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Vandenberg v. Brunswick Corp.: A Not So Cautionary Tale of Fraud and Mistake

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Factual Background

In this case arising from an unfortunate accident, plaintiffs Scott and Patricia Vandenberg filed a lawsuit against defendants Brunswick Corporation, a yacht manufacturer, and Brunswick Boat Group, a division of Brunswick, alleging that their failure to provide adequate railings caused plaintiff Scott Vandenberg to fall from the upper deck of a yacht and break his neck, rendering him a quadriplegic. *Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶¶ 5. The case proceeded to jury trial, and during juror deliberations, plaintiffs settled with defendants for $25 million. *Vandenberg*, 2017 IL App (1st) 170181, ¶ 9. After a dismissal order was entered, the jury was permitted to deliberate to verdict and returned a verdict for defendants. *Id.* ¶¶ 11-12. Then, the plot thickened.

Brunswick uncovered that the jury had asked a question, prior to the settlement, indicating an intention to return a verdict for defendants. *Id.* ¶ 8. Brunswick also learned that plaintiffs' counsel obtained the content of that question during an *ex parte* conversation with the trial judge's clerk prior to any settlement. *Id.* Plaintiffs' counsel allegedly advised the clerk not to call defense counsel regarding the question. *Id.* ¶ 14. Then, plaintiffs' counsel called the handling claims adjuster and settled the case before the adjuster or defense counsel learned of the question or its contents. *Id.* ¶ 9.

Subsequently, one trial court judge held an evidentiary hearing; vacated the settlement on the grounds of fraud in the inducement, unilateral and mutual mistake, due process, and public policy; and entered judgment for defendants upon the jury verdict. *Id.* ¶ 22. Thereafter, another trial court judge vacated those orders and enforced the settlement upon a finding that Brunswick settled the case after disclosure of all material information. *Id.* ¶ 25. Defendants appealed.

On one side, plaintiffs asked that the $25 million settlement be enforced. On the other side, defendants requested a judgment in its favor on the jury verdict. Alternatively, on appeal, plaintiffs and defendants requested a new trial through a mistrial or grant of a new trial, respectively. Br. of Plaintiffs-Appellees, p. 48, *Vandenberg*, 2017 IL App (1st) 170181; Br. of Defendants-Appellants, p. 56, *Vandenberg*, 2017 IL App (1st) 170181.

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On the inside

Appellate Court Opinion

In a four-page analysis, two justices first found that a fraudulent concealment had not occurred because plaintiffs' counsel had no duty to disclose the contents of the note to opposing counsel or defendants' adjuster. *Vandenberg*, 2017 IL App (1st) 170181, ¶ 34. In reaching this conclusion, the appellate court focused on the second element of fraudulent concealment: "intent to induce a false belief where there is a duty to speak" and the requirement of a special or fiduciary relationship to establish the duty to speak. *Id.* ¶¶ 31-32. The appellate court held that plaintiffs' counsel owed no legal duty to disclose the contents of the note to defendants prior to settlement and further found that the Illinois Rules of Professional Conduct do not impose a legal duty to disclose that information. *Id.* ¶ 34.

The appellate court then considered the doctrine of mistake. "To rescind a contract based on mistake, a party must show (1) the mistake is material to the transaction, (2) it did not result from lack of diligence, (3) it is of such grave consequence that enforcement would be unconscionable, and (4) the other party can 'be placed in *statu quo*' or its precontract position." *Id.* ¶ 36 (citation omitted). The appellate court addressed only the final element and held that plaintiffs could not be placed in their pre-contract position because both parties now have information that did not exist before the settlement, namely that the jury would reach a verdict in favor of defendant. *Id.* ¶ 37.

A concurring justice reached the same result based upon the conclusion that all material information was disclosed prior to Brunswick placing the settlement on the record. *Id.* ¶ 45. Accordingly, that justice would not have reached the issue of whether a claim for fraud could be maintained due to a lawyer's duty to disclose an *ex parte* conversation. *Id.*

Additional Consideration: Fraud and the Duty to Disclose *Ex Parte* Communications

On appeal, defendant pointed to several rules including Cook County Circuit Court Rule 17, which prohibits *ex parte* communications and requires lawyers to disclose the contents of an improper *ex parte* communication to opposing parties if a hearing is not scheduled within two full court days of the communication. Cir. Ct. Cook County R. 17.1-2; Br. of Defendants-Appellants, p. 36, *Vandenberg*, 2017 IL App (1st) 170181. The appellate court did not address this rule in the published opinion. Either way, plaintiffs' counsel could not have violated the disclosure aspect of this rule until at least two days after the *ex parte* communication. Given that the appellate court opinion did not specifically identify any rule prohibiting an attorney from utilizing an improper *ex parte* communication to benefit a client before disclosing that communication to opposing parties, future litigants may well consider it proper.

