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

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IDC Leadership 2022 – 2023

Congratulations to the Newly Elected and Appointed Members of the IDC Board of Directors

Joseph A. Bleyer, *Bleyer & Bleyer*, Marion is a graduate of Southern Illinois University with honors with a Bachelor of Science in Accounting in 1983 and is a graduate from Southern Illinois University School of Law in 1986. He was admitted to the Illinois Bar on November 6, 1986. He is admitted to practice in the United States District Court for the Southern District of Illinois, United States District Court of Appeals for the Seventh Circuit and the United States Supreme Court. He has tried 78 jury trials in various Illinois State Courts and the United States District Court for the Southern District of Illinois. He has argued appeals in the Fifth District Appellate Court, the Illinois Supreme Court and the Seventh Circuit Court of Appeals. He is a partner with the Law Firm of Bleyer and Bleyer, Marion, Illinois.

Adam C. Carter is a partner with *Esp Kreuzer Cores LLP* in Wheaton, Illinois where he has a diverse practice representing corporations and individuals in the defense of complex tort and commercial litigation, including construction injury and defect litigation, catastrophic loss, and professional liability litigation. He is experienced in state and federal courts and has been admitted pro hac vice in numerous courts across the country. He has written and presented on professional liability topics and civil procedure issues, including personal jurisdiction and forum *non conveniens* principles, Illinois legislation, electronic discovery, and expert discovery. He was selected to receive the IDC's Distinguished Member Award in 2021 and previously was selected as one of the Emerging Lawyers in Illinois by Leading Lawyers Network after a statewide peer review surveying thousands of Illinois lawyers to determine the top lawyers in the state. Emerging Lawyers identified the top two percent of lawyers in Illinois who are under the age of 40 or who have practiced less than ten years.

Adam earned his Juris Doctor degree cum laude from the University of Illinois College of Law and his Bachelor of Arts degree cum laude from Augustana College. He has been an active member of the IDC since 2007. He currently serves on the IDC Board of Directors and as well as the Chair of the Civil Practice Committee and a member of the Legislative Committee.

Steven M. Grossi is an attorney with *Yvonne M. Kaminski and Associates* in Chicago. He is an experienced trial attorney with a litigation practice focused on the defense of automobile negligence, premises liability, and general negligence personal injury matters. Steve graduated from the University of Illinois at Urbana-Champaign, where he earned his J.D. and his B.A with a double major in economics and psychology. He is a Chartered Financial Consultant and a Chartered Property and Casualty Underwriter. Steve serves on the IDC Board of Directors, chairs the IDC Tort Committee, and contributes to several other committees and projects.

Meghan C. Kane, *Baker Sterchi Cowden & Rice, LLC*, Edwardsville, focuses her practice on trials involving complex business litigation matters, including in mass toxic torts. In addition to her toxic tort litigation work, Meghan has pursued and defended declaratory judgment actions; conducted insurance coverage analyses; defended various personal injury claims—including auto accident, Dram Shop, slip-and-fall, and construction accident claims; and represented multiple local government agencies—including municipalities and police departments in a variety of intentional and unintentional tort claims. Meghan has experience in pre-trial, trial, and post-trial proceedings. She also has appellate experience in the Illinois Appellate Courts for the 4th and 5th Districts and the United States Court of Appeals for the 7th Circuit. Meghan is a co-chair of Baker Sterchi's Product Liability Practice Group.

Glenn A. Klinger is an attorney in the Chicago office of *Freeman Mathis & Gary LLP*, where he advises companies navigating risk and insurance across a number of industries. He provides coverage opinions, claim review, and risk management counseling of claims under personal, commercial, and professional policies and risk transfer agreements. He also handles contested coverage disputes, bad faith claims, alternative dispute proceedings, and serves as monitoring counsel.

Glenn served previously as a Director-at-Large on the IDC's Board of Directors. He serves as Vice Chair of the IDC's Educate Pillar and has authored the *IDC Quarterly's* Practice Development column since 2021. He assisted with the development of the IDC's first A-Z Litigation Academy and was a presenter and facilitator of several sessions. He is a graduate of Illinois State University (B.S., Cum Laude) and Northern Illinois University College of Law (J.D., Cum Laude), where he received the Award for Outstanding Contribution to Trial Advocacy at his graduation commencement.

Erica S. Longfield is corporate counsel with Allstate Insurance Company in the Claim Litigation Practice Group, where she oversees matters against the Company involving coverage, bad faith and excess verdicts. Erica was previously in private practice for over 13 years where she had experience trying cases to

verdict in multiple venues throughout Illinois, as well as extensive arbitration and deposition experience. She is also an active member of the Illinois Defense Counsel and Chicago Bar Association.

Directors at Large

Ian J. Russell joined *Lane & Waterman* in 2005. Ian has extensive experience in commercial litigation, medical malpractice defense, and personal injury. He also counsels clients and provides analysis of issues involving media and first amendment law, election issues, and aviation matters. He represents clients in both Iowa and Illinois State and Federal courts.

Ian is a Martindale-Hubbell AV-rated attorney and a past President of the Iowa State Bar Association Young Lawyers Division. In 2014, he was named a Super Lawyers Great Plains Rising Star. In 2019, he was named to The Best Lawyers in America list for Personal Injury Litigation – Plaintiffs. He is currently the President Elect of the Iowa State Bar Association. He was also recently appointed by the Iowa Supreme Court to serve on the Commission on the Unauthorized Practice of Law. This is his second term on the Board of the IDC.

Ian is active in the Quad Cities and Eastern Iowa community, having worked with several community non-profits as a board or committee member. He has served as a board member or officer for the Downtown Davenport Partnership, the Ronald McDonald House Charities of Eastern Iowa and Western Illinois, and Friends of the Davenport Library. He also been active in politics having worked as the campaign treasurer for a United States Congressional Campaign and as a member of the Quad Cities Chamber of Commerce Business Advocacy Council that lobbied on behalf of the Quad Cities on the local, state, and national level.

Eugena "Gena" Whitson-Owen is an Assistant Vice President with *Zurich North America* and the Managing Attorney for Zurich's Staff Legal Offices in Chicago and Milwaukee. Prior to her current role, Gena was a Senior Trial Attorney representing Zurich's insured customers in the areas of construction negligence, products liability, and commercial transportation, and served as the Team Lead overseeing the technical and legal excellence of Zurich's staff legal counsel in ten offices across the Midwest. Gena serves on Zurich's Social Inflation Task Force and in 2022 co-hosted the inaugural Defense Counsel Summit for Zurich's staff legal, panel, and insured select attorneys across the country. Gena previously served on the IDC's Board of Directors from 2006-2008. She is an Instructor with the IDC A to Z Litigation Academy and has presented over the past 15 years on various topics at IDC Seminars. She also served as the President of the Women's Bar Association of Illinois in 2014-2015 in its historic 100th Centennial Year.

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President's Message

Terry A. Fox
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Ah, the first column. Written, actually, before I'm installed as IDC President. Everyone who sits in this position articulates a tremendous amount of awe at succeeding those special and talented people who have been the IDC President. I will not even start to name them or it will fill up the entire column. Perhaps that will be my second column when writer's block sets in.

We are at a momentous period in the United States, and perhaps human history. No one could have predicted forty years ago that the concept of free speech would be in jeopardy because speech is moving over privately owned media. The power to organize, motivate, inspire, prod to action, has never been as great for good or for evil. Various groups take different positions, and there is an agonizing battle being waged to sort all that out. Folks cheer or leer online at a billionaire buying up a tech media company, while similar outcries are not heard for purchases of print outlets. We seem to live in the age of hypocrisy where tactics and methods are determined to be reprehensible or brilliant depending on if they help your cause or hurt it.

Word assortments and labels are multiplying at an alarming rate. Virtue signaling, gaslighting, wokeism, trolling are terms that will likely be, by the time this column is printed, out of vogue and perhaps replaced by "electric lighting," "sleepism," "strolling," and "ardently displaying." Words are put together for seemingly nothing else but shock-value.

The IDC has been, for more than fifty years, the legal support group for Illinois defense lawyers. But not the kind envisioned to help those who want to be counseled and listened to about their non-legal feelings or put in a safe place. The IDC has been straight-forward in promoting the goals and vision of a more just system of civil justice and a more civil system of civil justice. We are professionals, and we act like professionals. We publish one of the finest and most technical periodicals on civil justice and put on equally professional presentations on specific areas of law.

Amazingly, the IDC has stayed well clear of partisan politics. At least those politics that do not impact civil justice procedure or substance. This aspect of the IDC has allowed the organization to thrive through periods of civil strife, like the present period, when people are living in the longest span of peace and exponential technological progress, which is removing physical demands on humans and making them seemingly more comfortable. During this period, surprisingly, society is fighting to tear itself apart, but the IDC has remained above that fight. I sincerely hope we do so in the future. Well into the future.

And this year we will continue to speak freely without fear of retribution for our viewpoint. While not part of our history, no one should be threatened with ridicule or any form of mob sanction for the thoughts that we choose to articulate in heated discussion at the Board or any other level of the IDC. It is true that, as the old saying goes, opinions are like [won't let me say this in print], everyone has one. But that leads me to my Iowa upbringing in farm country. There is a term "Iowa polite," meaning you never say anything rude about things or people because it is simply unheard of to do so. It's not nice. While we should perhaps not go that far, we should seriously consider if the manner in which we say things will denigrate any person who disagrees with our position. A lot can be said about "civil" discourse. When it is pleasant, we do not scare off anyone from engaging in it. If we welcome folks to share with us, and they feel secure knowing we will not ridicule them for what they say, all grow closer, issues get properly vetted, and we become a stronger organization.

The best way to encourage followers is to lead by good example. Let's be an example of truly "civil" lawyers.

Editor's Note

Britta Sahlstrom
SmithAmundsen LLC, Chicago

The *IDC Quarterly* is possible due to the incredible work of its many authors and editors, who generously give their time in service of informing, educating, and engaging IDC membership. I look forward to serving as Editor-in-Chief, and am honored to work on this publication alongside so many other IDC members.

I would first like to recognize Jim DuChateau, who excelled in his role as the *IDC Quarterly* Editor-in-Chief last year. I also want to thank the Executive Editor, John Eggum, and editors Tammy Wade, Edna McLain, and Georgia Joyce for their dedicated work on the Editorial Board. We are also pleased to welcome Amanda Zink as the newest member of the Editorial Board beginning with this edition of the *IDC Quarterly*. Finally, I would like to thank Sandra Wulf, the Executive Director of the IDC, for all her work to see that each edition of the *IDC Quarterly* makes its way to you.

In this edition of the *IDC Quarterly*, our authors discuss recent impactful decisions, examine nuanced areas of law, and provide practice insights. The Civil Practice Committee prepared the Monograph, which discusses the element of proximate cause in personal injury lawsuits. In particular, the Monograph details the 2021 changes to the Illinois Pattern Jury Instructions and recent developments in the law related to proximate cause.

In the Evidence and Practice Tips Column, Jonathan Federman and Paula Villela discuss the differences between defenses, affirmative defenses, and counterclaims and how each is litigated. The column highlights the importance of properly labeling your counterclaim or affirmative defense through its examination of the Illinois Supreme Court decision *Carmichael v. Union Pac. R.R. Co.*, 2019 IL 123853. In the Civil Rights Update, Bryan Vayr discusses two recent United States Supreme Court cases on the issue of qualified immunity.

The Technology Law Column, authored by Todd Rowe and Catherine Geisler, provides guidelines for compliance with state privacy regulations for small and mid-sized companies. The column addresses the non-uniform nature of current state data privacy laws and discusses how the more robust laws of some states, including Illinois and California, may provide guidance for business practices in states that have not yet developed their own data privacy laws. In the Supreme Court Watch Column, Matthew Champlin addresses the question of whether claims under the Biometric Information Privacy Act are subject to a one-year or five-year limitation period. In the Product Liability Column, Jennifer Rediehs discusses recent case law from the Seventh Circuit involving an alleged non-specific manufacturing defect.

The Medical Malpractice Update, by Dede Zupanci and Whitney Burkett, addresses the use of focus groups and mock trials, including the benefits of each and differences between them. In the Insurance Law Update, Stephen Murphy discusses a recent decision issued by the Illinois Appellate Court First District that addresses an issue of first impression regarding whether a tortfeasor's denial of liability is the legal equivalent of being "uninsured" for purposes of uninsured-motorist coverage under an auto insurance policy.

The feature article in this edition, by Michael Sever, addresses the differences in practice that an Illinois attorney will face while litigating a case *pro hac vice* in Wisconsin. In the Workers' Compensation Report, Bruce Bonds discusses the compensability of injuries while working from home. As work-from-home is likely to remain more common now than it was pre-pandemic, this column offers valuable insight into historic and recent workers' compensation cases involving remote workers. Glenn Klinger provides an overview of the intersection of litigation and insurance in the Practice Development Column.

In the Civil Practice and Procedure Column, Donald Patrick Eckler considers three recent premises liability cases. This column focuses on "unwitnessed" accidents, and the plaintiff's burden to show the defective condition and that such condition caused the injury alleged. The Health Law Column, written by Ann Barron and Emily Galligan and with the assistance of James Nelson, examines the role of consent forms in protecting healthcare entities where apparent agency is alleged. In the Legal Ethics Column, Michael Flaherty and Christopher Gallinari discuss a recent Illinois Supreme Court case involving the representation of multiple defendants in an action.

The Property Insurance Law Column, by Jim DuChateau and Ryan Chancellor, discusses the importance of the timing of filing a declaratory judgment action in connection with a demand for appraisal under a policy of insurance providing first-party coverage. In the Employment Law Column, Julie Bruch discusses the differences between federal and state law requiring employers to compensate employees equally for equal work under certain circumstances regardless of gender.

Feature Article

Michael P. Sever
Foran Glennon, Chicago

North of the Cheese Curtain: Practice Tips for Illinois Lawyers Practicing *Pro Hac Vice* in Wisconsin

Although the Illinois-Wisconsin state line is invisible to the eye, it is often obvious when you have crossed over from Illinois into Wisconsin. The Bears and Cubs flags change to the Packers and Brewers almost immediately. The Wisconsin State Patrol cars patiently wait behind Kenosha County overpasses, looking to pinch inattentive drivers bearing Land of Lincoln license plates. Even the Mars Cheese Castle serves as a sentinel.

As a lawyer practicing with dual legal citizenship in both Illinois and Wisconsin, I have come to learn that there are also less obvious changes once you are north of the border. Illinois defense attorneys who pick up the occasional Wisconsin assignment should be aware of several differences in procedural and substantive law when practicing north of the "Cheese Curtain" that have implications for client advisement, claim assessment, and litigation conduct. While this article could not possibly address all the differences between the two jurisdictions, hopefully, it can illuminate differences of import.

Fortune Favors the Quick-Footed

Many jurisdictions in recent years have attempted to speed the litigation process, and Wisconsin is no different. Accordingly, Illinois-based defense attorneys practicing in Wisconsin should be prepared to jump on their cases even faster than they do in Illinois. While Illinois Supreme Court Rule 181 affords a defendant 30 days to appear and file a responsive pleading (assuming service is not waived), Wisconsin abbreviates this timeline to just 20 days. *See* Wis. Stat. § 802.06, *et seq*.

Additionally, Wisconsin has a rapidly ticking clock regarding dispositive motion practice. Unless the court sets a different date in its scheduling order, a motion for summary judgment in Wisconsin must be brought within eight months of the complaint's filing. *See* Wis. Stat. § 802.08, *et seq*. Any party wishing to file a motion for summary judgment outside that time frame will need to seek leave of court.

The motion practice dance steps themselves are also more abbreviated in Wisconsin. The ubiquitous court dates for "presentment" of motions common in Illinois are nonexistent in Wisconsin. Parties instead typically receive a hearing date from the court upon the motion's filing. Additionally, reply briefs are often dispensed with altogether. Some forums, like Milwaukee County, expressly prohibit reply briefs for all non-dispositive motions without leave of court. *See* Milwaukee Cnty. Local Rule 3.11(C) ("No reply briefs shall be considered without the permission of the court."). Other jurisdictions, like Walworth County (Lake Geneva area), while not expressly barring reply briefs, make them practically impossible, as response briefs are not required to be on file until only a few days before the hearing, leaving little time for a reply.

All Politics, and Motion Practice, Is Local

Even the basics of Wisconsin motion practice standards vary from county to county, meaning Illinois attorneys practicing north of the border are well-served by consulting the local court rules before doing anything, and make assumptions at their own peril. For example, Milwaukee County has a ten-page limit for non-dispositive motions. However, Brown County (Green Bay) restricts the same motions to a laconic seven pages. *Compare* Milwaukee Cnty. Local Rule 3.11(E) *with* Brown Cnty. Local Rule 402.

Elsewhere, as mentioned *supra*, Walworth County (Lake Geneva area) requires any motion response brief to be submitted to the court five business

— *Continued on next page*

About the Author

Michael P. Sever is a partner at *Foran Glennon Palandech Ponzi & Rudloff, P.C.*, where he concentrates his practice in commercial litigation, construction litigation, casualty litigation, subrogation, products liability, and professional liability defense. Mr. Sever has represented companies and design professionals in cases involving construction negligence, contract enforcement, trucking accidents, premises liability, and personal injury defense. Mr. Sever also represents the world's largest collector car auction in a variety of matters, including dispute resolution, contract enforcement, litigation, and trademark registration. Mr. Sever earned his B.A. from Marquette University in 2006 and his J.D. from Saint Louis University School of Law in 2010. He is admitted to practice in the state courts of Illinois and Wisconsin, as well as the United States District Courts for the Northern District of Illinois, Eastern District of Wisconsin, and Western District of Wisconsin.

days *before* the court-scheduled hearing. But, right next door in Racine County, response briefs are due 20 days *after* the motion was filed, and failure to respond by the deadline constitutes a waiver. *Compare* Walworth Cnty. Local Rule (Civil) 2.A *with* Racine Cnty. Local Rule III.C.3. Failure to appreciate these distinctions can have profound consequences. Fortunately, the State Bar of Wisconsin has a handy reference to the local rules from each county. *See* State Bar of Wisconsin, *Wisconsin Circuit Court Rules*, https://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx (last visited July 11, 2022).

Beware of a "Direct" Attack

In Illinois, even mentioning that a defendant has insurance coverage can be the subject of contentious battles given the prejudicial effect it will have on the jury. In contrast, Wisconsin is a direct-action state, where the defendant's insurance carrier(s) can be named as a masthead defendant alongside their insured co-defendant. Often, placeholder defendants (*e.g.*, "ABC Insurance Company") will be named until the carrier's identity can be ascertained.

"Construct" Your Own Defense

For defense lawyers practicing in the construction domain, be prepared to unlearn what you have learned and start from scratch. As might be expected, Chicago's history as a center for architectural advances has led to a robust library of construction law precedents for Illinois courts to consider. However, Wisconsin's construction law jurisprudence is considerably less developed. Defenses that Illinois construction lawyers have utilized for decades may be unavailable in Wisconsin.

For example, a design professional defendant being sued in Illinois can rest assured that its project contract defines the standard of care, and with it, the extent of any duty owed. *See Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 482 (1985) (recognizing that the "degree of skill and care required of [the engineer] in this situation is dependent on his contractual obligation …. 'The scope of that duty, although based upon tort rather than contract, is nevertheless defined by the…contract' between the engineer and the developer"); *Thompson v. Gordon*, 241 Ill. 2d 428, 449 (2011). However, *Ferentchak* and *Thompson* have no precedential equivalent in Wisconsin that holds the project contract similarly sacrosanct.

Instead, Wisconsin plaintiffs can utilize the more amorphous doctrine of "equitable indemnification," which can even be asserted as an independent cause of action. Simply put, equitable indemnification shifts the loss from the one compelled to pay onto the party that, "under equitable principles," should bear the loss. *See Brown v. LaChance,* 165 Wis. 2d 52, 64-65 (Ct. App. 1991). Equitable indemnification's two basic elements are the payment of damages and the lack of liability. *Id.* Equitable indemnity does *not* require a shared or joint liability for the debt. *Est. of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶ 34.

