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MONOGRAPH

The Evolution of Forum *Non Conveniens* in Illinois and Recent Legislation to Limit the Doctrine

FEATURE ARTICLE

IPI 12.04: The "Sole Proximate Cause" Misnomer Should be Replaced by "100% Proximate Cause" to Accurately State the Law and Eliminate Confusion

Law | Equity | Justice

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President's Message

Nicole D. Milos
AAIS, Lisle

Congratulations, 2020 is over!

I look forward to a time when we will regale younger generations of stories of living through the 2020 pandemic. Much like my mother used to tell me stories of walking to school, through a blizzard, uphill, both ways. I look forward to boring younger generations of grim tales of e-learning and Zoom court. I will fashion bedtime stories of the great toilet paper shortage of 2020 and the year we spent living in pajama pants.

I have spent much of my career focusing on strategy and risk mitigation. A critical element in these tasks involves recognizing, understanding and proactively responding to emerging risk. Despite best efforts, 2020 presented challenges that were unforeseen and unexpected. These challenges forced all of us to reconsider what we previously perceived as "normal." 2020 forced us to adapt and evolve. We learned to utilize technology and connect virtually. We were compelled to think outside the box and encouraged to consider solutions that were previously believed to be inconceivable.

It is the mission of IDC to ensure civil justice with integrity, civility, and professional competence. IDC's network is comprised of defense attorneys across the state of Illinois who are dedicated to improving the judicial system and the practice of law. Despite the pandemic, IDC adapted and evolved; IDC continues to be a resource to our members for solutions and assistance.

IDC recognized the financial, personal, professional and mental hardships endured by everyone, including our members. In response to these adversities, IDC adapted and provided unparalleled value. Most importantly, IDC offered Illinois defense attorneys a voice, platform to connect and programs to navigate the challenges facing the practice.

Appreciating that Illinois defense attorneys were facing new challenges, IDC offered educational programs that focused on critical topics like virtual jury selection, remote depositions, and nontraditional business development tools.

In addition to COVID-19, protests and civil unrest brought the issues of diversity and inclusivity front and center. IDC recognized the importance of these issues and the need for education surrounding this conversation. The Diversity and Inclusivity Committee sponsored an honest and compelling discussion of diverse thoughts on diversity.

Trying to stay connected has presented its own set of challenges in 2020. Despite these hurdles, IDC placed a focus on fun. Whether sharing motivational words over social media, Zoom trivia or showing off our baking talents at the holiday party, IDC provided entertaining ways for our members to stay engaged.

IDC members were provided a voice at the newly formed Task Force on Court Operations During COVID-19 created by the Illinois Supreme Court. This Task Force made recommendations to the Supreme Court regarding the continuing challenges for the administration of justice resultant from the COVID-19 pandemic, including recommendations surrounding remote jury selection.

Throughout 2020, IDC used its Network platform to keep members informed of new rules and administrative orders. IDC members were provided a voice at the newly formed Task Force on Court Operations During COVID-19 created by the Illinois Supreme Court. This Task Force made recommendations to the Supreme Court regarding the continuing challenges for the administration of justice resultant from the COVID-19 pandemic, including recommendations surrounding remote jury selection.

IDC is taking a critical look at the structure of the organization and considering ways that we might provide even more value to our members, member firms and sponsors. Our membership task force will continue to evaluate and recommend actions to promote the value of IDC to new members. The task force is also taking a critical look at the new protocols implemented in light of COVID-19 and considering how we might parlay these protocols and expand the IDC's outreach.

No one expected the turmoil that came with 2020. However, 2020 provided several teachable moments, whether you spent hours cooking, learning common core math, or uploading virtual backgrounds, 2020 rewarded unconventional thinkers and pushed traditional norms. In the virtual world, IDC offered its members opportunities to demonstrate their professional expertise through publications and webinars. The exceptional events of 2020 have proven that IDC can evolve, will adapt, but most importantly, will thrive.

As we continue to respond to the challenges of COVID-19, defense attorneys will be tasked with incorporating those teachable lessons of 2020 into their practice. Our capacity to adopt those things that we learned in 2020 is only limited by our own imagination. I expect that in the immediate future we will be faced with practical questions regarding office space and the use of video conferencing as a cost-saving measure. I anticipate that COVID-19 will continue to present novel substantive legal challenges. I am fully confident that IDC will continue to offer our members insight into these emerging issues and a platform for education and spirited discussion of these challenges.

As we enter 2021, I look forward to putting the negative events of 2020 in the rearview mirror. However, I will remember and apply the lessons learned including those skills that improve professional efficiency and personal balance. I wish you all health, happiness and success.

Editor's Note

Jeremy T. Burton
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After 2020, I've recalibrated my expectations to simply hope for some incremental positive change in 2021. May it find us all. Education and preparedness—at least vocationally—are as near as the journal you currently have in your hands or on your screen. This issue of the *IDC Quarterly* continues to explore the effect COVID will have on our practice, but covers a variety of other topics as well, from new laws which have just gone into effect to recent cases setting new precedents. There is something for everyone in this issue.

The Monograph from the Civil Practice Committee covers the history and future of *Forum Non Conveniens* in Illinois. It analyzes whether a conflict exists between statutory law and the judiciary's ability to manage its own docket and discusses both interstate and intrastate forum motions. This issue also includes a feature article which seeks what at first glance may seem like an insignificant semantic change from "sole proximate cause" to "100% proximate cause" but thoroughly explores a number of different failures of pattern instruction 12.04. In our bonus length Supreme Court Watch Column by Matthew Champlin he views (1) timely substitution of judges by right, (2) whether consent to an abortion prevents a wrongful death action, and (3) whether the Fair and Accurate Credit Transactions Act requires that a plaintiff plead and prove an actual injury.

The Civil Practice Column authored by Donald Patrick Eckler and Kayla Condeni summarizes a series of cases discussing judicial estoppel and sets forth exactly how the court weighs out whether one party is a bad actor. Susan Wagener's Medical Malpractice Column covers the Illinois recognition of the loss of Chance Doctrine in malpractice cases, where a patient has been deprived of a chance to recover or negligence harmed patient care or increased the risk of a poor outcome. The Municipal Law Column by Thomas DiCianni asks what exactly the term discretionary means in "discretionary immunity." Mark Hansen, and Emily Galligan provide us with a Health Law article on the difference between a retained consultant and a retained expert and whether there is any fallout in converting from expert to consultant.

This *Quarterly* has some notable contributions regarding insurance law. Patrick Cloud's Insurance Law Update spells out with precision the difference between equitable contribution and equitable subrogation. The Evidence and Practice Tip Column concisely reviews the consequences of filing a frivolous lawsuit. James DuChateau's Property Insurance Column reviews policyholder non-compliance and whether substantial prejudice is required in order to void coverage.

This edition has a number of articles touching on employment issues. This

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Editor's Note | continued

Quarterly's Construction Law Update by Sarah Jansen and Jamie Rein delves into employee/employer issues in the context of the Workers' Compensation Act and the Employee Leasing Company Act, ultimately providing advice to construction companies that use other company's employees and their prospects to avoid liability exposure. Brian Vayr's Civil Rights Column explores political firing and whether they are ever appropriate from an employment law perspective. The Employment Law Column of Julie Bruch covers the new Chicago Fair Workweek Ordinance, which went into effect in July and touches on both employment issues and our new COVID reality.

The Employment Law article is just one of a series of articles which continue to explore the ways our world and legal practice has changed since March of last year. Perhaps the most direct is Gregory Odom's article "Should Illinois Business Brace for a Wave of COVID-19 Personal Injury Lawsuits?" Defense attorneys know, never bet against the ingenuity of the plaintiff's bar. Our Recent Decisions article by Tara Kuchar covers a recent case analyzing whether an employee with a home office could result in proper venue and a decision related to the Illinois Consumer Fraud Act in the context of an attorney's fee dispute. The Technology Law column of Patrick Stufflebeam covers the virtual world we continue to inhabit, asking whether the Rules of Professional conduct require attorneys to be familiar with and employ end-to-end encryption in confidential client communications.

As always, this issue of the Quarterly will keep you up to date.

Feature Article

Melinda S. Kollross and **Paul V. Esposito**
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IPI 12.04: The "Sole Proximate Cause" Misnomer Should be Replaced by "100% Proximate Cause" to Accurately State the Law and Eliminate Confusion

Names are important. They make identification easier, whether of tangibles like persons, places, and things, or intangibles like Arabic numerals and the Pythagorean Theorem. Some things get wrongly named. Our numerals originated in India, not Arabia. The Babylonians derived the theorem about 1000 years before Pythagoras.

The law also has its misnomers, one being the "sole proximate cause defense." It has created a lot of confusion. For one, "sole proximate cause" is not an affirmative defense. *Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 93 (1995). A defendant denying causation need not plead it to raise it. *Leonardi,* 168 Ill. 2d at 93. Rather, a plaintiff bears the never-shifting burden of proving that a defendant's wrongful conduct is a proximate cause of injury. *Id*. at 93-94. The so-called defense merely recognizes a defendant's right to offer evidence negating causation. *Id*. This allows a defendant to argue that plaintiff failed to meet its burden.

Far greater confusion results from the word "sole," especially as seen in IPI 12.04:

> **Concurrent Negligence Other Than Defendant's**
> More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

About the Authors

Melinda S. Kollross is an AV-rated Preeminent shareholder and Chair of *Clausen Miller*'s Appellate Practice Group, handling trial monitoring, post-trial and appellate litigation for savvy clients nationwide. Licensed in Illinois and New York, she has litigated more than 200 appeals in state and federal reviewing courts, including participation in three appeals before the United States Supreme Court. Her practice includes commercial litigation, first-party property, liability insurance coverage and liability defense. Ms. Kollross is a proud member of the Federation of Defense and Corporate Counsel (FDCC), the Defense Research Institute (DRI), the Illinois Defense Counsel (IDC), and the Appellate Lawyers Association.

Paul V. Esposito is a partner at *Clausen Miller P.C.*, where he is a member of the firm's appellate practice group. He has brief and argued cases in the Supreme Court of the United States, several federal courts of appeals, all Illinois reviewing courts, and numerous reviewing courts throughout the country. Mr. Esposito often works directly with defense counsel at trials nationwide.

> A defendant denying causation need not plead it to raise it. Rather, a plaintiff bears the never-shifting burden of proving that a defendant's wrongful conduct is a proximate cause of injury. The so-called defense merely recognizes a defendant's right to offer evidence negating causation. This allows a defendant to argue that plaintiff failed to meet its burden.

> [However, if you decide that the ***sole*** proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.] (emphasis supplied).

The first paragraph, which has been Illinois law for over a century, is plain enough. *Seith v. Com. Elec. Co*., 241 Ill. 252, 259 (1909). It expansively recognizes that more than one defendant, or even more than one nonparty, may be a proximate cause of injury.

The optional second paragraph is the real problem. It is as restrictive as the first paragraph is expansive. It has been read to mean that a defendant may only blame one person—a nonparty—as the "sole" proximate cause. The Notes on Use state:

> This instruction should be used only where negligence of a person ***who is not a party to the suit*** may have concurred or contributed to cause the occurrence.
>
> * * *
>
> The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct ***of a third person*** (emphasis supplied).

Though a defendant might argue that multiple parties and nonparties are the 100% proximate cause, IPI 12.04 does not say so. This omission can negate even the best defense argument as to non-liability.

As originally drafted, IPI 12.04 stated:

> More than one person may be to blame for causing injury. If you believe that the defendant was negligent and that its negligence caused injuries to the plaintiff, it is not a defense that some third person may also have been to blame. *Quoted in Vandaveer v. Norfolk & W. R.R*., 78 Ill. App. 2d 186, 205 (5th Dist. 1966).

The instruction was overhauled in 1965 to read:

> More than one person may be to blame for causing an injury. If you decide that a defendant was negligent and that his negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> [However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.] *Quoted in Miyatovich v. Chi. Trans. Auth*., 112 Ill. App. 2d 437, 443 (1st Dist. 1969).

The overhaul made three changes. First, it required proof of "proximate" causation. Second, it included language in the paragraph to prevent a blameworthy defendant from escaping liability when a ***nonparty*** is ***partially*** to blame. Third, it added the optional second paragraph on sole proximate cause. That paragraph balanced the first paragraph by allowing a defendant to avoid liability when a nonparty is ***fully*** to blame. For example, the *Miyatovich* defendant fully blamed plaintiff's nonparty husband, who drove the car in which plaintiff was injured in a collision.

The problem with the second paragraph is not that it is incorrect. While it is a correct statement of law, it fails to account for the many cases in which 100% fault might be shared by multiple parties and nonparties, including plaintiff—but not by a particular defendant. Referring only to "sole" proximate cause leaves the instruction incomplete.

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The Supreme Court recognizes that a defendant should be allowed to point at more than one other person as proximately causing injury. In *Nolan v. Weil-McLain*, 233 Ill. 2d 416 (2009), plaintiff sued twelve asbestos defendants, eleven of whom settled or were dismissed prior to trial. The remaining defendant sought to identify them as the collective proximate cause of the accident. The Supreme Court agreed. The trial court wrongly barred defendant from "presenting evidence of decedent's other asbestos exposures in support of its sole proximate cause defense." *Nolan,* 233 Ill. 2d at 445.

In *Ready v. United/Goedecke Services, Inc*., 238 Ill. 2d 582 (2010), the decedent was killed when a scaffolding truss fell on him. Defendant contended that the conduct of two settling defendants was the sole proximate cause of the death. The Court ruled that the evidence "tended to show that the settling ***defendants'*** conduct was the sole proximate cause" and so justified an IPI 12.04 instruction. *Ready,*238 Ill. 2d at 592 (emphasis supplied).

Based on *Nolan* and *Ready*, a divided Appellate Court ruled that the conduct of multiple persons may be lumped together as the sole proximate cause. *Douglas v. Arlington Park Racecourse LLC*, 2018 IL App (1st) 162962. Plaintiff jockey was paralyzed when he fell from his mount during a race. Plaintiff blamed Arlington for poor maintenance of the synthetic racing surface. Arlington denied negligence and argued that the sole proximate cause was either the surface manufacturer or another jockey. The trial court gave the IPI 12.04 instruction. Following a defense verdict the court granted plaintiff's motion for new trial, reasoning that evidence of two proximate causes precluded a sole proximate cause.

In a split decision, the First District ordered the verdict reinstated. The panel's most significant disagreement turned on how to interpret the word "sole." To the majority, sole proximate cause does not depend on the number of tortfeasors:

> The defendant may wish to argue that (1) Non-Party A's negligence was the sole proximate cause of the plaintiff's injuries; (2) Non-Party B's negligence was the sole proximate cause; or (3) the negligence of Non-Party A and Non-Party B, collectively, was the sole proximate cause. Those three arguments are simply three different ways of saying the same thing: that the plaintiff failed to prove that the party-defendant's negligence was a proximate cause of the plaintiff's injuries— not even 1% of the cause—because 100% of the cause of the plaintiff's injuries was the conduct of Non-Party A and/or Non-Party B. The critical point here is that the defendant's level of contribution to the plaintiff's injuries is 0%; whether the 100% of the blame falls on Non-Party A, Non-Party B, or both, is of no import. The sole proximate cause theory should be just as viable with two or more nonparty actors as it is with a single nonparty. *Douglas,* 2018 IL App (1st) 162962, ¶37.

The majority also reasoned that from a linguistics perspective, "sole" does not necessarily imply just the singular. *Id*. ¶57. It can also imply an individual group, *e.g*., a group of sole survivors of an accident. *Id*. ¶ 57-58.

In the dissent's view, because Arlington offered evidence of two proximate causes unrelated to each other, there could be no "sole" proximate cause. *Id*. ¶ 125. Focusing on the word "sole," the dissent found "absurd" the majority's dividing a single "group" into individuals. *Id*. ¶ 127. It contended that the language of the instruction and its Notes on Use contemplate that "sole proximate cause" must mean one—and only one—cause. *Id*. ¶ 128-29. If a defendant wants to argue that others are 100% at fault, nothing prevents it. *Id*. ¶ 134.

Adding further confusion is *Doe v. Alexian Bros. Behav. Health Hosp*., 2019 IL App (1st) 180955, ¶ 33, which disagreed with the *Douglas* majority's explanation of "sole proximate cause." Besides following the *Douglas* dissent, the term can be, and was, confusing to the jury. *Doe,* 2019 IL App (1st) 180955, ¶33. A term is ambiguous when it can be understood by reasonably well-informed people in different ways. *Carmichael v. Labor. & Ret. Bd. Emps. Annuity Ben. Fund of Chi*., 2018 IL 122793, ¶ 36. Absent a definitive Supreme Court ruling, the interpretive differences in "sole" make it the wrong term for IPI 12.04. A judicially created doctrine should be free of ambiguities that can be eliminated by better choices of words.

It is the wrong term for a broader reason: "sole" fails to convey a defendant's full position on proximate cause. Among multi-party comparative fault cases, those where one party or nonparty is the only proximate cause of injury are probably the exceptions. Causal fault is more often allocated among a number of persons. A defendant who has denied liability does not really care whether all fault can be allocated to one person as the "sole" proximate cause. The defendant cares that 100% fault can be allocated to everyone other than itself. And though it might try to spread causal fault among other parties and nonparties, IPI 12.04 is silent about that subject. It only mentions "sole" proximate cause, which some courts treat as involving only one person.

Plaintiffs are not burdened with the same limitation. No plaintiff needs to prove that one person is the sole proximate cause of injury. A plaintiff may blame as many persons as the evidence allows. IPI 12.04 says so: "More than one person may be to blame for causing an injury." The current IPI 12.04 is imbalanced because a plaintiff has an easier time proving a defendant's liability than the defendant has in showing its non-liability. Defendants should be freed from the limitation that the name "sole proximate cause" imposes.

Everyone agrees that a defendant is not liable whether one other person alone is 100% at fault or four others are a combined 100% at fault. The focus of IPI 12.04's second paragraph should not be on "sole." It should be on 100%, a term every juror can understand. Ultimately, that is what juries do every day: allocate 100% fault. *See* IPI B.45.03.A; IPI 600.14 (verdict forms). Juries are even allowed to allocate fault to nonparties when a plaintiff's contributory fault is at issue. *Id*. The goal is to find where the 100% fault lies, whether among all parties or nonparties, or just one of them.

Because the scope of proximate is much broader than "sole" proximate cause, IPI 12.04 needs another overhaul. Here is a proposal:

12.04 Concurrent Negligence Other Than Defendant's

More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his/her [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that one or more persons [, even if not a party,] to the suit may also have been to blame.

[However, if you decide that the injury to the plaintiff was 100% proximately caused by the conduct of one or more persons [, even if not a party to the suit,] other than [the] [a] defendant, then your verdict should be for [the] [that] defendant.]

[For purposes of the instructions, the word "person" includes a business organization of any type (for example, a corporation, partnership, proprietorship, etc.).]

The first paragraph remains largely unchanged. It still allows plaintiffs to argue that everyone sued is liable, regardless of their shares of fault. It also allows plaintiffs to counter a blameworthy defendant's suggestion that another person's fault excuses the defendant from liability.

The optional second paragraph undergoes a more significant change. It eliminates reference to "sole" proximate cause in favor of "100%" proximate cause. A defendant may still argue that one party, or one nonparty (the traditional "empty chair"), is the 100% proximate cause. In that sense, it retains the notion that sole proximate cause is limited to only one tortfeasor. It also recognizes the law that a defendant is not liable if the causal fault of plaintiff, the other defendants, and any nonparties combines to equal 100%. This is what a good instruction should do: inform a jury of the law. A jury should know that it is unnecessary to identify a "sole" proximate cause to find a defendant not liable.

There is a third proposed paragraph, this one also optional. Because IPI 12.04 currently uses the word "person," the paragraph tells jurors that the word includes business organizations. Whether it is included in IPI 12.04 or moved to the IPI 1.01 cautionary instruction, jurors need to understand the connection between persons and organizations.

Besides these modifications, the Notes on Use need major revision. Under the current notes, the instruction may not be used to point to any party in the case or to more than one nonparty. As *Nolan*, *Ready*, and *Douglas* show, however, the law is very different. A revised 12.04 should explain the expansive scope of proximate cause.

Some names likely will not change; the Babylonians will probably never get credit for their theorem. But the law can do better and should. The focus of IPI 12.04 should be on "100% proximate cause," not sole proximate cause.

Municipal Law

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Government Must Make a Conscious Decision to Exercise Discretion to Apply Discretionary Immunity

The "discretionary immunity" of §2-201 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act (the "Tort Immunity Act"), 745 ILCS 10/2-201, is the most significant statutory immunity available to local governments. It immunizes from liability government employees "serving in a position involving the determination of policy or the exercise of discretion" for acts or omissions "in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201. The immunity is equally available to the government employer that could be vicariously liable for its employee's acts or omissions, under §2-109 of the Tort Immunity Act, which provides that a public entity cannot be liable for its employee's actions where the employee is not liable. 745 ILCS 10/2-109. Although it reads like a concept only applicable at the high levels of public governance, it can apply along the entire range of government operations. The discretionary immunity is absolute, not subject to exceptions for even corrupt misuse of power (*Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 493 (2001)), or willful and wanton misconduct (*In Re: Chicago Flood Litigation*, 176 Ill. 2d 179, 196 (1997)).

The parameters of the discretionary immunity have been accurately described as "murky." *E.g.*, *Malinski v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685, ¶ 10; *Albers v. Breen,* 346 Ill. App. 3d 799, 808 (4th Dist. 2004). But in its last two terms the Supreme Court has cleared some muskiness in two cases that establish a threshold burden for a government to prove the immunity. The acts and omissions immunity under §2-201 arises from a balancing of competing interests and a judgment on a course of action to be taken. *Harinek v. 161 N. Clark St*., 181 Ill. 2d 335, 342 (1998). Immunities under the Tort Immunity Act are affirmative defenses that the governmental defendant has the burden of proving. *Van Meter v. Darien Park District,* 207 Ill. 2d 359, 370 (2003). Government defense attorneys often argue that §2-201 applies to actions that are discretionary in nature, with no further proof needed. In *Monson v. City of Danville*, 2018 IL 122486, and *Andrews v. Metropolitan Water Reclamation Dist*., 2019 IL 124283, the Supreme Court held that the government defendant's burden of proving the discretionary immunity requires proof that discretion actually occurred, not just that the act or omission in question was one that was discretionary in nature. A conscious decision is necessary, one in which the government employee imbued either with the ability to make policy decisions or exercise discretion, balanced competing interests and made a judgment based on those interests.

The Supreme Court in *Monson* held that the defendant city failed to carry its burden in proving it was immune from liability under §2-201. The plaintiff was injured when she fell on a city sidewalk in the city's downtown business district, alleging as a result of the city's negligent maintenance of the area. *Monson*, 2018 IL 122486 ¶ 3. The city asserted the discretionary immunity in a motion for summary judgment, supported by an affidavit establishing that it had a project in place to repair its downtown sidewalks in which its superintendent of downtown services and its public works director inspected the sidewalks, with the latter making the final decision on which parts of the sidewalks would be repaired or replaced. The public works director stated in the affidavit that the sidewalk was "either not prioritized to be in need of replacement" during the project, or "such replacement would not fit with the allowable time and budget for that project." *Id.* ¶ 34.

The director testified in his deposition, however, that he did not recall with any specificity any decisions made about the specific sidewalk where the plaintiff was injured. *Id.* ¶ 34. Summary judgment was reversed, the Supreme Court finding that the city did not prove a "conscious decision" was made, balancing the competing interests, not to repair the area. *Id*. Was discretion actually exercised, or was it just an oversight? The proof necessary to establish the exercise of discretion was lacking.

About the Author

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The parameters of the discretionary immunity have been accurately described as "murky." But in its last two terms the Supreme Court has cleared some muskiness in two cases that establish a threshold burden for a government to prove the immunity.

In *Andrews v. Metropolitan Water Reclamation District*, 2019 IL 124283, the Court reversed summary judgment for the defendant sanitary district, again finding that discretionary immunity was not proven in the trial court because there was no evidence of a "conscious decision" in which the balancing involved in the determination of policy and the exercise of discretion was made. *Andrews*, 2019 IL 124283 ¶ 31. The case involved a construction project in which the district required its outside contractors to submit plans to the district engineer to review, with the engineer having the right to disapprove of and reject any procedures and methods he found to be unsafe. *Id*. ¶ 4. Nevertheless, the contractor maintained responsibility for safety on the project. Two of the contractors' employees were seriously injured descending into a chamber of a settling tank to work on a gate. They climbed down a job-made wooden ladder and then transitioned onto a fiberglass extension ladder set inside the chamber. One employee slipped off the ladder, falling onto the other, causing severe injuries to both. *Id*. ¶ 6. The employees sued the district alleging that its engineer negligently allowed this dangerous process to take place. The trial court granted summary judgment to the sanitary district, based on the contractual provision that gave the district engineer the discretion to reject any procedures and methods he thought were unsafe. The Supreme Court applied the "conscious decision" rule announced in *Monson* and reversed summary judgment.

The dissent in *Andrews* pointed out how prior cases would have been decided differently prior to *Monson* and this new conscious decision rule. Most significantly, in *In Re: Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), the defendant city was held immune from liability for the flooding of an underground tunnel system that penetrated adjacent buildings in the Chicago Loop, caused by a city contractor's pile driving activities in the Chicago River. The city was immune under §2-201 and 2-109, precisely because its contract with the dredging company gave the city the discretion to approve or reject the pile driving plan. Whether any analysis of the plan that balanced competing interests even occurred did not matter. No proof of a conscious decision was required.