But in another context, the appellate court invalidated a judge's order based upon the appearance of impropriety arising from the judge's failure to disclose a potentially influential *ex parte* communication, even though the judge's decision was not influenced by that communication. *See In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 858-59 (5th Dist. 1998). Moreover, defendants observed on appeal that the Illinois Appellate Court has affirmed a criminal contempt determination where an attorney failed to disclose the contents of an *ex parte* communication. Br. of Defendants-Appellants, p. 36, *Vandenberg*, 2017 IL App (1st) 170181; *see also In re Estate of Wernick*,

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176 Ill. App. 3d 153 (1st Dist. 1988). And defendants argued on appeal that the appellate court should adopt the principle recognized by other courts that "even ostensibly innocent clients cannot benefit from a fraud perpetrated by their attorney." Br. of Defendants-Appellants, p. 53, *Vandenberg*, 2017 IL App (1st) 170181 citing *Chevron Corp. v. Donzinger*, 833 F.3d 74, 150 (2d Cir. 2016). Accordingly, practitioners should be wary before relying on the *Vandenberg* opinion to conclude that an attorney is permitted to utilize improper *ex parte* communications to benefit a client during the time period before disclosure is required by local rule.

Additional Consideration: Mistake

As stated above, the appellate court decided the issue of rescission on the element of pre-contract position, an argument that plaintiffs did not make on appeal. Br. of Plaintiffs-Appellees, *Vandenberg*, 2017 IL App (1st) 170181. Should this issue arise again, is another appellate court likely to decide the matter similarly? Entering judgment for defendant surely would not place plaintiffs in their pre-contract position, as plaintiffs had possessed a claim for damages that could have been either settled or taken to verdict. Alternatively, a new trial would return plaintiffs to the position of having an unliquidated claim for damages against Brunswick. Another jury might award plaintiffs no money, or another jury might award plaintiffs $100 million. The risk of an adverse verdict would remain for both sides, as it did before the settlement, and the potential for settlement would likewise remain. So it stands to reason that another appellate court might not reach the same conclusion.

Importantly, if a new trial had been awarded, the jury assigned to decide the case would not yet have tipped its hand. Conversely, at the time plaintiffs settled with defendants, the jury assigned to decide the case had already asked a question indicating that the jurors were considering a verdict for defendant and perhaps even likely to return a verdict for defendant. Regardless of the strength of that indication, there is little doubt that the question resulted in an inference more favorable to defendant and that the inference could have impacted the settlement value of the claim.

From plaintiffs' perspective, a new jury and clean slate would actually put them in a significantly better position than they had at the time of settlement, as the jury had already indicated an increased likelihood of a defense verdict. Plaintiffs' bargaining power in the event of a new trial is more likely greater, not less, than the bargaining power they would have possessed if both parties had learned of the jury note at the same time. Thus, another appellate court might well conclude that plaintiffs should not have been permitted to enter into an enforceable settlement during the time when they could have benefitted from superior knowledge obtained from an improper *ex parte* communication.

Conclusion

The appellate court opinion emphasized that the justices do not "in any way condone inappropriate conduct by lawyers or court clerks ***." *Id.* ¶ 40. Yet, this issue could arise again. For example, a judicial law clerk might prematurely disclose a judge's summary judgment ruling to one party or a court clerk could mistakenly reveal a jury verdict when calling an attorney to return to the courthouse. When millions of dollars hang in the balance, or even when the stakes are lower, is it practical to think that an opposing party will disclose that information immediately? After *Vandenberg*, opposing counsel is far more likely to instead attempt to exploit that superior knowledge to negotiate a settlement, particularly where the local rules don't require disclosure for at least two days. Still, practitioners should think twice before adopting that course of action and be aware that not every court will decide this issue in the same manner. ■

Cook County Strategy: How and When to Demand Transfer of Law Division Suits Filed in Suburban Districts to the Daley Center

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Many Cook County civil defense attorneys have experienced Law Division suits filed in the five non-Chicago Municipal District court locations of Cook County. There are several reasons one can imagine why a plaintiff's attorney would strategically choose to file a Law Division suit in the suburbs rather than the Daley Center. Oftentimes, the plaintiff's attorney's office is situated within the suburban district where he/she frequently appears before those judges assigned to M2, M3, M4, M5, or M6. Therefore, the proximity of the suburban Cook County court may be more geographically convenient to plaintiff's counsel. The suburban court may also feel like a "home turf" advantage to plaintiff's counsel.