Similarly, equitable indemnification does *not* require that the party seeking indemnification have a contractual relationship with the party from whom equitable indemnification is sought. *Id.* ¶ 43. Quite simply, equitable indemnification is possible when one party is exposed to liability for the wrongful acts of another. *Id.* ¶ 41. A design professional defendant filing a motion to dismiss in Wisconsin on the grounds that the alleged duty is not in the project contract may find the motion summarily denied on equitable indemnification principles. The court will instead apply the standard of ordinary care, and if "under equitable principles" the architect is alleged to have contributed to a scenario where the plaintiff had to pay, a dismissal will not be granted.

However, this does not mean that the project contract is irrelevant to the design professional's defense, as an end-run around equitable indemnification may be able to put the project contract (and its assignment of duties, for purposes of standard of care analysis) back at center stage. Despite Wisconsin's lack of a *Ferentchak* equivalent, the Wisconsin Supreme Court has a history of "examin[ing] business contracts and agreements to help determine what is included within the duty of ordinary care, where the alleged negligence arose out of a business relationship." *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶ 35 (citing *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶¶ 6-9; *Baumeister v. Automated Prod., Inc.*, 2004 WI 148, ¶¶ 21-24). While a Wisconsin court may not give the project contract the full *Ferentchak* treatment, one may cite to Wisconsin law in support of an argument that any discussion of ordinary care should include an examination of what the parties agreed prior to the project was "reasonable under the circumstances." *See Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶ 18 (citing *Hoida*, 2006 WI 69, ¶38 (recognizing that "contractually assumed obligations and agreed upon limitations…shape[ ] [the] duty of ordinary care…because they set out what the parties agreed was reasonable under the circumstances”)).

Our firm had recent success making such an argument on behalf of a design professional in Racine County, where upon examination of the project contract, the court found that the design professional did not assume the duties that the plaintiff alleged were breached. The court found no standard of care violation and swiftly entered summary judgment in favor of the design professional.

Conclusion

This discussion provides but a few examples of the differences Illinois practitioners need to be aware of when defending a claim in Wisconsin. As stated at the outset, this article (and perhaps no article) could ever hope to address all the differences between defending claims in both Illinois and Wisconsin. Your local sponsoring attorney should be able to help navigate the specific facts of your case, but gaining familiarity with local practice yourself can only save both you and your client valuable time and resource. Hopefully, the foregoing is helpful in illustrating the types of issues that can easily present themselves.

Insurance Law Update

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Denial of Liability vs. Uninsured Motorist Coverage: One of These Things is Not Like the Other

On an issue of first impression, the Illinois Appellate Court First District held a tortfeasor’s denial of liability is not the same as being uninsured and does not entitle an injured party to uninsured-motorist coverage. *Great West Casualty Co. v. Brambila*, 2022 IL App (1st) 210939, ¶ 1. Although the court acknowledged that the injured party was an allegedly faultless victim that would not be compensated unless the tortfeasor was found liable, like an uninsured motorist, the policies’ plain and unambiguous language barred recovery of any uninsured motorist coverage. *Great West Casualty Co.*, 2022 IL App (1st) 210939, ¶ 9.

Background

John Grygorcewicz and Juan Brambila were involved in an automobile accident, causing Grygorcewicz’s death and Brambila’s injuries. *Id.* ¶ 3. Brambila subsequently filed an uninsured/underinsured motorist (UM/UIM) claim with Great West Casualty Company (Great West) and filed a negligence claim against Grygorcewicz’s estate. *Id.* ¶¶ 3, 5.

Brambila sought coverage under two insurance policies with Great West. *Id.* ¶ 4. The policies stated that Great West would “pay all sums [Brambila] is legally entitled to recover as compensatory damages from the owner or driver of an ‘uninsured motor vehicle.’” *Id.* ¶ 10. This language mirrors the language of Illinois’ UM statute. *Id.* ¶ 12 (citing 215 ILCS 5/143(a)1). “[U]ninsured motor vehicle” was defined by the policies as “a land motor vehicle” “[f]or which no liability bond or policy at the time of an ‘accident’ provides at least the amounts required [by law],” or “[f]or which an insuring or bonding company denies coverage or becomes insolvent.” *Id.* ¶ 10. Great West denied Brambila’s UM and UIM claims.

First, Great West denied the UM claim because Grygorcewicz was insured by State Farm Insurance Company (State Farm) at the time of the accident. *Id.* ¶ 4. Second, Great West denied Brambila’s UIM claim because the State Farm policy’s limit exceed Brambila’s policy’s

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UIM limit. *Id.* The Great West policies provided that its UIM limits would be reduced by the amount of other available coverages. *Id.*

Brambila's lawsuit against the estate was met with equal resistance. Grygorcewicz's estate asserted an "act of God" defense and claimed factors outside of human control caused the accident and Grygorcewicz could not be held liable. *Id.* ¶ 5. Brambila informed Great West of this development and argued the estate's denial of liability should be treated the same as a denial of coverage because it leaves him without the ability to recover from Grygorcewicz's insurance policy. *Id.* ¶ 6. Great West disagreed and filed a declaratory judgment action. *Id.*

Great West sought summary judgment during the pendency of Brambila's lawsuit against the estate. *Id.* ¶ 5 n.1. Brambila conceded UIM coverage was unavailable but argued he was entitled to UM benefits because there was no coverage available under the State Farm policy after the estate denied liability (the assertion of the "act of God" defense) and left him "in essentially the same position as someone injured by an uninsured motorist and that Illinois UM law is designed to provide protection to such individuals." *Id.* ¶ 6. The circuit court rejected Brambila's argument that the estate's denial of liability was the same as State Farm denying coverage and found that Brambila did not satisfy the Great West policies' definition of "uninsured motorist." *Id.* Thus, there was no UM coverage, and summary judgment was granted in favor of Great West. *Id.*

Illinois Appellate Court First District Decision

The First District court affirmed summary judgment in favor of Great West. *Id.* ¶ 1. The appellate court recognized:

> While Brambila may be correct that he is in a similar position to someone who has been injured by an uninsured motorist, in that he allegedly was a faultless victim and would otherwise be unable to obtain compensation if Grygorcewicz is found not liable, his insurance policies clearly and unambiguously foreclose the availability of UM coverage in this case.

Id. ¶ 9. The appellate court determined there were two reasons why Brambila was not entitled to UM coverage under the Great West policies. *Id.* ¶ 10.

The court first rejected Brambila's argument that a denial of liability equated a denial of coverage. "The denial of liability is not a denial of coverage; the two concepts are plainly distinct." *Id.* ¶ 11. Therefore, because Grygorcewicz was insured at the time of the accident, and the estate's denial of liability did not constitute a denial of coverage by State Farm, Grygorcewicz was not an uninsured motorist as defined by the Great West policies. *Id.*

Second, if Grygorcewicz estate's "act of God" defense is successful, Brambila will have failed to prove an essential element of his negligence claim, and the estate will not be liable for Brambila's injuries. *Id.* ¶ 13. Consequently, Brambila would not be entitled to UM coverage because he was not "legally entitled to recover any damages" from the estate as required by the plain language of Great West's policies. *Id.*

The court declined Brambila's invitation to find UM coverage on grounds that he should be treated as someone injured by an uninsured motorist under "the general Illinois policy of favoring a broad availability of UM coverage." *Id.* ¶ 14 (citation omitted). The court distinguished the numerous cases relied on by Brambila for his public policy argument because, in each of those cases, the plaintiffs were not only "legally entitled to recover," but also the drivers were "either unknown, actually uninsured, or uninsured by operation of law or contract." *Id.* ¶ 15. Those distinguishing facts were absent from the instant case. *Id.* Grygorcewicz was insured. "[T]he only impediment to Brambila recovering from Grygorcewicz's estate would be the lack of liability, and liability is a requirement for the availability of UM coverage." *Id.* Accordingly, the court affirmed the summary judgment in favor of Great West. *Id.* ¶ 16.

Conclusion

Having only been issued on May 27, 2022, it is unknown whether the Illinois Supreme Court or another appellate court will be asked, and choose, to weigh in. Only time will tell; however, as it stands today, the denial of liability by a tortfeasor does not "have the effect of rendering [the tortfeasor as] an uninsured motorist for the purposes of UM coverage." *Id.* ¶ 16.

Evidence and Practice Tips

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Defense, Affirmative Defense or Counterclaim? Knowing the Difference and How to Litigate Them

While the distinction between a simple defense, an affirmative defense and a counterclaim may seem obvious in the abstract, their requirements can often confuse trial lawyers when the same set of facts give rise to more than one. As a refresher:

> (1) a **defense** generally means the plaintiff either has no valid cause of action or cannot prove one or more elements of their cause of action and has failed to meet their burden (*e.g.*, the defendant(s) did not do this);
> (2) an **affirmative defense** means, even if the plaintiff can prove all the elements, they should not prevail because of additional circumstances that defeat the plaintiff's claim (*e.g.*, if defendant(s) had done this, plaintiff(s) still cannot win); and
> (3) a **counterclaim** means that regardless of the validity of the plaintiff's claim, the defendant has their own cause of action against the plaintiff, which may negate any remedy that the plaintiff may be awarded (*e.g.*, even if defendant(s) did X, plaintiff(s) owe defendant(s) for Y).

We examine below some of most common venues in pursuing each of the above methods to defend a client in a civil action and key differences in pleading requirements.

First, a simple defense is predicated on the rule that the plaintiff has the burden of pleading a cause of action and proving every element. A defendant may move to dismiss the complaint under Section 2-615 of the Illinois Code of Civil Procedure if the complaint fails to state allegations that amount to a cause of action, or the defendant may answer the complaint. Under Illinois law, every allegation of a complaint must be specifically admitted or denied, and if an allegation is not explicitly denied, it is deemed admitted. 735 ILCS § 5/2-610(a)-(b). However, if the defendant lacks knowledge sufficient to admit or deny an allegation, the defendant must state this in their answer and file an accompanying affidavit swearing to their lack of knowledge. 735 ILCS § 5/2-610(b). If the plaintiff cannot meet their burden, the defense prevails without raising any new allegations on its own.

Second, an affirmative defense, as noted above, is predicated on a set of facts or circumstances that either mitigates the defendant's conduct that gave rise to the claim, or bars the plaintiff from prevailing even if they can prove every element of the claim. Before answering the complaint, a defendant may move to dismiss under Section 2-619, which allows the defendant to present other affirmative defenses enumerated in the statute that may defeat the plaintiff's claims. Otherwise, an affirmative defense is raised in the defendant's answer to the complaint or in their reply to a counterclaim. If a defendant includes affirmative defenses in their answer, the plaintiff must then file a reply. 735 ILCS 5/2-602. Section 2-613 outlines various affirmative defenses that must be raised in the answer to the complaint, including:

- Payment;
- Release;
- Satisfaction;

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- Discharge;
- License;
- Fraud;
- Duress;
- Estoppel;
- Laches;
- Statute of frauds;
- Illegality;
- That the negligence of a complaining party contributed in whole or in part to the injury of which he complains;
- That an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery;
- Want or failure of consideration in whole or in part;
- Any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part; and
- Any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

735 ILCS 5/2-613. Since an affirmative defense is not an independent cause of action, it cannot survive if the plaintiff's complaint is dismissed.

Third, a counterclaim is an independent cause of action against another party in the lawsuit, which may be the plaintiff or a co-defendant. 735 ILCS § 5/2-608(a). As such, the counterclaim must be factually and legally sufficient in compliance with the fact pleading requirements under Illinois law and make a specific claim for relief. *Carmichael v. Union Pac. R.R. Co.*, 2019 IL 123853. A counterclaim must be pleaded as part of the answer and must be designated as a counterclaim. 735 ILCS 5/2-608(b). In Illinois, both counterclaims and cross-claims are referred to as counterclaims. The defendant to a counterclaim (which may be the plaintiff in the original complaint) must answer the counterclaim consistent with the procedures for answering a complaint. 735 ILCS 5/2-608(d). Unlike an affirmative defense, a counterclaim remains pending even if the plaintiff's claims are dismissed.

Knowing the difference between a defense, affirmative defense and counterclaim is crucial in effectively responding to a complaint, whether via motion to dismiss or an answer. In fact, the Illinois Supreme Court has made it clear in *Carmichael* that it will not consider the merits of an improperly labeled counterclaim that should have been litigated as an affirmative defense. *Carmichael*, 2019 IL 123853, ¶¶31-35. In that case, the plaintiff sought relief against a transportation company based on its alleged failure to carry an insurance policy in compliance with the requirements of Illinois law. *Id*. ¶ 5. The defendant pled affirmative defenses and a counterclaim challenging the constitutionality of the statute. *Id*. ¶¶5-12. After the counterclaim was dismissed, the defendant appealed, and the Illinois Supreme Court ultimately held that the counterclaim was improper as it did not seek affirmative relief. *Id*. ¶ 31. As such, the Court struck the counterclaim as duplicative of the affirmative defenses, declined to reach the merits of the constitutionality of the statute as it was not properly before the court and instead remanded to the trial court so defendant could proceed on its affirmative defenses. *Id*. ¶¶ 36-37. Thus, understanding those differences allows for a more cost-effective litigation and ensures that the defense will be prepared in the event that the plaintiff fails to properly answer any affirmative defenses and/or counterclaims.

Knowing the difference between a defense, affirmative defense and counterclaim is crucial in effectively responding to a complaint, whether via motion to dismiss or an answer.

Civil Rights Update

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Supreme Court Doubles Down on Qualified Immunity for Law Enforcement

Qualified immunity remains alive and well at the Supreme Court. In October of 2021, roughly four months after former Minneapolis police officer Derek Chauvin was convicted of murdering George Floyd, the Supreme Court handed down two decisions supporting the Court's broader application of qualified immunity. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) and *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021). Both *Rivas-Villegas* and *Tahlequah* reversed efforts by appellate courts to lessen the degree of factual similarity between a Fourth Amendment claim and "clearly established law." Lawyers defending law enforcement should closely familiarize themselves with these cases.

Qualified Immunity and the Fourth Amendment

Qualified immunity under federal law shields officers from civil liability as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

This begs the question: when is a law "clearly established," such that an officer should know not to violate it? According to the Supreme Court, a "clearly established" law should not be defined at "too high a level of generality." *Tahlequah*, 142 S. Ct. at 11. It is not enough for a rule to be "suggested" by then-existing precedent, but rather "the rule's contours must be so well defined" that it is "clear" an officer's conduct was illegal in the circumstances before them. *Id.* at 10 (internal quotations and citations omitted). In plain terms, qualified immunity is granted unless there is a sufficiently close factual fit between the complained-of conduct and a prior opinion from an appropriate court penalizing similar conduct.

In the Fourth Amendment context, the Supreme Court requires a particularly close fit between a lawsuit and the "clearly established law," Factual specificity is "especially important in the Fourth Amendment context" as the fact-specific nature of Fourth Amendment doctrines (such as excessive force) "sometimes [make it] difficult for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). In October of 2021, the Supreme Court reversed the Ninth and Tenth Circuits' efforts to permit a looser factual fit to defeat qualified immunity when dealing with claims of excessive force.

The *Rivas-Villegas* and *Tahlequah* Decisions

The Supreme Court's decisions in *Rivas-Villegas* and *Tahlequah* highlight how the Court remains vigilant against attempts to water down qualified immunity in the Fourth Amendment context. Both cases centered on alleged excessive force. The Supreme Court reversed denials of qualified immunity when the Circuit Courts attempted to require something less than a near perfect factual fit between the alleged misconduct and the "clearly established law."

Rivas-Villegas

In *Rivas-Villegas*, police officer Daniel Rivas-Villegas used his knee to apply pressure for approximately eight seconds to a then-compliant and facedown arrestee's back. Another officer

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removed a knife from the arrestee's pocket while the arrestee was detained. Moments before, the arrestee had been shot by officers twice with a beanbag round from a shotgun. *Rivas-Villegas*, 142 S. Ct. at 6. Prior to the use of force, Officer Rivas-Villegas learned the arrestee was drunk and reportedly attempted to break through an apartment door with a chainsaw to attack his girlfriend and her children. *Id.* Officer Rivas-Villegas also saw the arrestee lower his hands, contrary Rivas-Villegas' orders, in an apparent attempt to reach for a knife in the arrestee's right pocket. *Id.* The arrestee was shot twice with beanbag rounds when his hands went in the direction of his knife. *Id.* After being shot, the arrestee complied with the officers' orders, including an order to get facedown on the ground. However, the knife was still in the arrestee's pocket. At that point, Officer Rivas-Villegas squatted over the arrestee and placed his knee on the arrestee's back, near the pocket with the knife. *Id.* Officer Rivas-Villegas also leaned into his knee; applying pressure on the arrestee for the around eight seconds it took for another officer to remove the knife. *Id.* The arrestee was arrested without further incident.

The District Court granted Officer Rivas-Villegas qualified immunity, but the Ninth Circuit reversed. The Ninth Circuit found that Officer Rivas-Villegas violated a sufficiently specific rule of law based upon the Ninth Circuit's decision in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), which held that an officer cannot grind his knee into the back of a face-down, compliant arrestee. *Cortesluna v. Leon*, 979 F.3d 645, 654–55 (9th Cir. 2020). According to the Ninth Circuit, "rarely is a precedent as precisely aligned with the relevant actions" as *LaLonde*. *Leon*, 979 F.3d at 654. In both *Rivas-Villegas* and *LaLonde*, the arrestee had a weapon (a knife and chainsaw in *Rivas-Villegas*; a rifle in *LaLonde*), initially declined to follow the responding officers' orders, was subdued/injured through a projectile (beanbag rounds in *Rivas-Villegas*; pepper spray in *LaLonde*) and the arrestee was face-down and complying with orders when an officer put a knee on the subdued arrestee causing injury. *Leon*, 979 F.3d at 654 (discussing *LaLonde*, 204 F.3d at 950–52). The Ninth Circuit held that *LaLonde* was specific enough to find that Officer Rivas-Villegas could not press his knee into a compliant, facedown arrestee, and concluded that qualified immunity was inappropriate.

The Supreme Court reversed the Ninth Circuit, concluding that Officer Rivas-Villegas was entitled to qualified immunity. *Rivas-Villegas*, 142 S. Ct. at 8. The Court concluded that no "clearly established law" had been violated, rejecting the Ninth Circuit's reliance on *LaLonde*. What struck the Ninth Circuit as a "rarely…precisely aligned" case was "materially distinguishable" to the Supreme Court. *Compare Cortesluna*, 979 F.3d at 654, *with Rivas-Villegas*, 142 S. Ct. at 8. The Supreme Court recognized that unlike *LaLonde*, Officer Rivas-Villegas placed his knee on the arrestee for a brief period (8 seconds), the arrestee was armed at the time, and Officer Rivas-Villegas only placed his knee on the side of the arrestee's back closest to where the weapon was stashed. *Rivas-Villegas*, 142 S. Ct. at 8. The Court also noted that Office Rivas-Villegas was responding to a crime of violence (domestic battery) compared to the minor noise compliant at issue in *LaLonde*. *Id.* Given these facts, the Supreme Court unanimously concluded that no clearly established law showed that Officer Rivas-Villegas used excessive force and he was entitled to qualified immunity.

Tahlequah

In *Tahlequah*, two police officers were accused of using excessive force in 2016, when they shot and killed an intoxicated man who, contrary to the officers' orders, picked up a hammer and reared the hammer back as if to throw it at the officers. *Tahlequah*, 142 S. Ct. at 10. At the time the officers pulled the trigger, they knew the decedent was intoxicated and refused to leave the property. *Id.* at 10. Leading up to the shooting, the officers stayed about six feet away from the intoxicated man, and the man did not utter any threats but refused to be patted down for weapons. *Id.* The officers yelled at the decedent after the decedent picked up the hammer and started to wield it with both hands like a baseball bat. *Id.*

The District Court granted the officers summary judgment, but the Tenth Circuit reversed. The Tenth Circuit concluded that the officers' decision to shoot the intoxicated man was reasonable. However, the Tenth Circuit held that the officers could still be found liable, as it was the officers' own reckless or deliberate conduct that required the use of deadly force. *Tahlequah*, 142 S. Ct. at 10.