Other earlier discretionary immunity cases would have been decided differently if the conscious decision rule were applied. One prominent example is *Harinek v. 161 N. Clark Street Limited Partnership*, 181 Ill. 2d 335 (1998), where the Court found the discretionary immunity applied to the fire marshal's decision on how to conduct a fire drill, without any analysis of a conscious decision. The discretionary immunity applied merely because the fire marshal's position gave him the discretion on how to run a fire drill.

One question post-*Monson* is whether there are any situations in which the conscious decision rule is unnecessary because the act or omission giving rise to the lawsuit inherently required the balancing process. For example, the discretionary immunity has been applied to employment decisions. *E.g.*, *Brooks v. Daley*, 2015 IL App (1st) 140392, ¶¶ 30-31; *Johnson v. Mers,* 279 Ill. App. 3d 372, 380 (2d Dist. 1996). Employment decisions are inherently discretionary. A person cannot be hired, fired, or disciplined without a conscious decision that takes into consideration the type of balancing of factors that gives rise to the immunity. The *Andrews* dissent's most interesting observation was that the conscious decision rule could lead to articulation of "magic words," which pay lip service to the purpose of the discretionary immunity. Are the "magic words" from the *Andrews* dissent necessary in situations where the act or omission giving rise to the lawsuit could not have occurred without the exercise of the type of balancing of judgments that creates the immunity? Until further guidance it would seem that defense attorneys should evaluate any discretionary immunity defense for the need for some conscious decision evidence.

Property Insurance Law

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Examinations Under Oath: The Better Standard for Policyholder Noncompliance

Standard form property insurance policies contain itemized post-loss duties that policyholders are required to discharge in connection with their claim. Among these duties is the requirement that a policyholder cooperate with its insurer in the investigation and settlement of the claim. Additionally, if requested by the insurer, the insured may be required to submit to an examination under oath and produce documents related to the claim. The typical policy provision is phrased as follows:

> We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

See generally, State Farm Fire & Cas. Ins. Co. v. Miceli, 164 Ill. App. 3d 874, 883 (1st Dist. 1987); *W. World Ins. Co. v. Johnson,* 2007 WL 1100777, at *2 (S.D. Ill. Apr. 12, 2007).

The purpose of the examination under oath provision was set forth by the Supreme Court in *Claflin v Commonwealth Ins. Co.*, 110 US 81 (1884). The Court stated that the object of the policy provision is to enable the insurer to possess itself of all knowledge and information regarding the facts material to its rights, to enable it to decide upon its obligations. and to protect against false claims. In regard to the scope of questioning, the Court stated that every interrogatory that is relevant and pertinent in such examination is material in the sense that a true answer to it is the substance of the obligation of the insured.

Historical Approach to Noncompliance — Substantial Prejudice

Illinois courts have historically examined an insured's failure to appear for an examination under oath or failure to produce documents requested under the cooperation clause analysis, which examines whether the carrier was prejudiced by the insured's non-cooperation. For example, in *Piro v. Pekin Ins. Co.*, 162 Ill. App. 3d 225 (5th Dist. 1987), the insured's company was destroyed by fire. *Piro,* 162 Ill. App. 3d. at 226. Under the terms of the fire insurance policy, Pekin Insurance was allowed to examine and audit the relevant books and records of the insured and to request that the insured sit for an examination under oath. *Id*. While the insured did appear, he failed to produce requested documents and also refused to answer questions concerning the location, his rental properties, and the concerns of other businesses he owned claiming those matters were not relevant. *Id*. at 226-227. The insured subsequently filed suit demanding the proceeds of the policy. *Id*. at 227.

In its summary judgment motion, Pekin argued that the insured's actions at the examination under oath and refusal to produce documents amounted to a breach of a condition precedent to recovery under the policy. *Id*. In its response, the insured provided documents he claimed were responsive to the requested information. *Id*. The circuit court granted Pekin Insurance's motion and the insured appealed. *Id*.

In reversing the circuit court, the appellate court focused on the aspects of the insured's conduct it found to be cooperative. The court bolstered this viewpoint by citing to other jurisdictions where insureds were allowed to prosecute their actions to judgment without complying with the insurers' pre-suit requests for documentation and examination under the respective policies. *Id*. at 228. The appellate court noted that it was undisputed that the insured eventually provided

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documentation responsive to Pekin's requests. *Id*. The court took the position that if the proofs furnished by the insured are not satisfactory, the insured is entitled to be advised, and the insurer is bound to inform him of any want of compliance, and give the insured the opportunity to cure the objection. *Id*. at 229.

The appellate court held that the procedure followed in *C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of America*, 574 F. 2d 106 (2d Cir. 1978), was instructive. In *C-Suzanne*, the insurer moved for summary judgment on the basis that the insured failed to submit to examination under oath. *C-Suzanne Beauty Salon,* 574 F. 2d 106. The court denied the motion, and the insured was ordered to sit for an examination under oath. *Id*. The insurer was advised that it could renew its motion provided it could show that the delay prejudiced the investigation. *Id*. The insurer renewed its motion, which the court denied on the basis that the insurer failed to show any prejudice. *Id*. Applying *C-Suzanne*, requiring a showing of prejudice, the *Piro* court reversed the trial court. *Piro,* 162 Ill. App. 3d. at 230.

The cooperation clause standard was also discussed in great detail in the matter of *Piser v. State Farm Mt. Aut. Ins. Co.*, 405 Ill. App. 3d 341 (1st Dist. 2010). In *Piser*, the insured filed a claim related to a stolen motorcycle. *Piser,* 405 Ill. App. 3d at 343. State Farm denied the claim after the insured failed to provide requested documentation or to sit for an examination under oath. *Id*, at 344. The insured filed suit claiming breach of contract and vexatious and unreasonable delay pursuant to section 155 of the Insurance Code. *Id*. at 343. State Farm moved to dismiss based on its policy's cooperation clause. *Id*. The circuit court granted the motion, and the insured appealed. *Id*.

While the appellate court reviewed the importance of the cooperation clause to the insurer's investigation, it further noted that, "it is well settled law that 'unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract. This is the test to be employed in our courts in cases where the issue is a breach of the cooperation clause.'" *Id*. at 347. The court found that the insured's efforts to cooperate were negligible. *Id*. State Farm's showing of prejudice was the basis for the court's holding that it clearly set forth a defense barring the insured's claim. *Id*. at 348.

Analysis Under Condition Precedent Standard

As discussed, *supra,* standard property insurance policies contain "post-loss duty" provisions that enumerate various duties with which a policyholder is required to comply in order to present a claim and be entitled to coverage, including the requirement to sit for an examination under oath. Additionally, most policies also contain language requiring compliance with all policy provisions as a condition precedent to bringing suit on the policy. The standard language usually tracks as follows:

No one may bring legal action against us under this Coverage Part unless:

> 1. There has been full compliance with all of the terms of this Coverage Part; and
>
> 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Omega Demolition Corp. v. Travelers Prop. Cas. of Am., 2015 WL 3857341, at *1 (N.D. Ill. June 19, 2015).

Seemingly then, if a policyholder refuses to appear for or complete an examination under oath, such a failure would constitute noncompliance with the "legal action against us" provision, which is a condition precedent to legal action on the policy. Recently, Illinois state and federal courts have begun to re-examine the substantial prejudice approach and, instead, focus on the plain language of the policy.

In *Allstate Ins. Co. v. Mack*, 2016 Ill. App. (1st) 141171, Allstate filed a declaratory judgment action alleging that the insured breached the contract by refusing to execute HIPAA authorizations for medical records and to appear for an examination under oath. *Allstate*, 2016 Ill. App. (1st) 141171 at ¶ 1. The insured conceded that she did not sit for the requested examination under oath and that she had failed to execute the records authorization. The court granted summary judgment in favor of Allstate, and the insured appealed. *Id*. at ¶ 3.

On appeal, the insured claimed that the American Arbitration Act precluded her from complying with Allstate's discovery requests. *Id*. at ¶ 1. The court found that the issue on appeal was not a discovery dispute, but whether the insured was in breach of the contract for, in part, failing to sit for an examination under oath. *Id*. at ¶ 5. It held that Allstate's requests for executed authorizations and for the insured to submit for the examination under oath were expressly provided for in the insurance policy. *Id*. at ¶ 7. Since the policyholder admitted that she had failed to comply with Allstate's requests, the court found that the insured had breached the terms of the policy and was not entitled to pursue her insurance claim. *Id*.

— *Continued on next page*

In affirming the trial court's decision, the appellate court ruled that Allstate was not required to make a showing of prejudice; rather, the analysis focused on the plain language of the contract and the insured's failure to comply with the same. The Seventh Circuit Court of Appeals has noted that the "Duties After Loss" provision is not a cooperation clause that requires only reasonable assistance with the investigation of a claim, but is "an entirely separate condition that explicitly requires the policyholder to perform specific duties." *Foster v. State Farm Fire & Cas. Co.*, 674 F.3d 663, 667 (7th Cir. 2012) citing *Morris v. Economy Fire & Cas. Co*., 848 N.E.2d 663, 666 (Ind. 2006); see also *In re Intercontinental Sec. Corp.*, 62 B.R. 16 (N.D. Ill. 1986) (refusal to complete the examination under oath constituted a failure to comply with a condition precedent for recovery under the terms of the policy).

Conclusion

While traditionally analyzed under the "substantial prejudice" test of a policy's cooperation clause, an insured's failure to appear for or complete an examination under oath also constitutes a breach of the policy's "post-loss duties" provision. Compliance with this provision is a condition precedent to a policyholder's legal action against its insurer under the policy's "legal action against us" provision. In the wake of *Allstate v. Mack*, and accompanying federal cases, when confronted with an insured's failure to sit for an examination under oath or refusal to produce requested documentation, an insurance carrier should include the insured's breach of its post-loss duty obligations under the policy as a basis for declining coverage and should consider moving to dismiss any ensuing legal action for failure of condition precedent.

Technology Law

Patrick W. Stufflebeam
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Lookin' Out My Backdoor: Will Anti-Encryption Laws Invade the Attorney-Client Privilege?

The COVID-19 pandemic forced lawyers into a remote work environment with little notice, requiring lawyers to become even more dependent on technology. From virtual hearings to virtual mediations, lawyers have entered the virtual practice of law. And yes, this virtual world includes virtual conferences with clients and reliance on cloud storage options for client documents.

Due to the myriad of information storage options and virtual communications platforms, lawyers and law firms must carefully consider their technology and whether that technology is secure. Most security experts will advise lawyers to rely on technology that is "end-to-end encrypted," which means that only the sender and receiver can decipher the communication. End-to-end encryption prevents your client communications or the transfer and storage of client data from being intercepted by an unauthorized user.

The variety of technology options can present a struggle for lawyers and law firms in satisfying a lawyer's duty to understand the risks and benefits and constant scrutiny of technology in a lawyer's practice as prescribed in Illinois Rule of Professional Conduct 1.1, Comment 8. Zoom, for example, has become genericized and can now be a noun or a verb. And even with its millions of users, Zoom came under attack for its protection of client data. In November 2020, the Federal Trade Commission announced that it had reached a settlement with Zoom arising from Zoom's misleading claims surrounding the end-to-end encryption of customers' data. *In the Matter of Zoom Video Communications, Inc*., https://www.ftc.gov/system/files/documents/cases/1923167zoomacco2.pdf.

Some argue that end-to-end encryption should not exist without a backdoor, a technological method for a user other than the sender or recipient to access end-to-end encrypted data. In October 2020, the United States Department of

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> Most security experts will advise lawyers to rely on technology that is "end-to-end encrypted," which means that only the sender and receiver can decipher the communication.

Justice joined other representatives from the United Kingdom, Canada, Australia, New Zealand, India, and Japan in issuing the *International Statement: End-To-End Encryption and Public Safety*. https://www.justice.gov/opa/pr/international-statement-end-end-encryption-and-public-safety. While acknowledging strong encryption "plays a crucial role in protecting personal data, privacy, intellectual property, trade secrets and cyber security," the statement goes on to call for backdoors stating, "tech companies should include mechanisms in the design of their encrypted products and services whereby governments, acting with appropriate legal authority, can gain access to data in a readable and usable format." *Id.*

In June 2020, Senator Graham (R-SC) introduced the Lawful Access to Encrypted Data Act that the sponsor described as "a bill to bolster national security interests and better protect communities across the country by ending the use of 'warrant-proof' encrypted technology by terrorists and other bad actors to conceal illicit behavior." https://www.judiciary.senate.gov/press/rep/releases/graham-cotton-blackburn-introduce-balanced-solution-to-bolster-national-security-end-use-of-warrant-proof-encryption-that-shields-criminal-activity. "Warrant-proof" means backdoors. The proposed legislation would apply to companies such as manufacturers of operating systems, encrypted devices, and service providers, and it would apply to data at rest and data in transit, *i.e.*, the manufacturer would not only have to make the data on a device available but also all communication that runs over that device.

If this legislation—or similar legislation—is enacted, lawyers will need to revisit the impact of technological backdoors on client communications and the electronic storage and transmission of client data. Although backdoors are contemplated to be used only by the "good guys," it does not take much imagination to consider scenarios where such technology could be exploited for nefarious purposes.

The purpose of the attorney-client privilege is to promote the free flow of communication between attorneys and their clients by removing the fear of a compelled disclosure of confidential information. *People v. Williams*, 97 Ill. 2d 252, 294 (1983). Lawyers must also take reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, client information. Ill.S. Ct. R.1.6. Although Comment 18 to Rule 1.6 states that the inadvertent or unauthorized access to information does not constitute a violation if the lawyer has made reasonable efforts to prevent the access or disclosure, does the use of a technology known to have backdoors comply with the Rules?

Rule 1.6, Comment 19 includes a reasonableness standard when safeguarding information relating to the representation of a client, noting "[t]his duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy." Ill. R. S. Ct. 1.6, Comment 19.

Comment 19 continues, "[f]actors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use)." *Id*. If legislation mandates the use of backdoors in the tools regularly used by a lawyer, *e.g.*, laptop, smartphone, cloud storage, etc., a lawyer's use of this technology may be reasonable.

The virtual practice of law is likely to continue post-COVID-19, and with it, lawyers' reliance on new technology. A lawyer must continuously evaluate the technology he or she uses to verify it comports to their ethical obligations, including safeguarding client information and communications.

> The purpose of the attorney-client privilege is to promote the free flow of communication between attorneys and their clients by removing the fear of a compelled disclosure of confidential information.

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Seventh Circuit Adopts Broad View of Standing but Restrictive Definition of an Automatic Telephone Dialing System for Text Message TCPA Claims

Gadelhak v. AT&T Services,
19-1738 (7th Cir. Feb. 19, 2020)

The Seventh Circuit recently ruled on the issues of standing and the definition of "automatic telephone dialing system" ("ATDS") under the Telephone Consumer Protection Act ("TCPA") in its recent decision in *Gadelhak v. AT&T Services, Inc.*

The Plaintiff asserted that the defendant impermissibly used an automatic telephone dialing system to send him a text message without his consent. The defendant moved for summary judgment.

With regard to standing, the court analyzed whether the injury was "real" rather than "abstract" under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). In a similar case, the Eleventh Circuit found no standing because the receipt of a text message was not a cognizable injury under the Act because it was not sufficiently "concrete". *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019). The Seventh Circuit disagreed. While it noted that a few unwanted texts may be too minor annoyance to be actionable at common law, such texts nevertheless pose the same kind of harm that common law courts recognize and a concrete harm that Congress has chosen to make legally cognizable, and thus constituted a concrete injury-in-fact that gave the Plaintiff standing to sue.

While Plaintiff survived standing, his claim fell on the ATDS issue. The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." The Defendant asserted that as a grammatical matter, the phrase "using a random or sequential number generator" modifies both the terms "store" and "produce." The Defendant had texted the Plaintiff using a system that drew on a database containing the numbers of existing customers. The district court entered summary judgment for the Defendant, ruling that the Defendant's system did not constitute an ATDS under the TCPA.

The Defendant then outlined how a different form of equipment from its system could store numbers using a random or sequential number generator such that the Defendant's interpretation would not render the term "store" mere surplusage. Under the Defendant's interpretation, dialing systems that draw numbers from an existing database neither store nor produce numbers using a random or sequential number generator and thus cannot constitute an ATDS for TCPA purposes. The Seventh Circuit agreed, but based on a different analysis, ruling that a dialing system that "neither stores nor produces numbers using a random or sequential number generator," but rather "exclusively dials numbers stored in a customer database," "is not an 'automatic telephone dialing system' as defined by the Act." In construing the definition of ATDS narrowly, the Seventh Circuit joined the interpretation adopted by the Third and Eleventh Circuits and rejected the Ninth Circuit's differing interpretation.

Both the plaintiff and defense bar can take something from this decision. The ruling will help those plaintiffs asserting text-based TCPA claims to establish standing. Defendants facing these type of claim will benefit from the narrow definition of an ATDS. It would behoove those businesses sending these types of messages to make sure they fall within the parameters set forth by the Seventh Circuit to guard against potential TCPA liability.

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James K. Borcia is a partner with the Chicago firm of *Tressler LLP*, and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

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Should Illinois Businesses Brace for a Wave of COVID-19 Personal Injury Lawsuits?

As of this writing, the COVID-19 pandemic shows no signs of slowing in Illinois. According to the Illinois Department of Public Health, the diagnosis rate in Illinois has steadily increased since July 2020. Illinois Department of Public Health, *COVID-19 Statistics*, https://www.dph.illinois.gov/covid19/covid19-statistics (last updated November 5, 2020). With the increase in COVID-19 infections during this time, businesses should consider whether there will be a corresponding increase in personal injury lawsuits related to the pandemic. Similarly, businesses should understand the types of lawsuits that might be filed related to the pandemic.

As of November 6, 2020, 290 complaints have been filed in Illinois related to COVID-19. Hunton Andrews Kurth, *COVID-19 Complaint Tracker*, https://www.huntonak.com/en/covid-19-tracker.html (last visited on November 6, 2020). Before addressing possible theories of liability, businesses should understand the potential claimants that might file suit. Potential claimants may include employees, customers/patrons and their relatives. Regarding potential types of personal injury claims, businesses may face lawsuits based on infliction of emotional distress, negligence, secondary exposure, failure to warn, premises liability, willful and wanton misconduct, and workers' compensation claims.

As to infliction of emotional distress claims, plaintiffs may allege that a business's practices or policies concerning COVID-19 have caused them to experience emotional distress related to contracting, or the potential for contracting, COVID-19. Those pursuing intentional infliction claims would need to prove that a defendant's conduct was extreme and outrageous; the defendant intended to cause or recklessly or consciously disregarded the probability of causing emotional distress; the plaintiff suffered severe or extreme emotional distress; and the defendant's conduct caused the plaintiff's emotional distress. *Public Finance Corp. v. Davis*, 66 Ill.2d 85, 89-90 (1976). Importantly, the plaintiff would not need to prove an actual physical impact or injury. *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 555 (1983). For businesses that fail to comply with executive orders or Department of Health regulations related to COVID-19, it is not unreasonable to expect plaintiffs' attorneys to rely on such failure to argue that intentional or reckless conduct exists. Plaintiffs alleging negligent infliction likely would have a much more difficult time establishing liability unless they are what is considered "direct victims." Direct victims must establish that the defendant owed the plaintiff a duty of care; that the defendant breached that duty; the defendant's negligence caused the plaintiff's emotional distress; and the plaintiff suffered damages in the form of an immediate or instinctive emotional response that was severe or extreme, a long-lasting traumatic neurosis that was severe and extreme, or both. *Corgan v. Muehling*, 143 Ill.2d 296, 306, 311-12 (1991). Bystander victims, by contrast, would have to prove that they were in a "zone of physical danger" relative to the defendant's negligent conduct and a physical injury or illness. *Rickey*, 98 Ill.2d at 555.

Plaintiffs asserting negligence claims may allege that a business negligently exposed them to COVID-19, failed to take proper measures to protect them from exposure to COVID-19, failed to implement proper screening protocols related to COVID-19, failed to adequately warn them of the potential for exposure to COVID-19, or violated a public health statute or ordinance. At this time, such lawsuits already have been filed in Illinois. For example, in May 2020, five McDonald's employees

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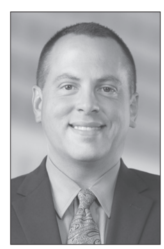
About the Author



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and four of their relatives filed suit against the company in Cook County, alleging failure to adopt proper safety protocols to protect against COVID-19. Amanda Bronstad, *Judge Refuses to Dismiss McDonald's Workers' Lawsuit Over COVID-19*, https://www.law.com/2020/06/03/judge-refuses-to-dismiss-mcdonalds-workers-lawsuit-over-covid-19/?slreturn=20201006114622 (June 3, 2020). Similarly, the family of a deceased Walmart employee filed a wrongful death lawsuit against the company in Cook County, alleging that Walmart failed to follow CDC and Department of Labor guidelines regarding COVID-19 and maintaining a safe workplace. *Evans v. Walmart, Inc.*, No. 2020L003938 (Cir. Ct. Cook Co.).

As to secondary exposure claims, this theory of liability stems from asbestos litigation. Specifically, a person's spouse or other family member typically alleges that he or she developed an asbestos-related illness through exposure to asbestos from the work clothes of his or her relative. In the context of COVID-19, two lawsuits based on this theory already have been filed in Illinois. In one case, the plaintiff alleged that her mother died of COVID-19 after her father contracted the virus through his employment at a meat processing plant. Tom Hals, *'Take home' lawsuits over COVID infections could be costly for U.S. employers*, https://www.reuters.com/article/us-health-coronavirus-usa-lawsuits/take-home-lawsuits-over-covid-infections-could-be-costly-for-u-s-employers-idUSKBN26J1H8 (Sept. 28, 2020). In the other case, the plaintiff alleged that she contracted COVID-19 from her husband, who she alleged contracted the virus through his employment with an electrical components manufacturer. *Id.* With the increase in COVID-19 diagnoses beginning in July, businesses should prepare to continue seeing this type of claim.

> [P]laintiffs may allege a traditional premises liability theory against businesses if they contract COVID-19 through exposure at a business. Regarding willful and wanton misconduct claims, defendants may expect these claims to be similar to negligence claims, but allege a heightened standard of misconduct, such as purposefully disregarding executive orders, administrative regulations, or government-issued guidelines.

Additionally, plaintiffs may allege a traditional premises liability theory against businesses if they contract COVID-19 through exposure at a business. Regarding willful and wanton misconduct claims, defendants may expect these claims to be similar to negligence claims, but allege a heightened standard of misconduct, such as purposefully disregarding executive orders, administrative regulations, or government-issued guidelines. A related claim may involve negligence based upon a violation of a statute or ordinance. Under Illinois law, a plaintiff can assert such a claim if the statute or ordinance violated was designed to provide a standard of conduct for the safety of a particular person or class of persons and the injury suffered was of the type the statute or ordinance intended to protect against. *See Ney v. Yellow Cab Co.*, 2 Ill.2d 74 (1954); *Bitner v. Lester B. Knight & Associates, Inc.*, 16 Ill. App. 3d 857 (3rd Dist. 1974). A potential theory to support this type of claim would be that the Illinois Emergency Management Agency Act qualifies as such a statute and, therefore, violations of it constitute negligence. According to the Act, one of its purposes is to "preserve the lives and property of the people of [Illinois] and protect the public…health." 20 ILCS 3305/2. The Act further indicates that to fulfill this purpose, "it is found and declared to be necessary…[t]o confer upon the Governor…the powers provided herein." 20 ILCS 3305/2(a)(2).

Finally, businesses certainly should anticipate workers' compensation claims related to COVID-19. Perhaps in anticipation of an increase in occupational exposure to COVID-19, on June 5, 2020, Illinois enacted House Bill 2455, which creates a rebuttable presumption that where a "front-line worker" is exposed to and contracts COVID-19, the illness arises out of and in the course of employment and is casually related to the hazards or exposures of employment. Front-line workers include individuals that are employed by essential businesses, as defined by executive order 2020-10, dated March 20, 2020, so long as the employees are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. Employers can rebut this presumption by establishing: 1) the employee was working from home and/or on leave for a period of 14 or more consecutive days immediately prior to their illness; 2) the employer was engaging in and applying to the fullest extent possible industry-specific workplace sanitation, social distancing, and health and safety practices based upon updated guidelines from the CDC or Illinois Department of Public Health, or was using a combination of various administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 days before the employee became ill.

Ultimately, another potential consequence of this pandemic is the likely increase in lawsuits against businesses. Given the unique and novel nature of the pandemic, there is much uncertainty over how these claims may resolve. Certainly, none of the theories of liability discussed above are necessarily meritorious, but that does not mean businesses should be unprepared. At a minimum, businesses should strongly consider following government-issued guidelines and recommendations and continually monitoring for new or updated guidelines and recommendations. The Toxic Tort Committee will continue monitoring legal developments in this area.