The jury pool is another factor to consider. On paper, all Cook County courts draw from the same jury pool; however, in practice one can expect the suburban Municipal District courts to draw a higher concentration of jurors from within their own boundaries. Therefore, the difference in jury pool, as subtle as it may be, might influence the plaintiff's choice for the place of filing.

While it is possible for both the plaintiff and the defendant to prefer the same suburban district for different reasons, this is not usually the case. A defendant's desire to seek transfer to the Daley Center is often driven by exact opposite practical considerations that drove the plaintiff's decision, not the least of which is the expense of Loop defense counsel traveling to the suburbs. Defense counsel must be familiar with the nuances and pitfalls of the applicable rules to win a transfer to the Daley Center.

Circuit Court of Cook Co. General Order No. 12. Sec. 2.1(a)(4) provides, in part, that only certain non-commercial calendar Law Division actions may be filed in the suburban districts under certain conditions, as follows:

> Law Division actions, excluding commercial actions as set forth on the Law Division Civil Action Cover Sheet, seeking compensatory and consequential damages <u>in excess of</u> $100,000 <u>wherein the occurrence took place or a defendant resides</u> within the boundaries of Municipal Districts Two, Three, Four, Five, or Six may be filed and heard in the respective Municipal District court locations. (emphasis added).

Therefore, as counterintuitive as it may seem, Law Division cases of the highest exposure may be properly filed and heard in the suburban Municipal District court locations. Defense counsel should carefully check whether or not the occurrence, in fact, took place within the boundaries of the Municipal District court location in which the suit was filed. The territories of the non-Chicago Municipal Department districts are defined in General Order No. 1.2 Sec. 2.3.

Even if the occurrence did not take place within those boundaries, the suit may still be properly filed in the suburban Municipal District court if the defendant "resides" within its confines. Determining where a defendant "resides" is more complicated for corporate defendants than for individuals. General Order No. 1.2 Sec. 2.1(a)(5)(i) provides that "Any private corporation … organized under the laws of this State … is a resident of any district in which it has its registered office or other office". Therefore, defense counsel must determine if it has a registered agent or any "other office" situated in that district.

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If neither one of these criteria are present, a motion to transfer to the Daley Center should be supported by an affidavit of the defendant unequivocally establishing the residency is not within the boundaries of that district and establishing that the occurrence did not take place within the district. If handled correctly, the defendant then appears to have an absolute right to transfer to the Daley Center. General Order No. 12. Sec. 2.1(a)(4) provides the following:

> "Upon the filing of [a motion objection to the location where the action is pending] the judge shall enter an order transferring the action to the Presiding Judge of the Law Division for reassignment within the Law Division in the Richard J. Daley Center . . . " General Order No. 12., 2.1(a)(4). (emphasis added).

Most importantly, defense counsel must be mindful of timeliness of the motion. The General Order provides a very short and oddly defined window of time in which a defendant can properly move for such a transfer, as follows:

> "A motion objecting to the location where the action is pending may be filed and noticed before the assigned suburban judge **not later than the time for a party to appear** or any extension thereof."

Defense counsel are not normally accustomed to a deadline requiring a motion to be filed and noticed "not later than the time for a party to *appear*" rather than the time for a party to *answer*, so it is easy for this distinction to fall through the cracks. If a defendant needs additional time to prepare the motion to transfer, defense counsel must be careful to secure a motion for an extension of time to *appear*, as opposed to an extension of time to *answer* and make sure the order granting the motion includes that verbiage. If the deadline is passed, defense counsel must be aware that General Order No. 12. Sec. 2.1(a)(4) provides the following:

> "Thereafter, only the Presiding Judge of the Law Division, for administrative purposes with notice to all parties of record, may transfer any Law Division case pending in Municipal Districts Two, Three, Four, Five or Six to the Law Division of the Richard J. Daley Center for reassignment."