The Supreme Court concluded the officers were entitled to qualified immunity. The Court declined to determine whether the Tenth Circuit's officer-created danger rule applied or was valid because the rule was immaterial to the result: the officers' conduct leading up to and including the shooting violated no clearly established law. *Tahlequah*, 142 S. Ct. at 10. The closest case the Tenth Circuit or the civil plaintiff could identify was *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997). There, the defendant-police officers responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to wrest a gun from the suspect's hands. *Tahlequah*, 142 S. Ct. at 10 (discussing *Allen*, 119 F.3d at 841). To the Supreme Court, the facts in *Allen* were "dramatically different" from *Tahlequah*. The officers in *Tahlequah* spoke with the decedent conversationally and did not "scream" at the decedent. Further, they did not yell at the decedent until he picked up a hammer and the officers stayed six or more feet away from the decedent. *Id.* These factual differences were sufficient to distinguish *Tahlequah* from *Allen*. Accordingly, no clearly established law condemned the officer's actions leading up to and including the shooting and the Supreme Court found that the officers were entitled to qualified immunity.

Conclusion

When dealing with the Fourth Amendment, the Supreme Court's *Rivas-Villegas* and *Tahlequah* decisions show that even when a precedent is seemingly "precisely aligned" with a plaintiff's claim, a plaintiff may still fail to satisfy a challenge to qualified immunity. In *Rivas-Villegas*, the lack of "clearly established law" came down to the location on the body where a police officer placed his knee on a facedown arrestee's back and whether that arrestee was armed. *Rivas-Villegas* and *Tahlequah* show that civil rights plaintiffs must go farther than focusing on generally similar cases to defeat qualified immunity. Rather there must be no meaningful factual difference between the case purporting to constitute "clearly established law" and the plaintiff's case.

Supreme Court Watch

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One Year, Five Years, or Both—What is the Limitation Period for Biometric Information Privacy Act (BIPA) Claims?

In *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, the Illinois Appellate Court First District answered the following certified question: "whether the limitation period in section 13-201 or section 13-205 of the Code of Civil Procedure (Code) applies to claims under the [Biometric Information Privacy] Act?" *Tims*, 2021 IL App (1st), ¶ 1. Section 13-201 provides a one-year limitation period for "slander, libel or for publication of matter violating the right of privacy." *Id.* ¶ 20, 735 ILCS 5/13-201. Section 13-205, on the other hand, provides a five-year limitation period for "all civil actions not otherwise provided for." *Id.* ¶ 22 (citing 735 ILCS 5/13-205). In answering the certified question, the First District held that the appropriate statute of limitation to apply depends upon the specific BIPA provision under which the plaintiffs seek recovery. *Id.* ¶ 33.

BIPA does not include its own limitation provision, and the court began its analysis by examining the text of 735 ILCS 5/13-201. *Id.* ¶¶ 8, 20-21. At the outset, a plain reading of section 13-201's one-year limitation period reveals that it applies to actions "for *publication* of matter violating the right of privacy." *Id.* ¶ 20 (emphasis added). The First District therefore began its analysis by distinguishing the two types of privacy interests recognized under Illinois law—secrecy and seclusion. *Id.* ¶ 21.

It noted that the "core of the tort of intrusion upon seclusion is the offensive prying into the private domain of another rather than publication." *Id.* (internal quotation omitted). In other words, while certain privacy torts, such as "public disclosure of private facts, appropriation of the name or likeness of another, and false-light publicity," necessarily include publication as an element, inclusion upon seclusion does not. *Id.* For that reason, section 13-201, which contains a publication requirement, does not apply to intrusion upon seclusion claims. *Id.* (citing *Benitez v. KFC Nat'l Mgmt. Co.*, 305 Ill. App. 3d 1027, 1033 (1st Dist. 1999)). Stated otherwise, the court held

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that section 13-201 simply "does not encompass all privacy actions but only those where publication is an element or inherent part of the action." *Tims*, 2021 IL App (1st), ¶ 29.

The First District next examined the language and purpose of BIPA, noting that the duties imposed under the Act encompass "the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information." *Id.* ¶ 25. The court noted that each subsection of Section 15 of the Act imposes a separate and distinct duty, and "a private entity could violate one of the duties while adhering to the others." *Id.* ¶ 30. Notably, an entity "would violate section 15(a) by failing to develop a written policy establishing a retention schedule and destruction guidelines," or "section 15(b) by collecting or obtaining biometric data without written notice and release." *Id.* ¶ 31 (citing 740 ILCS 14/15). Section 15(c) prohibits the sale, lease, trade, or profit from biometric data, and section 15(d) "is violated by disclosing or otherwise disseminating such data" absent certain prerequisites. *Id.* ¶¶ 31-32 (citing 740 ILCS 14/15). An entity violates section 15(e) "by not taking reasonable care in storing, transmitting, and protecting biometric data." *Id.* ¶ 31 (citing 740 ILCS 14/15).

BIPA does not include its own limitation provision, and the court began its analysis by examining the text of 735 ILCS 5/13-201. At the outset, a plain reading of section 13-201's one-year limitation period reveals that it applies to actions "for publication of matter violating the right of privacy." The First District therefore began its analysis by distinguishing the two types of privacy interests recognized under Illinois law—secrecy and seclusion.

The First District noted that "[w]hile all these duties concern privacy, at least three of them have absolutely no element of publication or dissemination." *Id.* ¶ 31. Actions could be brought under subsections 15(a), (b), or (e) "without having to allege or prove" publication or disclosure. *Id.* Those actions, concluded the court, are therefore not "for publication of matter violating the right of privacy" under Section 13-201. *Id.* For that reason, the First District held that "section 13-201 governs actions under section 15(c) and (d) of the Act, and section 13-205 governs actions under section 15(a), (b), and (e) of the Act." *Id*. ¶ 35. In other words, actions brought under sections 15(c) and (d) have a one-year limitation period, and actions brought under sections 15(a), (b), and (e), have a five-year limitation period.

In its petition for leave to appeal to the Illinois Supreme Court, Defendant contends that the First District improperly viewed each subsection of Act as separate and distinct causes of action. Defendant argues that the Act's purpose, as recognized by the Illinois Supreme Court in *Rosenbach v. Six Flags*, 2019 IL 123186, ¶ 37, is to protect against unauthorized publication of biometric data before it occurs. Indeed, argues Defendant, even the subsections not expressly referencing publication further that overarching purpose.

For example, without the retention and destruction policy required under section 15(a) of the Act, data could be disseminated. Section 15(b), providing for a written release, allows an individual to decide if and how data will be disseminated, and section 15(e), in requiring reasonable care in storage, transmission, and protection of biometric data is also aimed at preventing the unauthorized publication of private data. In short, the Act as a whole operates as a privacy claim to protect against publication. Therefore, contends Defendant, the one-year limitation period under section 13-201 should apply to all BIPA claims.

Finally, Defendant points out that at least one court has held that actions under the Illinois Right of Publicity Act, 765 ILCS 1075/1, *et seq*. (IRPA)—an act that shares similar goals to BIPA on related subjects—are subject to the one-year limitation period contained in section 13-201. *See Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006). Both acts, argues Defendant, expand the common law right for invasion of privacy, and neither act requires publication to the masses to state a claim. Because the one-year limitation period applies to IRPA, it too must apply to BIPA.

Civil Practice and Procedure

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A Special Category of Premises Cases: The "Unwitnessed" Accident

Three recent decisions from the Illinois Appellate Court illustrate the particular problems for plaintiffs and the issues and argument to raise by defendants with regard to accidents where the plaintiff cannot specify how the accident occurred. While not cited in all three cases to be discussed, the principle remains as articulated in the one that does, *Aalbers v. LaSalle Hotel Properties*, 2022 IL App (1st) 210494, ¶ 23, in which the court stated that "[n]ot only was *Kimbrough* [*v. Jewel Cos.,* 92 Ill. App. 3d 813 (1st Dist. 1981)] well-reasoned and correctly decided, but it has also consistently remained on sound and solid legal footing as the mainstay of slip-and-fall summary judgment cases."

Aalbers v. LaSalle Hotel Properties

Though her fall was caught on video, the plaintiff in *Aalbers*, 2022 IL App (1st) 210494, could not identify what caused her fall as it neither could be seen on the video nor could she identify the cause. This case frames the discussion.

In *Aalbers*, the court affirmed the grant of summary judgment in favor of the defendants, including the hotel owner and operator, the construction manager, general contractor, and flooring subcontractor, in which the plaintiff fell in the lobby of a hotel that had undergone construction nine months prior to the plaintiff's fall. *Id.* ¶¶ 1-4. The plaintiff "described her fall specifically as a 'trip' and not a slip, stating that 'there was a piece of something' she 'tripped on, like a ledge in the area where the carpet and tile met *** a lip.'" Plaintiff admitted that she never saw a lip or ledge in the flooring before she fell because she was not looking down while she walked, and she never saw a ledge in the flooring after she fell because she went sliding when she fell and never looked at the area that day or anytime thereafter to see what potentially could have caused her to fall. She insisted, however, that there had been "'just like a little ledge that just caught [her] toe' somewhere on the floor." *Id*. ¶ 6.

Upon close questioning by counsel for defendant, the plaintiff could not describe what caused her fall. Specifically, at her deposition the following questioning occurred:

> [COUNSEL]: So then how do you know you fell on a ledge then?
> [PLAINTIFF]: Well, I felt it. I felt it with my toe. I felt it as I went.
> Q. I see. So other than feeling the ledge, you have never seen the ledge?
> A. No.
> Q. Fair statement?
> A. Fair statement.
> * * *
> Q. *** How do you know it was a ledge as opposed to some other encumbrance on the floor?
> A. There was something that caught my foot as I fell.
> Q. Okay.
> A. Yeah, something that caught my foot.
> Q. And I want to make sure I have you correctly. I don't want to go back and forth. But you felt something catch your foot; is that correct?
> A. Correct.
> Q. You did not see what caught your foot before you fell, correct?
> A. Correct.
> Q. You did not see what caught your foot after you fell, correct?
> A. Correct.
> Q. So you couldn't tell me the size of whatever you tripped on, correct?
> A. Correct.
> Q. You couldn't describe it in any way, shape or form the thing that you believe caused you to trip, true?
> A. True.
> * * *
> Q. Couldn't say if it was metallic, wood or otherwise, correct?
> A. Correct.

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About the Author

Donald Patrick Eckler is a partner at *Freeman Mathis & Gary LLP*, 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.

> Q. You couldn't even say what it physically is other than to say that it may have been a ledge, correct?
> A. Correct.

Id.

The circuit court granted the defendants' motions for summary judgment citing to *Kimbrough*, and finding that:

> [A]lthough plaintiff's testimony established she fell on the hotel's floor, she failed to show either a defective condition existed in the flooring that caused her to fall or, if there was such a condition, that any defendant here caused it. With respect to the former, the court noted that plaintiff could not describe the appearance, shape, size, or material composition of the alleged condition that caused her fall; she only stated it was "something" like a lip or ledge that she felt but never saw. The court also noted that the surveillance video likewise failed to identify what caused her to fall. From this, the court concluded that plaintiff's claim was conjecture that could not, and did not, prove a defect.

Id. ¶ 10. The circuit court also found no causation. *Id*.

On a motion to reconsider the plaintiff asserted that the court had misapplied *Kimbrough* because the plaintiff could identify the "lip or ledge" and its location on the floor, pointed to pictures that were not used in the original motion, and raised new argument under Restatement (Second) of Torts, section 385, and additional cases based upon a new argument that the contractors owed duties to the plaintiff even though the work had been completed and accepted. *Id*. ¶ 11. The circuit court found that it correctly applied *Kimbrough*, and found the new arguments waived. *Id*. ¶ 12.

> The testimony elicited by the defendants however established that based on the court's "thorough review of pertinent legal principles, the evidence presented, and relevant case law," plaintiff cannot show with any reasonable certainty that there was a defective condition in the flooring or that any such condition caused her fall," and as such, the court held that plaintiff failed to prove proximate causation and summary judgment in favor of defendants was properly granted.

On appeal, the court held that the plaintiff failed to show proximate cause and thus summary judgment was proper. *Id*. ¶ 18. Following a lengthy discussion of *Kimbrough*, the court concluded that the plaintiff could not identify "any defective condition that caused her to fall in the lobby and/or that this condition was caused by any of the defendants." *Id*. ¶¶ 19-24. The plaintiff could not identify that she ever saw the condition and could not describe it. *Id*. ¶ 25. The court distinguished a litany of cases that were cited by plaintiff to support the contention that *Kimbrough* did not apply and to get past summary judgment. *Id*. ¶¶ 28-32. The testimony elicited by the defendants however established that based on the court's "thorough review of pertinent legal principles, the evidence presented, and relevant case law ... plaintiff cannot show with any reasonable certainty that there was a defective condition in the flooring or that any such condition caused her fall," and as such, the court held that plaintiff failed to prove proximate causation and summary judgment in favor of defendants was properly granted. *Id*. ¶ 38.

Huston v. P.J. Hoerr, Inc.

In *Huston v. P.J. Hoerr, Inc.*, 2022 IL App (3d) 200541-U, ¶¶ 1-2, 22, the court affirmed the grant of summary judgment to the defendant in a case in which a carpenter was found dead on a work site where he was last seen 20 minutes before on a scaffold drilling drywall. No one witnessed the incident. *Huston*, 2022 IL App (3d) 200541-U, ¶¶ 10-11.

The scaffold had wheels and the room had debris. *Id*. ¶¶ 12-13, 24-26. It was claimed that the scaffold toppled over and caused the deceased to fall causing his death. *Id*. ¶ 6. Testimony conflicted about the position of the body when the co-workers found him and whether the deceased was tangled inside the scaffold or on top of it when found. *Id*. ¶ 70.

In affirming the trial court, the appellate court stated:

> [Plaintiff] Huston argues that a genuine issue of material fact exists because debris was placed in the room where Jeremy was working at the direction of [General Contractor] PJH, which created an uneven floor surface and an unsafe work condition that was left unmitigated by PJH. Thus, PJH allegedly "prevented Jeremy from using a lift, which would have prevented [his] fall." For these reasons, Huston argues it is reasonable to infer from the circumstantial evidence that PJH proximately caused Jeremy's fatal injuries after debris became entangled in the scaffold's wheels, causing that piece of equipment to tip over. We disagree.
>
> Our review of the record reveals that the circumstantial evidence of what caused Jeremy's accident is insufficient under the law to survive summary judgment. Speculation and conjecture are insufficient to establish proximate cause unless the circumstances are so related that the argued-for interpretation of an incident is the only probable one. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 34-35. Here, Jeremy was hanging drywall when he was injured. No one was present when Jeremy was injured, nor had anyone else been present in the room for 20 minutes. [Foreman] Ariana had seen the scaffold at that time and stated that it was locked in place and ready for use. After yelling was heard, Jeremy was found on the floor in the mechanical room and the scaffold was tipped over. The observations of the individuals who saw Jeremy postincident were not consistent with each other regarding where he was in relation to the scaffold. There was no evidence to indicate whether Jeremy was even on the scaffold immediately before he was injured. Under these circumstances, we hold that Huston could not prove PJH's conduct proximately caused Jeremy's injury and subsequent death. *See Berke*, 2016 IL App (1st) 150397, ¶ 34. Thus, the circuit court did not err when it granted summary judgment in favor of PJH.

Huston, 2022 IL App (3d) 200541-U, ¶ ¶ 69-70. Like the situation in *Aalbers*, where the plaintiff is unable to establish how the accident happened the plaintiff cannot prevail because they cannot establish causation.

Kopin v. F.B. McAfoos & Company

In *Kopin v. F.B. McAfoos & Company*, 2022 IL App (5th) 210264-U, the court affirmed the judgment of the circuit court following a bench trial in which the plaintiff claimed he fell on the defendant's property because of a step. Unlike *Aalbers* and *Huston* which focused on the causation element, the *Kopin* court focused on the duty and breach elements.

The plaintiff was at a tractors dealer when, after purchasing an item for his tractor, "walked around the patio to look at the mowers, and then walked toward a concrete ramp that led to the parking lot. The plaintiff stepped off the patio, intending to walk down the ramp, but his foot missed the ramp and he fell to the ground." *Kopin*, 2022 IL App (5th) 210264-U, ¶ 4. Or did he?

While the plaintiff identified the location in an area he circled on Exhibit 1a where he fell in his direct examination testimony at trial, on cross examination, defense counsel referenced excerpts from the plaintiff's discovery deposition to highlight differences between plaintiff's trial testimony and deposition testimony "in regard to a number of pertinent facts, including the location of the plaintiff's fall and the events leading up to his fall." For example, defense counsel:

> referenced excerpts from the plaintiff's discovery deposition in which the plaintiff stated that he fell onto a graveled portion of the parking lot, and denied that he fell in the area circled in Exhibit 1a….Defense counsel referred to another excerpt from the plaintiff's discovery deposition in which counsel asked whether the plaintiff intended to step down from the patio and onto the parking lot. The plaintiff answered that he "intended to step off there," but he "didn't know it was that far." When asked whether he gave that testimony, the plaintiff replied, "I don't believe I did."
>
> In response to further questioning by defense counsel, the plaintiff testified that when he reached the edge of the patio, he "took it for granted that the con-

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> crete ramp was across there," and he did not look down. Later, the plaintiff testified that before he stepped off the patio, "I looked, and that ramp was there, and I just thought the ramp was there, and I stepped off of there, and there was nothing there and down I went." The plaintiff also testified that by the time he stepped down from the patio, he was ready to go home.

Id. ¶¶ 15-16.

Following the bench trial, the court entered judgment in favor of the defendant finding that the condition was an open and obvious condition and not an unreasonably dangerous condition. *Id*. ¶ 20. Importantly, the court also found that the plaintiff failed to exercise ordinary care and that it was his own negligence that was the proximate cause of his injury. *Id*. The appellate court affirmed the decision of the trial court. *Id*. ¶¶ 29-31.

While not directly analogous to *Aalbers* and *Huston* in that those were summary judgment cases that did not involve argument of open and obvious conditions, the importance of close questioning of the plaintiff in *Kopin* to ascertain where it was that he fell and how, is what likely carried the day.

Conclusion

These cases illustrate excellent defense work in cases which could have easily been lost or proceeded to trial in the cases of *Aalbers* and *Huston*. Even with video of the accident, as was the case in *Aalbers*, the plaintiff must still prove how the accident occurred and what the defect was that caused the injury. In these three cases the plaintiff could not meet this most basic of burdens and the defendants prevailed.

Workers' Compensation Report

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Compensability of Injuries While Working from Home

Over two years after Covid-19 forced employees throughout Illinois to work remotely, many Illinoisans continue to work from home exclusively or some of the time. As we all become accustomed to remote work and workers find rhythms to their day, we must remember that work injuries can, and do, occur in the remote setting also. Someone might trip on a door frame while rushing to find headphones before a video call. Someone else might slip a disc while grabbing a backpack with a work laptop from the backseat of the car. Discussing the workers' compensation implications of injuries that occur in home offices seems timely, but the problems presented by remote work are not new. Since the 1980s, workers' compensation cases in Illinois have addressed injuries that occur in home offices or workshops. As attorneys attempt to navigate the "new normal" that has resulted from the past two years of "unprecedented" change in the workplace, they can rest assured that when it comes to injuries that occur when people work from home, Illinois has plenty of precedent.

Pre-Covid-19 Decisions

Before the Covid-19-induced increase in remote work, Illinois workers' compensation attorneys addressed injuries that occurred at home for decades. Breaking these decisions down into four core categories helps illustrate important principles these precedents provide. First, earlier cases considered time spent working from home offices in Illinois to establish jurisdiction to hear a workers' compensation case. After clearly establishing jurisdiction, workers' compensation cases addressing home injuries generally fall into the following categories: (1) injuries that occur in home offices; (2) injuries that occur during the transition between home and office; and (3) injuries that occur on the job, but outside of an office.

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About the Author

Bruce L. Bonds is a shareholder in *Heyl, Royster, Voelker & Allen, P.C.*'s Champaign office and is the past Chair of the firm's state-wide workers' compensation practice. Mr. Bonds concentrates his practice in the areas of workers' compensation and third-party defense of employers. He is an Adjunct Professor of Law at the University of Illinois College of Law where he has taught workers' compensation law to upper level and graduate students since 1998. Mr. Bonds co-authored a book with Kevin Luther of the firm's Rockford office, entitled *Illinois Workers' Compensation Law 2020-2021*, which is published by Tomson Reuters. The book provides a comprehensive up-to-date assessment of workers' compensation law in Illinois. Mr. Bonds has been named to the Illinois Super Lawyers List for many years. He is a Leading Lawyer in Illinois, a Fellow in the College of Workers' Compensation Lawyers, and was named as one of the "50 Most Influential People in Workers' Compensation" by SEAK, Inc. in 2014.