Supreme Court Watch

Matthew B. Champlin
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Supreme Court Dives in to Address "Test the Waters" Exception

Palos Community Hospital v. Humana Insurance Company

In Illinois, civil litigants are "entitled to one substitution of judge without cause as a matter of right," provided the motion to substitute "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 . . .." 735 ILCS 5/2-1001(a)(2)(i)-(ii). In *Palos Community Hospital v. Humana Insurance Company,* the Illinois Supreme Court is asked whether a right to substitution exists after a party "tests the waters" as to the judge's likely ruling on a pending motion.

Palos Community Hospital sued Humana Insurance Company in the Circuit Court of Cook County for breach of contract. *Palos Cmty. Hosp. v. Humana Ins. Co.*, 2020 IL App (1st) 190633, ¶ 12. The case was originally assigned to Judge Sanjay Tailor, who appointed retired Judge James Sullivan as a "discovery master" to mediate certain discovery disputes between the parties. *Palos Cmty. Hosp.*, 2020 IL App (1st) 190633, ¶ 13. Judge Sullivan was unable to resolve the discovery issues, so he recommended that the court order Palos to produce certain documents and respond to certain discovery. *Id.* ¶ 14.

Before issuing a discovery order, Judge Tailor transferred to the chancery division, and the case was reassigned to Judge Diane Shelley. *Id.* ¶ 15. In March 2017, the parties appeared before Judge Shelley. *Id.* ¶ 24. At that time, Palos argued that Judge Tailor lacked the authority to appoint a "special master of discovery," and Palos requested time to file an objection to the procedure used by Judge Tailor. *Id.* Judge Shelley indicated "she saw no need 'to deviate from the procedure that Judge Tailor . . . already established,'" and stated that she would continue to follow that procedure "'unless something new is presented to the Court.'" *Id.*

In April 2017, Palos filed objections to Judge Sullivan's recommendations and moved to strike Judge Sullivan. *Id.* ¶ 26. At hearing, Palos argued, among other things, that Judge Sullivan's appointment as a special master was unconstitutional. *Id.* Judge Shelley stated, "I'm not making an announcement at this juncture, but there is some precedent for a judicial officer to seek assistance in matters of this nature." *Id.* ¶ 27. Judge Shelley indicated that she "was not shocked by

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the position that my predecessor took," but nevertheless would "keep an open mind" and review the case law cited by Palos. *Id.* Humana was given time to respond to Palos's motion. *Id.*

Prior to Judge Shelley ruling on the pending motions, Palos moved for substitution of judge as a matter of right. *Id.* ¶ 28. Judge Shelley denied the motion as untimely, finding that Palos discerned the court's reluctancy to strike the discovery master's recommendation, and that the court's ultimate decision on that issue would impact the heart of the controversy. *Id.* After a jury verdict in favor of Humana, Palos appealed, arguing, among other things, that the circuit court erred in denying Palos's motion to substitute judge as a matter of right. *Id.* ¶¶ 1, 22.

The Illinois Appellate Court First District affirmed, holding that Palos "had tested the waters because it could discern Judge Shelley's position on the production of documents at the heart of this controversy." *Id.* ¶ 29. The First District found that Judge Shelley had not "volunteered her opinion on her own initiative," and that the interactions between Judge Shelley and the parties at the two hearings gave Palos an opportunity to form an opinion as to Judge Shelley's leanings. *Id.* ¶¶ 29-30. The First District acknowledged that "there may be a conflict with other appellate districts" concerning "testing the waters," but found that "testing of the waters remains a viable objection to substitution of judge motions as a matter of right in the First District." *Id.* ¶ 29, n. 1. "Even if the judge did not rule on a substantive issue, the substitution motion may be denied if the party has tested the waters and formed an opinion as to the judge's reaction to his or her claim." *Id.* ¶ 23.

Palos asks the Illinois Supreme Court to resolve the conflict among appellate districts concerning the "test the waters" exception to substitutions of judge as a matter of right. Palos argues that this judicially-created doctrine, which is applied in the first, third, and fifth districts of the appellate court, has no place given the substitution statute's plain language. To the contrary, Palos advocates for application of the statute as written—a substitution may be had ". . . before the judge to whom it is presented has ruled on any substantial issue in the case." *See* 735 ILCS 5/2-1001(a)(2)(ii). This approach is taken in the appellate court's fourth district. *See, e.g., Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 26-27, 50. Because there was no ruling on any substantial issue here, Palos contends that its motion was improperly denied and everything thereafter is a nullity. Finally, argues Palos, even if the supreme court adopts the "test the waters" exception, the exception is inapplicable here, because Judge Shelley did not "tip her hand" on any substantial issue.

Alleged Medical Malpractice Causes Fetal Injury, Thereafter Parents Consent to Abortion: Wrongful Death or Express Exception Under the Wrongful Death Act?

Monique Thomas v. Edgard Khoury, M.D.

In *Thomas v. Khoury*, the Illinois Supreme Court is asked whether physicians may be sued under the Wrongful Death Act when a fetus is consensually aborted after alleged medical malpractice injures the fetus. The Appellate Court First District held that the Wrongful Death Act does not bar recovery where the physician "knew or had a medical reason to know of the pregnancy and the alleged malpractice resulted in a non-viable fetus that died as a result of a lawful abortion with requisite consent." *Thomas v. Khoury*, 2020 IL App (1st) 191052, ¶ 24. The Illinois Supreme Court granted the defendant-physicians' petition for leave to appeal.

Dr. Robert Kagan performed elective surgery on Monique Thomas at Alexian Brothers Medical Center. *Thomas*, 2020 IL App (1st) 191052, ¶¶ 1, 6. Dr. Edgard Khoury administered general anesthesia for the surgery. *Id.* ¶ 6. Pre-surgical blood and urine tests revealed "a potential indication of pregnancy," and while an ultrasound "did not definitively show an intra-uterine pregnancy . . . it could have been consistent with a pregnancy of less than four weeks." *Id.* Nevertheless, "[t]he doctors told Thomas she was not pregnant," and performed the surgery. *Id.*

Thomas later went to the emergency room at Advocate Lutheran General Hospital, where she was given analgesics and antibiotics for a post-surgical infection. *Id.* ¶ 7. Doctors then confirmed her pregnancy and advised that the anesthesia and medications associated with the surgery and subsequent infection can cause fetal malformations. *Id.* Given this information, Thomas chose to have an abortion. *Id.*

Thomas subsequently filed suit, alleging that Doctors Khoury and Kagan violated the standard of care in advising her that she was not pregnant. *Id.* ¶ 8. Thomas claimed this negligence directly harmed "her and the fetus, resulting in the termination of her pregnancy." *Id.* In addition to claiming injury to herself and the fetus, Thomas specifically asserted a wrongful death claim on behalf of "Baby Doe as a medical patient." *Id.* ¶ 9.

After denying the doctors' motion to dismiss, the circuit court certified the following question for appeal: "Whether section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2, bars a cause of action against a defendant physician or medical institution for fetal death if the defendant knew or had a medical reason to know of the pregnancy and the alleged malpractice resulted in a non-viable fetus that died as a result of a lawful abortion with requisite consent." *Id.* ¶ 2. Section 2.2 of the Act provides:

> The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.
>
> There shall be no cause of action against a physician or medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given. Provided, however, that a cause of action is not prohibited where the fetus is live-born but subsequently dies.
>
> There shall be no cause of action against a physician or medical institution for the wrongful death of a fetus based on the alleged misconduct of the physician or medical institution where the defendant did not know and, under the applicable standard of good medical care, had no medical reason to know of the pregnancy of the mother of the fetus.

740 ILCS 180/2.2.

The First District, recognizing that the Wrongful Death Act "cannot extend to situations beyond the legislature's intent," evaluated the statute as a whole and concluded that the second and third paragraphs "stand independent of one another, each a separate limitation on causes of action against physicians and medical institutions." *Id.* ¶¶ 16-17. The court found the second paragraph bars an action "against a physician or medical institution for the wrongful death of a fetus 'caused by' a legal and consensual abortion." *Id.* ¶ 17. The third paragraph, found the court, bars an action "where the defendants did not know and 'under the applicable standard of good medical care, had no medical reason to know' of the patient's pregnancy." *Id.*

> The First District held that "[a]lthough the cause of death, in a literal sense, was the abortion (second paragraph), the decision to abort or not arose out of defendants' alleged medical misconduct (third paragraph) when they knew and, 'under the applicable standard of good medical care, had medical reason to know of the pregnancy.'"

The First District held that "[a]lthough the cause of death, in a literal sense, was the abortion (second paragraph), the decision to abort or not arose out of defendants' alleged medical misconduct (third paragraph) when they knew and, 'under the applicable standard of good medical care, had medical reason to know of the pregnancy.'" *Id.* ¶ 4. Because the second and third paragraphs of Section 2.2 appear independently, held the court, "the second paragraph does not nullify (or provide an impediment for bringing) the cause of action." *Id.* "To find otherwise," concluded the court, "would enable physicians and medical institutions to deflect allegations of medical malpractice whenever an abortion follows alleged medical misconduct that injures a fetus and they knew and, under the applicable standard of good medical care, had medical reason to know of the pregnancy." *Id.* ¶ 22.

On appeal to the Illinois Supreme Court, the doctors argue that Section 2.2 presents no ambiguity. They point

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out that the first paragraph of Section 2.2 provides that the state of gestation of a human being does not foreclose a wrongful death action. The second and third paragraphs of Section 2.2 create two exceptions to that rule as it pertains to physicians and medical institutions. The doctors contend the second paragraph plainly bars an action against a physician for wrongful death of a fetus caused by a legal, consensual abortion. The third paragraph, argue the doctors, does not apply here, where the undisputed cause of fetal death was consensual abortion.

The doctors also argue that the First District's reading of Section 2.2 stretches the Wrongful Death Act beyond its terms, and the First District's holding conflicts with *Light v. Proctor Cmty. Hosp.*, 182 Ill. App. 3d 563, 566 (3d. Dist. 1989) (holding Section 2.2 required dismissal of action against radiologist who performed thyroid scan on pregnant plaintiff where plaintiff made subsequent decision to abort pregnancy). The doctors point out that the General Assembly has taken no action to amend the relevant statutory language in the over 30 years since *Light* was decided. It is for the legislature, not the courts, to decide the boundaries for a wrongful death action, and here, argue the doctors, the legislature has decided that no such action shall arise.

Let's Get the FACTA Straight: Is Actual Injury Required for Standing?

Soto v. Great America, LLC

This case raises the question of whether a plaintiff who sustains no actual injury has standing to sue for a mere technical violation of the federal Fair and Accurate Credit Transactions Act of 2003 (FACTA), 15 U.S.C. § 1681c(g)(1) (2012). The Illinois Appellate Court, relying largely on *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, held that plaintiffs had standing to sue based solely upon the violation of their statutory rights. *Soto v. Great America, LLC*, 2020 IL App (2d) 180911, ¶ 26.

Congress enacted FACTA to protect consumers from identity theft and credit- and debit-card fraud. *Soto*, 2020 IL App (2d) 180911, ¶ 3. It prohibits merchants from printing more than the last five digits of a credit or debit card on receipts, and it provides "actual damages resulting from the violation or statutory damages of $100 to $1000" against a merchant for willful noncompliance. *Id.*; *see* 15 U.S.C. § 1681n(a)(1)(A) (2012).

On August 5, 2017, plaintiffs made several purchases at Six Flags, and each receipt included the first six digits of their debit card numbers. *Soto*, 2020 IL App (2d) 180911, ¶ 4. On August 11, 2017, plaintiffs filed a class action complaint, claiming that Six Flags' reckless conduct "exposed them and the members of the class to 'an increased risk that their payment card could be compromised.'" *Id.*

Six Flags sought dismissal, arguing that plaintiffs lacked standing because plaintiffs did not allege an injury from the statutory violation. *Id.* at ¶ 6. Six Flags pointed out that the first six digits on debit cards "identify only the card issuer and reveal no personally identifying information." *Id.* The circuit court found that plaintiffs lacked standing and granted the motion to dismiss. *Id.* at ¶ 1.

On appeal, the plaintiffs argued that the statute does not require an injury in fact or actual damages—a statutory violation is sufficient. *Id.* at ¶ 13. Six Flags countered that in Illinois, "principles of standing require a 'concrete and palpable' injury in fact" and the "failure to truncate the first six digits of plaintiffs' debit cards was harmless." *Id.* Indeed, argued Six Flags, the federal courts of appeals have held violations of FACTA's truncation requirements are merely technical, and violation of the statutory provision alone is insufficient to establish actual harm needed for standing under federal law. *Id.* at ¶ 22.

Relying on the Act's plain language, the Illinois Appellate Court, Second District, agreed with plaintiffs and reversed the dismissal. *Id.* at ¶ 37. "When given its plain and ordinary meaning, the language of section 1681n(a)(1)(A) indicates the legislature's intent that the statute provide alternative recovery for actual damages, if any, *or* statutory damages of not less than $100 and not more than $1,000." *Id.* at ¶ 16 (emphasis in original). The Appellate Court found that the employment of the disjunctive *or* in the statute meant that "if the alternative relief of statutory damages is sought, actual damages need not be pleaded or proved." *Id.*

The Appellate Court further noted that such an interpretation is consistent with the Illinois Supreme Court's holding in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 40 (no injury or adverse effect beyond violation of statutory rights needed in order to qualify as "aggrieved" person under Biometric Information Privacy Act), and the Appellate Court's opinion in *Lee v. Buth-Na-Bodhaige, Inc.,* 2019 IL App (5th) 180033, ¶ 64. *Soto v. Great America, LLC*, 2020 IL App (2d) 180911, ¶ 26. Finally, because the court was "not required to follow federal law on issues of standing," it declined to consider "the inconsistent positions of the federal courts." *Id.* at ¶ 22.

On appeal to the Illinois Supreme Court, Six Flags argues that the Appellate Court's holding effectively establishes that Illinois law does not have an injury-in-fact requirement. It opens Illinois courthouse doors to statutory-damage class actions under a federal law that even federal courts have held does not automatically confer standing. Six Flags contends that the Appellate Court's reliance on *Rosenbach* is misplaced, because *Rosenbach* did not address standing, but rather the definition of an "aggrieved person" under the Biometric Information Privacy Act. In *Rosenbach*, argues Six Flags, the Court found that the statute actually created a substantive privacy interest in biometric information. Here, claims Six Flags, there is no such interest created by FACTA. Illinois law includes an injury-in-fact requirement akin to the one that exists in federal courts, and because plaintiffs sustained no actual injury, argues Six Flags, the Appellate Court's decision should be reversed.

Insurance Law Update

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Equitable Contribution versus Equitable Subrogation: A Brief Overview

An accident occurs. An insured is sued. Multiple insurers have policies that apply or may apply. Disputes arise as to which insurer is primarily versus secondarily liable and to what degree each should contribute to the resolution of the claim. Litigation ensues among the insurers. Often, at this point, confusion occurs regarding the doctrines that apply. Many have heard of the terms "equitable contribution" and "equitable subrogation" but do not know much beyond that—such as the applicability of the doctrines and their elements. Luckily, in *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307 (2004), the Illinois Supreme Court provided a useful overview of these doctrines and how and where they apply.

Like many coverage cases, *Home Ins. Co.* starts with an accident at a construction site. Allied Asphalt Paving Company ("Allied") was a general contractor for a highway renovation project. *Home Ins. Co.*, 213 Ill. 2d at 309-10. Allied had two subcontractors: Aldridge Electric Company ("Aldridge") and Western Industries ("Western"). *Id*. at 10. One night at the jobsite, an intoxicated driver drove through the construction site and injured an Aldridge employee. *Id*. Following the accident, the injured employee brought suit against Allied and Western alleging that they breached their duty to provide a safe workplace, including failing to provide proper safety lights, traffic cones, and other traffic control devices. *Id*. The allegations of the injured employee's complaint alleged that Allied's liability would have arisen from both Western's work and Aldridge's work.

At the time of the accident, Allied was an additional insured under two commercial liability policies with limits of liability of $1 million: one issued by Home Insurance Company ("Home") to Aldridge and one issued by Cincinnati Insurance ("Cincinnati") to Western. Each of the additional insured endorsements only added Allied as an additional insured if Allied's liability arose out of "your work" as defined by the policy. *Id*. at 310. Therefore, Allied was only an additional insured under Home's commercial liability policy for liability arising out of Aldridge's work and only an additional insured under Cincinnati's policy for liability arising out of Western's work. *Id*. It was also undisputed that, for the coverage provided to Allied, Home's policy was excess to Cincinnati's policy. *Id*.

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As Aldridge's injured employee's case proceeded, Cincinnati settled the claim against Western for $40,000. *Id*. However, a dispute arose concerning the settlement of the claim against Allied. *Id*. Aldridge's employee was willing to settle the claim against Allied for $600,000, but Cincinnati was only willing to contribute $100,000. *Id*. at 311. As such, Home contributed $500,000 to resolve the employee's claim under protest. *Id*.

Home then initiated litigation against Cincinnati, seeking recovery under theories of equitable contribution and equitable subrogation. *Id*. at 311. The trial and appellate courts both entered judgment in Cincinnati's favor. *Id*. at 313-15. The supreme court affirmed in part and reversed in part, finding that Home was entitled to a recovery under a theory of equitable subrogation but was not entitled to any relief under a theory of equitable contribution.

The supreme court noted that, while they are often used interchangeably, the terms "contribution," "indemnification," and "subrogation" have "distinct differences between them." *Id.* at 315-16. According to the supreme court, contribution "applies to multiple, concurrent insurance situations and is only available where the concurrent policies insure the same entities, the same interests, and the same risks." *Id*. at 316. As such, "when two insurers cover separate and distinct risks there can be no contribution among them." *Id*.

Applying these principles, the court ruled that contribution was not available to Home. First, the court observed that "it is well settled that the doctrine of equitable contribution is not applicable to primary/excess insurer issues." *Id*. This is due to the fact that "by definition the policies do not cover the same risks – the protections under the excess policy do not begin until those of the primary policy cease." *Id*. at 317.

Second, even if Home's policy were not excess to Cincinnati's, the supreme court held that equitable contribution was still inapplicable because the policies still did not insure the same risk. Even though both policies potentially applied to the same *loss*, the "policies clearly covered different possibilities or degrees of probability for suffering harm or loss. The Cincinnati policy covered Allied only for liability arising out of Western's work, while the Home policy covered Allied only for liability arising out of Aldridge's work." *Id*. at 322. As a consequence, "[a]lthough it was possible that both policies would one day be triggered because Allied's liability for an accident arose out of both Western's *and* Aldridge's work, this is a different question than whether the policies set out to cover the same risk." *Id*. (emphasis in the original).

However, although it agreed with the lower courts that an equitable contribution claim was unavailable to Home, the supreme court found that Home could maintain an equitable subrogation claim. The court started by reciting the elements for equitable subrogation: "(1) the defendant carrier must be primarily liable to the insured for a loss under a policy of insurance; (2) the plaintiff carrier must be secondarily liable to the insured for the *same loss* under its policy; and (3) the plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier." *Id*. at 323 (emphasis in the original).

In applying these elements to the case at hand, the supreme court focused on a key distinction between the doctrines that the appellate court overlooked. As the supreme court perceived, "[t]he elements necessary to maintain a contribution action focus prospectively on the 'risk' that the parties set out to cover." *Id*. As a consequence, "[f]or a coinsurer to recover, it must have insured the identical risk." *Id.* On the other hand, "a subrogation claim only requires that the secondary insurer insure the 'same loss' as the primary insurers." *Id*. "This requirement looks retrospectively at the loss suffered." *Id.*

Therefore, because Allied only suffered one loss that arose out of Western's work, Cincinnati would be "wholly liable for that loss as the primary insurer, and Home was only secondarily liable for that loss as the excess insurer." *Id*. Additionally, although the Aldridge employee's case was never tried, there was a presumption that the employee would have prevailed on all of his theories of liability because the case settled prior to trial. *Id.* at 325. Because the supreme court found that Cincinnati did not present sufficient evidence to rebut this presumption, it ruled that Home was entitled to judgment as a matter of law on its claim for equitable contribution. *Id*.

Finally, while under a theory of equitable subrogation, an insurer who is secondarily liable is typically entitled to recover the full amount of the loss from an insurer who is primarily liable, case-specific waiver issues limited Home's recovery from Cincinnati to $200,000. *Id*. at 326-327.

The doctrines of equitable contribution and equitable subrogation can be confusing. And there are multiple issues associated with the doctrines beyond those discussed in *Home Ins. Co. v. Cincinnati Ins. Co*. However, for those new to the doctrines, their elements, and their differences, this case provides a useful starting point for the evaluation of the doctrines and their potential applicability to a case at hand.

Civil Rights Update

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It Can't Be Politics: Seventh Circuit Offers a Timely Refresher on Political Firings

Hanson v. LeVan, **967 F.3d 584 (7th Cir. July 21, 2020)**

Election Day 2020 has passed, meaning a number of new officials are assuming office. All of these newly-elected officials will be faced with a fundamental question: what to do with the previous officeholder's staff?

Lawyers representing governmental entities headed by elected officials are likely familiar with their client's occasional temptation to "clean house" — particularly if the election was contentious, or the incoming official wishes to orient his or her office in a different direction. However, the Seventh Circuit recently offered a timely reminder that elected officials cannot remove most staff simply due to political or partisan views, and affirmed the limited utility of qualified immunity at the pleadings stage of such cases.

In *Hanson v. LeVan*, 967 F.3d 584, 596 (7th Cir. July 21, 2020), the Court permitted a Deputy Assessor (a rather low-level bureaucrat charged with collecting data and plugging it into prescribed formulas and programs) to proceed with her lawsuit against the newly-elected Milton Township Assessor, noting the plaintiff adequately alleged the Assessor violated her First Amendment rights. The Plaintiff alleged she and number of fellow Deputy Assessors were terminated because they supported the previous Assessor in the recent election. Stated differently, Plaintiff alleged a violation of the Supreme Court's *Elrod-Branti* rule, which holds that the First Amendment is violated when a public employee is dismissed on the basis of his or her political affiliation, *unless* party affiliation is an appropriate requirement for the position. *Id.* at 592; *see also Elrod v. Burns*, 427 U.S. 347, 372 (1976); *Branti v. Finkel*, 445 U.S. 507, 516 (1980). Party affiliation is only an appropriate condition of employment when the position puts the political dissident in a position to obstruct the implementation of policies the electorate put the winning candidate in office to pursue. *Hanson*, 967 F.3d at 592. The focus, then, is on whether the job in question entails substantial policymaking responsibility, discretion in carrying out the elected official's policy goals, or the need to maintain confidentiality (such as a speech writer) about the official's political discussions. *Bogart v. Vermilion Cty.*, 909 F.3d 210, 213-14 (7th Cir. 2018).

the First Amendment is violated when a public employee is dismissed on the basis of his or her political affiliation, *unless* party affiliation is an appropriate requirement for the position.

To prove a job does or does not entail the sort of responsibilities that would make political beliefs and associations a relevant criteria, the court will usually defer to "reliable" job descriptions, and (if applicable) a statute or ordinance that lays out the position's responsibilities. *Hanson*, 967 F.3d at 593. If neither the job description nor the ordinance/statute clearly define a position's responsibilities, then the Court will turn to how the position is carried out "on the ground" by

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Bryan J. Vayr is an Associate at *Heyl, Royster, Voelker & Allen, P.C.*, in Champaign, where he focuses his practice on civil litigation, with a focus on complex civil rights, governmental defense, and professional liability. Much of his practice entails defending government, law enforcement, and educational institutions in cases alleging violations of civil rights in state and federal court. Mr. Vayr also represents counties and municipalities in tort litigation and contract disputes, including employment, infrastructure, and construction disputes. Mr. Vayr joined Heyl Royster in 2017 after receiving his J.D., *summa cum laude*, Order of the Coif, from the University of Illinois College of Law and B.S., *magna cum laude*, from the University of Illinois-Springfield. While in law school, Mr. Vayr was Managing Articles Editor for the *University of Illinois Law Review*, and was recognized by the Clinical Legal Education Association for his work in the College's Civil Litigation Clinic. Prior to joining Heyl Royster, Mr. Vayr worked at the Champaign County States Attorney's Office, a Chicago-based firm specializing in complex litigation, and the Land of Lincoln Legal Assistance Foundation.

the employee—opening the door for the employee's allegations and testimony to dictate the analysis. *Id.*

Hansen demonstrates the potential pitfalls in moving to dismiss a First Amendment claim in the partisan-firing context. A motion to dismiss focuses only on the pleadings, and a job description is unlikely to be attached to a complaint in this context. As such, the defendant-official typically has only two main pleadings-focused arguments on the First Amendment question: (1) to argue some statute or ordinance clearly establishes the job in question entails political discretion/judgment—a relatively rare species of law; or (2) to argue the law did not clearly establish the position in question was protected by the First Amendment. The *Hansen* court reiterated how weak the second argument is at the pleadings stage, noting the qualified immunity analysis is broad when determining whether to dismiss a complaint. *Id.* at 597. Thus, the question was not whether it was clearly established that a *deputy assessor* at the Milton Township Assessor's Office had a political component to their job, but, instead, whether it was clearly established that a *low-rung position that entailed no political judgment* was protected from a political termination. *Id.* at 597–98. The latter, more-generic proposition has existed since the *Elrod-Branti* line of cases themselves, and therefore the Court easily found that the complaint should not be dismissed on qualified grounds.

In summary, in the post-election rush, lawyers representing elected officials should be mindful of the First Amendment risks associated with terminating employees in mid- and low-level positions. If a terminated employee files suit, the Seventh Circuit's recent *Hansen* decision shows such lawsuits are ill-suited to quick dismissal.

