); *also see Wallace v. Kato*, 549 U.S. 384 (2007).

[63] *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

[64] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)

[65] *DeShaney,* 489 U.S. at 197.

[66] *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

[67] *DeShaney*, 489 U.S. at 199-200.

[68] *Id*. at 200.

[69] *Id*. at 201 (emphasis added).

[70] *Sandage v. Bd. of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 598 (7th Cir. 2008).

[71] *King v. East St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 (7th Cir. 2007)

[72] *White v. Rochford*, 592 F.2d 381 (7th Cir.1979).

[73] *White*, 592 F.2d at 382.

[74] *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

[75] *Reed*, 986 F.2d at 1125.

[76] *Id*. at 1123.

[77] *Brown v. Reyes*, 815 F. Supp. 2d 1018, 1022 (N.D. Ill. 2011) (citing *Windle v. City of Marion, Ind.*, 321 F.3d 658, 661 (7th Cir. 2003)).

[78] *Sandage*, 548 F.3d at 600.

[79] *Stevens v. Umsted*, 131 F.3d 697, 705 (7th Cir. 1997).

[80] *Reyes*, 815 F. Supp. 2d at 1022 (citing *Ellsworth v. Racine*, 774 F.2d 182, 185 (7th Cir. 1985)).

[81] *Reyes*, 815 F. Supp. 2d at 1024-1025.

[82] *Id*. at 1022-23.

[83] *Johnson v. City of Seattle*, 474 F.3d 634 (9th Cir. 2007).

[84] *Hernandez v. City of Goshen*, 324 F.3d 535 (7th Cir. 2003).

[85] *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389 (5th Cir. 1999).

[86] *Saenz*, 183 F.3d at 392.

[87] *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc).

[88] *Pinder*, 54 F.3d at 1181.

[89] *Matican v. City of New York*, 524 F.3d 151 (2d Cir. 2008).

[90] *Matican*, 524 F.3d at 154.

[91] *Id.* at 158 n. 7.

[92] *Id.* at 159.

[93] *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e).

[94] *Griffin,* 557 F. 3d at 1119.

[95] *Id*. at § 1997e(a).

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[96] *Woodford v. Ngo*, 548 U.S. 81, 93 (2006).

[97] *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (quoting *Woodford*, 548 U.S. at 88).

[98] *Nyhuis v. Reno*, 204 F.3d 65, 71 (3d Cir. 2000); *also see Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 538 (7th Cir. 1999).

[99] *See Rumbles v. Hill,* 182 F.3d 1064, 1069 (9th Cir. 1999).

[100] For example, a failure to file a timely grievance within 15 days as required by the California prison code may constitute a failure to exhaust under the PLRA. *Harvey v. Jordan*, 605 F.3d 681, 685-686 (9th Cir. 2010) (citing Cal. Code Regs. Tit. 15 § 3084.1(a)).

[101] 28 U.S.C. § 1915A(a).

[102] 42 U.S.C. § 1997e(c)(1).

[103] *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008), *as amended on denial of reh'g and reh'g en banc,* (Sept. 12, 2008).

[104] *Harvey,* 605 F.3d at 683-684 (citing *Marella*, 568 F.3d at 1027 (quoting *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005))).

[105] *Marella*, 568 F.3d at 1027.

[106] *Pavey*, 544 F.3d at 742-743; *also see Hatch v. Cravens*, No. 3:06-CV-07 WDS, 2008 WL 2952355, at *1 (S.D. Ill. July 30, 2008).

[107] *Pavey, 544 F 3d* at 741.

[108] *Id*.

[109] *Allen v. McCurry,* 449 U.S. 90, 105 (1980).

[110] 28 U.S.C. 1738 (1948).

[111] *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 83 (1984); *Gilbert v. Illinois State Bd. of Educ.,* 591 F.3d 896 (7th Cir. 2010).

[112] *See* Restatement (Second) of Judgments, § 28 (1982).

[113] *Bobby v. Bies*, 556 U.S. 825 (2009).

[114] *Migra*, 465 U.S. at 84-85.

[115] *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991); *Lee v. City of Peoria,* 685 F.2d 196 (7th Cir. 1982); *Durgins v. City of East St. Louis,* 272 F.3d 841 (7th Cir. 2001).

[116] *University of Tennessee v. Elliott,* 478 U.S. 788, 799 (1986), citing *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966).

[117] *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 350 (1971).

[118] *Allen v. McCurry,* 449 U.S. 90, 95 (1980); *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009) (trial court denial of suppression motion which was not appealable does not preclude a § 1983 claim where the criminal charges were dismissed before trial).

[119] *Heck v. Humphrey*, 512 U.S. 477 (1994).

[120] *Wallace v Kato*, 549 U.S. 384, 397 (2007).

[121] *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

[122] *Town of Newton*, 480 U.S. at 397-398; *also see Gonzalez v. Kokot,* 314 F.3d 311 (7th Cir. 2002).