*The author would like to thank **Jensen A. Rehn**, a summer associate in *Heyl Royster*'s Champaign office, for her assistance with this article.

Establishing Jurisdiction in Illinois

Before getting into the substance of a case, the specific facts of a claim made by employees with a home office have historically mattered for establishing jurisdiction for the Illinois Industrial Commission (now the Illinois Workers' Compensation Commission). In 1988, *Associates Corporation of North America v. Industrial Commission*, 167 Ill. App. 3d. 988, 990 (1st Dist. 1988), involved a traveling salesperson who had a heart attack in Providence, Rhode Island, while on a business trip. The decedent lived in Illinois for the entirety of his employment and had an office in his home. *Assocs. Corp. of N. Am.*, 167 Ill. App. 3d. at 990. He held work meetings, received five to seven work phone calls per day, and received work mail at home. *Id.* When determining whether the Industrial Commission had jurisdiction to hear a case about the decedent's injuries, the court considered the number of days he worked from home and the use of his Illinois address and phone for work purposes to "conclude that the decedent established a fixed, non-temporary employment situs in Illinois…." *Id.* at 995. This finding by the court upheld the reversal of the initial Illinois Industrial Commission's determination that it lacked jurisdiction. *Id.* Overall, this decision demonstrates the importance of determining the home-based work set up before arriving at the substance of a particular case.

Injuries that Occur in Home Offices

Although cases like *Associates Corporation* indicate that people who get hurt in home offices could receive compensation, not every set of facts presents a compensable injury. For example, in *West v. Illinois Workers' Compensation Commission*, 2013 IL App (5th) 120134WC-U, ¶¶ 4-5, the claimant sold insurance in the field for his employer. The claimant alleged that he spent most of his time typing on a work laptop that he used in the insurance company's office, in an office he set up in his bedroom at home, in the car, and in customers' homes. *West*, 2013 IL App (5th) 120134WC-U, ¶ 6. When he sought compensation for repetitive stress injuries resulting in carpal tunnel release and cubital tunnel release surgeries, the commission determined that his injuries did not arise out of his employment, and both circuit and appellate courts affirmed that decision. *Id.* ¶ 58.

A similar outcome occurred in *Garrett v. Illinois Workers' Compensation Commission*, 2018 IL App (4th) 170606WC-U, ¶ 5, when a sales representative for Liberty Mutual started working from an office in his home in the fall of 2006. He provided his own desk. *Garrett*, 2018 IL App (4th) 170606WC-U, ¶ 5. Liberty Mutual provided the docking station for a computer and an ergonomic chair. *Id.* Here, the appellate court affirmed the circuit court and commission findings that the claimant's injuries did not result from a work-related repetitive trauma injury to his back. *Id.* ¶ 64. Overall, *Associates Corporation* and *Garrett* show that injures that occur in home offices receive the same standard for "arising out of work" as injuries that occur in office buildings.

Injuries that Occur During Travel Between Home and Office

Sometimes Illinois workers get injured during the period of travel, or transition, between their home and office. For example, in *R.J. Reynolds Tobacco Co. v. Industrial Commission*, 133 Ill. App. 3d 322, 326 (3d Dist. 1985), the claimant suffered injuries in an accident that occurred during work hours as he drove a company car, containing company materials, from his employer's premises to a workshop in his home. The employer knew that the claimant sometimes completed work from his home workshop because the company did not have certain power tools. *R.J. Reynolds Tobacco Co.*, 133 Ill. App. 3d at 326. The claimant left work early to complete a display for his employers using the tools in his home workshop. *Id.* Here, the court noted that it "would not find compensable every accidental injury that might have occurred after the plaintiff left his office until he completed work on the company's display rack" but affirmed the commission's finding that these particular injuries arose out of work and did not go against the weight of the evidence. *Id.*

More recently, a similar determination was made in *Bolingbrook Police v. Illinois Workers' Compensation Commission*, 2015 IL App (3d) 130869WC. One morning, a police officer hurt his back as he lifted his duty bag into his personal car and got ready to drive to the police station. *Bolingbrook Police*, 2015 IL App (3d) 130869WC, ¶ 3. The police department neither required nor prohibited officers from transporting their duty bags between their homes and the station. *Id.* ¶ 5. In this case, the court held that the officer "was injured while performing actions that were directly related to his job-related task" of "maintain[ing] the safekeeping of the equipment that is necessary for [his] duties on patrol." *Id.* ¶ 4. Again, the case hinged on how the task related to the officer's work duties rather than whether

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he was lifting a work bag at the station or in his home garage.

Injuries that Occur Outside of the Office

When injuries from neutral risks occur outside of an office space, making the connection between work duties and the injury depends on whether the worker faced greater exposure to the risk than the general public. *See Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d. 149, 163 (1st Dist. 2000). One neutral situation occurred in *Graff v. Family Hospice*, 12 IL W.C. 11837 (Ill. Indus. Com'n Aug. 20, 2014), when an on-call nurse twisted her ankle while turning around to grab her clipboard from her kitchen table. The nurse was walking to her front door when she realized that she forgot her work clipboard on her kitchen table. *Id.* at 2. As she turned to start walking towards the kitchen table to grab the clipboard, she tripped on a clean, carpeted surface. *Id.* at 2-3. The arbitrator found that the nurse did not get hurt out of and in the course of her employment. *Id.*

In contrast, a traveling plumber who tripped on a curb while out inspecting plumbing in the City of Chicago received compensation in *Nee v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 132609WC, ¶ 29. There, the court found that the plumber was "exposed to the risk of traversing a curb to a greater degree than a member of the general public by virtue of his status as a traveling employee at the time of his accident" and should therefore receive compensation. *Nee*, 2015 IL App (1st) 132609WC, ¶ 28. Although these cases show the historical findings of the courts regarding neutral risks, the factors for distinguishing neutral risks from risks distinctly related to employment have shifted within the past few years.

Decisions Contemporaneous with the Covid-19 Pandemic

In addition to the increase in Illinois employees working from home, another event from 2020 shaped the future of workers' compensation cases: the *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848, decision. There, the Illinois Supreme Court outlined the three categories of risks that employees may be exposed to: "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *McAllister*, 2020 IL 124848, ¶ 38 (quoting *Illinois Inst. of Tech. Rsch. Inst.*, 314 Ill. App. 3d at 162). When considering risks associated with employment, *McAllister* provided three more subcategories: "(1) acts [the employee] was instructed to perform by the employer, (2) acts that [the employee] had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." *McAllister*, 2020 IL 124848, ¶ 46. When applying these categories of risk to the facts in *McAllister*, the court found that searching around for a pan of carrots on one's hands and knees qualified as "an act his employer might reasonably expect him to perform incident to fulfilling his assigned job duties as a sous-chef in arranging the walk-in cooler." *Id.* ¶ 51. Future decisions will hinge on what acts qualify as a "reasonable expectation" for a particular position or job assignment.

Although *McAllister* drew upon earlier ideas about categories of risks, the breakdown it provided for subcategories of risks "distinctly associated with employment" will play a major role in the analysis of arbitrators and commissioners attempting to determine what injuries from remote work are compensable.

Key Takeaways for Future Decisions

Looking ahead, the frequency of workers' compensation cases that involve injured remote workers will likely only increase in Illinois. Although the circumstances may seem novel at first, arbitrators, commissioners, and the courts have decades of decisions to draw upon for guidance.

Take, for example, a hypothetical individual who lives in Rock Island, Illinois, and works remotely from her home for a company located in Davenport, Iowa. Perhaps while getting ready for a video conference one morning, she trips over a door frame of her home office after grabbing headphones from another room in her house. Analyzing the cases discussed above provides some guidance for a potential outcome.

First, based upon the holding of *Associates Corporation*, the Illinois Workers' Compensation Commission would likely have jurisdiction in this case given the amount of time and the substance of the work the employee does in Illinois. Then, *West* and *Garrett* indicate that the fact that the injury occurred at home does not change the standard applied to determining whether her injury is compensable. The hazards of her home have become the hazards of her workplace. Although the decisions in *Nee* and *Graff* might initially suggest that the hypothetical employee's injuries result from a neutral risk that would require greater exposure to tripping hazards, *McAllister* indicates that tripping could fall into one of the subcategories of "risks distinctly related to employment." Perhaps the employer instructed employees to always join video calls with headphones. Perhaps using headphones, and thus going to grab headphones, is reasonably expected pursuant to an assigned duty of participating in video conferences for work. Unlike determining the "reasonable expectations" for a role like a sous chef, which has existed for a long time, determining the "reasonable expectations" for remote roles might prove more challenging. Over the next few years, the increasing number of workers' compensation cases involving injured remote workers will help define the parameters of "reasonable expectations." As arbitrators, commissioners, and the practicing workers' compensation bar help define these new parameters, they will continue building upon and defining the precedent for employees in Illinois who sustain injuries while working from home.

Employment Law

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The Federal and State Equal Pay Act – What Employers Need to Know

Both federal and state law require that employers compensate employees equally for equal work regardless of gender under certain circumstances. While the laws have many similarities, there are enough differences that practitioners should be familiar with both statutes.

The Federal Equal Pay Act of 1963

The federal Equal Pay Act of 1963 (EPA), as amended, is part of the Fair Labor Standards Act of 1938, and prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. 29 U.S.C. §206(d). Similarly, all employers are covered by the EPA as long as they are engaged in commerce or in the handling of goods that have moved in commerce. 29 CFR §1620.1. To establish a claim under the EPA, an employee must demonstrate a difference in pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. §206(d)(1). An employer may then establish one of four affirmative defenses to explain the pay discrepancy. They are "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earning by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id.* The regulations, set forth in 29 C.F.R. §1620, explain how these terms should be applied. "The equal work standard does not require that compared jobs be identical, only that they be substantially equal." 29 C.F.R. §1620.13(a). "[D]ifferences in skill, effort, or responsibility" do not justify a finding that two jobs are not equal "where the greater skill, effort, or responsibility is required of the lower paid sex." 29 C.F.R. §1620.14(a). Instead, courts "look to the actual job duties performed by each employee, not to his or her job description or title." *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006).

Courts have repeatedly held that "a difference in pay based on the difference in what employees were previously paid is a legitimate 'factor other than sex.'" *Lauderdale v. Ill. Dept. of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (internal citations omitted). Keep in mind, though, that under the Illinois Equal Pay Act, "It is unlawful for an employer to seek the wage or salary history, including benefits or other compensation, of a job applicant from any current or former employer." 820 ILCS 112/10(b-10). The only exceptions are where the individual's pay is a matter of public record or they are a current employee. *Id.*

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About the Author

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The EPA includes alternative statutes of limitations—three years if the violation was willful and two years for any other violation. *See* 29 U.S.C. § 255 (a). However, under the paycheck accrual rule, as codified by the Lilly Ledbetter Fair Pay Act of 2009, an actionable "unlawful employment practice occurs, with respect to discrimination in compensation . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. §2000e-5(e)(3)(A). Consequently, "'a new cause of action for pay discrimination ar[ises] every time a plaintiff receive[s] a paycheck resulting from an earlier discriminatory compensation practice'—even one that 'occur[ed] outside the statute of limitations period.'" *Kellogg v. Ball State Univ.*, 984 F.3d 525, 529 (7th Cir. 2021) (internal citations omitted). The *Kellogg* court confirmed that the Ledbetter Act paycheck accrual rule applied to EPA claims. *Kellogg*, 984 F.3d at 530. As a result, the employer faced potential liability for unequal pay to a female employee going back to her 2006 hiring based on the executive co-director allegedly stating during the hiring process that "he wouldn't pay [her] any more, because then [she] would be making as much as his Ph.D instructors and . . . he offhandedly told [her] that [she] didn't need any more money, because he knew [her] husband worked at Ball State, so [they] would have a fine salary." *Id.* at 527.

The Illinois Equal Pay Act

The Illinois Equal Pay Act (IEPA) applies to an "employer" which is defined as "an individual, partnership, corporation, association, business, trust, person, or entity for whom employees are gainfully employed in Illinois and includes the State of Illinois, any state officer, department, or agency, any unit of local government, and any school district." 820 ILCS 112/5. Thus, every single employer in Illinois is covered by the IEPA, even though the Illinois Department of Labor's (IDOL) FAQ section states that it only applies to employers with four or more employees—which is the definition of employer that existed prior to 2016. *Equal Pay Act FAQ*, Illinois Department of Labor, https://www2.illinois.gov/idol/FAQs/Pages/equal-pay-faq.aspx (last viewed July 3, 2022) (hereinafter "IDOL FAQs").

The IEPA requires an employee establish the same elements as the EPA and affords employers the same four affirmative defenses as the EPA. 820 ILCS 112/10(a). The IEPA also includes an additional defense that the payment is made under "a differential based on any other factor other than: . . . (ii) a factor that would constitute unlawful discrimination under the Illinois Human Rights Act, provided that the factor: (A) is not based on or derived from a differential in compensation based on sex or another protected characteristic; (B) is job-related with respect to the position and consistent with a business necessity; and (C) accounts for the differential." 820 ILCS 112/10(a)(4)(ii). The IEPA also contains the same prohibitions for unequal pay based on race. 820 ILCS 112/10(a).

An employee or former employee who believes an employer has violated the IEPA has one year from the date of underpayment to file a complaint with the IDOL. 820 ILCS 112/15(b). Employers are required to maintain records of the name, address, and occupation of each employee as well as their wages for a period of not less than 5 years. 820 ILCS 112/20. Employers who fail to meet this requirement may suffer the same fate as the employer in *People ex rel. Illinois Dept. of Labor v. 2000 W. Madison Liquor Corp.,* 394 Ill. App. 3d 813 (1st Dist. 2009), where the appellate court affirmed judgment in favor of an employee on an IEPA claim where the IDOL compliance officer estimated the amount owed due to the employer's failure to maintain adequate payroll records.

While the IEPA prohibits employers from asking about a job applicant's wage or salary history, including benefits or other compensation, Public Acts 100-1140 and 101-177 allow employers to ask applicants their expectations with respect to wage or salary, benefits, and other compensation, including unvested equity or deferred compensation that the applicant would lose by quitting their current job. 820 ILCS 112/10(b-10 and b-15). An employer is not in violation of these provisions when a job applicant voluntarily and without prompting discloses current wages or salary history as long as the employer does not consider or rely on this disclosure as a factor in determining whether to offer the job applicant employment, in making an offer of compensation, or in determining future wages, salary, benefits, or other compensation. 820 ILCS 112/10(b-20).

The IEPA contains new requirements that certain private employers with more than 100 employees and which are required to file an EEO-1 Report with the EEOC must comply with between May 25, 2022 and March 23, 2024 depending on when the employer receives notification from the Illinois Department of Labor of their application due date. *See* IDOL FAQs. Covered employers must submit an application to obtain an Equal Pay Registration Certificate (EPRC) every two years. 820 ILCS 112/11. To determine whether the employer has more than 100 employees, IDOL requires employers to count the total number of people employed by the business who worked in or were based out of Illinois on December 31 of the 12-month calendar year immediately prior the year the employer is required to submit an EPRC application. IDOL

FAQs. All employees of a business based in Illinois should be included in the total employee count, even if the employees are working remotely outside of Illinois and a business with multiple locations should include only the employees whose base location is in Illinois. *Id.*

The application for an EPRC must include demographic and wage data to IDOL, along with the employer's most recently filed Annual Employer Information Report EEO-1 and an Equal Pay Compliance Statement certifying that the average compensation for its female and minority employees is not consistently below the average compensation for its male and non-minority employees. 820 ILCS 112/11(c). The Equal Pay Compliance Statement must also contain a certification that the employer does not restrict employees of one sex to certain job classifications, and makes retention and promotion decisions without regard to sex; that the business corrects wage and benefit disparities when identified; how often the business evaluates benefits and wages; and the approach the business takes in determining what level of wages and benefits to pay its employees. *Id.* Applicants must also pay a $150 filing fee. *Id.*

Practice Pointers

Business with more than 100 employees should prepare for their EPRC application by notifying IDOL of the contact person who will be responsible for submitting the application. Employers should also begin assembling the required information if they have not received a deadline from IDOL yet. While assembling the records, employers should review the data to determine if it appears that there are any IEPA violations and remedy those issues immediately. As with virtually all employment statutes, there are penalties for employers who are not in compliance.

Product Liability

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Non-Specific Defect: Seventh Circuit Specifies When a Plaintiff is Relieved of the Obligation to Identify a Particular Defect in a Product

Many product manufacturers are frustrated when faced with a lawsuit where their product testing does not show any specific defect in the product. Unfortunately for those manufacturers, in certain cases, Illinois courts allow plaintiffs to pursue a claim of non-specific defect in a product. In *Bensenberg v. FCA US LLC*, 31 F.4th 529 (7th Cir. 2022), the Seventh Circuit reversed summary judgment in favor of the defendant in a case involving a purported non-specific defect. The case shows a specific scenario where even a product out of the control of the manufacturer for seven years can fall victim to a non-specific defect theory.

In *Bensenberg*, the plaintiff filed suit against an automobile manufacturer in the Central District of Illinois, invoking diversity jurisdiction. After the district court granted summary judgment in favor of the defendant, the plaintiff's claims for strict liability relating to manufacturing and design defects of the air bag system became subject to an appeal. *Bensenberg*, 31 F.4th at 533.

On the date of the accident, the plaintiff's decedent was driving a 2008 Chrysler Aspen when she lost consciousness as the result of a medical event. *Id.* at 532. The car drifted off the highway and entered a grassy ditch at a speed that witnesses placed at 45 to 65 mph. *Id.* The car hit a raised driveway in the ditch, became airborne and struck a small concrete post upon landing. *Id.* During the accident the car's side airbag deployed, but the front airbag did not deploy. *Id.* The driver's body hit the steering wheel and underlying dashboard sustaining injuries. *Id*. at 532-33.

The plaintiff retained an expert who opined that when the vehicle struck the concrete post, it was likely traveling close to 53 miles per hour, which exceeds the mandatory deployment threshold of the front airbag. *Id.* at 533. The defendant's expert opined that the vehicle was likely traveling less than the required threshold when it struck the concrete post. *Id.* at 540. Both experts took the

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same general approach to estimating the vehicle's speed at impact. They both looked at the evidence bearing on the vehicle's path of travel, the available data regarding the vehicle's speed at the moment it became airborne, the distance the vehicle traveled when it returned to the ground, and the clues offered from the damage to the vehicle. *Id.*

Plaintiff's expert opined that if the vehicle was traveling above the deployment threshold when it struck the post, "then the airbag system was defective in not deploying the airbag in such a high-energy impact." *Id*. The defendant filed a motion *in limine* to exclude this opinion. *Id*. at 533-34. The district court did not take issue with the opinion of the plaintiff's expert that the vehicle was likely traveling over the deployment threshold. *Id*. at 534. Instead, the district court criticized the expert's "jump from [that] premise to [his] conclusion that the airbag system was thus defective. [He] offer[ed] no opinion to establish *how* the airbag system's design was defective. *Bensenberg v. FCA US LLC*, No. 417CV04213SLDJEH, 2020 U.S. Dist. LEXIS 223025, at *14 (C.D. Ill. Nov. 30, 2020)(emphasis added).

The district court granted the defendant's motion *in limine* to exclude the expert's opinion and granted summary judgment in favor of the defendant. *Bensenberg*, 2020 U.S. Dist. LEXIS 223025, at *9-10. The court reasoned that the complexity of the airbag system prevented a layperson from being able to evaluate whether the airbag was unreasonably dangerous as a result of a defect, so expert testimony was required. *Id.* at *9.

On appeal, the plaintiff clarified that he was not pursuing a design defect claim, but only a manufacturing defect claim based on a non-specific manufacturing defect in the airbag system. *Bensenberg*, 31 F.4th at 534. The plaintiff argued that his reliance on the expert's opinion that the vehicle was traveling over the threshold required to trigger the mandatory deployment mechanism was sufficient to support an inference that the failure to deploy was due to an unknown manufacturing defect. *Id*.