Construction Law

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Application of Exclusive Remedy Protections of the Illinois Workers' Compensation Act and the Employee Leasing Company Act to Construction Companies that Borrow Workers from Other Companies

It is not uncommon for construction companies to utilize the services of other companies' employees on jobsites. For example, a utility company may require carpentry services on a project, but because they have no carpenters on staff, they "borrow" one from another company. These arrangements are often done through subcontracts and the company loaning the employee is often considered a subcontractor, even though the services to be provided are simply the use of an employee. Because subcontracts are used, those in the industry do not often think of these arrangements as "loaning employer/borrowing employer" relationships under the Workers' Compensation Act ("WCA"), 820 ILCS 305/1, *et. sec*., that could entitle both companies to certain protections from lawsuits filed by borrowed employees injured on the job. Nor do they think of these arrangements as "employee leasing company/client company" relationships under the Employee Leasing Company Act ("ELCA"), 215 ILCS 113/1, *et. sec*., that could also provide such protections to both companies. This article briefly addresses the exclusive remedy protections of the WCA and the ELCA and provides an outline to qualify for these protections in lawsuits filed by borrowed employees who are injured on the job. It also briefly

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The WCA specifically incorporates the borrowed-employee doctrine that has long existed in Illinois. It makes both "borrowing employers" and "loaning employers" jointly and severally liable for worker's compensation payments to loaned employees who were injured while working for the borrowing employer.

addresses some additional considerations for loaning and borrowing employers under the WCA.

Workers' Compensation Act

1. Exclusive Remedy Protections

The WCA has an exclusive remedy provision that extends immunity to employers for personal injury lawsuits filed by their employees who were injured on the job. 820 ILCS 305/5(a). Under this provision, injured employees have no common law or statutory right to recover damages from their employer for injuries sustained while engaged in the line of duty as an employee, other than the specific workers' compensation payments required under the WCA. *Id.* This provision is generally understood to provide the *exclusive* means by which an employee can recover against an employer for a work-related injury. *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 14. Moreover, due to the WCA's exclusive remedy protections, liability for contribution claims filed by third-parties against the injured party's employer is capped at the amount of workers' compensation payments made to the injured employee. *Kotecki v. Cyclops Welding Co.*, 146 Ill. 2d 155, 165 (1991). This is commonly referred to as the *Kotecki* cap.

The WCA specifically incorporates the borrowed-employee doctrine that has long existed in Illinois. It makes both "borrowing employers" and "loaning employers" jointly and severally liable for worker's compensation payments to loaned employees who were injured while working for the borrowing employer. 820 ILCS 305/1(a)(4). Because both employers are responsible for worker's compensation payments, the WCA also provides both employers with exclusive remedy and *Kotecki* cap protections. *Palomar v. Metropolitan Sanitary District*, 225 Ill. App. 3d 182, 189 (1st Dist. 1992) (citing *American Stevedores Co. v. Industrial Commission*, 408 Ill. 449, 453–54 (1951)); and *Costiloe v. Allis-Chalmers Corp.*, 245 Ill. App. 3d 896, 898-99 (3rd Dist. 1993). To qualify as a "borrowing employer" or a "loaning employer" entitled to such protections, an entity must show that a borrowed employment relationship existed. *Chavez v. Transload Services, L.L.C.,* 379 Ill. App. 3d 858, 862 (1st Dist. 2008).

2. Borrowed Employment Relationship

To determine whether a borrowed employment relationship existed under the WCA, courts consider various factors. *Chavez,* 379 Ill. App. 3d at 862 (citing, *O'Loughlin v. ServiceMaster Company Limited Partnership,* 216 Ill. App. 3d 27, 34 (1st Dist. 1991)); and *Dildine v. Hunt Transp., Inc.*, 196 Ill. App. 3d 392, 395 (3d Dist. 1990). The two most important, and often controlling, factors include: (1) whether the borrowing employer had the right to control and direct the manner in which the employee performed the work; and (2) whether a contract of hire existed between the borrowing employer and the employee. *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 15 (citing *A.J. Johnson Paving Co. v. Industrial Comm'n,* 82 Ill. 2d 341 (1980)). Whether a borrowed employment relationship existed under the WCA is generally a question of fact, but it can be a question of law, ripe for a motion to dismiss or summary judgment, if the facts are undisputed and capable of one inference. See, *e.g.*, *Prodanic,* 2012 IL App (1st) 110993, ¶ 15; and *Evans v. Abbot Products, Inc.*, 150 Ill. App. 3d 845, 849 (1st Dist. 1986).

a. Right to Control and Direct the Manner in which Employee Performed Work

The primary factor in determining whether a borrowed employment relationship existed is whether the borrowing employer had the right to control and direct the employee's work. *A.J. Johnson Paving, 82 Ill.2d at 348.* Whether an employer has "control" over an employee's work depends upon the character of

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the supervision of the work done, the manner of direction of the servant, the right to discharge, the matter of hiring, and the mode of payment. *Saldana v. Wirtz Cartage Co.,* 74 Ill. 2d 379, 389-90 (1978): *Russell v. PPG Indus., Inc.*, 953 F.2d 326, 329 (7th Cir. 1992). Illinois courts have held where the following facts are present, an affirmative finding on the right to control is warranted: (1) the employee worked the same hours as the borrowing employer's employees; (2) the employee received instruction from the borrowing employer's foreman and was assisted by the borrowing employer's employees; (3) the loaning employer's supervisors were not present while the work was being performed; (4) the borrowing employer was permitted to tell the employee when to start and stop working; and (5) the loaning employer relinquished control of its equipment to the borrowing employer. *Prodanic,* 2012 IL App (1st) 110993, ¶ 16 (citing *A.J. Johnson Paving,* 82 Ill.2d at 349).

b. Contract of Hire

The second controlling factor in determining whether a borrowed employment relationship existed is whether there was a contract of hire between the borrowing employer and the employee evidencing the employee's consent to such a relationship. *Prodanic,* 2012 IL App (1st) 110993, ¶ 15. Such consent can be expressed through a written contract or implied. *A.J. Johnson Paving,* 82 Ill. 2d at 350. Implied consent exists where the employee knows the borrowing employer generally controls or is in charge of the employee›s performance. *Id*. Additionally, the employee's acceptance of the borrowing employer's direction demonstrates the employee's acquiescence to the employment relationship. *Id.*; *Prodanic*, 2012 IL App (1st) 110993, ¶ 17. Several courts have found implied consent where the employee showed up to work for the borrowing employer and willingly took direction from the employer. *A.J. Johnson Paving,* 82 Ill. 2d at 350; *Chavez,* 379 Ill. App. 3d at 863; and *Evans,* 150 Ill. App. 3d at 849.

While it is typical for subcontracting agreements to include independent contractor language, that language alone should not preclude a finding of a borrowed employment relationship. In an unpublished opinion, *France v. Graphic Packaging International, Inc*., 2018 IL App (1st) 180347-U, ¶¶ 24-26, the court noted that an independent contractor provision was a factor, but the language itself was not controlling. Instead, the two factors in *A.J. Johnson Paving Co.,* discussed above, are looked at to determine if an employee relationship existed. Under the two factors, the court held, despite the independent contractor language, the defendant was a "borrowing employer" of the plaintiff. *France,* 2018 IL App (1st) 180347-U, ¶¶ 24-26.

1. Additional Considerations

a. Borrowing Employer is Primarily Responsible for Workers' Compensation Payments.

If a borrowed employment relationship existed, both the borrowing employer and the loaning employer are jointly and severally liable for worker's compensation payments. 820 ILCS 305/1(a)(4); *Costiloe,* 245 Ill. App. 3d at 898-99. However, unless there is an agreement to the contrary, the borrowing employer is *primarily* responsible for such payments. *Costiloe,* 245 Ill. App. 3d at 898-99. Thus, barring any agreement to the contrary, if the payments were already paid by the loaning employer, the loaning employer has a right to recovery from the borrowing employer. *Id*., at 899-900; *Illinois Ins. Guar. Fund v. Virginia Sur. Co., Inc*., 2012 IL App (1st) 113758, ¶ 5.

b. Borrowing Employer or Loaning Employer can avoid Responsibility for Workers' Compensation Payments through Agreement and still be entitled to WCA Exclusive Remedy Protections.

Regardless of which company makes the actual payments, both employers in a borrowed employment relationship are entitled to the WCA's exclusive remedy and *Kotecki* cap protections. *Holten v. Syncreon North America, Inc.*, 2019 IL App (2d) 180537; *Costiloe,* 245 Ill. App. 3d at 899-900. Therefore, if the joint employers had an agreement that only one of the employers would be responsible for workers' compensation insurance, and the responsible employer obtained such insurance and made workers' compensation payments to the injured employee, the other entity would still be entitled to the WCA excusive remedy and *Kotecki* cap protections despite not making any workers' compensation payments or ever being responsible for such payments. *Costiloe,* 245 Ill. App. 3d at 899-900; *Illinois Ins. Guar. Fund,* 2012 IL App (1st) 113758, ¶ 19.

[U]nder the ELCA, in a situation where a company borrows an employee from another company, assuming both companies qualify as an "employee leasing company" or a "client company", and at least one of the companies procured workers' compensation insurance for an injured borrowed employee, the injured employee's only legal recourse against both companies would be payments under the applicable workers' compensation insurance.

Employee Leasing Company Act

1. Exclusive Remedy Protections

The ELCA also provides exclusive remedy protections to certain employers. Under the ELCA, "employee leasing companies" and their "client companies" are entitled to "the exclusivity of the remedy under the worker's compensation and employers' liability provisions of a workers' compensation policy or plan that either party has secured." 215 ILCS 113/45. Therefore, under the ELCA, in a situation where a company borrows an employee from another company, assuming both companies qualify as an "employee leasing company" or a "client company", and at least one of the companies procured workers' compensation insurance for an injured borrowed employee, the injured employee's only legal recourse against both companies would be payments under the applicable workers' compensation insurance.

2. "Employee Leasing Company" and "Client Company"

Under the ELCA, an "employee leasing company" is an entity that leases *any* of its workers to a lessee through an "employee leasing arrangement." 215 ILCS 113/15. And a "client company" is an entity that obtains *any* of its workforce from another entity through an "employee leasing arrangement." *Id.* Thus, for a contractor to be considered an "employee leasing company" or a "client company" entitled to the ELCA's exclusive remedy protections, there must be an "employee leasing arrangement" between the two entities.

3. "Employee Leasing Arrangement"

The ELCA provides that an "employee leasing arrangement" is a "contractual arrangement, including long-term temporary arrangements whereby a lessor obligates itself to perform specified employer responsibilities as to leased employees including the securing of workers' compensation insurance ***." *Id*. Under this definition, the hiring contractor would have to show the subcontract requires the loaning employer to perform "specified employer responsibilities" as to the injured employee. Though case law on the issue is scarce, under the statute's plain language, if the subcontract requires the loaning employer to purchase workers' compensation insurance or employer's liability insurance, such requirements may suffice. Of course, an independent contractor provision in a subcontract may suggest the subcontract is not an employee leasing agreement, but, as with a borrowed employment relationship under the WCA, such a provision may just be another factor to consider, and may not necessarily preclude a finding of an "employee leasing agreement."

Conclusion

If your client is a construction company that subcontracts for the use of other companies' employees, don't rule out the application of the WCA's or the ELCA's exclusive remedy protections in lawsuits filed by such employees. These protections, if applicable, may considerably limit your client's liability exposure. On the flip side, in structuring and executing such subcontracts, consider the ramifications under the respective Acts for both the loaning employer and your client, particularly under the WCA. If a borrowed employment relationship exists under the WCA, both companies are jointly and severally liable for workers' compensation payments, and, barring any agreement to the contrary, your client may ultimately be responsible for the entirety of such payments.

Employment Law

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Chicago Employers Must Comply with Fair Workweek Ordinance

Effective July 1, 2020, the Chicago Fair Workweek Ordinance, Municipal Code of Chicago Chapter 1-25, took effect. It has three stated goals. First, it seeks to enact and enforce fair and equitable employment scheduling practices in the City of Chicago. Second, it seeks to provide the working people of Chicago with protections that ensure employer scheduling practices do not unreasonably prevent workers from attending to their families, health, education, and other obligations. Third, it seeks to require employers needing additional hours, whether temporary or permanent, to first offer those hours to current part-time "Covered Employees." *See* City of Chicago Mun. Code Ch. 1-25-010 *et seq*., available at https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2593703. Employers must comply with this ordinance if: (1) they employ globally 100 or more employees, or 250 or more in the case of a not-for-profit; (2) at least 50 of those employees are "Covered Employees"; and (3) the employer is primarily engaged in a "Covered Industry." Ch. 1-25-020.

Who is covered by this ordinance?

Covered employees are those who meet all four of the following criteria: (a) perform work for an employer in the capacity of: (i) an employee, as opposed to a contractor (as determined by Internal Revenue Service guidelines), or (ii) a worker for a day and temporary labor service agency, as defined in the Day and Temporary Labor Services Act, 820 ILCS 175/5, who has been on assignment to the employer for 420 hours within an 18-month period; (b) spends the majority of their time at work for that employer while physically present within the City of Chicago; (c) performs the majority of their work in a "Covered Industry" for that employer; and (d) earns less than or equal to $50,000 per year as a salaried employee, or less than or equal to $26.00 per hour as an hourly employee, from that employer. For Hotels, set service fees that an employee earns are included in the calculation of the stated hourly wage threshold. An employee who staffs a Banquet Event and receives a set gratuity for that work shall not be deemed to be a Covered Employee for purposes of that Banquet Event. The stated wage amounts will be increased yearly in proportion to an increase in the Consumer Price Index and rounded up to the nearest multiple of $0.05. On or before every June 1, the City of Chicago Department of Business Affairs and Consumer Protection will make available to employers a bulletin announcing the adjusted amount for the upcoming year. Ch. 1-25-020.

The term "Covered Industry" is defined in the ordinance as (1) building services—including janitorial services, building maintenance services, and security services with the exception of on-duty police officers or other government officials performing their official duties; (2) healthcare—including (i) services that require licensure under one or more of the following Illinois licensing act: the Hospital Licensing Act, the Nursing Home Care Act; the Specialized Mental Health Rehabilitation Facilities Act, the Assisted Living and Shared Housing Act, the Life Care Facilities Act, the Ambulatory Surgical Treatment Center Act, or licensure as a Freestanding Emergency Center under the Emergency Medical Services Systems Act, or (ii) dialysis serviced provided by a Dialysis Facility; (3) hotels; (4) manufacturing which is defined as the production of tangible goods for use from raw or prepared materials by giving the materials new forms, qualities, properties, or combinations, whether by hand-labor or machines; (5) restaurants —defined as any business licensed to serve food in the City of Chicago which as has, globally, at least 30 locations and at least 250 employees in the aggregate, but not those limited to three or fewer locations in the City that are owned by one Employer and operating under a sole franchise; (6) retail—defined as the sale to end users of tangible products that are primarily for personal, household,

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or family purposes, including, but not limited to, appliances, clothing, electronics, groceries, and household items; and (7) warehouse services—defined as the storage of goods, wares, or commodities for hire or compensation, and, in connection with this operation, may include the loading, packaging, sorting, stacking, wrapping, distribution, and delivery of those goods. Ch. 1-25-020.

The requirement to provide advance notice of work schedules

The ordinance mandates that covered employers must comply with the following rules for covered employees:

1. Provide an initial estimate of work schedule. Before starting work, the employer must provide a good faith estimate in writing of the Covered Employee's projected days and hours or work for the first ninety days of employment, including:

   (A) the average number of weekly work hours the Covered Employee can expect to work each week;
   (B) whether the Covered Employee can expect to work any on-call shifts; and
   (C) a subset of days and a subset of times or shifts that the Covered Employee can expect to work, or days of the week and times or shifts on which the Covered Employee will not be scheduled to work. The good faith estimate is not a contractual offer binding the Employer, but an estimate made without a good faith basis violates the ordinance. Ch. 1-24-040(a)(1).

   The written notice is defined as a printed or printable communication in a physical or electronic format including email, text message or a computer system or is otherwise sent and stored electronically. Ch. 1-25-020.

   Before starting work, the employee may request that the employer modify the projected days and hours of work and the employer must consider the request, and in its sole discretion may accept or reject the request and notify the employee of its decision in writing within three days of the request. Ch. 1-25-040(a)(2).

2. Provide written notice of work hours by posting the Work Schedule (defined as all of the Covered Employee's shifts, including specific start and end times for each shift during a calendar week) no later than 10 days before the first day of any new schedule and post the Work Schedule no later than 14 days before the first day of any new Work Schedule beginning July 1, 2022, by posting the Work Schedule within the unit or department or workgroup either in a conspicuous place at the workplace that is readily accessible and visible to all Covered Employees or using the usual methods of communication, or both. The written Work Schedule shall include the shifts and on-call status of all current Covered Employees at that worksite. Upon written request of a Covered Employee, an Employer shall transmit the Work Schedule by electronic means. Ch. 1-25-040(b)(1).

   Employers are permitted to change an employee's work schedule after it is posted, up to the 10 or 14 day deadlines in section 40(b)(1), without penalty. After that deadline, any changes will be subject to the notice and compensation requirements in the ordinance. Ch. 1-25-040(b)(2).

   Covered Employees who an employer permits to self-schedule by selecting their shifts without pre-approval or work in a venue that regularly hosts Ticketed Events with a capacity of at least 5,000 people are not bound by this provision. Ch. 1-25-040(b)(3).

   Covered Employees who are victims of domestic violence or sexual violence as defined by statute or who have a family or household member who is a victim may request orally or in writing that their work schedule not be posted or transmitted to other employees. Ch. 1-25-40(b)(4). This must be implemented immediately.

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Predictability pay is defined as wages calculated on an hourly basis at the employee's regular rate as compensation for schedule changes made by an employer to a Covered Employee's schedule pursuant to the ordinance, in addition to any wages earned for work performed by that employee.

Procedures for schedule changes

Except for limited circumstances, a Covered Employee has the right to decline any previously unscheduled hours that the employer adds to the Covered Employee's schedule less than 10 days before the first day of any new schedule through June 30, 2022, and less than 14 days before the first day of any new schedule beginning July 1, 2022. Ch. 1-25-050(a).

Where a Covered Employee agrees to work hours that are scheduled after the deadline in Section 1-25-040(b)(1), in addition to the regular rate of pay, the Covered Employee shall receive one hour of Predictability Pay for each shift in which the employer adds hours of work, changes the date or time of a work shift with no loss of hours, or cancels or subtracts hours from a regular or on-call shift with more than 24 hours' notice. Ch. 1-25-050(b)(1). Predictability pay is defined as wages calculated on an hourly basis at the employee's regular rate as compensation for schedule changes made by an employer to a Covered Employee's schedule pursuant to the ordinance, in addition to any wages earned for work performed by that employee. Ch. 1-25-020.

Where the employer subtracts hours from a regular or on-call shift or cancels a shift, including while the employee is working on a shift, the employer must pay at least 50 percent of the Covered Employee's regular rate of pay for each hour the employee does not work. Ch. 1-25-050(b)(2). The employer must amend the posted work schedule and transmit it to the Covered Employee in writing within 24 hours of a schedule change. Ch. 1-25-050(c).

There are some exceptions to these requirements. Additional pay is not due where the work schedule change is for one of a number of identified reasons: (1) threats to employers, Covered Employees, or property, or when civil authorities recommend that work not begin or continue; (2) public utilities fail to supply electricity, water, or gas, or the sewer system fails to serve the location of work; (3) acts of nature (including, but not limited to, flood, earthquake, tornado, or blizzard); (4) war, civil unrest, strikes, threats to public safety, or pandemics; (5) a mutually agreed upon schedule change between employees, subject to any existing employer policy; (6) a schedule change that is mutually agreed upon by employer and Covered Employee and confirmed in writing; (7) due to the employee's request due to use of sick leave, vacation leave, or other policies offered by the employer and where the request is confirmed in writing; (8) due to the employee working less hours for disciplinary reasons for just cause, provided the employer documents the incident in writing; (9) certain scheduling changes of banquet events; (10) certain delays in the manufacturing process; (11) for healthcare employers, identified disasters, circumstances where a patient needs specialized skills through the completion of a procedure, or any unexpected substantial increase in demand for healthcare for certain identified reasons; (12) certain changes to a ticketed event; and (13) the Covered Employees self-schedule. Ch. 1-25-050(d).

Offers of additional work hours to existing employees

When an employer needs to fill additional shifts of work, the ordinance requires that the employer first offer additional shifts to existing qualified Covered Employees and if they do not accept, to temporary or seasonal workers who have worked for the employer for two or more weeks. Ch. 1-25-060(a). The employer's system for filling shifts cannot discriminate on the basis of a protected class and, whenever practicable, the employee shall first offer the hours to part-time Covered Employees. Ch. 1-25-060(b). Employers are not required to schedule employees to work hours required to be paid at a premium rate. Ch. 1-25-060(c).

Covered Employees can decline hours that are less than 10 hours after the end of the previous day's shift. Ch. 1-25-070(a). When a Covered Employee works a shift that begins less than 10 hours after the end of the previous day's shift, the employer must pay the employee at a rate of 1.25 times the employee's regular rate of pay for that shift. Ch. 1-25-070(b). Covered employees also can request a modified work schedule such as additional shifts or hours, changes in days of work, changes in start or end times, permission to change shifts with co-workers, place limitations on availability, request part-time employment, job sharing, reduction or change in work duties, or part-year employment. Ch. 1-25-080. The ordinance does not mandate that employers accept any of these employee requests.

Notice and posting

Employers must post a notice of employee rights in a conspicuous place and provide notice in the Covered Employees' first paycheck. Ch. 1-25-090. A copy of the notice is available here. https://www.chicago.gov/content/dam/city/depts/bacp/OSL/fwwnoticejuly1letter.pdf

Retaliation and penalties

The ordinance makes it unlawful to discriminate or retaliate against Covered Employees for exercising any rights under this ordinance and subjects the employer to a $1,000 fine. Ch. 1-25-100. Employers who violate any rule in this ordinance are subject to a fine of between $300-$500 for each offense, and each Covered Employee whose rights are affected constitutes a separate and distinct offense to which a separate fine shall apply. Ch. 1-25-130.

Private cause of action

Starting January 1, 2021, within two years of an alleged violation of the ordinance, an employee may file a civil action seeking payment of Predictability Pay unlawfully withheld as well as litigation costs, expert witness fees, and reasonable attorney fees. Ch. 1-25-140. To do so, the employee must first exhaust administrative remedies by submitting a written complaint to the City describing the violation which will be sent to the employer by the City for a response or opportunity to cure the violation, and the City will notify both sides that the complaint is closed because the violation was cured or the complaint is justified and has enforced it against the employer to conclusion, or finds the complaint to be unjustified. Ch. 1-25-140.

Record retention requirements

The ordinance requires that covered employers must maintain for at least three years, or for the duration of any claims, a record of each Covered Employee's name, hours worked, pay rate, and records demonstrating compliance with the ordinance, including good faith estimates of work schedules, initial posted schedule and all subsequent changes to that schedule, consent to work hours where consent is required, and documentation of hours of work to existing employees and responses to such offers. Ch. 1-25-160. Employers must provide copies of all such records to Covered Employees upon a reasonable request. Ch. 1-25-160.

Effect of union contracts

The ordinance allows employers to enter into collective bargaining agreements which are in excess of the minimum standards in the ordinance. Ch. 1-25-030. The requirements of the ordinance may be waived in a bona fide collective bargaining agreement, but only if the waiver is set forth explicitly in such agreement in clear and ambiguous terms. Ch. 1-25-030.

Practice pointers

Effective July 1, 2020, the Commissioner of the Department of Business Affairs and Consumer Protection developed additional rules and guidance for enforcement of this ordinance. Those rules are available at https://www.chicago.gov/content/dam/city/depts/dol/rulesandregs/Fair%20Workweek%20Rules.pdf.

Employment attorneys who represent employers covered by this ordinance should ensure that the employers are complying with each of the rules set forth in this ordinance to avoid potentially costly penalties and exposure to attorney fees.

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When an Office is Not an “Other Office”

In *Tabirta v. Cummings, et al.,* 2020 IL 124798, the Supreme Court of Illinois held that a corporation was not a Cook County resident for purposes of the Illinois venue statute simply because one part-time employee worked from his home in Cook County and because it had some sales in Cook County. As such, the trial court was directed to transfer the case from Cook County to an appropriate venue. *Tabirta,* 2020 IL 124798, ¶ 37.

The facts of the *Tabirta* case are straightforward. The plaintiff suffered serious injuries after his vehicle was hit by a truck driven by defendant James Cummings, an employee of Glister-Mary Lee Corporation. *Id.* ¶ 3. Glister-Mary Lee owned the truck. *Id.* Though the accident occurred in Ohio, the plaintiff sued Cummings and Glister-Mary Lee in Cook County, Illinois. *Id.*

In Illinois, venue is proper in one of two places: the county where a defendant resides or the county in which the occurrence (or some part of it) giving rise to the suit occurred. *Id.* ¶ 19. Because the accident occurred in Ohio, Cook County was a proper venue only if a defendant resided there. *Id.* ¶ 4. A corporate defendant resides “in any county in which it has its registered office or other office or is doing business.” *Tabirta,* 2020 IL 124798, ¶ 4. In the trial court, both Cummings and Glister-Mary Lee filed motions to transfer for improper venue on the grounds that neither were a Cook County resident. Their motions were denied, they appealed, and the trial court’s ruling was affirmed. Thereafter, the supreme court agreed to hear the case.