The rationale for such an exacting and unworkable deadline is unclear. Defense counsel must be mindful that it is arguably much easier to waive an objection to the suburban location than it is to waive an objection to personal jurisdiction. This deadline creates an unnecessarily significant hardship on defense counsel who are assigned cases shortly before the time to appear. An amendment to the General Order No. 12. Sec. 2.1 changing the deadline to "not later than the time for a party to answer" would be fair and appropriate. ■

Conduct Unbecoming: A Refresher on *Res Judicata*, Claim-Splitting, and How to Avoid the "Agreement-in-Effect" Exception

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By now, defense attorneys should be well-familiar with the Illinois Supreme Court's decision in *Rein v. David A. Noyes*, which established that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to the broader *res judicata* defense. 172 Ill. 2d 325, 339-40 (1996). The *res judicata* doctrine provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. *Id.* at 334. Importantly for defense attorneys, the doctrine encompasses not only matters that were actually litigated in the prior case, but also all matters that *should or could have been* litigated. *Id.* at 334-35 (emphasis added). It is a powerful legal tool for defendants who have been subjected to repetitive lawsuits based on the same set of facts or circumstances.

The following requirements must be satisfied in order to apply the doctrine: (1) a final judgment on the merits was rendered by a court of competent jurisdiction; (2) there is an identity of parties or their privies; and (3) there is an identity of cause of action. *Id.* at 335. The rule is founded upon the principle that litigation should have an end and that no person should be unnecessarily harassed with the multiplicity of suits. *Id.* at 340. The principles of fairness and judicial economy that underlie the *res judicata* doctrine also prevent a litigant from splitting a single cause of action into more than one proceeding.

Claim-splitting, which is an aspect of the law of preclusion, prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action. *Id.* Effective though these preclusion doctrines may be, there are six exceptions that defendants must be aware of in order to successfully take advantage of them:

1. The parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein;

2. The court in the first action expressly reserved the plaintiff's right to maintain the second action;

3. The plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action;

4. The judgment in the first action was plainly inconsistent with the equitable implementation of statutory scheme;

5. The case involves a continuing or recurrent wrong; or

6. It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.

Restatement (Second) of Judgments § 26(1) (1980). This article is concerned with the first exception and, specifically, what it means to "agree in effect" to a plaintiff's claim-splitting.

Of the three concepts—agreement in terms, agreement in effect, and acquiescence—agreement in effect is the more elusive of a precise definition.[1] It must be "something short of full-fledged, express consent to the refiling—otherwise it would be an 'agreement in terms'—and it must occur prior to the refiling—otherwise it would be acquiescence." *Dinerstein v. Evanston Ath. Clubs, Inc.*, 2016 IL App (1st) 153388, ¶ 56. Critically, silence alone is insufficient to establish an "agreement in effect." *Id.* at ¶ 59. Under our adversarial system, a defendant is not obligated to stop a plaintiff from making a fatal mistake. *Id.* at ¶ 60.

That notwithstanding, the *Dinerstein* court explained that an "agreement-in-effect" is "conduct by defense counsel, before the plaintiff voluntarily dismisses the case, that implies the defendant will not object to claim-splitting when the action is refiled." *Id.* at ¶ 61. The court ultimately decided that an evidentiary hearing was warranted to determine whether or not defense counsel "agreed in effect" when he discussed with plaintiff's counsel the viability of voluntarily dismissing and refiling his case, and did not rule on whether the exception applied. *Id.* at ¶ 64.

The Second Circuit provided some guidance with its recent decision in *Kantner v. Waugh*, however. In that case, plaintiff filed a multi-count medical malpractice suit against defendants based on permanent injuries following bariatric surgery. 2017 IL App (2d) 160848, ¶ 3. Plaintiff alleged claims of (1) informed consent, which was later dismissed with prejudice, and (2) negligence. *Id.* On the eve of trial, plaintiff moved to continue because, two days earlier, she had been battered by her son, a military veteran returned from Afghanistan. *Id.* at ¶ 5.