The defendant argued that the plaintiff waived any theory of manufacturing defect by not making that argument to the district court. *Id*. at 536. Based upon the deposition of the plaintiff's expert, the defendant believed that the plaintiff was only pursuing a design defect claim. *Id*. The district court cited the expert's deposition and report to arrive at the same conclusion:

> During his deposition, [Plaintiff's expert] explained that the airbag deployment threshold was typically "about a delta-v of 10 miles an hour." He did not know the Aspen's deployment threshold but concluded that it was more likely than not that the front airbag threshold had been met. ("I cannot say, you know, 80 or 90 percent, but more than 50 percent.") In his report, [the expert] stated: "[i]f the accident had[] a higher severity reaching the airbag deployment threshold (for the front airbag) as it could ... then the airbag system was defective in not deploying the airbag in such a high-energy impact." The airbag manufacturer's diagnostic tool found no faults or problems with the system, so he draws a possibility of a design defect from the fact the airbag did not deploy and from other reports that airbags in similar vehicles also failed to deploy.

Bensenberg, 2020 U.S. Dist. LEXIS 223025, at *30 (internal citations omitted).

In a footnote, the appellate court further discussed the testimony of the plaintiff's expert rejecting the notion that the expert's testimony conceded that the only possible defect was a design defect. Specifically, the appellate court stated:

> [Plaintiff's expert] expressed a willingness to take the defense experts at their word, which would leave only a design defect as the explanation for the airbag's failure to deploy. ("Now, does that indicate that the air bag did not function? It could. But your experts have looked at it and they're saying no, it did not [malfunction]. The air bag is functioning properly, alright? And I take their word. So the air bag, assuming it is functioning properly, then the only other option is that the air bag is not properly designed ... .") (emphasis ours). Reading [the] remarks in context, we do not understand him to have conceded away the possibility of a manufacturing defect. In any case, [Plaintiff's expert], as a witness, was not in a position to formally waive, on the plaintiff's behalf, the non-specific manufacturing defect theory that [the plaintiff] is asserting.

Bensenberg, 31 F.4th at 536 n.2. (internal citations omitted).

Once the appellate court found that the plaintiff could still pursue a manufacturing defect, it then moved on to determining if the plaintiff's expert opinions were sufficient to pursue a non-specific defect claim. The court recognized that Illinois courts employ two different approaches to determine whether a product is unreasonably dangerous: the consumer expectations test and the risk-utility test. *Id*. at 535. The plaintiff invoked the consumer expectations test to show that the defect rendered the airbag unreasonably dangerous. *Id*. The Seventh Circuit found that Illinois recognizes non-specific defect claims, which relieves a plaintiff of the obligation to identify a specific defect in a product. *Id*. at 535-36. The plaintiff may resort to circumstantial evidence to support an inference that a product was defective by showing that the product failed to perform as expected in light of its nature and intended function, that the product was not being used abnormally, and that there were no reasonable secondary causes of failure. *Id*. at 536 (citing *Tweedy v. Wright Ford Sales, Inc*., 64 Ill. 2d 570, 574 (1976)).

The defendant argued that the *Tweedy* case was distinguishable from this case because the vehicle in this case was much older. *Bensenberg*, 31 F.4th at 536-38. *Tweedy* involved a brake failure of a newer car. *Id*. at 537. The car only had 7,500 miles on it when the brake failure occurred. *Id*. Prior repairs had been made to the car, but never to its brakes. *Id.* No expert could opine of the specific failure in the brake system. *Id*. The Illinois Supreme Court concluded that a factfinder could infer the existence of such a defect from the failure of the brakes to work as expected:

> Here the evidence shows that the brakes of an automobile driven approximately 7,500 miles, inspected … prior to delivery, inspected again at 6,000 miles, and subjected to no abnormal use prior to the occurrence, failed to function in the manner reasonably to be expected. Plaintiff was driving carefully at a reasonable rate of speed, the weather was good, the roads were dry, he knew the intersection well, and there was no evidence of any reasonable secondary cause.

Id. (citing *Tweedy,* 64 Ill. 2d at 574-75).

While the appellate court agreed that *Tweedy* was distinguishable from the subject case, it was not for the same reason alleged by the defendant. *Bensenberg*, 31 F.4th at 538. The court stated that the reliability and efficacy of brakes or tires decline with time and usage, but airbags are only used when they are deployed and are designed to last for the life of the vehicle. *Id*. The court reasoned that there was no indication from the record that the airbags had ever been deployed or replaced. *Id.* There was also no indication that the vehicle's electronic monitoring system alerted the driver to a potential malfunction requiring service or replacement of the airbag system. *Id.* The court held that a jury could find that the driver could reasonably expect the front airbag to deploy if the vehicle struck something while exceeding the deployment threshold. *Id*. at 538-539.

The appellate court stated that there was no question that the plaintiff's expert was qualified. *Bensenberg*, 31 F.4th at 539. The appellate court further stated that there was no fault with the methodology of the Plaintiff's expert because he took the same general approach as the defendant's expert. *Id*. at 539-540. The only issue that the district court had with the expert's opinion revolved around the fact that he did show enough to establish a non-specific design defect. *Id*. at 539. The appellate court attributes this to the district court's failure to appreciate the nature of a manufacturing defect theory. *Id*. The plaintiff's theory is that the vehicle collided with a concrete post, while traveling at a rate of speed above the airbag's must-deploy threshold. *Id*. at 540. The plaintiff's expert opined that the vehicle more likely than not was traveling closer to 53 miles per hour (the last recorded speed on the vehicle's EDR) than to the lower speed opined by the defendant's expert. *Id*. If the opinion of the plaintiff's expert is accepted, it would rule out the defendant's opinion that the vehicle was traveling at the lower speed. *Id*. All data on the record indicated that the airbag system was functioning properly at the time of the accident. *Id*. Therefore, a factfinder could infer the airbag had not been subject to abuse or tampering that might interfere with its operation. *Id.* This would permit an inference that there was a non-specific manufacturing defect in the vehicle's airbag system that accounts for the front airbag's failure to deploy. *Id*. Since this creates a question of fact, summary judgment is precluded. As a result, the appellate court reversed the ruling of the lower court and remanded the case for further proceeding. *Id*.

Health Law

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A Comparison of *Delegatto* and *Brown*: Using Consent Forms to Obtain Summary Judgment on Apparent Agency

Consent forms play a critical role in protecting healthcare entities from lawsuits where apparent agency has been alleged. Two cases, *Delegatto v. Advocate Health & Hospitals*, 2021 IL App (1st) 200484, and *Brown v. Mercy Hospital and Medical Center,* 2021 IL App (1st) 200834-U, were recently released by the Illinois Appellate Court First District. Together, these opinions provide guidance to counsel in the construction and use of consent forms to obtain summary judgment on the issue of apparent agency.

Overview

In *Delegatto*, the plaintiff alleged that Silver Cross Hospital and Medical Center was vicariously liable for the death of the plaintiff's decedent due to the alleged medical negligence of an orthopedic surgeon and a physician assistant. *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 1, 4. The plaintiff alleged that the surgeon and the physician assistant were employees and/or agents of Silver Cross, and that Silver Cross never informed the plaintiff's decedent that her medical care was being provided by non-employees. *Id*. ¶ 4.

The plaintiff's decedent consulted with the surgeon and the physician assistant at the surgeon's office located in the Illinois Spine and Scoliosis Center. *Id*. ¶ 6. During the consultation, she signed two patient forms—one which contained language that provided, "I authorize payment of medical benefits for any services to me by Illinois Spine & Scoliosis Center, to be paid directly to Illinois Spine & Scoliosis Center." *Id*. According to her deposition testimony, the decedent wanted her procedure to be performed at Silver Cross and chose this orthopedic surgeon due to his affiliation with Silver Cross. *Id*. ¶¶ 7-9. Before the surgery she executed the required Silver Cross consent forms, including a "HOSPITAL SERVICES" form, which contained the following language:

> I UNDERSTAND THAT ALL PHYSICIANS, NURSE PRACTITIONERS AND PHYSICIAN ASSISTANTS FURNISHING SERVICES TO ME, INCLUDING EMERGENCY DEPARTMENT, RADIOLOGISTS, ANESTHESIOLOGISTS, PATHOLOGISTS, AND THE LIKE, ARE INDEPENDENT CONTRACTORS AND ARE NOT EMPLOYEES OR AGENTS OF THE HOSPITAL….

Id. ¶¶ 9-10. She executed a surgical consent form containing similar language. *Id*. ¶ 11.

Similarly, in *Brown*, the plaintiff filed a medical malpractice lawsuit against Mercy Hospital and Medical Center and two cardiologists based on theories of actual and apparent agency for the death of the plaintiff's mother. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 1, 5. The plaintiff alleged that the physicians negligently recommended and performed a cardiac catherization

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*The authors acknowledge and appreciate the assistance of **James Nelson**, summer law clerk at Heyl Royster's Peoria office.

procedure on the plaintiff's decedent, which resulted in her death. *Id*. ¶¶ 4-5.

Like *Delegatto*, the plaintiff's decedent in *Brown* executed a consent form at the outset of her hospital admission and prior to her procedure. *Id.* ¶¶ 8-9. In addition, she signed four other consent forms in the months leading up to her procedure, when she had visited the defendant hospital. The consent forms were identical and provided the following language:

> **2. PHYSICIAN SERVICES**: I understand and agree that [defendant] does not control or direct my physicians' independent medical judgement regarding the care and treatment of me. I understand that my physicians who provide services to me at [defendant] may not be employed or paid by [defendant]. Non-employed, independent medical contractors include, emergency department physicians, anesthesiologists, radiologists, pathologists, hospitalists, on-call and consulting physicians, surgeons, specialists, obstetricians/nurse midwives, gynecologists, pediatricians, neonatologists, cardiologists, other specialists and allied health providers working with these physicians. They have been permitted to use the hospital facilities and have chosen our facilities as the place they wish to treat and care for their private patients.
>
> **My decision to seek care from [defendant] is not based upon any understanding or representation or advertisement that the physicians who will be treating me are employees or agents of the hospital. If I wish to know if my physician is employed by the hospital, I will ask the physician. I have a right to select my own physician and the right to change any of my physicians at any time.**

Id. ¶ 9 (Emphasis in original).

In both cases, the First District acknowledged the required elements to establish a claim for apparent agency. A plaintiff must plead and prove: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create an appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Delegatto*, 2021 IL App (1st) 200484, ¶ 26; *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 19-21.

"Holding Out" Analysis

The first element of an apparent agency claim is referred to as "holding out," and is satisfied if the hospital holds itself out as a provider of care without informing the patient that the care is provided by independent contractors. *Delegatto*, 2021 IL App (1st) 200484, ¶ 27. The focus of the holding out element is whether the patient knows or should have known that the physician is an independent contractor. *Id*.

The first element of an apparent agency claim is referred to as "holding out," and is satisfied if the hospital holds itself out as a provider of care without informing the patient that the care is provided by independent contractors.

The court in *Delegatto* found that the hospital's consent forms were clear and unambiguous. *Id*. ¶ 47. The court noted that it could have ended its analysis under the second element given the plaintiff's failure to satisfy the first element. *Id*. ¶ 50. In the interest of completeness, however, the court analyzed the remaining arguments. *Id*. In doing so, the court noted that the second element, the "appearance of authority," is frequently grouped with the "holding out" element and are treated as one. *Delegatto*, 2021 IL App (1st) 200484, ¶¶ 27, 50. Therefore, the court recognized that the plaintiff was required to show evidence that the plaintiff's decedent had either actual or constructive notice of the defendant's status as an independent contractor. *Id*. ¶ 55.

The court concluded that the consent forms executed by the plaintiff's decedent on three separate occasions clearly and unambiguously informed her that "all physicians" were independent

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contractors and were therefore sufficient to put her on notice of the surgeon's relationship to Silver Cross. *Id.* ¶ 55. The court further noted that the surgeon's office space was barren, there was no signage on the door, no business cards bearing the name of his practice, and no support staff to receive phone calls or visitors at his office. *Id*. Based on these facts, the plaintiff could not show an appearance of authority because the plaintiff failed to show that plaintiff's decedent was not sufficiently notified of the defendant's independent contractor status. *Id*.

In *Brown*, the court noted the existence of a signed treatment consent form which expressly provided that the physicians on staff at the hospital were not employees or agents of the hospital. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 23-24. In addition, First District noted that the Illinois Supreme Court declared, if "the patient is in some manner put on notice of the independent status of the professionals with who [s]he might be expected to come into contact[,]" the hospital cannot be held vicariously liable. *Id.* (citing *York v. Rush-Presbyterian—St. Luke's Medical Center*, 222 Ill. 2d 147, 182 (2006)).

In *Brown*, the court carefully analyzed the consent forms and concluded that they clearly notified the decedent that the two defendant-physicians were independent contractors, despite plaintiff's arguments that the decedent did not read or understand the consent forms and that the forms were ambiguous. *Brown*, 2021 IL App (1st) 200834-U, ¶¶ 10, 26-28. The court noted that plaintiff signed and initialed on more than one occasion and that the language contained in the consent forms was clear and unambiguous that consulting physicians, including specialists and cardiologists, were not employees of defendant. *Id*. ¶ 44. Furthermore, even though the first paragraph of the consent forms provided that physicians who provide services "may not be employed" by defendant, the court noted that Section 2 inherently and clearly notified the plaintiff's decedent that the physicians were independent contractors when read in its entirety. *Id*. ¶ 26. The court also noted that the consent form placed the burden on the patient to follow up with the physician if there were any questions regarding the physician's employer. Because the plaintiff failed to satisfy the holding out component of her apparent agency claim, the court concluded its analysis of the apparent agency claim, noting that the failure to satisfy the first element renders summary judgment appropriate and there exists no need to address the remaining elements. *Id.* ¶ 45 (citing *Wallace v. Alexian Bros. Medical Center,* 389 Ill. App. 3d 1081, 1085-86 (1st Dist. 2009)).

In *Brown*, the court carefully analyzed the consent forms and concluded that they clearly notified the decedent that the two defendant-physicians were independent contractors, despite plaintiff's arguments that the decedent did not read or understand the consent forms and that the forms were ambiguous. The court noted that plaintiff signed and initialed on more than one occasion and that the language contained in the consent forms was clear and unambiguous that consulting physicians, including specialists and cardiologists, were not employees of defendant.

Conclusion

Brown and *Delegatto* provide us with insight into the courts' focus when analyzing apparent agency claims—particularly with regard to the use of consent forms. While consent forms are not dispositive on the issue of "holding out," as shown in these decisions, they are critical with regard to the issue of notice. Proper wording can appropriately position these claims for summary judgment. Plaintiffs will inevitably have difficulty establishing the holding out element of an apparent agency claim if defense counsel can provide evidence that a consent form, which expressly provides that certain physicians on staff at the hospital are not employees or agents of the hospital, has been executed by the patient. All medical facilities should consider comparing their consents to those used by the facilities in *Brown* and *Delgado.*

Legal Ethics

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An Update on Ethical Issues in the Representation of Multiple Clients

On April 21, 2022, in *McQueen v. Green*, the Illinois Supreme Court held that "so long as a good-faith factual basis exists for a plaintiff's claim of direct negligence against an employer, the plaintiff should be allowed to pursue such a claim in addition to a a claim of vicarious liability." *McQueen v. Green*, 2022 IL 126666, ¶ 43. In so ruling, the Court rejected the argument, and the practice of some courts, that once an employer admits responsibility for its employee's alleged negligence under the law of *respondeat superior*, an injured plaintiff cannot as a matter of law assert claims against the employer for its direct negligence, such as for negligent hiring, negligent supervision, or negligent retention. *McQueen*, 2022 IL 126666, ¶¶ 44-46.

Under *McQueen*, injured plaintiffs will be able to present a greater variety of claims against a greater number of defendants than had been the case before courts that applied the now-obviated rule that precluded claims for direct negligence against employers who agreed to *respondeat superior* liability.
McQueen, then, presents an opportunity to review the ethical issues that can arise in the representation of multiple defendants.

The Illinois Rules of Professional Conduct (Rules) prohibit the representation of a client if it "involves a concurrent conflict of interest." Ill. R. Prof'l Conduct R. (2010) 1.7(a) (eff. Jan. 1, 2010). Rule 1.7(a) defines a "concurrent conflict of interest" as one where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

As for "Special Considerations in Common Representation" of more than one client on a matter, Comment 29 to Rule 1.7 states the following:

> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients,

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> representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

Before *McQueen*, the representation of both an employer and an employee in defense of a claim could generally focus on whether the individual employee whose conduct intersected with the injured plaintiff was negligent. On that point, in most if not all instances, the employer and employee could agree. Only as to whether *respondeat superior* liability should apply, because of factual issues of whether the alleged employee who caused the harm was acting within the scope of his employment, would conflicts of interest and the need for separate counsel for the employer and the employee typically arise. *See Murphy v. Urso*, 88 Ill. 2d 444, 453 (1981).

After *McQueen*, the potential exists for a greater number of conflicts of interest to arise in negligence actions against employer defendants. For instance, an individual employee whose acts or omissions harmed the plaintiff may deny that he was negligent. And his employer may agree. But on a claim for negligent supervision, their interests may diverge. The employer may contend that it properly supervised the employee whereas the employee may insist that he was not properly supervised, giving rise to a conflict of interest between the two.

Separate and apart from *McQueen*, defense counsel should remain mindful of other situations in which the representation of multiple clients may give rise to conflicts of interest. For instance, it is well-settled that a conflict of interest exists between the interests of an insurer and those of the insured where proof of certain disputed facts would take the claimant's case outside the scope of policy coverage. *See Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 198-99 (1976). In cases involving multiple defendants, depending on the policy language, the situation may arise where the defense of one defendant is best served by proof of a set of facts that would take the claimant's case outside of coverage for a different insured. Insurance defense counsel owes each individual insured as its client "the same professional obligations that would exist had the attorney been personally retained by the insured." *Rogers v. Robson, Maters, Ryan, Brumund and Belom*, 74 Ill. App. 3d 467, 472 (3d Dist. 1979). However, defense counsel should not represent one insured in proving a defense that would have the effect of denying coverage to another insured client. Instead, in situations where multiple insureds have adverse interests, each of the insureds is entitled to separate counsel who are independent from the insurer, at the insurer's expense. *See Murphy*, 88 Ill. 2d at 452.

The same can be true in cases where a plaintiff seeks punitive damages against some but not all co-insureds. It is well-settled that conflicts of interest between an insurer and insured can arise in cases where plaintiffs seek both compensatory and punitive damages. *See Nandorf v. CNA Ins. Cos.*, 134 Ill. App. 3d 134, 137 (1st Dist. 1985); *Illinois Municipal League Risk Management Assn. v. Seibert*, 223 Ill. App. 3d 864 (4th Dist. 1992); *Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill. App. 3d 743 (1st Dist. 1997); *Xtreme Prot. Servs., LLC v. Steadfast Ins. Co.*, 2019 IL App (1st) 181501. Regarding a conflict between insurer and its insured, the *Seibert* court explained:

> Although the claims are not mutually exclusive, the [Risk Management] Association could benefit by a finding that Seibert's conduct justifies a punitive damages award. The Association may be required to pay only minimal compensatory damages, while Seibert may be personally liable for a large punitive damages award. If Seibert's conduct is ruled malicious, the Association would not be liable for even the compensatory damages because injuries caused by such acts are excluded from indemnification.

Siebert, 223 Ill. App. 3d at 875; *see also Mobil Oil*, 288 Ill. App. 3d at 756-57 (conflict of interest existed where provable compensatory damages likely could exhaust policy limits, there was potential for large punitive damages award not covered by policy, and insured had interest to settle case before trial but insurer "would have lost nothing by letting the case go to the jury"); *Xtreme*, 2019 IL App (1st) 181501, ¶ ¶ 25, 29 (same). Just as an insurer would be "required ... to relinquish control of its insured's defense when the plaintiff could be prejudiced by the insurer's attorney presenting the case in the best light for the insurer," *Seibert*, 223 Ill. App. 3d at 875, so could defense counsel be required to decline or withdraw from a multiple representation where one insured defendant could be prejudiced by the attorney presenting the case in the best light for another insured defendant.