In the trial court, the parties engaged in venue discovery, creating a robust factual record. Glister-Mary Lee’s residency was the focus since it was undisputed that the defendant driver was not a Cook County resident. As a Missouri corporation whose agent and principal place of business are located in Randolph County, Illinois, Glister-Mary Lee denied it was a Cook County resident. *Id*. ¶ 5. The plaintiff argued that Glister-Mary Lee was a resident because it had an “other office” in Cook County and was “doing business” in Cook County. *Id*.

According to the plaintiff, Glister-Mary Lee’s “other office” was the home-office of a part-time employee located in Cook County. *Id.* None of Glister-Mary Lee’s food manufacturing plants were located in Cook County. *Id.* The part-time employee was a long-time Cook County resident who began working for Glister-Mary Lee following his retirement from a lengthy career in the food industry. *Tabirta,* 2020 IL 124798, ¶ 6. He only worked 20 hours per week as a customer service representative and account representative. *Id.* He was hired because of his food industry experience to service customers in northern Illinois. *Id.* ¶ 7. He generally worked with three clients, “Aldi, Inc., located in Batavia, in Du Page and Kane Counties; Central Grocery, located in Joliet, in Kendall and Will Counties; and Sears/K-mart, located in Hoffmann Estates in Cook County.” *Id.* ¶ 6. The employee spent nearly all of his time on the Aldi account and relatively minimal time related to Sears/K-Mart, the only customer in Cook County. *Id.* The part-time employee only visited the Cook County client twice a year for an hour each time. *Id.* Glister-Mary Lee did not pay the employee’s “mortgage, real estate taxes, utilities, cell phone bills, internet charges, office supplies, or any other expenses associated with his home office.” *Tabirta,* 2020 IL 124798, ¶ 8. However, the customer service line did forward to his cell phone, and he used a company e-mail to communicate with his customers. *Id.*

Glister-Mary Lee presented evidence that it does not “advertise to the public that it has an office in Cook County.” *Id.* ¶ 9. Moreover, the part-time Cook County employee was not hired because of his location but for his experience. *Id.* Nor was his employment contingent on his county of residence. *Id.* Glister-Mary Lee did not “own, lease, or occupy any property in Cook County.” *Id.* Nor did it “design, manufacture, advertise, finance, or sell its products” from within Cook County. *Tabirta,* 2020 IL 124794, ¶ 10. As for its sales, Cook County sales only accounted for 0.19% of Glister-Mary Lee’s sales. *Id.*

The trial court ultimately concluded that the part-time employee’s home office in Cook County was an “other office” for purposes of determining Glister-Mary

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The trial court ultimately concluded that the part-time employee's home office in Cook County was an "other office" for purposes of determining Glister-Mary Lee's residence under the venue statute. However, the court rejected that Glister-Mary Lee was "doing business" in Cook County.

Lee's residence under the venue statute. *Id.* ¶ 11. However, the court rejected that Glister-Mary Lee was "doing business" in Cook County. The appellate court ultimately affirmed the circuit court's judgement. *Id.* ¶ 13.

The supreme court began its analysis by affirming that "proper venue is a valuable privilege belonging to the defendant" and that its purpose is to "ensure that the action will be brought either in a location convenient to the defendant by providing for venue in the county of residence or convenient to potential witnesses, by allowing for venue where the cause of action arose." *Id.* ¶ 16. However, it is the defendant's burden to prove that the plaintiff's chosen forum is improper.

The supreme court first considered whether the part-time employee's home office was an "other office" for purpose of venue. It analyzed the appellate court's decision in *Melliere v. Luhr Bros., Inc.,* 302 Ill. App.3d 794 (1999), that specifically considered the meaning of "other office" for purposes of establishing venue. *Tabirta,* 2020 IL 124798, ¶ 22. In *Melliere,* the appellate court held that venue was proper in St. Clair County because the defendant "leased an airport hangar" at an airport located in St. Clair County. *Tabirta,* 2020 IL 124794, ¶ 23. While none of the defendant's employees in its core business (construction) were housed at the hangar, the appellate court found that the airport hangar was an "other office" for purpose of establishing residency for venue. *Id.* ¶¶ 23-25. The defendant used the hangar to house its airplane, which transported its employees. *Id.* ¶ 23. The defendant employed two full-time pilots who regularly reported to the hangar for work. *Id.* ¶ 23. The *Melliere* court found that "the phrase 'other office'" in the venue statute meant a "fixed place of business at which the affairs of the corporation are conducted in furtherance of corporate activity," and did not have to be a traditional office. *Id.* ¶ 26. Thus, it concluded that the hangar was an "other office."

The supreme court contrasted the facts before it to the facts in *Melliere. Id.* ¶ 27. While the home office of Glister-Mary Lee's part-time employee was his traditional office where he engaged in activities in furtherance of Glister-Mary Lee's business interests, it was not enough to establish venue. *Tabirta,* 2020 IL 124798, ¶ 27. Rather, the venue statute requires that the private corporation have an "other office" in the county; thus, the question is whether Glister-Mary Lee had an office in Cook County. *Id.* Therefore, the court had to decide if the part-time employee's home office was an office of Glister-Mary Lee. *Id.*

The supreme court found it was not. Glister-Mary Lee had not "purposely selected a fixed location in Cook County to carry on its business activities." *Id.* ¶ 29. Rather, Glister-Mary Lee hired a part-time employee based on his experience who simply happened to live in Cook County. *Id.* ¶ 29. It did not hire him because he was in Cook County. *Id.* Moreover, Glister-Mary Lee had no ownership interest in the employee's home, did not pay any of the bills for the home, and did not pay utilities, and while it provided the employee a computer, it had not provided him with a cell phone or office supplies. *Tabirta,* 2020 IL 124798, ¶ 30. Thus, the part-time employee's Cook County home office was insufficient to establish that it was an "other office" of Glister-Mary Lee. *Id.* ¶ 32.

The supreme court next considered whether Glister-Mary Lee was "doing business" in Cook County for purpose of establishing residency under the venue statute. *Id.* ¶37. It noted that "doing business" requires rather extensive contacts with the venue such that the corporation's activities are like those of a localized business within the county. *Id.* ¶ 34. The supreme court found that Glister-Mary Lee did not "design, manufacture, advertise, finance or sell its products from Cook County." *Id.* ¶ 35. Moreover, its sales to Cook County customers were extremely limited. *Id.* ¶ 36.

Thus, the Illinois Supreme Court reversed and remanded the case back to the circuit court for a venue transfer. Justice Kilbride wrote a special concurrence. He agreed with the majority but clarified that the majority opinion does not create a bright line rule that a home office alone cannot establish residency

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and venue. Rather, he noted that it is an "open question whether, for example, evidence that a defendant operated a small business out of her residence would be sufficient to meet the statutory venue requirements." *Tabirta,* 2020 IL 124798, ¶ 44. The resolution of whether any particular "home office" is a defendant's "other office" will depend on the specific facts of the case. *Id.*

Defending a Fee Award—Evidence and Analysis Required

In *Aliano v. Transform SR LLC,* 2020 IL App (1st) 172325, the Illinois Appellate Court First District addressed a variety of issues related to the trial court's award of attorney's fees to a prevailing plaintiff under the Illinois Consumer Fraud Act (ICFA).

Generally, the facts of the underlying lawsuit are not particularly important to the issues evaluated by the appellate court. What is important, however, is that the plaintiff prevailed on his ICFA claim, was awarded $3.10 in actual damages, and as such was entitled to an award of a reasonable attorney's fee. *Aliano v. Transform, LLC,* 2020 IL App (1st) 172325, ¶ 2-3. The attorney fee award was the subject of much litigation, and part of the litigation had already been appealed. In the prior appeal, the appellate court affirmed the plaintiff's $3.10 in actual damages but reversed the attorney fee award because the court "erred as a matter of law in admitting an attorney billing statement into evidence in the absence of the plaintiff's production of the original time sheets underlying the statement and in relying upon that statement in calculating the plaintiff's recoverable fees." *Id.* ¶ 2. The reasonableness of the award, however, had never been considered. *Id.*

When the case was remanded, the plaintiff sought nearly $340,000 in fees and costs. *Id.* ¶ 3. The revised fee petition was supported by the lead attorney's affidavit with attached billing statements. *Id.* The billing statement had line item entries for legal bills spanning a period of October 27, 2011 through June 17, 2016, describing "the task performed, the date performed, the time taken to perform the task," the identity of the person who performed the work, the billing rate, and total amount. *Id.* Following the evidentiary hearing, the trial court awarded $267,000 in fees. *Id.* Following the hearing, Sears declared bankruptcy. Transform was substituted as the real party in interest, and the instant appeal was heard.

On appeal, Transform argued that the $267,000 award was improper under section 10a(c) of ICFA. *Aliano*, 2020 IL App (1st) 172325, ¶ 6. The court broke the award into two groups: pre-January 1, 2014 bills and post-January 1, 2014 bills. *Id.* As for the pre-2014 bills, Transform argued that the circuit court violated the law-of-the-case doctrine by allowing the plaintiff to present an exhibit that the appellate court had already ruled was inadmissible. *Id.* "The law-of-the-case doctrine prohibits the reconsideration of issues that have been decided by a reviewing court in a prior appeal." *Id.* ¶ 12.

In the remanded proceedings, the plaintiff submitted an exhibit that was identical to the one at issue in the prior appeal. *Id.* ¶ 9. The appellate court found this violated the law-of-the-case doctrine. *Id.* ¶ 11. However, the plaintiff also submitted a second exhibit where data was derived from electronic information from the original handwritten timesheets that the plaintiff's attorney had destroyed. *Id.* ¶ 14. While the plaintiff's attorney acknowledged these handwritten slips were intentionally destroyed after he verified the accuracy of the computerized entries, the attorney also testified that they were not destroyed in bad faith or to prevent their examination. *Id.* However, the court noted that it is the defendant's right to examine original time records. *Id.* ¶ 15. Thus, it held that the trial court erred in admitting and relying on the exhibit when awarding fees. *Id.*

The plaintiff tried to argue that the trial court had not relied on the exhibits but on the testimony of his counsel. *Id.* His counsel, however, testified he could not remember all the work performed, but upon reviewing a spreadsheet he created (whose content was nearly identical to certain of the billing statements), he claimed to have a refreshed memory. *Id.* ¶ 18. However, the appellate court rejected this and ultimately found that the "trial court's determination that" counsel had "testified credibly from refreshed recollection" was against the manifest weight of the evidence. *Id.* ¶¶ 21-22.

As to the post-2014 fees, the defendant argued that the circuit erred in finding that plaintiff was entitled to an award of fees related to defending the prior appeal and failed to properly assess the reasonableness of the fees. The defendant argued that the plaintiff was not entitled to attorneys' fees related to the prior appeal because he was not the prevailing party. *Id.* ¶ 28. The appellate court noted, however, that a plaintiff is the prevailing party "if he is successful on any significant issue in the litigation that achieves some benefit which he sought in bringing suit." *Id.* ¶ 27. The appellate court found that, on appeal, the plaintiff's actual damage award was affirmed, which ensured plaintiff's right to seek attorney's fees. *Id.* ¶ 28. Thus, the fees related to the prior appeal could be awarded.

The defendant argued there was nothing "reasonable about awarding" nearly $267,000 in a "garden variety run-of-the-mill consumer fraud litigation where 89% of the services were billed at senior partner rates," the fee award was "nearly 87,000 times the actual damages awarded, and that no attorney would spend 700 hours of time litigating a case whose damages were $3.10."

The defendant also argued that the circuit court did not appropriately determine the reasonableness of the fee petition. Specifically, the trial court had failed to "give due consideration to the factors to be used to determine the reasonableness of the attorney fees requested." *Id.* ¶ 29. The defendant argued there was nothing "reasonable about awarding" nearly $267,000 in a "garden variety run-of-the-mill consumer fraud litigation where 89% of the services were billed at senior partner rates," the fee award was "nearly 87,000 times the actual damages awarded, and that no attorney would spend 700 hours of time litigating a case whose damages were $3.10." *Id.* ¶ 29. The plaintiff argued there was no requirement of proportionality. Rather, ICFA provides that the prevailing plaintiff is entitled to attorneys' fees. *Aliano*, 2020 IL App (1st) 172325, ¶ 29.

The appellate court noted that while ICFA is a "remedial statute that is to be liberally construed to effectuate its purpose . . . attorneys fees awarded pursuant to section 10a(c) must nonetheless be reasonable." *Id.* ¶ 30. It noted that the lodestar approach is the starting point of the analysis but that it is not the end. *Id.* ¶ 31. Rather, other factors must be considered that may adjust any lodestar amount up or down. *Id.* The additional factors to be considered are: "the degree of the opposing party's culpability or bad faith; the ability of the opposing party to satisfying award of fees; whether an award of fees against the opposing party would deter others from acting under similar circumstances; whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the act; and the relative merits of the parties' positions." *Id.* ¶ 31. The novelty and difficulty of the issues involved, the skill required to perform the legal services properly, and the amount involved and the result obtained are also considered. *Id.*

Ultimately, the appellate court concluded that the circuit court failed to consider a number of the other factors in evaluating the fee petition. *Id.* ¶ 32. There had been no bad faith on behalf of the defendant, the plaintiff was the sole beneficiary of the suit, the suit did not raise significant legal issues, and there was nothing novel about the case. *Id.* The appellate court also noted that "billing judgment" is a key component of determining a fee. *Id.* ¶ 33. It observed that "hours that are not properly billed to one's client are also not properly billed to one's adversary," and the purpose of fee-shifting was not to "produce a windfall for attorneys." *Id.* The appellate court noted that the plaintiff had only received $3.10 in actual damages, but his counsel expended $335,000 in fees and more than 700 hours of legal services, which did not reflect "billing judgment."

Ultimately, the appellate court reversed the trial court's award of pre-January 1, 2014 "fees based upon a failure of proof." *Id.* ¶ 23. It also vacated the attorney fee award for legal services provided after January 1, 2014 and remanded the matter to the circuit court to award the plaintiff reasonable attorney fees for that period. *Id.* ¶ 33.

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Supreme Court Affirms: Experts Redesignated as Consultants Are Entitled to Consultant's Privilege Against Disclosure

In a recent opinion, the Illinois Supreme Court affirmed the First District Appellate Court's decision that a party that previously disclosed a witness pursuant to Illinois Supreme Court Rule 213(f)(3) as a controlled expert may later redesignate that witness to be a consultant pursuant to Illinois Supreme Court Rule 201(b)(3). *Dameron v. Mercy Hospital & Medical Ctr*., 2020 IL 125219, ¶ 54. This decision is significant because it effectively shielded certain medical studies from discovery. *Dameron*, 2020 IL 125219, ¶ 1.

Facts and Procedural Posture

The plaintiff, Alexis Dameron, filed a medical malpractice suit against Mercy Hospital and Medical Center and several medical professionals, alleging she sustained injuries during a surgical procedure. *Dameron v. Mercy Hospital & Medical Ctr.*, 2019 IL App (1st) 172338, ¶ 4. In her answers to interrogatories, the plaintiff disclosed David Preston, M.D. as a Rule 213(f)(3) expert witness who would testify as to the results of the comparison electromyogram (EMG) and/or nerve conduction study (EMG study) performed on the plaintiff. *Dameron*, 2019 IL App (1st) 172338, ¶ 5. Thereafter, the plaintiff intended for Dr. Preston to prepare a report about his findings. *Id.*

Months later, the plaintiff filed a motion to designate Dr. Preston as a non-testifying expert consultant pursuant to Rule 201(b)(3) and to preclude discovery of the facts and opinions known to Dr. Preston. *Id.* ¶ 6. In doing so, the plaintiff contended that Dr. Preston had been retained to evaluate the nature and extent of the plaintiff's injuries and perform the EMG and was not retained because Dr. Preston treated her. *Id.* ¶ 7. The plaintiff further contended that opposing counsel was properly and timely notified that Dr. Preston had been withdrawn as a testifying expert witness. *Id.* As a result of the redesignation, the plaintiff argued that Dr. Preston's opinions were privileged from discovery pursuant to Rule 201(b)(3). *Id.*

The trial court denied plaintiff's attempt to redesignate Dr. Preston and ordered the plaintiff to produce Dr. Preston's records of the EMG. *Id.* ¶ 9. The plaintiff refused to comply and the court found her in contempt. *Id.* Thereafter, the plaintiff appealed. *Id.* ¶ 10.

First District Opinion

In analyzing whether a party that previously disclosed a witness as a controlled expert may thereafter redesignate that witness as a consultant, the First District Appellate Court discussed the Illinois Supreme Court's *Taylor* case, which provided that a party may withdraw an expert witness so long as the opposing party is given clear and sufficient notice. *Dameron*, 2019 IL App (1st) 172338, ¶ 19 (citing *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994)). However, the appellate court noted that the plaintiff in this case also sought to redesignate Dr. Preston from a controlled expert witness to a non-testifying consultant whose reports and opinions are protected from

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*The authors would like to thank **Taylor Cascia**, a paralegal with *Heyl, Royster, Voelker & Allen, P.C.*, for her assistance with this column.

discovery pursuant to the privilege set forth in Rule 201(b)(3). *Id.* Therefore, the court looked to the federal discovery rules for guidance. *Id*. ¶ 22.

Among the cases analyzed by the court was *San Román v. Children's Heart Center, Ltd*., which explains that the Federal Rules of Civil Procedure distinguish between an expert whose opinions may be presented at trial and an expert employed only for trial preparation and not expected to testify. *Id.* ¶ 22 (citing *San Román v. Children's Heart Center, Ltd*., 2010 IL App (1st) 091217, ¶ 23). The court also analyzed a 2009 Seventh Circuit Court of Appeals' decision, *Securities & Exchange Commission v. Koenig*, which noted that "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report *has been disclosed*, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed." *Dameron*, 2019 IL App (1st) 172338, ¶ 24 (citing *Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009)) (emphasis added). However, neither of the aforementioned cases distinguished situations where only the expert's identity was disclosed from those where the expert's report had been disclosed. *Dameron*, 2019 IL App (1st) 172338, ¶ 24. Another case, *Davis v. Carmel Clay Schools,* No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, 2013 WL 2159476, at *5-6 (S.D. Ind. May 17, 2013), recognized what constituted a "designation" of an expert witness. In *Davis*, the court noted that once the expert's report was disclosed to the opposing party, the expert ceased to enjoy protection from discovery by the opposing party. *Dameron*, 2019 IL App (1st) 172338, ¶ 25 (citing *Davis*, 2013 U.S. Dist. LEXIS 70251, 2013 WL 2159476, at *5-6).

> [T]he court held that a party is permitted to redesignate an expert from a Rule 213(f) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and where a report has not yet been disclosed.

Based on the Illinois Supreme Court Rules and Illinois and federal case law, the First District held that because the court ordered plaintiff's attorney to produce "Dr. Preston's records regarding his June 1, 2017 comparison EMG study," but the EMG study was absent from the record on appeal, the appellate court could not conclude that the material sought was of a purely concrete nature or that the production of the EMG study had the potential to expose Dr. Preston's thought processes. *Dameron*, 2019 IL App (1st) 172338, ¶ 50. Therefore, the court held that Dr. Preston's EMG study was protected by the consultant's work product privilege. *Id.* ¶¶ 52-53. The First District's ruling was appealed by the defendants.

Supreme Court Opinion

The Supreme Court affirmed the holding from the First District, though the Supreme Court's analysis differed from that of the First District. *Dameron*, 2020 IL 125219, ¶ 54. The Supreme Court focused on the committee comments to Rule 213, which makes clear that the purpose of paragraph (f) "is to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." *Dameron*, 2020 IL 125219, ¶ 31 (citing Ill. S. Ct. R. 213, Committee Comments, paragraph (f) (adopted Mar. 28, 2002)). The plaintiff alerted the defendants of her intention to redesignate Dr. Preston almost a year before the trial date. *Id.* Therefore, the court reasoned that the defendants had almost a year of advance notice that Dr. Preston would not testify as an expert witness. *Id.* Accordingly, Dr. Preston's redesignation would cause defendants no "unfair surprise *at trial*." *Id.* (emphasis in original). The supreme court further reasoned that the defendants could not have come to meaningfully rely on Dr. Preston's participation at trial as an expert witness because the defendants never received Dr. Preston's report. *Id.* ¶ 32. Therefore, the court held that a party is permitted to redesignate an expert from a Rule 213(f) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and where a report has not yet been disclosed. *Id.*

Defendants argued that even if Dr. Preston were permitted to be redesignated as a consultant under Rule 201(b)(3), the plaintiff must still turn over Dr. Preston's report and test results which consisted of objective data that was not considered "core work product." *Dameron*, 2020 IL 125219, ¶ 36. The supreme court disagreed, noting that the analysis should consider the exceptional circumstances portion of the Rule 201(b)

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(3) definition of consultant, which states that the "identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain *facts* or opinions on the same subject matter by other means." *Id.* ¶ 40 (citing Ill. S. Ct. R. 201(b)(3)). The supreme court noted that in this case, the defendants asserted that the report and results of the EMG constitute concrete factual data, which was expressly protected under the consultant privilege provided in Rule 201(b)(3). *Id.* ¶ 45. Therefore, the disclosure was protected absent any exceptional circumstances. *Id.* Unlike the First District, the Illinois Supreme Court considered whether it was 'impracticable' for a party to otherwise obtain facts or opinions on the same subject. *Id.* ¶¶ 41-42. Concluding it was not for the defendants in the instant case, the Illinois Supreme Court affirmed the First District's ruling. *Id.* ¶ 54.

Conclusion

The Illinois Supreme Court concluded that a party is permitted to redesignate an expert from a Rule 213(f)(3) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and to avoid production of a report created by that expert absent a showing of "exceptional circumstances." *Dameron*, 2020 IL 125219, ¶ 52. When faced with similar circumstances, defense counsel should carefully consider how to demonstrate exceptional circumstances pursuant to Rule 213(b)(3). Counsel should further strive to avoid premature disclosures that could give rise to a similar redesignation issue.

Evidence and **Practice Tips**

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Potential Consequences of Filing a Frivolous Lawsuit

Imagine reviewing a complaint filed against one of your clients. Upon an initial review, the plaintiff alleges outlandish facts that appear to be false. Upon closer review, you notice that the allegations are not only false, but were alleged only to harass your client. Maybe the plaintiff is a disgruntled neighbor trying to force your client to remove trees newly planted on the client's own property. Maybe it is a customer of your client's business who was denied entry for refusing to wear a mask during a pandemic. Perhaps some of the allegations are false and irrelevant to the lawsuit, and the ones that may be true clearly do not entitle the plaintiff to any relief even under the most generous interpretation of the law. Your first reaction is to file a motion to dismiss, but there has to be more you can do to protect your client for the legal fees about to be incurred to defend a lawsuit whose sole purpose was harassment. The question is, what can you do?

1. The Rules

Illinois Supreme Court Rules 3.1 and 137 govern the requirement that all pleadings be filed in good faith and not for the purpose of harassment.

Under Illinois Supreme Court Rule 3.1:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an ex-

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Illinois Rule of Civil Procedure 137 allows a party to recover sanctions for any pleading filed in bad faith, including a frivolous complaint. Under Rule 137, "appropriate sanctions may include an order to pay the other party's reasonable expenses incurred because of the filing of the pleading, motion, or other document, including a reasonable attorney fee. Because the rule is penal, it must be strictly construed."

tension, modification or reversal of existing law. ***.

Illinois Rule of Civil Procedure 137, in turn, provides:

(a) Signature requirement/certification. Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. ***. **The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation**. ***. If a pleading, motion or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee.

(Emphasis added).

2. Enforcement

Illinois Rule of Civil Procedure 137 allows a party to recover sanctions for any pleading filed in bad faith, including a frivolous complaint. Under Rule 137, "appropriate sanctions may include an order to pay the other party's reasonable expenses incurred because of the filing of the pleading, motion, or other document, including a reasonable attorney fee." *Garlick v. Bloomingdale Twp.*, 2018 IL App (2d) 171013, ¶ 44. "Because the rule is penal, it must be strictly construed." *Garlick*, 2018 IL App (2d) 171013, ¶ 44.

"The standard for evaluating a party's conduct under the rule is one of reasonableness under the circumstances existing at the time of the filing." *Id.* ¶ 45. "The party requesting sanctions is obligated to show that the opposing party made assertions of fact that were untrue and were made without reasonable cause." *Id.* Further, "Rule 137 is intended to prevent counsel from making assertions of fact or law without support." *Ambrose v. Thornton Twp. Sch. Trs.*, 274 Ill. App. 3d 676, 685 (1st Dist. 1995). "Courts consider an allegedly offending complaint at the time it was filed instead of engaging in hindsight." *Katsoyannis v. Findlay*, 2016 IL App (1st) 150036, ¶ 49.

Before seeking sanctions, it is vital to consider that a high burden must be met. Rule 137 sanctions will not be awarded based on mere inconsistency in the testimony on record or when a genuine issue exists on the plaintiff's right to redress. For instance, in a neighborly dispute over an easement to access a nearby beach, the defendant could not recover sanctions because there was a genuine dispute as to whether plaintiffs had a right to traverse defendants' property on the basis that no other viable option to access the beach easement existed. *Katsoyannis*, 2016 IL App (1st) 150036, ¶ 49.