Concerned about potential expert witness cancellation fees, defense counsel objected to the continuance. *Id.* at ¶ 7. The court stated it would grant the continuance, provided that plaintiff assumed any cancellation fees. *Id.* With plaintiff's counsel uncertain about what to do, defense counsel suggested that plaintiff voluntarily dismiss the case, and stated "And I think *we have offered* to not object to a motion to voluntarily dismiss the case. And we would not seek any reimbursement on costs now *or upon refiling.*" *Id.* at ¶ 7. The court granted plaintiff's motion to voluntarily dismiss his negligence claim with the order reflecting the following language: "On plaintiff's oral motion and by agreement of the parties, the case is voluntarily dismissed pursuant to statute 735 ILCS 5/2-1009 [(West 2014)] with no costs assessed." The order did not include the words "upon refiling." *Id.*

Plaintiff refiled his negligence claim shortly thereafter. *Id.* at ¶ 9. Defendants moved to dismiss the refiled claim pursuant to the *res judicata* doctrine. *Id.* at ¶ 9. Plaintiffs conceded that *res judicata* applied, but argued defendants offered to accept a voluntary dismissal and to waive costs *upon refiling. Id.* at ¶ 10. Relying on *Matejczyk v. City of Chicago*, defendants argued the exception to *res judicata's* rule against claim-splitting must be expressly reserved in the order. *Id.* at ¶ 11. The trial court agreed with defendants and granted the motion to dismiss. *Id.* at ¶ 15.

The Second District disagreed. Under an agreement-in-effect analysis, which the court explained requires a lower standard than agreement-in-terms, defendants need only imply by their conduct that they will not object to claim-splitting when the action is refiled. *Id.* at ¶ 27. A court must look to "conduct and the resulting implications

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[1] An "agreement in terms" to claim-splitting is something that happened before the refiling wherein the parties explicitly agreed that the defendant would not object to the plaintiff's refiled action on *res judicata* grounds. *Dinerstein v. Evanston Ath. Clubs, Inc.*, 2016 IL App (1st) 153388, ¶ 53. Failing to object to the claim-splitting once the action is refiled constitutes "acquiescence." *Id.* ¶ 48. The time to object to a claim-splitting is not at the time of the voluntary dismissal, as a defendant has almost no basis to object to a first-time voluntary dismissal, and certainly not on *res judicata* grounds, before plaintiffs have even refiled the action. *Id.* at ¶ 48.

under the totality of the circumstances." *Id.* Applying the law to the facts, the court determined the defendants "implied the viability of the refiled claim" when they suggested that plaintiff could voluntarily dismiss his case and failed to correct the trial court when it erroneously stated the plaintiff could promptly proceed to trial thereafter. *Id.* at ¶ 37. The court considered the totality of the defendants' conduct, including their offer to draw up the written order, and determined that defendants' conduct implied they would not object to a refiling based on *res judicata's* rule against claim-splitting. *Id.* at ¶ 33.

Thus, to avoid an "agreement-in-effect" to the rule against claim-splitting, defense attorneys would be wise to remember that sometimes, even for lawyers, silence is golden. ■

Strategic Considerations and Practice Pointers for Re-Allocating Punitive Damage Awards

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In the last year alone Illinois has seen a number of large plaintiff's verdicts with substantial punitive damage awards. For example, on June 28, 2017 in *Ravizza v. PACCAR, Inc., et al.*, a Cook County jury awarded a $20 million verdict for the plaintiff, $10 million of which was a punitive damage award for PACCAR's alleged failure to design and install an adequate safety mechanism on its heavy-duty trucks to prevent their hoods from suddenly closing. On July 18, 2017 in *Baumrucker v. Express Cab Dispatch, Inc.*, a Cook County jury returned a $500,000 punitive damages award as part of an $897,000 verdict for the plaintiff for, *inter alia*, Express Cab's willful and wanton entrustment of a cab to a driver whose driving record that it had failed to sufficiently assess. On July 24, 2017 in *Mitchell v. Abbvie, Inc.*, federal jurors in Chicago returned a $150 million verdict—the entirety of which was as a punitive damage award—against Illinois-based Abbvie, Inc. based on the company's allegedly fraudulent misrepresentation of its testosterone gel, AndroGel.

When faced with a punitive damage award, a defense attorney should consider not only the underlying basis and the size of that award, but also—though frequently forgotten—its allocation. Illinois Statute 5/2-1207 allows a trial court judge, either upon motion or *sua sponte*, to allocate a punitive damage award among the plaintiff, the plaintiff's attorney, and the Illinois Department of Human Services.

> The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services. The amount of the award paid from the punitive damages to the plaintiff's attorney shall be reasonable and without regard to any contingent fee contract, except that such amount shall not exceed the amount authorized by the contingent fee contract. In apportioning punitive damages as provided in this Section, the court shall consider, among other factors it deems relevant, whether any special duty was owed by the defendant to the plaintiff.