Defense counsel also should be attuned to any situation where the interests of one insured client may be furthered through the assertion of third-party claims for contribution or indemnity but where such claims are not equally available to all insured clients and may not further the interests of all of them all if asserted by one of them. Cases have held the duty to defend to encompass the assertion of third-party claims for contribution or indemnity which have the effect of seeking to reduce or eliminate the liability of the party asserting them. *See Great Am. E&S Ins. Co. v. Power Cell LLC,* 356 F. Supp. 3d 730, 746 (N.D. Ill. 2018); *Great West Cas. Co. v. Marathon Oil Co*., 315 F. Supp. 2d 879, 882-83 (N.D. Ill. 2003); *Selective Ins. Co. v. Creation Supply, Inc.*, 2017 IL App (1st) 161899-U, ¶¶ 42-43. As the court in *Great West* held:

> 'Defense' is about avoiding liability. Claims and actions seeking third-party contribution and indemnification are a means of avoiding liability just as clearly as is contesting the claims alleged to give rise to liability. A duty to defend would be nothing but a form of words if it did not encompass all litigation by the insured which could defeat its liability, including claims and actions for contribution and indemnification.

Great West, 315 F. Supp. 2d at 882-83. Accordingly, defense counsel may be required to decline or withdraw from a multiple representation if the reasonable assertion of such a third-party claim on behalf of one insured defendant would unfairly prejudice another insured defendant.

These ethical issues for defense counsel can arise in a variety of types of matters. For instance, in medical malpractice actions, plaintiff can assert claims for institutional negligence against hospitals that are separate and apart from claims that a treating physician's services fell beneath the standard of care. *See Studt v. Sherman Health Sys*., 2011 IL 108182, ¶ 21. In the area of municipal liability, plaintiff can assert claims against municipalities under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978) in addition to claims for civil rights violations under 42 U.S.C. §1983 against individual police officers, with the *Monell* claims turning on whether the police officers' actions were caused, in part, by various customs, policies and practices of the municipality. In the area of legal malpractice, a plaintiff who alleges the negligent loss of a claim or defense in a former lawsuit can combine claims against attorneys who are no longer employed by the insured firm with claims against attorneys who remain employed by the firm, where they all worked on the disappointed client's former matter. The attorneys who are no longer with the firm may have a defense where the claim or defense was viable when they left the firm and was lost if at all while on the watch of other attorneys who remain employed with the firm. *See Mitchell v. Schain, Fursel & Burney, Ltd*., 332 Ill. App. 3d 618, 621-22 (1st Dist. 2002); *Land v. Greenwood*, 133 Ill. App. 3d 537, 540 (4th Dist. 1985); *see also Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 755 n.3 (2d Dist. 2008). These are only a few examples.

Regarding the possibility of waiver of a concurrent conflict of interest, Rule 1.7(b) states:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent.

As for "informed consent," Rule 1.0(e) defines it as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could adversely affect that client's interests. *In re Cobb*, 2016PR00066, M.R. 29225 (May 24, 2018). The attorney must ensure that the client knows and understands the conflict, the threat it poses to the attorney's objectivity and any other considerations material to the client's decision whether to accept representation from that attorney. *In re Barrick*, 87 Ill. 2d 233, 239 (1981).

Accordingly, in cases where a waivable conflict of interest exists, whether defense counsel has obtained informed consent from multiple clients to permit common representation may depend on the extent to which defense counsel has complied with its ethical obligations under Rules 1.2, 1.4 and 1.5.

Under Rule 1.2(a) "a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult

— Continued on next page

with the client as to the means by which they are to be pursued." Rule 1.4 imposes an affirmative duty on lawyers to take the steps necessary to keep clients informed about their cases so the client can make intelligent choices as to the direction of the litigation. *See also In re Smith*, 168 Ill. 2d 269, 282-83 (1995). Rule 1.4(a) states that a lawyer shall "keep the client reasonably informed about the status of the matter," Rule 1.4(a)(3), "promptly inform the client of any decision or circumstance with respect to which the client's informed consent ... is required," Rule 1.4(a)(1), and "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." Rule 1.4(a)(5). In addition, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b).

It is in light of these Rules that defense counsel should evaluate and notify the affected clients whether any possible conflict of interest exists in the representation of multiple insureds on a matter, whether under *McQueen* or otherwise. To facilitate the consideration within your own firm of your own firm's legal and ethical obligations to its clients, it can be useful to consult with an outside ethics counsel or an internal general counsel who has the role and function of advising your firm as a client. Regardless of whether such conferrals about the law firm's own ethical and legal obligations to its clients occur internally or externally, they should remain protected by the law firm's own attorney-client privilege. *See Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 47.

Medical Malpractice Update

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The Use of Focus Groups and Mock Trials

We all know the sinking feeling in the pit of our stomachs when a set of facts fraught with question marks comes across our desk. A case that presents a situation so unique that no theme or strategy seems to provide cohesion. A case where a circumstance changes after most of discovery has been completed and fundamentally alters the litigation. Or just a unique case that makes identifying the inherent biases in the jury box seem impossible. In all of these situations, the use of focus groups and/or mock trials can provide you with vital information. It is worth noting that plaintiffs' attorneys across the country have been using focus groups and mock trials to develop their cases for years.

Take, for example, a case where a doctor has been accused of overprescribing narcotics and mood-altering medications in order to induce patients to coming to his office so that he may assault them—through both medical malpractice claims as well as intentional torts. That one sentence has implications for coverage, jury verdicts/settlements, defense strategy and juror attitudes that could all conflict. This will require insight into how potential jurors will handle information outside the normal realm of evidence presented in a medical malpractice case. In situations like these, the use of focus groups and mock trials provide valuable opportunities to gain insight into the minds of jurors.

What is the Difference Between a Focus Group and a Mock Trial?

Lawyers often use the terms "focus group" and "mock trial" interchangeably, but doing so shortchanges the benefits provided by each. A focus group is a panel or panels of individuals that as closely as possible resembles the makeup of your jury pool. Once assembled, the panel is asked general questions about the issues, themes, and specific factual circumstances in a particular case as well

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as their own conceptual biases that can affect your litigation. On the other hand, a mock trial is a group of individuals closely resembling the likely makeup of your jury pool that hears actual trial presentations regarding the evidence in your case and is asked to come to a decision regarding liability.

The primary difference is that a mock trial "jury" will actually weigh the evidence and determine liability, whereas a focus group provides information on the individuals' emotional and psychological reactions to elements of the case without considering them in the setting of jury deliberation. Many believe these definitions to differ only in semantics, but the role of each is markedly distinct, and the timing of when to use each avenue of research can make a significant difference in your ability to determine litigation strategy. Finally, the preparation and presentation required for each by the attorneys also solidifies the distinction between the two. Based on the circumstances of your particular case, one or both of these research avenues can provide valuable information about jurors that will radically improve your likelihood of a positive outcome for your client.

Exploration: Focus Groups Help Shape Themes and Discovery Strategy

Early in the case, either before or immediately after party depositions, a focus group to study unique factual issues and potential juror biases allows the defense team the ability to shape their future discovery and motion practice to better develop their own strategy with the potential jury pool in mind. The defense team can learn whether certain facts that will come out in discovery will inhibit the jury from hearing other evidence. More importantly, a focus group allows the defense to understand what biases and ingrained ideas jurors will bring into the jury box that will affect how they see the case. All of these things help the defense team identify obstacles—known or surprising—to achieving the best outcome for our clients.

For a focus group, attorneys need to present facts in a general way, without argument. The point is not to explore whether potential jurors would find liability, but rather to understand *how* they are evaluating these issues. The primary driver is to learn what issues or facts or elements matter more than others, and why they matter. Doing so allows you to tailor the litigation themes, develop more detailed demonstrative exhibits, develop a plan for witness preparation, and generally set your client and team up for success at trial.

Correlation: Mock Trials Aid in Honing Trial Presentation

A mock trial, usually most effectively done once a significant portion of expert discovery is underway or complete, allows the defense team the opportunity to observe how their chosen themes, witnesses, and strategies correlate to outcomes. Jurors are required to listen to and consider trial-ready openings, evidence, and closing arguments and then make liability determinations using real-world jury instructions and verdict forms from the jurisdiction to render verdicts. Observing not only how the evidence but also the arguments, exhibits, and stylistic demeanor of the attorneys affects jurors enables the defense to learn where jurors' biases are influencing their understanding of the evidence and whether those effects are likely to lead to a favorable outcome for our clients.

Many will ask if a mock trial can predict an outcome. The answer is a resounding question mark, and one much better left to the cited scientists who study juries all over the country. From the perspective of a litigator, a mock trial enables you to evaluate not only how jurors will consider the evidence but also how your own presentation will color the process. In so doing, you will gain a better understanding as to how potential juries will treat these issues. For this case certainly, but more importantly, for the next one.

Conclusion

Utilizing the correct research vehicle at various time frames allows litigators to identify and remedy problems with overall strategy as well as witness and trial presentation about which we simply would not know without these tools. Several companies all over the country provide these services, and you will need to speak with the professionals at these organizations to pinpoint the best option for your individual case as well as to discuss the important logistics and issues that concern all clients—cost, timing, efficacy, goals, etc. The more in depth the discussion you have with the provider, the more effective your research will be in providing vital information about your case. For many cases, the information gleaned using these tools can open our eyes and ensure that we are keeping our focus on our ultimate audience – the jury.

Technology Law

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Guidelines for Compliance with State Privacy Regulations for Small and Mid-Sized Companies

In the last issue, we discussed how there currently is no single framework at the federal level controlling the collection and storage of data. Rather, courts and federal agencies, such as the Federal Trade Commission (FTC), have filled in the role of regulating small portions of U.S. data collectors. Unlike the federal level, several states have already passed laws on how data collectors may collect, store, and use data. Unfortunately, states that have implemented data privacy laws are not uniform across the U.S. While a large corporation may have the resources to decipher and compile all state privacy laws, many small and mid-sized businesses struggle to comply with the various state laws.

California Privacy Laws

Of all the states' privacy laws, California privacy laws are the most comprehensive. California enacted several laws that govern how the data collected from California residents is collected, stored, and used. For example, California enacted the California Consumer Privacy Act (CCPA), Cal. Civ. Code § 1798.100, which provides similar data protections as the European Union's General Data Protection Regulation (GDPR). The CCPA gives consumers the right to access, delete, and share their personal information that is collected by businesses. However, this law only applies to for-profit entities that do businesses in California that meet any of the following: (1) have a gross annual revenue of $25 million; (2) buy, receive, or sell personal information of 50,000 or more consumers, households, or devises; or (3) derive 50% or more of their annual revenue from selling consumers' personal information.

California also passed the California Online Privacy Protection Act (CalOPPA), Cal. Bus. & Prof. Code §§ 22575, 22579, which requires privacy policies to include information on how operators must respond to web browsers' "do not track" signals or similar mechanisms that track a user. Under CalOPPA, data collectors are required to also disclose the following: (1) the categories of personally identifiable information (PII) collected through the website; (2) the categories of third-party entities with whom the operator may share PII or other personal information; (3) a description of the process, if maintained, for a customer to review and request changes to any PII; and (4) whether other parties may collect PII about a user's online activities over time and across different websites when a user utilizes a website. *See* Cal. Bus. & Prof. Code § 22575.

Although California's privacy laws only protect the personal information of California residents, California has the most comprehensive set of data privacy laws. Thus, reviewing California privacy laws may provide guidance on how businesses should collect, store, use, and protect personal information of

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residents where there is minimal or no state privacy laws.

Illinois Privacy Laws

Similar to California, Illinois has also enacted several data privacy laws, but Illinois is unique in that it passed the Biometric Information Privacy Act (BIPA), 740 ILCS 14 *et seq*., which regulates the retention, collection, disclosure and destruction of biometric information in the possession of private Illinois businesses. BIPA defines biometric information as any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Pursuant to BIPA, a biometric identifier is defined as a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Under section 15(b), no private entity may collect or obtain a person's or a customer's biometric identifier or biometric information unless it first: (1) informs the person in writing that biometric identifier or biometric information is being collected or stored; (2) informs the person in writing the specific purpose and length of time for which this information is being collected, stored, and used; and (3) receives a written release from the person. 740 ILCS 14/15(b). BIPA also provides a private cause of action against any entity that fails to notify persons before their biometric information is collected and stored. *See* 740 ILCS 14/20. Notably, to bring a private cause of action under BIPA, a plaintiff need not allege an actual injury or adverse effect beyond a violation of his or her rights under BIPA. *See Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186. Although not all businesses may be affected by BIPA, businesses should be cognizant of the types of personal information that it collects, stores, or uses, especially any that relates to biometric information.

Other State Privacy Laws

Other states have started to implement their own data privacy laws in order to protect their citizens' personal information and to regulate how data collectors collect, store, or use this information; however, not all entities are subject to a state's privacy laws. For example, Virginia passed the Virginia Consumer Data Protection Act (CDPA), VA Code Ann. § 59.1-575 *et seq*., which goes into effect on January 1, 2023. Similar to the CCPA, the CDPA applies to entities that conduct business in Virginia or produce products or services that target Virginia residents and that either (1) control or process personal data of at least 100,000 consumers during a calendar year or (2) control or process personal data of at least 25,000 consumers and derive over 50% of gross revenue from the sale of personal data. *See* Va. Code Ann. § 59.1-576. Similarly, Colorado passed the Colorado Privacy Act (CPA), Colo. Rev. Stat. Ann. § 6-1-1301 *et seq.*, which goes into effect on July 1, 2023. The CPA applies to entities that conduct business in Colorado or produce products or services that target Colorado residents and that either (1) control or process personal information of at least 100,000 consumers per calendar year; or (2) derive revenue from the sale of personal information and control or process the personal information of at least 25,000 consumers. *See* Colo. Rev. Stat. Ann. § 6-1-1304. Here, Virginia and Colorado have slightly different criteria on which entities are subject to their respective privacy laws. Thus, if a business collects, stores, or uses personal information of citizens in a state that has data privacy laws, it is important to first determine whether a business is subject to that state's privacy laws.

Conclusion

Not all states have their own data privacy laws; however, more states are beginning to consider implementing such laws to protect the personal information of their citizens. As a result, if a business collects data from consumers in a state that does not have any privacy laws, it might be beneficial for that business to look to state privacy laws like those in California for guidance on how to collect that data. It is also important for businesses to ensure that they actually fall within the scope of a state's privacy laws. Some states have various criteria that must be met for an entity to be subject to a state's privacy law; however, there are other state statutes, such as Illinois's BIPA statute, with no such requirements. Because not all state privacy laws are uniform across the country, businesses must be mindful of each state's privacy laws and be cognizant that states with no privacy laws may in the future pass such laws. Currently, the legislatures of Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, and Pennsylvania are considering their own data privacy statutes.

In our next article, we will discuss how industry standards relating to privacy may affect small to mid-sized businesses.

Property Insurance Law

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Declaratory Judgment Actions in the Appraisal Process—Timing is Everything

When it comes to declaratory relief in property insurance claims, timing is of a paramount importance. If an insurer initiates a declaratory judgment action too early, you risk drawing a ripeness argument. In contrast, if you file too late after a coverage dispute arises, you can find yourself staring down a mootness challenge and defending a breach of contract action instead of prosecuting a declaratory proceeding. A recent opinion out of the Appellate Court of Illinois, Third District held that a declaratory judgment action is not the proper vehicle to review a coverage question where an insurer first denied an insured's request for appraisal and only after the declination did the insurer seek declaratory relief on the issue of appraisability. *Travelers Indem. Co. of Am. v. Townes of Cedar Ridge Condo. Ass'n,* 2022 IL App (3d) 200542. As discussed hereafter, the decision offers guidance to coverage counsel—if an insurer wants confirmation of the correctness of its position that a dispute is not subject to appraisal, it should file for declaratory relief prior to rejecting a request for appraisal. *Id*. ¶ 17.

In *Townes of Cedar Ridge*, Travelers filed a declaratory judgment action against Cedar Ridge, a condominium association, seeking a declaration that the appraisal provision in the policy did not encompass and extend to the scope of the claim dispute, and that it properly denied the insured's request for appraisal. *Id*. ¶ 1. Travelers issued a property insurance policy to Cedar Ridge that contained a standard appraisal provision, which allowed either party to make a demand for appraisal of the claim if there is a disagreement on the value of the property or the amount of loss. *Id*. ¶ 3. While the policy provided coverage for direct physical loss, it also excluded from coverage loss caused by wear and tear and for deterioration. *Id*.

Cedar Ridge filed a claim under its policy with Travelers for hail damage to its buildings as a result of a storm. *Id*. ¶ 4. Travelers inspected the properties and determined that while some damage was caused by hail, most of the damage resulted from wear and tear, which is an excluded cause of loss and therefore not covered under the policy. *Id*. Travelers issued a check to Cedar Ridge for the amount it determined to be covered, approximately $17,000, and denied the remainder of the claim. *Id*.

Shortly thereafter, Cedar Ridge provided Travelers with an estimate for $2,078,657.08 to repair the damage it claimed was caused by the hailstorm, and demanded appraisal of its claim under the policy to resolve the dispute as to the amount of loss. *Id*. ¶ 5. Travelers rejected the insured's demand for appraisal, contending that because the dispute was over coverage, not the amount of loss, the appraisal provision did not apply. *Id*; *see also Lytle v. Country Mut. Ins. Co.*, 2015 IL App (1st) 142169, ¶ 27 (finding that appraisal is not appropriate for issues of insurance coverage or contract interpretation). After Travelers rejected the policyholder's appraisal demand, it filed a declaratory judgement action concerning the scope of the appraisal provision. The trial court granted Cedar Ridge's motion to dismiss the complaint, finding that Travelers forfeited its ability to seek declaratory relief on the issue of appraisability when it rejected the insured's appraisal demand. *Townes of Cedar Ridge,* 2022 IL App (3d) 200542, ¶ 6.

Travelers appealed, arguing that its dispute with Cedar Ridge "was an insurance coverage dispute not amenable to the appraisal provision" and that the

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"declaratory judgment action is an appropriate means to resolve it." *Id*. ¶ 8. In other words, Travelers asserted that there was an actual dispute between the parties, and a declaratory judgment action was the proper means to resolve the dispute. *Id*. Under the statute, a declaratory judgment proceeding allows the court to make binding declarations of rights in cases where an actual controversy exists. 735 ILCS 5/2-701(a). However, the court found once Travelers denied the request for an appraisal, there was no longer an actual controversy between the parties. *Townes of Cedar Ridge,* 2022 IL App (3d) 200542, ¶ 11.

Travelers first claimed that, because Cedar Ridge did not withdraw its appraisal request after Travelers denied it, the coverage issues were left in limbo and "there exists an actual controversy about where the dispute should be resolved, either through the appraisal process or by some other procedure." *Id*. ¶ 12. The court disagreed with Travelers because the appraisal request was explicitly denied, and as such, there was no reason for Cedar Ridge to withdraw the request, as no further action was required. *Id*. Despite Travelers assertion that a declaration would "guide the parties' future conduct regarding the appraisal process," the court found that no actual controversy existed because Travelers denial of the appraisal request "terminated any controversy regarding its applicability." *Id*. ¶ 13. Essentially, if Travelers wanted to seek guidance regarding the appraisal provision, it should have done so before it denied the appraisal request. *Id*.

To support its position that the declaratory action was timely, Travelers compared its conduct to that of an insurer who rejects its duty to defend and later seeks a declaration that its denial was proper. *Id*. ¶ 14. Travelers relied on *L.A. Connection v. Penn-America Insurance Co.*, 363 Ill. App. 3d 259 (3rd Dist. 2006), which held that where an insurer denied the insured's tender of defense and the insured then sought declaratory relief, the insurer discharged its duty to defend by filing a "cross-claim for declaratory relief in response to the declaratory judgment action filed by the insured." *See Townes of Cedar Ridge,* 2022 IL App (3d) 200542, ¶ 14 (citing *L.A. Connection*, 363 Ill. App. 3d at 264). The court readily distinguished *L.A. Connection*, as the issue there was whether the insurer was estopped from asserting policy defenses due to its denial of its duty to defend, and the issue in *Cedar Ridge* was whether a declaratory judgment action is the proper vehicle to review Travelers' conduct. *Townes of Cedar Ridge*, 2022 IL App (3d) 200542, ¶ 15. Additionally, the court noted that in *L.A. Connection*, the insured initiated the declaratory action, but in *Cedar Ridge*, it was Travelers who initiated the proceedings. *Id*. Finally, unlike a duty to defend case, where the underlying claim would remain pending, "Travelers' denial of the appraisal request foreclosed any further action based on the appraisal provision." *Id*. It was Travelers who ended the dispute and then sought confirmation that its conduct was appropriate. *Id*.