However, a party or attorney cannot file a complaint without a reasonable investigation and cannot rely purely on speculation. For instance, Rule 137 sanctions were appropriate where a plaintiff refused to dismiss a complaint to enforce a FOIA request after the defendant township provided the plaintiff

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with the information requested. *Garlick*, 2018 IL App (2d) 171013, ¶ 47. Further, an attorney's failure to conduct an investigation before filing a complaint supports sanctions. See *Kellett v. Roberts*, 276 Ill. App. 3d 164, 173 (2d Dist. 1995); *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 704 (2d Dist. 1998). Sanctions are appropriate for allegations that are purely speculative. *Kellett,* 276 Ill. App. 3d at 704. Sanctions are also appropriate for baseless claims. See *Alcantar by Alcantar v. Peoples Gas Light & Coke Co.*, 288 Ill. App. 3d 644, 650 (1st Dist. 1997) (sanctions appropriate for filing frivolous complaint as the law firm was aware that the allegations were not true and the claims were baseless). Rule 137 provides the proper avenue of recourse if you are defending a complaint in which the allegations are purely speculative, or if the plaintiff or plaintiff's counsel know the allegations are untrue and baseless.

Conclusion

Rule 137 sanctions are not to be taken lightly any time a client believes themselves to be the victim of a baseless lawsuit. That does not mean, however, that a client who has been sued as a means of harassment is left with no option other than to incur the costs of defending a lawsuit filed in bad faith. Once it becomes evident that the plaintiff has no basis in law or fact, it is worth contacting the plaintiff's counsel ask whether his or her client is prepared to withdraw the complaint. If there is no longer a genuine dispute, the evidence on record is uncontroverted, and the plaintiff has no good faith basis to argue for a change in the current state of the law, the pursuit of sanctions is appropriate to ensure that the interests of an improperly sued defendant are protected.

Civil Practice and **Procedure**

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Party's Intent to Deceive Is Crucial Factor in Application of Judicial Estoppel

*"If you tell the truth,
you don't have to remember anything."
– Mark Twain*

Despite the requirement for parties to tell the truth in their filings, often it is the case that through inadvertence or intention, they fail to do so. Judicial estoppel has long been the means by which courts have prevented parties from taking advantage of their intention to hide the truth or be less than forthcoming. Prior to the Illinois Supreme Court decision of *Seymour v. Collins*, 2015 IL 118432 the leading case on judicial estoppel was *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1st Dist. 1996). In the run up to *Seymour*, a series of cases, *Berge v. Kuno Mader*, 2011 IL App (1st) 103778, *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, and *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, seemed to signal a move in the direction of enforcing the doctrine. See *A Re-sharpened Tool in the Shed: The Value of Judicial Estoppel*, *IDC Quarterly*, Vol. 23, No. 2, Starr M. Rayford and Donald Patrick Eckler. Since *Seymour*, the doctrine has been nuanced as courts have struggled with applying the doctrine.

Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *Seymour v. Collins*, 2015 IL 118432, ¶ 36. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from "deliberately changing positions" according to the exigencies of the moment. *Id.* Judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 460 (1st Dist. 2003). The elements of judicial estoppel apply where (1) the same party has taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative

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proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. *Seymour*, 2015 IL 118432, ¶ 37. Notably, while at times the court included the additional requirement that the inconsistent statement be made "under oath," (see, *e.g*. *People v. Caballero*, 206 Ill.2d 65, 80 (2002)), in *Seymour* the supreme court explicitly held that a statement under oath is not required for the doctrine to apply, and the primary concern is whether the party "intends that the trier of fact accept the truth of the facts alleged." *Seymour*, 2015 IL 118432, ¶ 37. The five general requirements must be proven by "clear and convincing evidence" before the doctrine applies. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 20.

The *Seymour* court made clear that application of the doctrine of judicial estoppel requires a two-part analysis: first, the five general prerequisites are met; and second, the court must exercise its discretion by taking into consideration whether the party's inconsistent positions were based on an intent to deceive or mislead rather than mere inadvertence or mistake. *Seymour*, 2015 IL 118432, ¶ 47. Thus, the formulaic application of the five requirements is not sufficient and practitioners must be prepared to show evidence of the party's intent to deceive. What amounts to "clear and convincing evidence" of an intent to deceive, and the proper exercise of the court's discretion, is explored in the cases below.

Seymour v. Collins

The circuit court granted the defendant's motion for summary judgment pursuant to the doctrine of judicial estoppel. *Id.* ¶ 1. The decision was upheld by the appellate court, only to be reversed and remanded by the Illinois Supreme Court. *Id.* The plaintiffs, Terry and Monica Seymour, filed personal injury claims after Mr. Seymour was injured in an automobile accident while being transported in an ambulance. *Id.* ¶ 3. Prior to the personal injury lawsuit, the Seymours had filed for Chapter 13 bankruptcy, and it eventually came to light that the plaintiffs had failed to disclose their personal injury action in the bankruptcy proceeding. Given this failure, the defendants argued that the plaintiffs should be judicial estopped from proceeding with their claims. *Id.* ¶¶ 8-9. The circuit court agreed finding that since the plaintiffs had failed to disclose the case as a potential asset in their bankruptcy case, they were judicially estopped from seeking a monetary judgment against the defendants. *Id.* ¶ 18.

The Illinois Supreme Court reversed and held the doctrine did not apply. The court first noted that even if all five elements are technically met that does not mean an intent to deceive or mislead is necessarily present because "inadvertence or mistake may account for positions taken and facts asserted." *Id.* ¶ 47. Further, whether or not to apply the doctrine is still within the court's discretion and the court can consider several additional factors such as "the significance or impact of the party's action in the first proceeding and, as noted, whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.*

The supreme court defined the dispositive issue to be "whether plaintiffs 'deliberately' changed positions according to the exigencies of the moment, whether they used 'intentional self-contradiction as a means of obtaining unfair advantage.'" *Id.* ¶ 50. It is worth noting that for purposes of analyzing the intention of plaintiffs, the court assumed (rather than wading into the weeds of bankruptcy law) that the plaintiffs were under a continuing duty to disclose their personal injury lawsuit during the bankruptcy proceeding. *Id.* ¶ 52. The court equally assumed that the five general requirements of judicial estoppel were met, thus limiting its inquiry to whether the plaintiffs *intended to deceive or mislead the court*, which it described as a "critical factor" in the application of judicial estoppel. *Id.* ¶ 53.

Significantly, in determining the plaintiffs "intention to deceive or mislead" the court also assumed that the plaintiffs did intend for the bankruptcy court to accept the truth of their position, *i.e*. that they had no "assets" - as the plaintiffs understood the term - other than those disclosed. *Id.* ¶ 54. In holding there was no evidence of such an intent, the court rejected the argument that since the plaintiffs had disclosed other assets (such as a workers' compensation claim that arose during the bankruptcy) they knew to disclose the personal injury lawsuit. *Id.* ¶ 55. However, the court reasoned there was no justification to extrapolate such an inference because the injury and workers' compensation claim were relevant, and submitted, in the motion to modify only because they explained the plaintiffs' decrease in income. *Id.* ¶ 58.

Moreover, the court noted the evidence showed that the plaintiffs had been advised by their bankruptcy attorney that they had to report any lump sum funds received in excess of $2,000 during the pendency of the bankruptcy. *Id.* ¶ 61. The court found it was reasonable for a laymen to infer that smaller sums, including unliquidated claims for money such as the pending personal injury lawsuit, did

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not have to disclosed. *Id.* The court held that it would not "penalize, via presumption, the truly inadvertent omissions of good-faith debtors in order to protect the dubious, practical interests of bankruptcy creditors." *Id.* ¶ 63. Thus, *Seymour* not only makes clear that application of the doctrine requires clear and convincing evidence of an intent to deceive, but shows there is no such evidence in the bankruptcy context where it is reasonable to infer the layman plaintiff did not know of his duty to disclose a personal injury lawsuit.

Higginbotham serves as a good example of "clear and convincing" of a party's intent to deceive. The court at the time found particularly persuasive the fact the plaintiff signed an agreement in the bankruptcy proceeding agreeing to notify bankruptcy counsel if he wished to file a lawsuit.

Higginbotham v. Fintel

In another similar case, the Illinois Appellate Court First District affirmed the circuit court granting defendant's motion for summary judgment based on the application of judicial estoppel. Like the plaintiffs in *Seymour,* the plaintiff first filed chapter 13 bankruptcy. Thereafter he filed a medical malpractice lawsuit but never amended the bankruptcy petition to include the lawsuit as a potential asset. The plaintiff argued that while most of the prerequisites of the doctrine of judicial estoppel were met, he received no benefit from the inadvertent failure to disclose his medical malpractice lawsuit because all of his creditors that had "perfected" their claims had been paid in full. *Higginbotham v. Fintel*, 2019 IL App (1st), 181420-U, ¶ 14. The circuit court disagreed and ruled that he had received a benefit from the nondisclosure "because some of his debts were discharged without his creditors' knowledge of his potential to recover a monetary judgment from the lawsuit." *Id.* ¶ 15.

On appeal, the first issue was whether the plaintiff received a benefit from the nondisclosure of his lawsuit in the bankruptcy proceedings. *Id.* ¶ 24. The defendants argued that he did receive a benefit because he obtained a discharge of his unsecured debt (he paid off all his secured debt) and the termination of his bankruptcy case without the Chapter 13 trustee, his creditors, or the bankruptcy court having any knowledge about his medical malpractice lawsuit. *Id.* ¶ 26. The plaintiff argued that there was no benefit, because the unsecured creditors failed to file proof of their claims, and under bankruptcy law, they would not have received any money, even if he had disclosed the lawsuit. *Id.* The court rejected this argument and held that the "plaintiff here has clearly and convincingly received a benefit from his nondisclosure, namely his ability to proceed in the bankruptcy case without the bankruptcy court, his trustee and his creditors being aware of this potential asset." *Id.* ¶ 30. The court explained that "our focus is on the benefit received by plaintiff not the lack of harm felt by his creditors." *Id.*

The court also held there were "undisputed facts" showing that the plaintiff's failure to disclose the lawsuit in bankruptcy was not accidental. In support thereof, the court relied on the fact that when the plaintiff filed bankruptcy, he signed an agreement stating that he would notify his bankruptcy attorney if he wished to file a lawsuit, thus affirming he was on notice that he needed to disclose. *Id.* ¶ 37. The court also rejected the argument that the plaintiff was relying on his bankruptcy attorneys because there was no evidence in the record that he ever told the bankruptcy attorneys about the medical malpractice lawsuit. *Id.* The court also found persuasive the fact that the plaintiff answered in written discovery that a bankruptcy case was filed in 2016, when it was really filed in 2013. *Id.* Thus, the court held it was reasonable to infer that the plaintiff's failure to disclose the medical malpractice case was intentional rather than inadvertent. *Id.* ¶ 38. The court also made this telling observation, "… plaintiff describes himself as a 'blundering laymen,' who did not know he needed to disclose the lawsuit in bankruptcy court. But in same breath, he argues he could not have had a motive to conceal the lawsuit because the disclosure of it would not have affected his repayment plan. This argument is a microcosm of what the doctrine of judicial estoppel is intended to prevent: changing positions according to the exigencies of the moment." *Id.* ¶ 40.

Thus, *Higginbotham* serves as a good example of "clear and convincing" of a party's intent to deceive. The court at the time found particularly persuasive the fact the plaintiff signed an agreement in the bankruptcy proceeding agreeing to notify bankruptcy counsel if he wished to file a lawsuit.

Adrenaline v. Greenlayer

This matter involved a breach of contract claim. First, Adrenaline, an event management company, filed a breach of contract claim in Illinois against Greenlayer, a sports apparel company. *Adrenaline Sports Management, Inc. v. Greenlayer, LLC*, 2019 IL App (1st) 180802-U, ¶¶ 2-4. One day later, Greenlayer filed its own complaint against Adrenaline in Oregon, which included claims not only for breach of contract but also alleged that Adrenaline breached a settlement agreement by filing the Illinois lawsuit and conversion. *Id.* Adrenaline moved to dismiss the Oregon complaint arguing it was not subject to personal jurisdiction in Oregon and its earlier-filed Illinois complaint involved the same cause for the same parties. *Id.* ¶ 8. In response to the motion, Greenlayer argued that the Oregon complaint was not the same because it included claims of breach of settlement agreement and conversion, which were factually and legally distinct from the breach of contract claim filed in Illinois. *Id.* The Oregon court denied the motion to dismiss and the matter continued to be litigated in Oregon. *Id.*

Thereafter in the Illinois case, Greenlayer moved to dismiss Adrenaline's complaint pursuant to § 2-619(a)(3) because it involved the same cause and the same parties as the Oregon action. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 9. Adrenaline responded that Greenlayer should be judicially estopped from arguing that the Illinois and Oregon suits involved the same cause because it took the opposite position in response to Adrenaline's motion to dismiss the Oregon complaint. *Id.* ¶ 10. The Illinois court dismissed Adrenaline's complaint and Adrenaline appealed. *Id.* ¶ 12.

Prior to engaging in the § 2-619(a)(3) analysis, the appellate court reviewed whether Greenlayer should be judicially estopped from arguing that the Illinois and Oregon actions involved the same cause because it previously argued in the Oregon case that the two actions did not involve the same cause. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 15. The appellate court held the circuit court did not abuse its discretion in declining to apply the doctrine. The court explained that the doctrine of judicial estoppel "applies only to a party's statements of fact and not to legal opinions or conclusions." *Id.*, citing *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st), 142754, ¶ 66. The court held that whether two actions involve the same cause within the meaning of § 2-619(a)(3) is a legal conclusion, not a factual assertion, thus while Greenlayer may have taken a different legal position, it had not made any factually inconsistent statements in the Oregon and Illinois proceedings. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 16.

Stumeier v. Janis

This matter involved the allegation that the defendants negligently removed timber from the plaintiffs' property. Specifically, that the defendant Janis entered into a timber purchase agreement with Langford, which required Janis to stake and mark the boundary lines of the property where the timber was located and for Langford to remove the timber. *Stumeier v. Janis*, 2020 IL App (5th) 190405-U, ¶ 3. The agreement also stated that Janis would indemnify Langford for any claims of third parties for damages resulting from errors in the location of the boundary lines. *Id.* ¶ 4. The plaintiffs alleged that Langford negligently removed some timber from their property and sought to hold both Janis and Langford liable. Janis filed a motion for summary judgment arguing that he could not be liable for the negligence of Langford because he did not control Langford's work, who was an independent contractor. *Id.* ¶ 6. The plaintiffs ultimately "confessed judgment" on the motion for summary judgment in Janis's favor. *Id.* The matter continued against Langford who was ultimately defaulted and ordered to pay the plaintiffs' damages. *Id.* After the default judgment was entered, Langford executed an assignment to the plaintiffs for his claim of indemnity against Janis based on the agreement between Janis and Langford. *Id.* ¶ 7. One of the underlying plaintiffs, as the assignee of Langford, filed the complaint against Janis seeking indemnity under Janis's agreement with Langford. *Id.* ¶ 8. Janis filed a motion to dismiss arguing that the plaintiff confessed to entry of summary judgment in Janis's favor in the original action, based on the argument that Janis could not be liable for Langford as an independent contractor, and the plaintiff was therefore judicially estopped from arguing as such in the indemnity action. *Id.* ¶ 11. The court in the indemnity action agreed and dismissed the matter.

On appeal, the Illinois Appellate Court Fifth District cursorily stated that the trial court had found that the five general requirements of judicial estoppel had been met. However, the court reversed and remanded the trial court's order dismissing the plaintiff's complaint based on judicial estoppel. The only basis for

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reversing and remanding was that "there was nothing in the record to indicate that the trial court engaged in the second step of the judicial-estoppel analysis, *i.e*. exercising its discretion in deciding whether to apply judicial estoppel." *Id.* ¶ 17. The trial court's order "never mentioned the equitable factors, such as the intent to deceive, that are set forth in *Seymour*." *Id.* Given this, the appellate court remanded the matter back to the trial court to consider these factors. *Id.* ¶ 17.

Stevenson v. Sharma

In the most recent decision, and contrary to its earlier decision in *Higginbotham v. Fintel*, the Illinois Appellate Court First District reversed the order of the circuit court granting summary judgment in favor of the defendants based on judicial estoppel. The court held there was a genuine issue of material fact whether the plaintiff's failure to disclose his cause of action to the bankruptcy court was inadvertent or an intentional act of deception. *Stevenson v. Sharma*, 2020 IL App (1st), 192430-U, ¶ 1. The action involved a dental malpractice claim against the defendants. Three years before filing the malpractice lawsuit, the plaintiff had filed for Chapter 13 bankruptcy. *Id.* ¶ 6. Like the plaintiffs in *Higginbotham*, as part of the bankruptcy proceeding the plaintiff signed an agreement stating that he would notify the attorney if he wished to file a lawsuit. *Id.* ¶ 8. While the dental malpractice action was still pending, the plaintiff's debt was discharged, including $136,399 in unsecured debt. The plaintiff never disclosed the dental malpractice claim in the bankruptcy proceeding. *Id.* ¶ 9. After learning of the bankruptcy proceeding, the malpractice defendants filed an emergency motion to dismiss. The court continued the motion and ordered the plaintiff to reopen the bankruptcy case and amend the schedules to include his malpractice claim against the defendants. *Id.* ¶ 15. The defendants then filed a motion for summary judgment again arguing that plaintiff's claim was barred under the doctrine of judicial estoppel. *Id.* ¶ 18. The court granted the motion, holding that all five elements had been met and the evidence established the plaintiff intended to deceive or mislead the bankruptcy court. *Id.* ¶ 21. In support of that finding, the court pointed to the following evidence: the agreement between the plaintiff and his bankruptcy counsel that required him to inform his counsel if he wished to file a lawsuit; the plaintiff's disclosure of two cases against him while failing to disclose two lawsuits he was prosecuting; and the plaintiff's financial motive for concealment of money judgment to his creditors. *Id.* ¶ 21. On appeal, the plaintiff argued that the first and fourth elements had not been met (that plaintiff had taken two positions and intended the trier of fact to accept the truth of the facts alleged) because under federal bankruptcy law he was not required to disclose the malpractice action, citing to various provisions of the bankruptcy code. *Id.* ¶¶ 26-28. The court summarily rejected this argument finding the vast weight of authority holds that a debtor has a continuing obligation to disclose post-petition causes of action. *Id.* ¶ 30. Thus, the primary issue was the second part of the judicial estoppel two-part analysis: whether the circuit court properly exercised its discretion, taking into consideration such factors as (1) the impact of the plaintiff's action in the first proceeding, and (2) whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake. *Id.* ¶ 33. In support of his argument that his failure to disclose was inadvertent, the plaintiff relied on his own affidavit averring that he was not aware he needed to disclose the claim and did not intent to deceive the court. *Id.* ¶ 34. The defendants argued there was evidence of intent: the agreement the plaintiff signed that required him to inform counsel if he wished to file a lawsuit; the bankruptcy schedule indicating he had no income compared to his deposition testimony in the malpractice case stating that he earned up to $1200 a day as a boat captain; and his application to proceed as an indigent plaintiff in a 2014 case based on his purported unemployment even though he was working as a boat captain. *Id.* ¶ 36. The defendants argued this showed a pattern of changing his position based on what benefitted him most given the proceeding. While such evidence was seemingly sufficient in *Higginbotham* to find intent, the court held that the evidence raised a credibility issue which was properly left to the trier of fact and reversed the grant of summary judgment. *Id.* ¶ 38.

Conclusion

As the above cases show, the court must engage in a two-part analysis before the doctrine of judicial estoppel applies: (1) are the five prerequisites satisfied; and (2) exercising its discretion is it proper for the court to apply the doctrine taking into consideration whether the inconsistent positions were taken with an intent to deceive the court. As *Seymour* and is progeny show, it is the second step, focused on discretion and the party's intent, that seems to be the most crucial factor in the court's analysis. This highlights the equitable nature of the doctrine. Practitioners seeking to have the doctrine applied must be prepared to show evidence of the plaintiff's intent to deceive.

Susan A. Wagener
HeplerBroom LLC, Chicago

Plaintiffs Take a Chance: The Development of Nonpattern Jury Instructions on the Loss of Chance Doctrine

In a recent decision, the Illinois Appellate Court First District held that a trial court's failure to issue a loss of chance jury instruction denied the plaintiff a fair trial, and in so doing, reversed longstanding precedent that the Illinois Pattern Jury Instruction on proximate cause properly states the law in loss of chance medical malpractice cases. *Bailey v. Mercy Hosp. & Med. Ctr.*, 2020 IL App (1st) 182702, ¶ 3. In doing so, the court found that the Illinois Pattern Jury Instruction on proximate cause does not distinctly inform the jury about loss of chance and that a jury may consider, as a proximate cause of a patient's injury, that a defendant's negligence lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to a plaintiff. *Bailey,* 2020 IL App (1st) 182702, ¶ 115.

Since 1986, Illinois has recognized the Loss of Chance Doctrine. *See Northern Trust Co. v. Louis A. Weiss Memorial Hospital*, 143 Ill. App. 3d 479, 487-489 (1st Dist. 1986) (finding delay in treatment supporting evidence for proximate cause). The loss of chance doctrine in a medical malpractice action refers to two types of situations:

> "(1) where a plaintiff has been deprived of a chance to survive or recover from a health problem due to the medical provider's negligence, or (2) where the medical provider's negligence has either lessened the effectiveness of plaintiff's treatment or increased plaintiff's risk of an unfavorable outcome."

Sinclair v. Berlin, 325 Ill. App. 3d 458, 464 (1st Dist. 2001). Historically, this doctrine has not been recognized as a separate theory of recovery, but rather as a proximate cause analysis. *Sinclair*, 325 Ill. App. 3d 466.

Generally, parties have the right to instruct the jury on their theory of the case if the facts in evidence or a reasonable inference from those facts support the theory. *Bailey,* 2020 IL App (1st) 182702, ¶ 108. Illinois Pattern Jury Instructions must be used when applicable, unless the trial court determines that the instruction does not accurately state the law. *Id.* at ¶ 84. The trial court has discretion in determining what jury instructions will be presented and are not to be overturned absent an abuse of discretion such as inaccurately stating the law. *Id*.

In the absence of a specific instruction on loss of chance, plaintiffs often request the submission of nonpattern jury instructions on loss of chance, and such requests are routinely denied on the basis that the standard IPI jury instruction on proximate cause sufficiently encompasses loss of chance consideration. In *Cetera v. DiFilippo*, the plaintiffs appealed the verdict in favor of a physician for a loss of chance medical negligence action claiming that the rejection of the proposed non-IPI loss of chance instruction deprived the jury of sufficient instruction on proximate cause. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (1st Dist. 2010). The appellate court affirmed the trial court's denial of the instruction, relying on prior decisions affirming refusals of similar proffered nonstandard instructions because the proximate cause instruction, IPI Civil (2011) No. 15.01, properly states the law in loss of chance cases, which the court finds no reason to depart from such determination. *Id.*; *see Sinclair*, 325 Ill. App. 3d at 466-467.

In *Bailey*, the appellate court reversed this long standing precedent; becoming the first court in Illinois to hold that the Illinois Pattern Jury Instruction on proximate cause is not sufficient in loss of chance cases, and that a plaintiff is entitled to a separate, loss of chance instruction. *Id*. at ¶ 113-117 (where plaintiff presented evidence through

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About the Author

Susan A. Wagener is a partner in *HeplerBroom*'s Chicago office and focuses her legal practice on the defense of health care professional licensure cases, medical malpractice, nursing home litigation, and general healthcare law matters. In addition to her active trial practice, she regularly presents and publishes on topics related to malpractice risk management and the defense of disciplinary matters. Ms. Wagener is licensed to practice in Illinois and Wisconsin and is admitted to the bars of the United States Supreme Court, the Illinois Supreme Court, and the United States District Court for the Northern District of Illinois.

expert testimony that patient suffered a missed opportunity when toxic shock and sepsis were not discovered and treated earlier, thus resulting in patient's death). At trial, the plaintiff requested the following nonpattern jury instruction:

> "If you decide or if you find that plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in Jill Milton-Hampton lessened the effectiveness of the medical services which she received, you may consider such delay one of the proximate causes of her claimed injuries or death."

Id. at ¶ 112. This request was denied by the trial court and a verdict was returned for the defendants. On appeal, the court specifically relied on the Illinois Supreme Court decision in *Holton v. Memorial Hosp.*, which grants plaintiffs the right to submit evidence and recover on a loss of chance theory. *Holton v. Memorial Hosp.*, 176 Ill. 2d. 95, 119 (1997) (where patient suffered paraplegia as a result of negligent failure to diagnose condition and admitted evidence of missed opportunity to prove proximate cause). The supreme court reasoned that "[t]o the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidenced to a jury that the defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery." *Id*. The appellate court in *Bailey* took this reasoning a step further stating:

> "When a trial court refuses a loss of chance instruction, the jury is forced to understand a plaintiff's loss of chance theory argued at trial without an instruction to guide them on the law and how it should be applied to the general proximate causation concept described in IPI Civil (2011) No. 15.01.

Bailey, 2020 Ill. App. (1st) 182702 ¶ 114.