735 Ill. Comp. Stat. Ann. 5/2-1207. While "[t]here is no requirement that all punitive damages assessed be awarded to the plaintiff in a civil case" most typically, that is precisely what happens. *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 369 (Ill. App. Ct. 2d Dist. 2004). However, this reflects a philosophical incongruity between why punitive damages are awarded and how those damages are distributed.

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The Rationale Behind Illinois' Split-Recovery Statute

It is elementary that punitive damages, unlike compensatory damages, serve to punish the wrongdoer and to deter that party and others from committing similar acts of wrongdoing in the future. *Slovinski v. Elliot*, 927 N.E.2d 1221 (Ill. 2010). However, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . . . As the types of compensatory damages available to plaintiffs have broadened, [including allowing pain and suffering damages as compensatory damages,] the theory behind punitive damages has shifted toward a more purely punitive . . . understanding." *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 370 (Ill. App. Ct. 2d Dist. 2004) (*citing Cooper Indus. v. Leatherman Took Grp., Inc.,* 532 U.S. 424, 437 n. 11 (2004)). This history is worth remembering. Only after compensatory damages have been awarded are punitive damages even considered. In this way, the damage structure emphasizes the legal system's intent to fully compensate the plaintiff himself from the compensatory award, no matter how nominal. In crafting the split-recovery statute, the Illinois legislature also acknowledged this intent: payment of the entire punitive damage award to the plaintiff results in a "windfall, because it is in addition to his actual damages." 735 ILCS 5/ 2-1207 (West Supp. 1992) (historical and practice notes). The legislature was explicit that "a principal justification for punitive damages is that visiting financial distress on wickedness serves a public purpose." *Id.*

It is elementary that punitive damages, unlike compensatory damages, serve to punish the wrongdoer and to deter that party and others from committing similar acts of wrongdoing in the future. However, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . . . As the types of compensatory damages available to plaintiffs have broadened, [including allowing pain and suffering damages as compensatory damages,] the theory behind punitive damages has shifted toward a more purely punitive . . . understanding."

Practice Pointers

In addition to Illinois, several other states allow the redistribution of punitive damage awards. However, Illinois is in the minority in allowing any reallocation to be based solely on the court's discretion, rather than a prescribed ratio for distribution. The other states' split-recovery statutes mandate the way in which the damages should be allocated. For example in Missouri, 50% of any punitive damage award (less attorneys' fees and expenses) is to be paid into the state's Tort Victims' Compensation Fund. Mo. Ann. Stat. § 537.675 (West).

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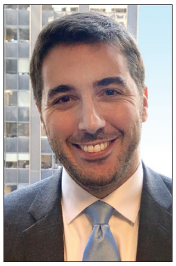
The broad discretionary nature of Illinois' split-recovery statute has strategic advantages for the defense bar. By emphasizing the plaintiff's adequate compensation through the underlying compensatory damages and the purpose of punitive damages, a defense attorney can successfully reallocate the punitive damages to the Illinois Department of Human Services. In this way, the defense bar can disincentivize plaintiffs from pursuing punitive damages claims except in only the most warranted circumstances and can encourage better post-judgment settlements.

Under the statute, the *maximum* the plaintiff's attorney can receive is the same percentage specified by the contingency fee agreement with the plaintiff; however, the statute specifically instructs judges to set aside that agreement, using it only as a cap on the plaintiff's attorneys' potentially damages, and instead consider the reasonableness of the award. 735 ILCS 5/2-1207. In crafting the 5/2-1207 the legislature worried "that plaintiffs' counsel have become the chief beneficiaries of this public policy of deterrence even though they were not intended to be such and have not been injured by the conduct of the defendants for which such damages are being awarded[.]" 735 Ill. Rev. Stat. 1987, ch. 110 ¶ 2-1207, historical and practice notes (West Supp. 1992).

Therefore, 5/2-1207 specifically contemplated that the majority of any punitive damages award would be allocated to the Illinois public through the Department of Human Services. By focusing on the intended distribution, the defense bar can, over time, temper the plaintiff bar's increasing thirst for punitive damages. Knowing that he himself is not likely to be the recipient of the additional punitive funds is a critical consideration and a powerful deterrent to those unwarranted claims for punitive damages. The unlikelihood of additional personal financial enrichment encourages the full and proper consideration of the punitive damage claim as its inclusion will almost certainly increase the case expense, time, and risk: punitive damage awards are subject to remitter after trial and more likely to be appealed, delaying the plaintiff's award for years. An error at trial could mean vacation of the award or the mandation of a new trial altogether, an experience no client or lawyer relishes. ■



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