Instead, the appellate court aligned *Townes of Cedar Ridge* with *Eyman v. McDonough District Hospital*, 245 Ill. App. 3d 394 (3rd Dist. 1993). In *Eyman*, a doctor sought a declaration that she properly terminated a recruitment agreement. *Id*. at 395-96. The *Eyman* court affirmed dismissal of the declaratory judgement action because the doctor had terminated the contract before seeking a determination that it was proper to do so, and that "the doctor was seeking a declaration of nonliability for past conduct, which was not a proper subject for a declaratory judgment complaint." *Townes of Cedar Ridge,* 2022 IL App (3d) 200542, ¶16 (quoting *Eyman*, 245 Ill. App. 3d at 396).

The court in *Townes of Cedar Ridge* held that, like the doctor in *Eyman*, Travelers terminated the appraisal procedure, and then sought a declaration that from the court to approve its conduct. *Townes of Cedar Ridge,* 2022 IL App (3d) 200542, ¶ 17. The court made clear that "a declaratory judgment action is not the proper vehicle to review past conduct." *Id*. If Travelers wanted confirmation of its position that appraisal, as demanded by the insured, was not the appropriate vehicle to resolve the dispute over the amount of loss, Travelers should have filed a declaratory judgment action seeking guidance of whether the appraisal provision applied to the claim. *Id*. Instead, Travelers denied first and sought guidance later. Therefore, the trial court did not err when it dismissed Travelers declaratory judgment action. *Id*.

Ultimately, the holding in *Townes of Cedar Ridge* serves as an important reminder that timing is everything when it comes to questions of coverage surrounding time-sensitive policy provisions like an appraisal process. The decision stands for the proposition that, as it pertains to first-party insurance coverage disputes, a declaratory judgment action is not the proper device to seek approval for past conduct. Instead, where a question of coverage exists, it is proper practice to first seek a declaratory judgment, while proceeding to appraisal under a reservation of rights, and then, based on the outcome of the declaratory action, seek a stay, termination or modification of the pending appraisal proceeding.

Practice Development

Glenn A. Klinger
Freeman Mathis & Gary LLP, Chicago

Intersection of Litigation and Insurance: Common Policies

This is the second column in a series discussing the role of insurance in defense litigation. The first column touched on several basic concepts like general classes of insureds (*e.g.*, named insured, insured, or additional insured), first-party versus third-party insurance, and the separate, but often blurred, duties to defend and indemnify. Generally, insurance is the assumption of another's risk. Risk averse individuals and entities purchase insurance to substitute a fixed cost, *i.e.*, a premium, for the risk of incurring a larger cost, *i.e.*, paying to defend against a lawsuit or satisfy a judgment. *EBCF Enterprises, Inc. v. Erie Ins. Exch.*, No. 20 C 5476, 2021 WL 5280948, at *6 (N.D. Ill. Nov. 12, 2021) (applying Illinois law). Insurance carriers accept certain kinds of risk and, in turn, spread it among a pool of many policyholders to minimize the insurance carrier's overall risk. *Adams v. Plaza Fin. Co., Inc.*, 168 F.3d 932, 934 (7th Cir. 1999) (applying Illinois law). That is one reason there are many different lines of insurance available to the risk averse: different lines protect against different kinds of risk.

The Illinois Insurance Code provides for and regulates classes of insurance: life, accident and health (Class 1); casualty, fidelity, and surety (Class 2); and fire and marine insurance (Class 3). 215 ILCS 5/4. Classes 2 and 3 include liability and property policies and are often an integral part of defense litigation. When defending an allegedly negligent driver in a rear-end collision case, defense counsel is usually retained by an insurance carrier. The defense attorney's fees are paid from the liability section of the policy that covers the insured for property damage and bodily injury liability to third persons after an accident. The insured defendant driver may also have property or first-party coverage under that policy for personal injuries/medical expenses (sustained by the insured), collision (to fix the insured's own auto), and comprehensive coverage (for events like flooding, theft, and fire). In Illinois, uninsured and underinsured motorist coverage is statutorily required. The intricacies of those coverages are best explored separately.

Beyond auto policies, though, some of the more common liability and property policies are set out here. In general, liability policies provide third-party coverage for the insured's acts and omissions that cause loss or damage to third-parties and/or their property. Examples include:

Homeowners: protects the insured if someone other than a family member residing in the home is injured on the residence premises or if the insured causes unintentional damage to property of another. *Note*: the injury typically does not have to occur on the insured premises.

Commercial General Liability: covers businesses when a person is injured on the premises or property damage is caused because of the operation of the business. Common claims include slip and falls, customer injuries, and libel/slander lawsuits (if personal injury coverage is included).

Professional Liability: covers professionals and businesses (accountants, lawyers, physicians, etc.) for claims by clients or customers based on negligent errors and omissions and/or wrongful acts. Usually, these policies are written on a claims-made basis, which means coverage is only provided for claims made during the policy period.

Workers' Compensation/Employer's Liability: pays for medical expenses and partial lost wages from work-related injuries and illnesses and provide the employer with defense and/or indemnity if the employer is blamed for an employee's injury or illness.

Employment Practices Liability: protects companies against claims or lawsuits by employees, former employees, and employment candidates based on some conduct of the

About the Author

Glenn A. Klinger is Senior Counsel at *Freeman Mathis & Gary LLP*, where he concentrates his practice on insurance coverage disputes involving commercial and professional policies. He also litigates commercial and bad faith cases, and advises clients on issues related to risk management and transfer.

> Generally, insurance is the assumption of another's risk. Risk averse individuals and entities purchase insurance to substitute a fixed cost, *i.e.*, a premium, for the risk of incurring a larger cost, *i.e.*, paying to defend against a lawsuit or satisfy a judgment. Insurance carriers accept certain kinds of risk and, in turn, spread it among a pool of many policyholders to minimize the insurance carrier's overall risk.

employer like harassment, discrimination, or wrongful termination.

Property policies typically provide first-party coverage for damage to the insured's own property, and include:

Commercial Property: insures against damage to a company's buildings, contents, and occasionally personal property of others due to a covered cause of loss like fire, explosion, windstorm, or lightning. May also include business income and extra expense coverage, equipment breakdown, and/or ordinance and law coverage.

Business Income: commercial insurance for loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of its operations. Coverage applies to loss suffered during the time required to repair or replace the damaged property and may apply to loss for a specified number of days after repairs are completed. This is also known as business interruption coverage.

Builder's Risk: protects property and construction materials during a construction or renovation project. These are typically all-risk policies, which means coverage for property damage caused by anything *except* what is specifically excluded in the policy. Typically purchased by building owners or contractors where required by contract.

Finally, package policies provide more than one kind of coverage in the same policy, *e.g.*, the Business Owners Policy (BOP) and Commercial Package Policy (CPP). The BOP includes coverages for general liability, property, and business interruption, while the CPP will include those coverages, plus the insured can pick and choose other coverages like vehicle/auto, errors and omissions, employment practices liability, pollution liability, and etc.

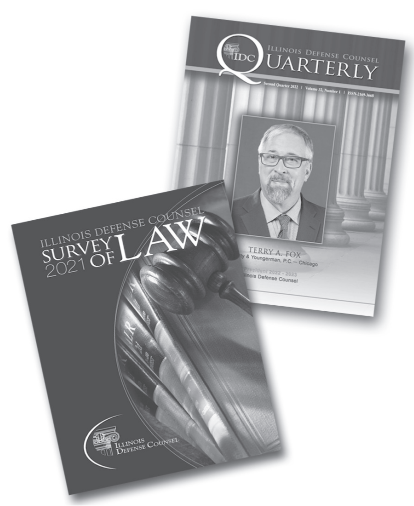
IDC Launches Print Opt-Out for IDC Publications

In response to member feedback, IDC has launched a print opt-out option for all members that receive IDC publications (*IDC Quarterly* and *IDC Survey of Law*) in hard copy. Members that prefer not to receive IDC publications in print may now update their preferences to receive the publications in electronic-only format.

Members who opt out of printed publications will continue to have full access to all IDC content as soon as it is published online.

To opt out of print publications, members should 1) log in to www.IDC.law, 2) select "Edit Bio" and 3) select "Publication Preference—ELECTRONIC Publications Only" under the Additional Information section. (Note that all member preferences are defaulted to PRINT Publications Only. You will only need to update your profile if you would like to receive IDC publications electronically.)

If you have questions about IDC publications or opting out, please contact IDC Executive Director Sandra Wulf at sandra@idc.law.



Association News

IDC Annual Meeting & Awards Luncheon

IDC Officers and Directors Elected, Appointed

John F. Watson of *Craig & Craig, LLC* in Mattoon was elected 2022-2023 IDC Secretary/Treasurer and to a position on the Executive Committee at the Annual Meeting held on June 24, 2022. Mr. Watson will move up the Executive Committee ladder to become president in June 2027.

Other officers on the Executive Committee include President **Terry Fox**, *Flaherty & Youngerman, P.C.*, Chicago; President Elect **Tracy Stevenson**, *Law Office of Tracy Stevenson, P.C.*, Chicago; First Vice President **Denise Baker-Seal**, *Brown & James, P.C.*, Belleville, and Second Vice President **R. Mark Cosimini**, *Rusin & Maciorowski, Ltd.*, Champaign.

The following members were elected to three-year terms on the IDC Board of Directors:

Adam C. Carter, *Esp Kreuzer Cores LLP*, Wheaton; **Steve Grossi**, *Yvonne M. Kaminski & Associates*, Chicago; **Meghan Kane**, *Baker Sterchi Cowden & Rice LLC*, Belleville, **Glenn Klinger**, *Freeman Mathis & Gary LLP*, Chicago.

Joe Bleyer, *Bleyer & Bleyer*, Marion was appointed to serve as a Director.

At their July 2022 Board Meeting, the Board of Directors appointed **Erica Longfield**, *Allstate*, Chicago as a Director and **Ian Russell**, *Lane & Waterman, LLP*, Davenport, IA and **Eugena A. Whitson-Owen**, *Zurich North America*, Schaumburg as Directors at Large.

DRI Recognizes Beasley

Laura Beasley, *Baker Sterchi Cowden & Rice LLC*, Belleville, was recognized by DRI Chief Executive Officer Dean Martinez, with the DRI Exceptional Performance Citation. This citation recognizes Ms. Beasley for supporting and improving the standards of education of the defense bar and for contributing to the improvement of the administration of justice in the public interest.

Distinguished Member Award Presented to Untress L. "Trez" Quinn

Untress L. "Trez" Quinn of *Armstrong Teasdale LLP* in Edwardsville was honored with the Illinois Defense Counsel (IDC) 2022 Distinguished Member Award. The award was presented during the organization's Annual Meeting, held on June 24, 2022.

"Trez Quinn has been essential at advancing the IDC Diversity and Inclusion efforts. Mr. Quinn ensured that even during COVID, the Illinois Defense Counsel did not waiver in the strategy to promote an organization committed to serving all members of the defense bar. IDC and the legal profession are fortunate to have such a dedicated advocate, which is why he is being recognized by the Distinguished Member Award," said IDC President Laura Beasley.

Mr. Quinn commented: "I am humbled and honored to receive such a recognition. In order to make change, one cannot sit back idle or satisfied. You have to put your words and beliefs into action. I believe I have a responsibility and obligation not only to my family, myself, and personal community, but also to my professional community, to do my part to make circumstances better for all. I understand there were those who came before me who did just that, and I stand on their shoulders. Now it's my turn to fulfill my obligation."

Untress L. "Trez" Quinn is a partner and seasoned trial lawyer at Armstrong Teasdale, focusing his practice on the defense of medical malpractice and other catastrophic loss lawsuits. He has defended multiple complex litigation cases in both state and federal courts involving civil rights, product liability, medical malpractice and wrongful death claims. He serves as the Diversity Committee Chair for the Illinois Defense Counsel. Mr. Quinn has been recognized by Leading Lawyers℠, National Black Lawyers Top 100, and received the NAACP's 54th Freedom Fund Awards for Excellence in Law.

Glenn Klinger Receives Rising Star Award

Glenn Klinger of *Freeman Mathis & Gary LLP* in Chicago is the 2022 recipient of the Illinois Defense Counsel (IDC) Rising Star Award. The award was presented during the organization's Annual Meeting, held on June 24, 2022.

"I am pleased to accept the 2022 Rising Star Award and grateful to be included among such distinguished past recipients. I never imagined that my involvement with IDC would reach the level it has today, which is a testament to the organization's strong leadership and commitment to practice development. It has been a pleasure to serve the membership and I am excited for many more years of service," said Mr. Klinger.

"Glenn Klinger was instrumental at putting forth our new A to Z Litigation Academy allowing IDC to give their members an interactive academy on the day-to-day practice of law in our new remote world. Glenn's drive and ability to think outside the box, is why he is truly a rising star," commented IDC President Laura Beasley.

Glenn Klinger is an attorney at Freeman Mathis & Gary LLP, where he counsels companies navigating risk and insurance across a number of industries like construction, professional services, and transportation. He provides opinion letters and claim review of commercial and professional lines of insurance and advises companies on effective risk avoidance and transfer. Glenn handles contested coverage disputes, bad faith claims, alternative dispute proceedings, and serves as monitoring counsel. A graduate of Northern Illinois University College of Law (J.D., Cum Laude), Glenn received the Award for Outstanding Contribution to Trial Advocacy for his class. He remains actively involved by helping students learn evidence and develop their own advocacy style.

Steve Grossi Named IDC Volunteer of the Year

Steve Grossi of *Yvonne M. Kaminski & Associates* in Chicago has been named the 2022 Volunteer of the Year by the Illinois Defense Counsel. Mr. Grossi was recognized for his many contributions to the IDC.

"In an organization built on volunteers, it is an honor to be considered the IDC Volunteer of the Year. I am thankful for the many IDC members whose efforts

— Continued on next page

inspire my own and foster a collaborative and supportive environment. I am consistently impressed by the high-quality work that is a hallmark of IDC writings for the legal community and advocacy regarding the important legal issues in Illinois. It is a true privilege to represent the defense bar, and I am grateful for both this recognition and the opportunity to work with such an esteemed group of defense attorneys," said Mr. Grossi.

IDC Executive Director Sandra Wulf remarked, "Our volunteers contribute to the association in so many ways. Steve volunteers at every opportunity —generously giving his time, energy, enthusiasm, and expertise to help his fellow IDC members and the defense community at large. Whether he is sharing his expertise or working through our Board and committees to improve the defense community, Steve is an indispensable member of the association. I am very happy to recognize Steve for all that he contributes."

Steve Grossi is an attorney with Yvonne M. Kaminski and Associates in Chicago. He is an experienced trial attorney with a litigation practice focused on the defense of automobile negligence, premises liability, and general negligence personal injury matters. Steve graduated from the University of Illinois at Urbana-Champaign, where he earned his J.D. and his B.A with a double major in economics and psychology. He is a Chartered Financial Consultant, and a Chartered Property and Casualty Underwriter. Steve serves on the IDC Board of Directors, chairs the IDC Tort Committee, and contributes to several other committees and projects.

Jennifer L. Maloney Receives 2022 President's Award

Jennifer L. Maloney of *Baker Sterchi Cowden & Rice LLC* was honored by 2021-2022 Illinois Defense Counsel (IDC) President Laura Beasley with the IDC President's Award.

In honoring Ms. Maloney, President Beasley remarked, "Jennifer Maloney and I have been practicing law together for years. When I left the prosecutor's office to join the civil defense world is when we first met, and we have had each other's backs ever since. I am able to always count on her hash out strategy of a case, collaborate on arguments, and late-night chats regarding issues with opposing counsel. I am lucky to have Jennifer as a partner as she is an amazing attorney, person, and my best friend."

"I am honored to receive the President's Award from the IDC and especially from Laura Beasley. Laura has been a close friend and colleague for many, many years. It has truly been an honor to support her endeavors to push the defense bar forward in progressive and relevant ways, and to always advocate for civility in a practice that sometimes forgets the virtue," said Ms. Maloney.

Jennifer L. Maloney is an attorney with Baker Sterchi Cowden & Rice LLC in St. Louis. She has spent her career advocating for businesses and insurance companies, primarily in the areas of premises liability, product liability, personal injury, and transportation. She is also experienced in toxic tort, pharmaceutical liability, construction, and nursing home litigation. In addition, Jennifer often is asked to serve as local counsel in complex commercial and class action litigation, as well as serve as an arbitrator in UI/UIM claims.

— Continued on next page

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Welcome

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

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La'Rie Suttle — Law Student, *DePaul University College of Law*
Eli B. Vine — *Clausen Miller PC*, Chicago
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MAXIMIZING MEDIATION IN COOK COUNTY
November 10, 2022
Pinstripes, Oak Brook

IDC Judicial Reception – Metro East
















IDC/ITLA Judicial Reception – Chicago

Member-Get-A-Member Program

We are so very thankful to the following IDC members who helped recruit new members to the IDC over the past year.

Denise Baker-Seal — *Brown & James, P.C.*
Tucker Blaser — *Brown & James, P.C.*
Donald Patrick Eckler — *Freeman Mathis & Gary LLP*
Glenn Klinger — *Freeman Mathis & Gary LLP*
Tyler Pratt — *Heyl, Royster, Voelker & Allen, P.C.*
Patrick Stufflebeam — *Tressler LLP*
Bob Varney — *Robert T. Varney & Associates*

We would also like to congratulate our Member-Get-A-Member Drawing winners:

Grand Prize Winner
Tyler Pratt — *Heyl, Royster, Voelker & Allen, P.C.*

Prize Winners
Tucker Blaser — *Brown & James, P.C.*
Donald Patrick Eckler — *Freeman Mathis & Gary LLP*
Bob Varney — *Robert T. Varney & Associates*

THE IDC MONOGRAPH:

The Element of Proximate Cause in a Personal Injury Lawsuit: Analysis, Complicating Factors, and Changing Jury Instructions

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The Element of Proximate Cause in a Personal Injury Lawsuit: Analysis, Complicating Factors, and Changing Jury Instructions

Introduction

The element of proximate cause in a personal injury case is analyzed, assessed, and argued at all stages of the litigation. It is contemplated by both sides at the time a claim is realized, at the pleadings stage of a lawsuit, while shaping and conducting discovery, during dispositive motions, and at trial. To be successful, a plaintiff must prove that the actions of the defendant, who owes that plaintiff a duty, must be sufficiently related to the plaintiff's injuries such that the law considers that defendant to have caused the injuries in a near or immediate and related manner. If the defendant's actions or omissions are seen to be too remote to the injuries, then those actions or omissions are not a proximate cause of the injuries. While the term "proximate cause" sounds as though it is easily definable, it nevertheless is the element in a lawsuit that can cause both plaintiff and defense attorneys significant consternation. This Monograph discusses the current status of Illinois law related to the element of proximate cause, including changes in jury instructions and developments in case law, as well as alternate arguments and defenses that defendants can make to show that their actions were not the cause of the plaintiff's alleged injuries and damages.

Proximate Cause and Jury Instructions

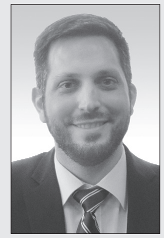
Most litigation attorneys agree that the subject of proximate cause is one

About the Authors

C. William Busse, Jr. is the President of the law firm of *Busse & Busse, P.C.* He has more than 33 years of legal experience handling civil jury trials and appeals. Mr. Busse has concentrated his practice in the defense of tort and insurance coverage litigation. He has handled hundreds of personal injury and wrongful death cases in various Illinois venues, including automobile, trucking, premises liability, product liability, aviation and construction injury claims, as well as fire and explosion and property damage claims. Mr. Busse served on the Board of Directors of the Illinois Defense Counsel from 2002 to 2014 and returned in 2018 to serve again and is a co-author of, *The 50 Year History of the IDC*.