The appellate court departed from its previous holding in *Cetera v. DiFilippo* on the basis that the function of jury instructions is to convey to the jury correct principles of law applicable to the evidence. *Id.*; *see also Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 507 (2002). The *Bailey* decision speaks to the propriety of the submission of nonpattern jury instruction on the loss doctrine, and further legitimizes the doctrine as a theory to be presented to a jury with greater guidance than previously granted.

Index of IDC Monograph and Feature Articles Volume 30

The *IDC Quarterly* has a rich tradition of presenting thought-provoking, timely, educational articles to the Illinois defense bar. This award-winning legal journal is a well-respected piece of the legal landscape in Illinois and the country. Our reputation for excellence is based upon years of excellent submissions from our members.

Below is an index of the Feature Articles and Monographs that have appeared in the *IDC Quarterly* in the past year. All submissions are available on our website, www.iadtc.org.

We are fortunate to have had the opportunity to present these pieces, and many others, to you over the years. We offer our sincere thanks to the many editors and authors who have made this journal what it is today.

Monograph Index

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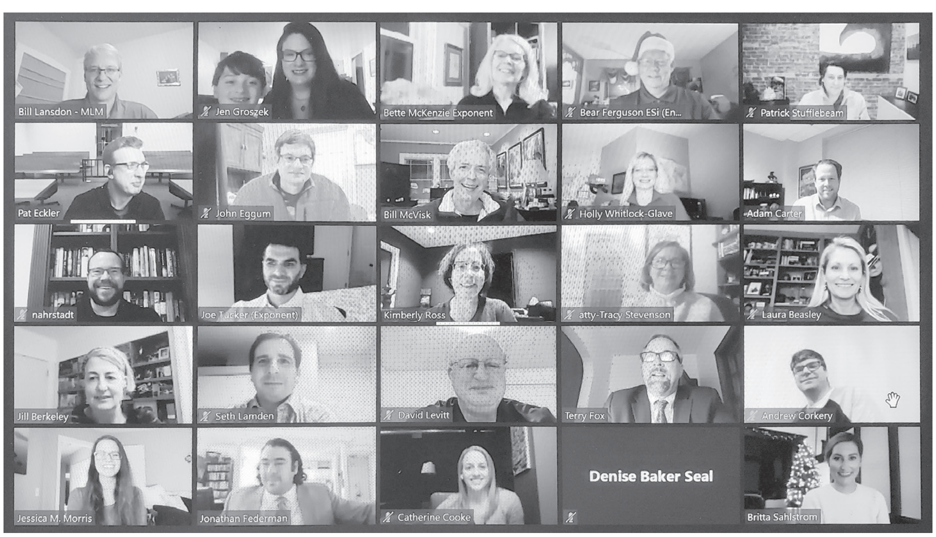
Association News

Virtual Holiday Party and “Nailed It!” Challenge

2020 has finally come to an end and, considering all that COVID-19 has brought us, we could not be happier. To celebrate the end of the year and the holidays, IDC hosted its annual Holiday Party via Zoom. We talked, laughed, and celebrated the achievements of our 2020 award winners. Plus, we threw in a little fun with our very own “Nailed It!” holiday competition.

You’ve seen those side-by-side comparisons of the beautiful baking projects featured on Pinterest and the hideous, laugh-out-loud attempts we non-crafty folk come up with, right? Well, IDC’s Nailed It! challenge gave our members the chance to build a holiday creation using edible items and their imagination. It was a great time, and we are so pleased with our Nailed It! entries.

2020 has been rough, but we’ve made it through TOGETHER. We sincerely thank you for your membership, participation, and support. We look forward to serving you in 2021.



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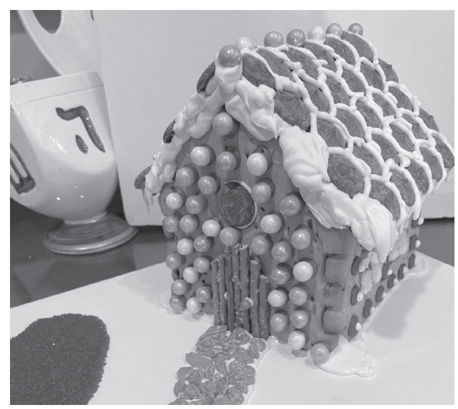

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Nailed It! Challenge | continued

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- The Role of Misuse in Consumer Product Safety
- The Status of the Exclusive Remedy Defense in Asbestos Litigation: All Hope Is Not Lost

Longfield Appointed to IDC Board of Directors

We are pleased to announce that **Erica Longfield** of *Swanson, Martin & Bell, LLP* in Chicago has been appointed to the IDC Board of Directors. Erica represents corporate clients and insurance companies in all phases of litigation. She focuses her practice in the defense of product liability and toxic tort matters, specializing in asbestos and benzene lawsuits. She also defends her clients in an array of commercial litigation and business disputes. Erica has experience trying cases to verdict in multiple venues throughout Illinois, as well as extensive arbitration and deposition experience.

Erica has long been active with the IDC and currently serves as the Vice Chair of the Toxic Tort Law Committee.

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A "Getting Started Guide" and *IDC Network* FAQs are available under the Help tab on *Network*. Take a look, give us a call at 800-232-0169, or email Sandra Wulf at sandra@idc.law to learn how you can get started.

Welcome

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

LaDonna Boeckman
HeplerBroom LLC, Chicago

Sandra Gallant-Jones
Office of the Illinois Attorney General, Springfield

Katherine Gustin
The Cincinnati Insurance Companies, Oak Park

Andrea Nikolai
Cassiday Schade LLP, Libertyville

Notice of Election

In accordance with the Illinois Defense Counsel's bylaws, an election must be held to fill the vacancies of the directors whose terms expire in 2021.

The following directors' terms will expire at the Annual Meeting in June 2021:

Donald Patrick Eckler
Pretzel & Stouffer, Chartered
John Eggum
Foran Glennon Palandech Ponzi & Rudloff, PC
Mark J. McClenathan
Heyl, Royster, Voelker & Allen, P.C.
Kimberly A. Ross
Ford & Harrison LLP
Britta Sahlstrom
SmithAmundsen, LLC
Jennifer A. Winking
Scholz, Loos, Palmer, Siebers & Duesterhaus LLP

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

Individual members of the IDC are eligible for election to the Board of Directors unless otherwise excluded by the bylaws. The bylaws declare that educators and law student members are ineligible to serve on the Board of Directors.

The bylaws declare that 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.

In addition, 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.

A nomination for election to the Board of Directors is complete and filed only if it includes the following:

- The Nominating Petition. The signatures of three (3) members in good standing must support each individual nominated.
- A statement by that member of his availability and commitment to serve actively on the board.
- A head and shoulders picture (high-resolution, jpg format preferred).
- A short biography (1-2 paragraphs maximum).
- A statement from the member, not to exceed 200 words, stating why the member thinks he or she should be elected to the Board of Directors.

Below, please find a sample Nominating Petition and Commitment to Serve Statement.

Nominations must be sent electronically to IDC Secretary/Treasurer **Denise Baker-Seal** at dbaker-seal@bjpc.com and IDC Executive Director **Sandra J. Wulf, CAE, IOM** at **sandra@idc.law**. Nominations must be accompanied by the five items listed above. All candidates will be featured with their biography, statement of candidacy, and picture in the IDC Quarterly. If more than six petitions are received, the feature will be sent to the membership.

All nominating petitions must be submitted no later than Friday, **April 2, 2021**.

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 Defense Counsel and I do hereby warrant and affirm my ability and commitment to serve actively on the Board of Directors of the Illinois Defense 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 Defense 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 Defense Counsel.

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

Dated this ______ day of __________________, 20__.

Illinois Defense Counsel MEMBERSHIP APPLICATION

Membership in the Illinois Defense 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 applying for membership as a(an) (Select Only One):

Private Practice Attorney, in practice:
- ❍ 0-3 years ($125)
- ❍ 4-5 years ($175)
- ❍ 6-9 years ($250)
- ❍ 10+ years ($275)

Public Sector Attorney, in practice:
- ❍ 0-3 years ($100)
- ❍ 4-5 years ($125)
- ❍ 6+ years ($150)

- ❍ **Claims Professional** ($50)
- ❍ **Corporation or Association Counsel** ($50)
- ❍ **Student** ($20)
- ❍ **Educator** ($75)

Applicant Information

Prefix______ First ________________ Middle______ Last ____________________ Suffix_____ Designation ______

Organization ____

Address____

City________________________ State_______ Zip _________ County ____________

Phone ________________________ Email ______________________________

Home Address ____

City ________________________ State _______ Zip_________ County____________

Phone __________________ Alternate Email Address ____________________________

IDC Sponsor____________________________________

Attorneys

Area of Practice __________________________________ # of Attorneys in Firm __________

Law School__________________________ Admitted to the Illinois Bar in (Year)_______ ARDC# ___________

Educator and Law Student Applicant Information

Prefix ______ First ________________ Middle______ Last ____________________ Suffix_____ Designation ______

Law School______________________________________ Anticipated Graduation Date________

Address____

City________________________ State _______ Zip _________ County ____________

Phone________________________ Email ______________________________

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:

Ethnicity__________________________________ Gender __________ Birth Date __________

(Application continued on next page)

IDC Illinois Defense 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

- ❍ Civil Practice Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Tort Law
- ❍ Toxic Tort Law

Administrative & Event Committees

- ❍ Diversity & Inclusivity
- ❍ Practice Development
- ❍ IDCares
- ❍ Social Media
- ❍ Legislative

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 a **Private Practice** or **Public Sector 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 **Claims Professional, Corporation** or **Association Counsel**, I will support the purpose and mission of the IDC.
- ❍ 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 3% 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 ______ County ______

Thank you for your interest in joining the Illinois Defense 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 Defense Counsel
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.IDC.law

THE IDC MONOGRAPH:

The Evolution of Forum *Non Conveniens* in Illinois and Recent Legislation to Limit the Doctrine

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The Evolution of Forum *Non Conveniens* in Illinois and Recent Legislation to Limit the Doctrine

Recent developments regarding the doctrine of forum *non conveniens* over the past year have forced civil litigation practitioners to consider both the Illinois appellate courts' evolving analysis of this doctrine as well as the potential for legislation attempting to eradicate intrastate forum *non conveniens* as an option for defendants and courts to consider when cases are filed in technically correct but wholly inconvenient forums within the state.

The purpose of this Monograph is to educate the reader as to the long history and importance of the forum *non conveniens* doctrine and to a recent movement to have the Illinois legislature act to take away Illinois courts' ability to transfer cases to more appropriate counties within the State. It is well-known that certain Illinois counties are viewed as more "plaintiff-friendly," while others are viewed as more defense-oriented. Plaintiffs have the power to choose where to file their lawsuits within the rules and laws concerning venue and jurisdiction. Illinois Supreme Court Rule 187, which allows for transfer or dismissal of cases pursuant to the doctrine of forum *non conveniens*, is a defendant's check on the plaintiff's unilateral choice, which ensures fairness and convenience to all parties. This rule has engendered a robust history of case law that continues to evolve as courts wrestle with the factors that make a county both technically correct and also fair and convenient to the parties, witnesses, jurors, and counties themselves.

History of the Doctrine of Forum *Non Conveniens*

The doctrine of forum *non conveniens* is a long-standing part of the common law in this country. Although the origins of the doctrine are unclear, it is believed that it was first discussed in Scottish

About the Authors

Andrew C. Corkery is a partner at *Boyle Brasher LLC* in Belleville, Illinois. His practice concentrates on defense of transportation and medical malpractice cases. Mr. Corkery is a *cum laude* graduate of St. Louis University School of Law. He serves on the IDC *Amicus* committee.

David A. Warnick is a trial attorney at *Johnson & Bell, Ltd.* handling a wide spectrum of matters in litigation ranging from healthcare to products liability, but his primary practice is on transportation litigation and all its intricacies. Mr. Warnick formerly practiced as a plaintiff's attorney which he believes has been a significant benefit to developing his skill-set. Mr. Warnick typically represents primary/excess insurers, trucking companies, variety of different types of business owners, and healthcare providers in all aspects of litigation in both state and federal courts throughout Illinois. Mr. Warnick thoroughly enjoys being a trial lawyer and finding creative ways to fulfill differing client needs.

Michael D. Gallo is an attorney at *Bruce Farrel Dorn & Associates*, the State Farm Mutual Automobile Insurance Company Claim Litigation Counsel office in Chicago, where he practices litigation defense of automobile negligence and premises liability matters. Mr. Gallo earned his J.D. from DePaul University College of Law in 2009. He is admitted to practice in the State of Illinois, the U.S. Court of Appeals for the Seventh Circuit, and the U.S. District Court for the Northern District of Illinois. This article is written in his individual capacity, and the views expressed herein do not necessarily reflect the view and position of State Farm or any other person or entity.

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Adam C. Carter is a partner with *Esp Kreuzer Cores LLP* in Wheaton. He focuses his practice in the areas of construction law, product liability, professional liability, aviation law, propane and explosives litigation, catastrophic injury and loss litigation, environmental litigation, and business torts and commercial Litigation. Mr. Carter is currently an elected member of the Board of Directors of the Illinois Defense Counsel and serves on the IDC Civil Practice and Legislative Committees. He earned his B.A. *cum laude* from Augustana College in 1998 and earned his J.D. *cum laude* from the University of Illinois College of Law in 2001. He was admitted to the Illinois Bar and United States District Court, Northern District of Illinois in 2001, and has been admitted *pro hac* vice to defend clients in numerous state and federal courts across the country.

estate cases.[1] In the federal courts of the United States, the doctrine was seen earliest and most frequently in admiralty law.[2] However, the doctrine was not exclusively used in admiralty law and has long been a doctrine of general application in the federal courts.[3]

The modern framework for forum *non conveniens* was first put forth in *Gulf Oil Corp. v. Gilbert*. *Gulf Oil Corp.* arose out of a warehouse fire in Lynchburg, Virginia.[4] The plaintiff was a resident of Virginia, and the defendant corporation was qualified to do business in Virginia and New York.[5] Plaintiff filed suit in New York even though the incident occurred in Virginia and most of the witnesses resided in Virginia.[6] The Supreme Court upheld the District Court's dismissal of the plaintiff's complaint and remittal to the courts of Virginia, explaining that under the principle of forum *non conveniens* a court may "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute" to prevent misuse of venue.[7] The court noted that it had not attempted to catalogue the circumstances which would require granting or denying the remedy – much discretion is granted to the court selected by the plaintiff.[8] Instead, the court provided a list of private and public factors the court is to consider when determining whether the case should be transferred.[9] The United States Supreme Court has continued to develop the doctrine set forth in *Gulf Oil Corp*.[10]

Illinois courts employ the analytical framework for forum *non conveniens* motions established in *Gulf Oil Corp*. In *Adkins v. Chicago, Rock Island & Pac. R.R. Co.*,[11] the Illinois Supreme Court provided one of the earliest discussions of forum *non conveniens* by Illinois courts. The case was brought by a Michigan resident against a railroad doing business in Iowa, Illinois and other states and involved a grade crossing collision in Iowa.[12] Originally, the case was filed in Iowa and then voluntarily dismissed, before being refiled in Illinois.[13] The defendant moved to dismiss the Illinois action on the ground of forum *non conveniens*.[14] Before the court could rule on the motion, the plaintiff added the engineer and conductor, who were Illinois residents, as defendants to the action.[15] The court denied the motion to transfer the case, and it proceeded to trial.[16] The forum issue was raised again in post-trial motions.[17] The Illinois Supreme Court applied the *Gulf Oil Corp.* factors and found the case should have been transferred to Iowa.[18] Specifically, the *Adkins* court noted that the only connection Illinois had to the lawsuit was that the railroad did business there, and that the action was ready for trial in Iowa before it was voluntarily dismissed and then tried in Illinois. [19]

As evidenced in *Adkins*, some of the first Illinois cases that employed the doctrine involved egregious examples of forum shopping. Three early forum *non conveniens* cases to go to the Illinois Supreme Court involved Federal Employment Liability Act ("FELA") suits arising out of injuries in Iowa, Michigan, and Oklahoma, respectively.[20] In all three, the only connection to Madison County or St. Clair County, where the cases were filed, was that the defendant railroad's track ran through those counties and that plaintiffs' lawyers' offices were in those counties. In each of these cases, the Illinois Supreme Court found that the private and public factors favored transfer of the case to the place where the incident occurred.[21] Since then, Illinois courts have continued to apply the *Gulf Oil Corp*. factors to dismiss cases where the incident occurs outside of the state of Illinois and the case is filed in Illinois. More recently, in *Fennell v. Illinois Central R.R. Co.*, the Illinois Supreme Court dismissed a FELA case filed in St. Clair County, Illinois brought by a former railroad employee who lived in Hazlehurst, Mississippi against a defendant with offices in Memphis, Tennessee.[22] The *Fennell* court applied the *Gulf Oil Corp.* factors in reaching its conclusion to dismiss the action in favor of a Mississippi forum.[23]

In addition to interstate forum *non conveniens*, Illinois also developed intrastate forum *non conveniens*, as recognized by the Illinois Supreme Court in *Torres v. Walsh*.[24] The *Torres* court stated any distinction between intrastate and interstate forum *non conveniens* was merely artificial.[25] The court found that it was in the trial court's discretion to dismiss a case when a more appropriate intrastate forum is available and maintenance of the action in the selected forum would cause unnecessary hardship to the defendant and other parties.[26] Unlike most states where intrastate forum *non conveniens* is created by state legislatures, in Illinois the doctrine was created by the court under its power to manage Illinois courts under Article VI, Sec. 16 of the 1970 Illinois Constitution.[27] In subsequent cases, Illinois courts applied the *Gulf Oil Corp.* factors to determine whether a case should be transferred intrastate.[28]

Venue Compared to Forum *Non Conveniens*

Venue and forum *non conveniens* are two related, and often confused, concepts. Venue is governed by statute while forum *non conveniens* is an

— Continued on page 4

equitable doctrine later encapsulated in an Illinois Supreme Court Rule.[29] Venue is the legal concept of where an action is to be heard, specifically the geographical location.[30] The determination of venue is a procedural question and, therefore, is within the province of the legislature.[31]

Proper venue is an important statutory privilege held by the defendant.[32] In Illinois, proper venue is governed by the Code of Civil Procedure.[33] Generally, the venue statute is designed to ensure that an action will be heard in a location that is either convenient to the defendant based on the county of residence or convenient to potential witnesses based on the county where the action arose.[34] As such, venue may properly lie in more than one location.[35]

This reflects the legislature's view that the defendant should not be burdened with defending an action in a location that does not have any connection to the action.[36] Further, the venue statute serves to protect the defendant against the plaintiff's arbitrary selection of a forum.[37]

The defendant may waive or even forfeit an objection to improper venue by failing to timely raise the issue.[38] Under section 2-104(b) of the Illinois Code of Civil Procedure, all objections to improper venue are waived unless a motion to transfer is brought by the defendant on or before the date the defendant is required to appear or within any further time granted to answer or move with respect to the complaint.[39] Therefore, the burden of proving improper venue is on the defendant.[40] The defendant must show a clear right to relief based on specific facts, not conclusions.[41] The defendant may establish the necessary specific facts by providing supporting affidavits.[42] Although the defendant has an absolute right to insist on proper venue, any doubts resulting from the inadequacy of the record will be resolved against the defendant.[43]

> [T]he doctrine of forum *non conveniens* is an equitable doctrine rooted in notions of fundamental fairness and the effective administration of justice. It presupposes the existence of at least two locations in which venue is proper and allows a court to decline jurisdiction if another location would better serve the ends of justice.

Relatedly, the doctrine of forum *non conveniens* is an equitable doctrine rooted in notions of fundamental fairness and the effective administration of justice.[44] It presupposes the existence of at least two locations in which venue is proper and allows a court to decline jurisdiction if another location would better serve the ends of justice.[45]

The procedure for a motion to transfer pursuant to the doctrine of forum *non conveniens* is governed by Illinois Supreme Court Rule 187.[46] Unlike a motion to transfer based on improper venue, a motion based on forum *non conveniens* grounds does not need to be raised before the defendant's answer, but rather must be filed within ninety days after the last day allowed for the filing of that defendant's answer.[47] The Fourth District Court of Appeals case of *New Planet Energy Dev. LLC v. Magee*[48] recently clarified the timing requirement of Rule 187, finding the deadline is triggered by the filing of the party's answer, and not an amended answer.[49] The court further noted that while Supreme Court Rule 183 allows the trial court to extend the time for filing, the defendant had not shown good cause for the forum *non conveniens* deadline to be extended.[50]

Additionally, the costs related to transferring an action differ depending on the basis for the transfer. The costs associated with transferring due to improper venue are taxed to the plaintiff, while the costs associated with transferring based on forum *non conveniens* considerations are taxed to the moving party.[51] Both motions may be supported by affidavit.[52]

Recent Forum *Non Conveniens* Decisions

There have been a series of recent decisions by the Fifth District Court of Appeals that have shown a more stringent approach to forum issues. The appellate court has closely examined the recent cases to determine if there is any real connection to the forum where the case is filed. The public factors appear to be of greater importance in the analysis than they have been in the past. All the recent cases decided by the Fifth District Court of Appeals involve incidents occurring outside St. Clair County with the lawsuits being filed in St. Clair County.

The Fifth District Court of Appeals ordered transfer from St. Clair County to Monroe County in *Shaw v. Haas*, in which a plaintiff was allegedly injured in a grocery store in Monroe County, Illinois, but filed her complaint in St. Clair County, Illinois.[53] In *Shaw*, the defendant lived almost equidistant from the two courthouses and the grocery store headquarters was similarly almost equidistance from both courthouses as well.[54]

In reversing the trial court's denial of defendants' motion to transfer, the Fifth District Court of Appeals noted that the St. Clair County courts are much more congested than the Monroe County Courts.[55] The court found that because the incident occurred in Monroe County, the residents of Monroe County had an interest in the litigation.[56] The court further noted that the plaintiff's choice of forum was entitled to less deference because he was not from St. Clair County.[57] The Fifth District Court of Appeals concluded it would be unfair to burden the citizens of St. Clair County with jury duty in that case.[58]

The Fifth District Court of Appeals also recently decided a medical malpractice case that illustrates this approach. *Kuhn v. Richard Nicol* involved medical malpractice claims where the alleged malpractice occurred in Clinton County, but the case was filed in St. Clair County, Illinois.[59] The Fifth District Court of Appeals found the trial court abused its discretion in denying the defendants' forum *non conveniens* motion and ordered the case to be transferred to Clinton County.[60]

In *Kuhn*, the Fifth District first noted that the alleged malpractice occurred in Clinton County.[61] The court further noted that plaintiff was a resident of Clinton County.[62] Plaintiff produced an affidavit of twenty-five witnesses who had information about plaintiff's condition before and after the stroke he suffered because of the alleged malpractice.[63] The court, relying on *Bland v. Norfolk Western Ry. Co.*,[64] addressed those witnesses in a manner similar to treating physicians and further questioned why counsel did not provide any explanation as to why no lay witnesses in Clinton County, where plaintiffs resided, were listed, as they could have provided identical testimony.[65] In its analysis, the court considered a viewing of the premises as a factor of trial convenience, even though it would be unlikely.[66]

The appellate court found the public factors strongly favored transfer to Clinton County.[67] The court noted that court congestion is a relevant factor to consider in determining whether the case should remain in plaintiff's chosen forum.[68] Specifically, the appellate court noted the Illinois Court's Statistical Summary showed that the courts of St. Clair County were significantly more congested than the courts of Clinton County.[69] Further, the court found that the residents of St. Clair County had no local interest in the claim even though defendants conducted business in St. Clair County.[70] The residents of Clinton County, however, had a strong local interest because they "rely on the defendants for their medical treatment."[71] Based on these factors, the court noted it would be unfair to burden the citizens of St. Clair County with jury duty when St. Clair County had no connection to the case.[72] Finally, the Kuhn court stressed that, although plaintiffs are accorded deference to their choice of forum, they are accorded less deference when the plaintiff is a non-resident of the county where the case is filed.[73]

On the same day the Fifth District Court of Appeals issued its opinion in *Kuhn*, it also published its opinion in another medical malpractice forum *non conveniens* case filed in St. Clair County, *Evans v. St. Joseph's Hospital*.[74] Unlike in *Kuhn,* in *Evans*, the appellate court affirmed the trial court's denial of the defendant's motion to transfer pursuant to forum *non conveniens*.[75]

The *Evans* case involved an alleged failure to diagnose recurrent kidney cancer.[76] The claim was filed in St. Clair Count against St. Joseph's Hospital, Dugan Radiology Associates, Dr. Thomas Doyle, Urology Consultants, and Dr. Jeffrey Parres.[77] St. Joseph's Hospital filed a motion to transfer pursuant to forum *non conveniens*.[78] Defendants argued that plaintiff was a resident of Clinton County and that the alleged malpractice occurred in Clinton County.[79] Dr. Doyle worked in Clinton County, while Dr. Parres worked in Madison County.[80] In response to the motion to transfer, plaintiff argued that Urology Consultants and its employees practice medicine in St. Clair County.[81] Plaintiff further argued Dr. Doyle and Dr. Parres lived in St. Louis, Missouri and the Clinton County courthouse was twice as far away from St. Louis as the St. Clair County courthouse.[82]

The Fifth District Court of Appeals found that some of the alleged malpractice occurred in St. Louis which was significantly closer to the St. Clair County courthouse than the Clinton County courthouse.[83] The court found court congestion was not as significant of a factor because the other factors did not strongly favor transfer.[84] The court also found that the interest in local controversy factor did not favor transfer because Urology Consultants practiced medicine in St. Clair County, and thus, residents of St. Clair County would have

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an interest in determining if they met the standard of care.[85]

Even more recently, the Fifth District Court of Appeals decided another medical malpractice case with a similar fact pattern, *Brandt v. Shekar et al*.[86] In *Brandt*, the plaintiff presented to St. Mary's Hospital in Marion County, Illinois for yearly screenings and diagnostic mammograms from 2012 to 2015.[87] The radiological services were provided by Mid-America Radiology, S.C., an Illinois corporation headquartered in Jefferson County, Illinois.[88] Plaintiff's screenings were reviewed by two radiologists, Dr. Shekar and Dr. Carmody.[89] Dr. Shekar was a resident of St. Clair County but practiced medicine in Marion County.[90] Dr. Carmody lived in Iowa but practiced in Marion County.[91] Plaintiff filed a cause of action against each defendant alleging that the defendants failed to timely diagnose cancer which caused plaintiff to suffer injury and damage.[92] Dr. Shekar conceded venue was proper but moved to transfer the case pursuant to forum *non conveniens*.[93] The co-defendants joined the motion.[94]

The trial court issued an order denying the transfer noting that Dr. Shekar was a resident of St. Clair County, that plaintiff's choice of forum was entitled to deference, and that defendants failed to meet their burden.[95] The Fifth District reversed the trial court and found the record clearly demonstrated that the litigation had no practical connection to St. Clair County and a balance of relevant factors strongly favored transfer to Marion County.[96] The court further found it was undisputed that the alleged interpretation of the mammograms, which was the basis for the lawsuit, occurred in Marion County.[97] The local interest in local controversies and the imposition of jury duty upon residents of the pending forum were also found to strongly favor transfer to Marion County.[98]

The opinion in *Brandt* drew a dissent. The dissenting opinion argued that because the majority disagreed with the trial court's reasonable conclusion, the court effectively lowered the standard of review in order to reverse.[99] The dissenting justice argued the appellate court was simply substituting its judgment for that of the trial court.[100]

Of note, all the cases discussed above contain some discussion of *Langenhorst v. Norfolk Southern Ry. Co*.[101] *Langenhorst* arose out of a railroad crossing collision that occurred in Clinton County, Illinois near the St. Clair/Clinton County line.[102] In affirming the trial court and appellate court's decision to deny transfer from St. Clair to County Clinton, the Illinois Supreme Court noted that a viewing of the premises would not help because the condition of the crossing had changed.[103] The Illinois Supreme Court also noted that witnesses were scattered amongst many counties and states.[104] The Illinois Supreme Court found that residents of St. Clair County would have an interest in the case because defendant had a registered agent in St. Clair County and defendant had railroad crossings and tracks throughout St. Clair County.[105] Therefore, the court found the totality of the circumstances did not strongly favor transfer to St. Clair County.[106]

Langenhorst remains good law; however, the recent Fifth District opinions reveal how fact specific the forum *non conveniens* analysis is under the current standards. Plaintiffs' attorneys opposing transfer cannot rely on *Langenhorst* for general principles that require transfer where witnesses are scattered or where the incident occurred close to the county line. Instead, the broader body of recent case law supports that plaintiffs must show a real connection to the county where the case is filed even if it is a neighboring county.

Legislation was Introduced to Eliminate Intrastate Forum *Non Conveniens* in the Last Legislative Session

Following on their success in reducing civil juries to six persons, effectively eliminating special interrogatories, and reshaping the relationship between employers and employees with regard to asbestos claims, the plaintiffs' bar took aim at ending intrastate forum *non conveniens* through legislative action in the last legislative session, which was cut short by the COVID-19 pandemic. This legislative effort is being made despite the fact the controlling forum *non conveniens* rule is established under the Illinois Supreme Court Rules and further developed through common law, and not any action of the General Assembly.

Article VI, Sec. 16 of the Illinois Constitution provides that "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."[107] Among the powers the Illinois Supreme Court has found its courts have under the Illinois Constitution is the power to transfer cases from one county to another county.[108] The Illinois Supreme Court has held that "if a statute conflicts with a rule that involves a matter within the judicial authority, the statute must yield to the rule."[109]

Codifying the power granted to the court in the Illinois Constitution, the Supreme Court has enacted Supreme Court Rule 187 that governs transfer under forum *non conveniens* and Supreme

Court Rule 384 that allows the Court to consolidate cases that are filed in different judicial circuits. Forum *non conveniens* has been noted by the courts to be an equitable doctrine that is "founded in considerations of fundamental fairness and sensible and effective judicial administration."[110] "This doctrine allows a trial court to decline jurisdiction when trial in another forum 'would better serve the ends of justice.'"[111]

It may be argued that in the new remote manner of litigation practice following the pandemic any difficulty in litigating a matter at a distance far from the locus of the dispute has been significantly reduced.

The courts, not the General Assembly, are tasked with balancing equities and doing justice between parties in determining, among other things, where a particular piece of litigation is most conveniently litigated. The factors for determining whether a given case should be transferred under forum *non conveniens* demonstrate the means to accomplish the central interest of Illinois courts in accomplishing their constitutionally mandated role of managing their dockets. When it comes to the allocation of judicial resources, courts are best suited to make these decisions, as compared to attorneys who file individual lawsuits that suit their individual interests or the General Assembly who legislates on a sweeping, statewide basis. The effort to eliminate intrastate forum *non conveniens* would violate the Illinois Constitution as the General Assembly would usurp the role of the courts and place the power to manage court dockets with plaintiffs' attorneys instead of Illinois courts.

Under Illinois' generous venue statute, if intrastate forum *non conveniens* were eliminated, cases could be filed in any county in which any defendant had a registered agent or "other office."[112] Such a change will have dilatory practical effects that would likely concentrate cases in certain counties, such as Cook, Madison, and St. Clair, and strain the courts and the budgets of those counties. Such congestion and the burden it would impose on the taxpayers and jurors of those counties are precisely the public interest factors that the doctrine of forum *non conveniens* is designed to alleviate.

Not only are many businesses and attorneys located in Madison, St. Clair, and Cook Counties, but also these counties are known to be very favorable counties for plaintiffs. The safeguards of forum *non conveniens* are necessary to prevent the imposition of litigation in counties far away from where the incident occurred based solely on what is best for plaintiffs. As an example, without intrastate forum *non conveniens*, a Pulaski County resident sued after an automobile accident that happened blocks from her home would have no recourse to prevent the lawsuit and trial from proceeding more than 350 miles away in Cook County. A fact as simple as another vehicle in the accident being owned by a Cook County resident would make that a real possibility. Depriving the courts of the ability to transfer such a case to the county where the accident occurred would harm the civil justice system in Illinois.

In this regard, it is important to note the high standard that the movant must meet on a motion to transfer a matter pursuant to forum *non conveniens*. Not only must the movant show that the factors, taken as a whole, "strongly" favor transfer (merely favoring transfer is insufficient), but also should the motion be denied, the standard of review is abuse of discretion.[113] Indeed, even obtaining review of a denial of motion to transfer under forum *non conveniens* is discretionary in the appellate court.[114] The hurdles that must be overcome to obtain transfer are high and protections for the plaintiff's choice of forum already are in place both procedurally and practically. The burdens on the system and to defendants of doing away with the doctrine of forum *non conveniens* would be substantial.

It may be argued that in the new remote manner of litigation practice following the pandemic any difficulty in litigating a matter at a distance far from the locus of the dispute has been significantly reduced. While that may be true, the public interest factors, in particular, will not be affected as jurors in a county far from the location of the dispute will be saddled with jury service and in cases where the scene of the incident is relevant, at least one of the private interest factors remains unchanged.

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Without Forum *Non Conveniens*, There is No Protection Against Forum Shopping

If intrastate forum *non conveniens* were abolished, then the tactic of "forum-shopping" would quite literally become permissible. Forum-shopping is, according to the Illinois Supreme Court, "contrary to the purposes behind venue rule."[115]

The plaintiffs' bar has endorsed abolishing the doctrine of intrastate forum *non conveniens*, arguing that, in essence, technology has obviated the need to transfer a case out of a chosen venue. However, advances in technology do not cure all the issues the doctrine of forum *non conveniens* is intended to protect against. Moreover, the argument regarding advances in technology appears to be a wolf in sheep's clothing – hiding the true purpose of the movement to eliminate intrastate transfers of cases, which is to allow plaintiffs to avail themselves of their most preferable venires without check or balance from defendants.

Eliminating such a vital bulwark as the forum *non conveniens* doctrine, reserved for limited circumstances, including where there may be manipulation or exploitation of venue rules, will cause more problems than it hopes to remedy. The outsized power given to a plaintiff to choose their venue, without safeguard or restraint, would allow for cases in what may be an otherwise inappropriate, yet technically valid, venue, potentially at great cost and prejudice to opposing parties. The scales of justice, which are meant to balance between the litigants, would be greatly tipped in favor of plaintiffs.

If intrastate forum *non conveniens* were to become no longer available, then venue would be the only hurdle to overcome when a plaintiff decides where to file the case. The bar for establishing venue is so low that any opposing motion would likely be considered frivolous. A forum *non conveniens* analysis presumes venue is technically proper yet serves the purpose of obviating abuse of the venue rules to select a more favored locality. It is for the trial court to analyze whether to decline jurisdiction if another forum "would serve the ends of justice."[116] Without this backstop, it is possible that many Illinois lawsuits would be filed in only a handful of counties.

That being the case, plaintiffs are afforded deference in their choice of venue. "The plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the plaintiff's forum choice should rarely be disturbed unless the other factors strongly favor transfer."[117] If both the occurrence and plaintiff are foreign to the chosen forum, then less deference is given, however, it does not mandate transfer.[118] The trial court must consider the location of the witnesses.[119] Historically, if witnesses are scattered across various counties (or other states), Illinois courts have found that this factor does not weigh in favor of transfer since no single county enjoys a predominant connection to the litigation.[120]

In *First American Bank v. Guerine*, the Illinois Supreme Court reaffirmed the validity of the doctrine of intrastate *forum non conveniens,* while also reversing a grant of motion to transfer venue based on the doctrine.[121] In *Guerine,* the plaintiff died in an automobile accident in DeKalb County when the defendant's trailer carrying a speedboat unhooked and collided with the vehicle driven by plaintiff.[122] Plaintiff, a resident Kane County, filed suit in Cook County.[123] The defendant resided in Cook County, along with one other witness.[124] No other trial witnesses were located in Cook County.[125]

In *Guerine,* the Illinois Supreme Court stated that "[a] concern animating our *forum non conveniens* jurisprudence is curtailing forum shopping by plaintiffs."[126] The court went on to note that in intrastate *forum non conveniens* matters both parties "'are jockeying for position by seeking a judge, jury, and forum that will enable them to achieve the best possible result for their clients,'" and that all other considerations underlying the *forum non conveniens* analysis are secondary.[127]

Ultimately, the Illinois Supreme Court found that because the case involves parties and witnesses dispersed among several counties in the same area of the state, no single location has a predominant interest, and the balance of factors must strongly favor transfer of the case before plaintiff can be deprived of his chosen forum.[128] When venue is challenged, the court must apply what has been called an "unequal balancing test," giving deference to the plaintiff's choice of forum.[129] Applying that test and deferring to the plaintiff's choice of forum usually results in decisions that favor the plaintiff's forum selection. Most often, "'the plaintiff's initial choice of forum will prevail, provided venue is proper and the inconvenience factors attached to such forum do not greatly outweigh the plaintiff's substantial right to try the case in the chosen forum.'"[130]

In *Dawdy v. Union Pacific R.R. Co.*, the plaintiff, a resident of Green County, Illinois, was driving a tractor in Macoupin County when he was involved in a traffic collision with a truck driver, who was a resident of Macoupin County and employed by Union Pacific

Railroad Company.[131] Plaintiff filed suit in Madison County against both the truck driver and Union Pacific.[132] Union Pacific maintained a principal place of business in Omaha, Nebraska, and did business in both Macoupin and Madison counties.[133] There were 18 witnesses who were located in various counties, none of whom were located in Madison County.[134]

The Illinois Supreme Court overturned the appellate court ruling which affirmed the trial court's denial of the defendants' forum *non conveniens* motion to transfer venue from Madison County to Macoupin County.[135] In its reasoning for the reversal, the Illinois Supreme Court considered the potential for a jury view of the scene of the accident favored transfer to Macoupin County.[136] The fact that Madison and Macoupin counties were adjacent to one another did not significantly factor into the court's analysis.[137]

In sum, the court reduced its deference to plaintiff's choice of venue of Madison County because he did not reside there, nor did the occurrence take place there, and after examination of the public and private interest factors, held accordingly that the circuit court of Madison County abused its discretion in denying the defendants' motion to transfer to Macoupin County based on the doctrine of intrastate *forum non conveniens*.[138] The Supreme Court wrote in *Dawdy*: "[W]hen the plaintiff is foreign to the forum chosen and the action that gives rise to the litigation did not occur in the chosen forum, this assumption [of convenience] is no longer reasonable. Instead, it is reasonable to conclude that the plaintiff is engaged in forum shopping to suit his individual interests, a strategy contrary to the purposes behind the venue rules."[139]

Often, the decisions to deny dismissal or transfer of cases pursuant to forum *non conveniens* within a given forum can hinge on seemingly trivial factual circumstances. For example, many companies who do business outside of Cook County nevertheless maintain registered agents or post office boxes therein. In practice, it is not uncommon to have an Illinois court deny a defendant's forum *non conveniens* motion for those weak linkages to the county even if the other factors favored another forum. Put simply, it is significantly difficult under the Illinois courts' current interpretation of Rule 187 for defendants to prove cases are worthy for transfer, unless the disconnect between the action and the forum is so stark that transfer is mandated.

The *Dawdy* court observed that "[a]n integral part of forum non conveniens analysis is fairness to the litigants and convenience to those that will be called to testify at trial. Realigning parties for the purposes of fixing venue in a county where there may be a more favorable outcome to plaintiffs does not reinforce or complement the principles of forum *non conveniens*. Instead, it perverts them."[140] The *Dawdy* court also recognized the disconnect and reasoned that, "none of the [18] witnesses reside in Madison County, and Macoupin County has a predominant connection to this case. The sole fact that one defendant maintains a post-office box in Madison County does not give Madison County a legitimate interest in or connection to this case."[141]

Forum Non Conveniens Transfers Are Sufficiently Difficult and the Doctrine Must Be Maintained

The practical reality of forum *non conveniens* motion practice is that dismissal or transfer will not happen unless the factors overwhelmingly favor it. Nevertheless, it is vital that the option of forum *non conveniens* motion practice remain intact. It is the mere threat of forum *non conveniens* motion practice that deters plaintiffs from completely flouting the rules of choosing their respective fora. However, without the doctrine, the deterrence is no longer present and there is no longer a way to oppose a chosen venue if it satisfies the basic venue requirements but is otherwise inconvenient or inappropriate as the chosen forum.

Forum *non conveniens* is a well-established principle of both American and Illinois law that must be maintained. The ability to seek transfer of a case under the doctrine is a fundamental protection for defendants and a vital tool for the courts to manage their dockets. As the Illinois Supreme Court has seen fit to incorporate intrastate and interstate forum *non conveniens* into a Supreme Court Rule, proposed legislation seeking to eliminate intrastate forum *non conveniens* would infringe on the role of the courts and violate the Illinois Constitution. Elimination of the doctrine, and therefore elimination of Illinois courts' ability to transfer a case to a more convenient and appropriate jurisdiction, would harm the delicate balance that must be protected in Illinois' civil justice system.

(Endnotes)

[1] *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994) (citing *Macmaster v. Macmaster*, 11 Sess. Cas. 685, 687 (No. 280) (2d Div. Scot.)(1833); *McMorine v. Cowie,* 7 Sess.Cas. (2d ser.) 270, 272 (No. 48) (1st Div. Scot.) (1845); *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français,"* [1926] Sess.Cas. (H.L.) 13 (1925)).

[2] *See The Maggie Hammond*, 76 U.S. 435 (1869); *The Belgenland*, 114 U.S. 355 (1885).

[3] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

[4] *Gulf Oil Corp*., 330 U.S at 502-03.

[5] *Id.* at 503.

[6] *Id.*

[7] *Id.* at 507, 512.

[8] *Id.* at 508.

[9] *Id.* at 508-09.

[10] *See American Dredging Co., v. Miller*, 510 U.S. 443 (1994); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

[11] *Adkins v. Chicago, Rock Island & Pac. R.R. Co.*, 54 Ill.2d 511 (1973),

[12] *Adkins*, 54 Ill.2d at 513.

[13] *Id.* at 513-14.

[14] *Id.* at 514.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 515-16.

[20] *Foster v. Chicago and Northwestern Transp. Co.*, 102 Ill.2d 378 (1984); *Satkowiak v. Chesapeake and Ohio R.Y Co.*, 106 Ill.2d 224 (1985); *Wieser v. Missouri Pac. R.R. Co.*, 98 Ill.2d 359 (1983).

[21] *Id*.

[22] *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶¶ 1-4, 27 (2012).

[23] *Fennell*, 2012 IL at ¶¶ 14, 48-51.

[24] *Torres v. Walsh*, 98 Ill.2d 338, 350 (1983).

[25] *Torres*, 98 Ill.2d at 351.

[26] *Id.*

[27] Kristen M. Smith, *Illinois' Evolving Doctrine of Intrastate Forum Non Conveniens*, 90 Ill. B.J. 638, 639 December 2002.

[28] See *Bland v. Norfolk & Western R.Y Co.*, 116 Ill.2d 217 (1987); *Peile v.* Skelgas, Inc., 163 Ill.2d 323 (1994).

[29] See 735 ILCS 5/2-101; Illinois Supreme Court Rule 187, (eff. Jan. 1, 2018).

[30] *Baltimore & Ohio Railroad Co. v. Mosele*, 67 Ill.2d 321, 328 (1977).

[31] *Chappelle v. Sorenson*, 11 Ill.2d 472, 475-76 (1957).

[32] *Bucklew*, 138 Ill. 2d 282, 288 (1990).

[33] 735 ILCS 5/2-101 *et seq*.

[34] *Baltimore & O. R. Co.*, 67 Ill.2d at 328.

[35] See *Kerry No. 5, LLC v. Barbella Group*, LLC, 2012 IL App (1st) 102641, ¶ 24; *Lake County Riverboat L.P., ex rel. FRGP, L.P. v. Illinois Gaming Bd.*, 313 Ill. App. 3d 943, 951 (2nd Dist. 2000).

[36] *Bucklew*, 138 Ill. 2d 282, 289.

[37] *Lake County Riverboat L.P.,* 313 Ill. App. 3d at 951.

[38] *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 154 (2005).

[39] 735 ILCS 5/2-104(b).

[40] *Corral*, 217 Ill.2d at 155.

[41] *Id.*

[42] 735 ILCS 5/2-104(c),

[43] *Corral*, 217 Ill.2d at 154-55.

[44] *Glass v. DOT Transportation, Inc.*, 393 Ill. App. 3d 829, 832 (1st Dist. 2009) (citing *Langenhorst v. Norfolk Southern Railway Co.*, 219 Ill.2d 430, 441 (2006)).

[45] *Glass*, 393 Ill. App. 3d at 832.

[46] Ill. S. Ct. R. 187.

[47] Ill. S. Ct. R. 187(a).

[48] *New Planet Energy Dev. LLC v. Magee*, 2020 IL App (4th) 200043.

[49] *Id.* at ¶ 26.

[50] *Id.* at ¶¶ 28-29.

[51] 735 ILCS 5/2-107; but see Ill. S. Ct. R. 187(c)(1).

[52] 735 ILCS 5/2-104(c); Ill. S. Ct. R. 187(b).

[53] *Shaw v. Haas*, 2019 IL App (5th) 180588, ¶ 3.

[54] *Shaw*, 2019 IL App (5th) 180588, ¶¶ 24-25.

[55] *Id*. at ¶ 30.

[56] *Id*. at ¶¶ 32-33.

[57] *Id*. at ¶ 34.

[58] *Id*. at ¶ 33; *see also Hale v. Odman*, 2018 IL App (1st) 180280 (2018) (a lawsuit involving an accident occurring in Kane County, one mile from the Cook County line, which was transferred from Cook County to Kane County where accident occurred and where most of witnesses resided.)

[59] *Kuhn v. Nicol*, 2020 IL App (5th) 190225 (2020).

[60] *Id*. at ¶¶ 1, 20-22.

[61] *Id*. at ¶ 12.

[62] *Id*. at ¶ 14.

[63] *Id*. at ¶ 5.

64 *Bland*, 116 Ill.2d 217 (1987).

65 *Kuhn*, at ¶¶ 13.

[66] *Id*. at ¶ 16.

[67] *Id*. at ¶ 18.

[68] *Id*. at ¶ 16.

[69] *Id*.

[70] *Id*. at ¶ 16-18.

[71] *Id*. at ¶ 17

[72] *Id*. at ¶ 18.

[73] *Id*. at ¶ 19.

[74] *Evans v. St. Joseph's Hospital*, 2020 IL App (5th) 190414 (2020).

[75] *Evans*, 2020 IL App (5th) 190414, ¶ 1.

[76] *Id*. at ¶ 3.

[77] *Id*.

[78] *Id*.

[79] *Id*. at ¶ 4.

[80] *Id*.

[81] *Id*. at ¶ 7.

[82] *Id*.

[83] *Id*. at ¶ 12, 15.

[84] *Id*. at ¶ 14.

[85] *Id*. at ¶ 15.

[86] *Brandt v. Shekar et al.*, 2020 IL App (5th) 190137.

[87] *Brandt*, 2020 IL App (5th) 190137, ¶ 4.

[88] *Id*.

[89] *Id*.

[90] *Id*. at ¶ 11.

91 *Id*.

92 *Id*. at ¶ 8.

93 *Id*. at ¶ 10.

[94] *Id*.

[95] *Id*. at ¶ 15.

[96] *Id*. at ¶ 51.

[97] *Id*. at ¶ 34.

[98] *Id*. at ¶ 50.

[99] *Id*. at ¶ 57.

[100] *Id*.

[101] *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill.2d 430 (2006).

[102] *Id*. at 434.

[103] *Id*. at 448-49.

[104] *Id*. at 449.

[105] *Id*. at 451.

[106] *Id*. at 454.

[107] Ill. Const. 1970, art. VI, § 16.

[108] *See Horn v. Rincker*, 84 Ill.2d 139, 149-51 (1981).

[109] *Peile,* 163 Ill.2d at 334.

[110] *Vinson v. Allstate*, 144 Ill.2d 306, 310 (1991) (quoting *Adkins v. Chicago, Rock Island & Pacific R.R. Co.* , 54 Ill.2d 511, 514, 301 N.E.2d 729 (1973)).

[111] *Langenhorst*, 219 Ill.2d at 441 (*quoting Vinson*, 144 Ill.2d at 310).

[112] See 735 ILCS 5/2-102(a).

[113] *Langenhorst*, 219 Ill.2d at 443, 453-54.

[114] See Illinois Supreme Court Rule 306(a)(2).

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[115] *Dawdy v. Union Pacific R.R. Co.,* 207 Ill. 2d 167, 174 (2003) (citing *Certain Underwriters at Lloyds, London v. Illinois Central R.R. Co.*, 329 Ill. App. 3d 189, 196 (2002)).

[116] *Langenhorst*, 219 Ill.2d at 441(quoting *Vinson,* 144 Ill.2d at 310).

[117] *Langenhorst*, 219 Ill.2d at 442 (quoting *First Am. Bank v. Guerine*, 198 Ill. 2d 511, 517, 764 N.E.2d 54, 58 (2002)).

[118] *Id.* at 442-43.

[119] *Fennell*, 2012 IL 113812 at ¶¶ 28-29.

[120] *Dawdy*, 207 Ill. 2d at 183-84.

[121] *First American Bank v. Guerine,* 198 Ill.2d 511 (2002).

[122] *Id.* at 512.

[123] *Id.* at 512-13.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 521.

[127] *Id.* (quoting G. Maag, *Forum Non Conveniens in Illinois: A Historical Review, Critical Analysis and Proposal for Change,* 25 So. Ill. L.J. 461 (2001)).

[128] *First American Bank,* 198 Ill.2d at 525-26.

[129] *Id.* at 521(citing *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill.2d 101, 107(1990)).

[130] *First American Bank*, 198 Ill. 2d at 520 (quoting *Peile*, 163 Ill.2d at 335-36 (Emphasis added)).

[131] *Dawdy* 207 Ill. 2d at 169.

[132] *Id.*

[133] *Id.* at 170.

[134] *Id.*

[135] *Id.* at 185.

[136] *Id.* at 179.

[137] *Id.* at 180.

[138] *Id.* at 184-85.

[139] *Id.* at 174 (citing *Certain Underwriters at Lloyds, London v. Illinois Central R.R. Co.*, 329 Ill. App. 3d 189, 196 (2nd Dist. 2002)).

[140] *Id.* at 184 (citing *Certain Underwriters*, 329 Ill. App. 3d at 199 (Emphasis added.))

[141] *Dawdy*, 207 Ill.2d at 184.