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.

Andrew C. Corkery is of counsel at *Pitzer Snodgrass P.C.* in St. Louis. His practice concentrates on defense of transportation and medical malpractice cases. He is a *cum laude* graduate of St. Louis University School of Law. He is Vice Chair of the IDC Civil Practice Committee and serves as a member of the IDC Amicus committee.



Michael D. Gallo is an attorney at *Yvonne M. Kaminski & 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.

John P. Heil, Jr. is a shareholder with *Heyl, Royster, Voelker & Allen, P.C.* where he serves as co-chair of the firm's Business and Commercial Litigation Practice Group. Mr. Heil's practice focuses on business and commercial litigation, complex civil rights litigation, the representation of insurance carriers in liability coverage disputes, and the defense of catastrophic tort claims in state and federal courts. Mr. Heil joined Heyl Royster in 2007 after serving for eleven years with the Cook County State's Attorney's Office. He received his J.D., with Honors, from Chicago-Kent College of Law in 1996.

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 typically represents primary/excess insurers, trucking companies, a 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.

of the most confusing areas of the law and one of the most difficult concepts to convey to a jury. Even though we have used the Illinois Pattern Jury Instructions (IPI) in this state for more than 60 years, it is not unusual for attorneys representing plaintiffs and defendants to argue at length during a jury instruction conference about exactly how the proximate cause instruction should be read to a jury. A look at the long and convoluted history of how a jury is instructed on this issue is illustrative of the problem.

Prior to the adoption of the IPI by the supreme court in 1961, a judge's role in instructing a jury was significantly different from what it is today. Rather than instructing the jury on the law as they do now, judges used to read arguments to juries that were prepared by the litigants' counsel. The IPI were adopted by the supreme court in order to accurately instruct juries as to the law of a case. The original IPI were supplemented in 1965, 1977, and 1981, and they were completely rewritten for the 2000 edition because of significant changes in the law as a result of tort reform, as well as to further simplify the instructions.

The IPI instruction regarding proximate cause was significantly modified recently in August 2021. This modification followed previous modifications in 2007 and 2009. Prior to the August 2021 adoption of the new Illinois Pattern Jury Instruction, Civil No. 15.01, which defines proximate cause, juries were given a combination of instructions, including IPI Civil No. 12.04, IPI Civil No. 12.05 and IPI Civil No. 15.01, when the litigation involved issues of proximate cause and negligence by an entity other than the defendant or the intervention of an outside agency. The pre-August 2021 version of IPI Civil No. 12.04, titled "Concurrent Negligence Other Than Defendant's," read as follows:

> To be successful, a plaintiff must prove that the actions of the defendant, who owes that plaintiff a duty, must be sufficiently related to the plaintiff's injuries such that the law considers that defendant to have caused the injuries in a near or immediate and related manner. If the defendant's actions or omissions are seen to be too remote to the injuries, then those actions or omissions are not a proximate cause of the injuries.

> 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 this 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.][1]

The Notes on Use for this instruction read:

> 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. This instruction may not be used where the third person was acting as the agent of the defendant or the plaintiff. Where two or more defendants are sued and one or more may be liable and others not liable, use IPI 41.03.
>
> 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.[2]

Before August 2021, IPI Civil No. 12.05 titled "Negligence-Intervention of Outside Agency" read as follows:

— Continued on page 4

> 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 something else may also have been a cause of the injury.
> [However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.][3]

The Notes on Use for this instruction stated, "The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was something other than the conduct of the defendant."[4]

Finally, before the August 2021 revision, IPI Civil No. 15.01, titled "Proximate Cause—Definition," read as follows:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.][5]

These three civil Illinois Pattern Jury Instructions—12.04, 12.05 and 15.01—were the proximate cause instructions used for over twenty years. In August 2021, the supreme court withdrew IPI Civil No. 12.04 and IPI Civil No. 12.05 and rewrote IPI Civil No. 15.01. The new IPI Civil No. 15.01, now titled "Proximate Cause—Definition and Use," reads as follows:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause, it is sufficient if it combines with another cause resulting in the 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 [something] [or] [someone] else may also have been a cause of the injury. However, if you decide that the defendant's conduct was not a proximate cause of the plaintiff's injury, then your verdict should be for the defendant.][6]

According to the Committee Comments for the new instruction, the rewrite was considered and performed, "with the intent of harmonizing the proximate cause instructions formerly found in IPI Civil No. 12.04, 12.05, and 15.01 into one proximate cause instruction to avoid unnecessary confusion and consternation."[7] The first paragraph of IPI Civil No. 15.01 was not altered. Further, the Committee Comments state:

> The second paragraph in this instruction merges the concepts previously conveyed in IPI 12.04, 12.05 into one proximate cause instruction because "Nomenclature aside, the sole proximate cause theory is simply one way a defendant argues that a plaintiff failed to carry its burden of proof on proximate cause—specifically, by arguing that the negligence of another person or entity, not a party to the lawsuit, was the only proximate cause of the plaintiff's injuries." *Douglas v. Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶ 36.[8]

Multiple Nonparty Causes and the "Sole" Proximate Cause Conundrum

The August 2021 revisions to the jury instructions appear to have been spurred, at least in part, by the Illinois Appellate Court First District's opinion in *Douglas v. Arlington Park Racecourse, LLC*. The former "sole proximate cause" jury instruction, IPI Civil No. 12.04, along with an associated special interrogatory, was the subject of a divided appellate court ruling in *Douglas* in 2018. The appellate court's opinion in *Douglas*, although clarifying the overall proximate cause analysis to some extent, highlighted the perceived confusion caused by various interpretations of the word "sole."

In *Douglas*, the primary plaintiff was a jockey who fell from his horse at Arlington Park Racecourse after another competitor bumped his horse during a race. The plaintiff jockey suffered permanent injuries that left him paralyzed from the chest down. He and his wife brought suit against Arlington Park, Churchill

Downs, Inc. (Arlington Park's owner), Martin Collins Surfaces and Footings, LLC (manufacturer of "Polytrack," the track's synthetic horse racing surface), and Keenland Ventures, PT (distributor of the synthetic racing surface). Prior to trial, the plaintiffs settled their product liability claims against Martin Collins and Keenland Ventures. They proceeded to trial against Arlington Park and Churchill Downs.[9]

The plaintiffs' theory at trial was that the defendants were negligent in their maintenance of the synthetic track surface such that, at the time the plaintiff jockey hit the track surface, he experienced an out-of-specification "pocketing" effect in the synthetic material which dramatically increased the impact on his spine, resulting in his paralysis.[10] The defendants raised a number of defenses in response to the claims against them. Among the defenses raised were two that addressed sole proximate causation. The defendants argued: 1) the other jockey's negligence during the race was the sole proximate cause of the injury, and/or 2) that Martin Collins' negligent failure to provide maintenance instructions for the Polytrack surface was the sole proximate cause of the injury.[11]

Over the plaintiffs' objection, the trial court instructed the jury using the long form of IPI Civil No. 12.04 then in effect, which stated:

> More than one person may be to blame for causing an injury. If you decide that the defendants were negligent and that their negligence was a proximate cause of injury to the plaintiffs, 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 other person other than the defendant, then your verdict should be for the defendant.[12]

The court also allowed the defendants to present the jury with a special interrogatory focused on the second paragraph of the aforementioned jury instruction. The special interrogatory stated: "On the date of the accident and at the time and place of the accident in question in this case was the conduct of some person other than the defendants the sole proximate cause of the plaintiffs' injuries? [Yes or No]."[13]

After deliberating, the jury returned a defense verdict and answered "yes" to the special interrogatory.[14] During post-trial proceedings, the plaintiffs argued that the sole proximate cause issue should not have been brought to the attention of the jury. The plaintiffs argued that, since the defendants identified *two* potential alternative causes of the injury, then neither could be the "sole" proximate cause. The trial court agreed. The court further found that the special interrogatory's reference to "some person other than the defendants" was vague. The trial court reasoned, therefore, that these two potential errors unfairly prejudiced the plaintiffs, warranting a new trial.[15] The defendants were granted leave to appeal the trial court's post-trial ruling pursuant to Supreme Court Rule 306(a)(1).[16]

The First District's majority framed its opinion as addressing this question: "[I]s the sole proximate cause theory and jury instruction available in a negligence action if a defendant argues more than one nonparty actor was the sole proximate cause of plaintiff's injury?"[17] Two of the three justices answered in the affirmative, thereby ruling that any number of nonparty actors may constitute the "sole" proximate cause of a plaintiff's injury.[18]

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The majority first addressed the propriety of IPI Civil No. 12.04, "Concurrent Negligence Other Than Defendant's," in this circumstance.[19] In so doing, it reviewed the logic behind the concept of "sole proximate cause." Although sometimes referred to as the "sole proximate cause defense" or the "empty chair defense," the opinion cautioned that no burden ever shifts to the defense: "the burden of proving proximate cause in a negligence action remains, at all times, on the plaintiff."[20] The concept of *sole* proximate cause is, at its core, one way for a defendant to argue that it was 0% responsible for a plaintiff's injury.[21] In making this argument or raising this defense, a defendant may suggest that a nonparty tortfeasor is 100% responsible for the plaintiff's injury. The court questioned whether there should there be any difference if a defendant wants to blame multiple nonparties for the plaintiff's injury. The court concluded that the number of nonparty tortfeasors is irrelevant to the crucial point at the root of the defense: that the defendant's level of contribution to the plaintiff's injury is 0%. A defendant, the court reasoned, may argue that the plaintiff failed to prove that his or her negligence was a proximate cause of the plaintiff's injuries because any number of other non-parties were—individually or collectively—100% the cause.[22] For example,

> (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.[23]

According to the court, a defendant should be entitled to the sole proximate cause jury instruction so long as some evidence in the record supports the theory, regardless of how many non-party individuals or entities the defendant wishes to blame.[24]

The *Douglas* majority found support for its conclusion in two Illinois Supreme Court decisions, *Nolan v. Weil-McLain* and *Ready v. United/Goedecke Services, Inc.*[25] *Nolan* was an asbestos case in which the plaintiff sued 12 companies for causing his mesothelioma. Eleven of the defendants settled before trial. At trial, the remaining defendant intended to present evidence that exposure to the 11 settling companies' products was the sole proximate cause of the plaintiff's condition. The court barred the defendant from presenting the evidence, and the jury found the defendant liable. The supreme court ultimately ruled that the circuit court relied on erroneous appellate court decisions that prevented defendants from introducing evidence of other asbestos exposures in support of a sole proximate cause defense. *Nolan* reiterated that the sole proximate cause defense "focuses the attention of a properly instructed jury . . . on the plaintiff's duty to prove that the defendant's conduct was *a* proximate cause of plaintiff's injury."[26]

The *Ready* case involved a fatal construction accident. Two of the construction entity defendants settled prior to trial. The plaintiff went to trial against the last remaining defendant.[27] The trial court barred the defendant from introducing evidence of the conduct of two settling parties: the project's general contractor and the decedent's employer. The defendant was found liable at trial. The supreme court again reversed the trial court's ruling as to a sole proximate cause defense. Although the conduct of the settling nonparties was unrelated, the court found that the excluded evidence supported a sole proximate cause theory.[28]

The majority in *Douglas* found that *Nolan* and *Ready* "inescapably support the conclusion that the sole proximate cause theory is available to a defendant, even when that defendant is claiming that more than one nonparty actor's negligence was the sole proximate cause of plaintiff's injuries."[29] The *Douglas* decision specifically rejected *Clayton v. County of Cook* and *Abruzzo v. City of Park Ridge*, two First District opinions declaring that a defendant may not assert a sole proximate cause theory when the defendant targets two or more nonparty entities as the "sole" proximate cause.[30] The court addressed *Clayton's* and *Abruzzo's* focus on the use of the word "sole," and its ordinary connotation with the "singular." Although acknowledging that *Clayton's* and *Abruzzo*'s reasoning was "logical," the majority nevertheless espoused a more expansive view. Citing two online dictionaries, the majority found that "sole" may also refer to membership in a group, to the exclusion of all other groups. "The paramount attribute of the word 'sole,'" it reasoned, "is its exclusivity, not its number."[31] In light of *Douglas* and *Nolan*, the majority saw no reason to limit a defendant to blaming a single non-party, "even when the evidence points to the conduct of multiple nonparties as comprising 100% of the cause of the plaintiff's injuries."[32]

The majority held that the trial court was originally correct when it provided the jury with the sole proximate cause instruction in IPI Civil No. 12.04. Sufficient evidence in the record suggested that both the other jockey and Martin Collins were 100% responsible for the accident, so the instruction was appropriate.[33] So, too, was the special interrogatory.[34] The trial court thus erred when it changed its mind post-trial.[35]

The dissent in *Douglas* sharply disagreed with the majority's conclusions. Initially, it distinguished *Nolan* and *Ready* because neither trial court allowed the sole proximate cause instruction. So, although the concept of multiple nonparties comprising the sole proximate cause was discussed, the supreme court did not tackle the question of the appropriate form of jury instruction.[36] More troubling to the dissent was the unrelated nature of the conduct of the two nonparties (the other jockey and horse bumping the plaintiff during a race and the turf manufacturer failing to adequately instruct Arlington Park on track maintenance).[37] In *Nolan*, the defense theory was that the 11 nonparties all allegedly did the same thing: exposed the plaintiff to asbestos. Their conduct was a single "cause."[38] In addressing *Ready*, the dissent argued the supreme court took a different tack. Although the settling general contractor and the plaintiff's employer performed different acts, the dissent found that the supreme court discussed the two settling entities' conduct "collectively." It took this to mean that *Ready*, like *Nolan*, "boil[ed] down to a single type of 'conduct' that is potentially 'the sole proximate cause.'"[39]

The dissent in *Douglas* further took issue with the majority's view of the definition of "sole." It found "simply absurd" the idea that multiple distinct individuals could form a "collective singular" and thus constitute a sole proximate cause of a plaintiff's injury. It pointed to the language of the instruction, which refers to "the" sole proximate cause of injury and "some other person" as targeting only one particular cause, not multiple.[40]

The dissent agreed that evidence suggested that the other jockey was the proximate cause of the plaintiff's injury, as well as evidence that suggested Martin Collins was the proximate cause of the injury. In this circumstance, the dissent reasoned, the sole proximate cause instruction was inappropriate. The two independent nonparties each could be 100% responsible for the injury. But they were not a collective "sole," and the theories of their liability were different. In the absence of the instruction, the defendants were still free to argue to the jury that 100% of the cause was attributable to others. Introduction of IPI Civil No. 12.04 and the special interrogatory, in the dissent's view, simply confused the issue.[41]

The divided *Douglas* opinion did not lead to consensus about the sole proximate cause instruction. The case of *Doe v. Alexian Brothers Behavioral Health Hospital*,[42] another First District decision issued 13 months later, illustrates the point. In *Alexian Brothers*, a jury's answer to a sole proximate cause special interrogatory was inconsistent with its verdict. Although the jury apportioned fault 20% to the defendant hospital and 80% to a third-party defendant former hospital employee, it also answered "yes" to the interrogatory asking whether the third-party defendant was the sole proximate cause of the plaintiff's injuries.[43]

In addressing jury confusion, the *Alexian Brothers* court discussed *Douglas* and specifically rejected it. The court commented that "*Douglas* highlights that 'sole proximate cause' is not well understood even in the legal community."[44] It then extensively quoted the *Douglas* dissent and agreed that "'sole proximate cause' cannot apply to more than one party."[45] The court seemed to go out of its way to make this pronouncement, since the defendant in *Alexian Brothers* was not pointing to multiple other nonparties in association with its sole proximate cause argument.[46]

Unlike in *Douglas*, IPI Civil No. 12.04 was never given to the jury in *Alexian Brothers*. The appellate court agreed with the trial court's refusal to give the instruction because the Illinois Supreme Court Committee on Jury Instruction's "Notes on Use" for the instruction dictated that it not be used when a party to the action (as opposed to nonparties in *Douglas*) is alleged to be the sole proximate cause of the injury.[47] But, said the court, "[w]hen a defendant presents a sole proximate cause defense, it necessarily follows that there will be a sole proximate cause instruction."[48] Without IPI Civil No. 12.04, there was no instruction. The special interrogatory therefore stood alone and, in the court's view, "undoubtedly" had "a confusing effect" on the jury.[49] The First District ordered a new trial.[50]

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> Illinois courts draw a distinction between a condition and a cause, which is consistent with the two-prong definition of proximate cause. If the defendant's alleged negligence does nothing more than furnish a condition by which the injury is made possible, and that condition, combining with an intervening act, causes an injury; then the two acts are not concurrent, and the creation of the condition is not the proximate cause of the injury.

Condition Versus Cause in Premises and Motor Vehicle Cases

The element of proximate cause under Illinois law contains two distinct requirements: cause in fact and legal cause.[51] To satisfy the first requirement of cause in fact, there must be reasonable certainty that the defendant's conduct caused the injury.[52] When there are multiple factors that may have combined to cause the injury, the defendant's conduct must have been a material element and a substantial factor in bringing about the injury.[53] As for legal cause, this is satisfied only if the defendant's conduct is so closely tied to the plaintiff's injury that the defendant should be held legally responsible for it.[54]

Illinois courts draw a distinction between a condition and a cause, which is consistent with the two-prong definition of proximate cause.[55] If the defendant's alleged negligence does nothing more than furnish a condition by which the injury is made possible, and that condition, combining with an intervening act, causes an injury; then the two acts are not concurrent, and the creation of the condition *is not the proximate cause* of the injury.[56] An intervening act is a new and independent force that breaks the causal connection between the original alleged negligence and the injury; and thus it becomes the cause of the injury.[57] The test to be used is whether the defendant reasonably might have anticipated the intervening act – not the injury—as a natural and probable result of the defendant's alleged negligence.[58]

The condition versus cause analysis frequently is encountered in premises liability cases. For premises liability cases involving falls that are claimed to be caused by slips or trips due to an issue with the premises, plaintiffs often will allege that building code violations existed when they were injured. However, violations of building codes do not—by themselves—establish proximate cause. Defendants can defend against these allegations by demonstrating that the alleged violation is simply a condition—and not the cause in fact—of a plaintiff's injuries.

In *Strutz v. Vicere*, the plaintiff slipped and fell on the back staircase at his apartment, which was owned by the defendants.[59] The plaintiff was the only witness to his fall. The plaintiff told his wife immediately after the accident that he fell over the railing but also told paramedics that he was walking backwards and slipped and fell.[60] The plaintiff sustained multiple fractures to his cervical spine and ultimately died as the result of his injuries three weeks later.[61] The plaintiff's estate retained an architect who opined that the staircase's spiral design violated Chicago's building code.[62] Additionally, the architect opined that the stairs were dangerous because the treads were too small, the riser heights and tread widths were uneven, a handrail on the wall side was absent, the handrail present was too low and uneven, and the area was inadequately lit.[63]

The trial court granted summary judgment in favor of the defendants, and in affirming the summary judgment, the First District held that "the possibility that the allegedly unreasonably dangerous staircase had caused [plaintiff] to slip and fall is insufficient to establish the necessary causal relationship between [defendants'] alleged negligence and [plaintiff's] injuries."[64] The court further held that violations of an ordinance or failure to comply with building codes by themselves do not establish proximate cause.[65]

Similarly, in motor vehicle cases, plaintiffs may allege that issues with the roadway, such as lack of warning signs or inoperative traffic control devices, were the proximate cause of a collision. However, in applying the condition versus cause analysis, Illinois courts often have held that those types of circumstances did nothing more than furnish a condition that made the plaintiff's injury possible but were not the proximate cause of the injury.

In *Thompson v. County of Cook*, a vehicle passenger died after the driver, who was intoxicated, veered off the road while driving through a curve. The passenger's estate sued the county alleging that it was negligent in failing to adequately warn motorists of the curve in the road where the accident happened.[66] In that area, a speed limit sign was present, but there was no separate sign warning of the curve.[67] In applying the condition versus cause analysis, the Illinois Supreme Court held that the roadway "provided nothing more than a location where [the driver's] negligence came to fruition."[68]

The case of *Quirke v. City of Harvey* represents an extreme example of the condition versus cause analysis. In *Quirke*, a recently terminated employee of an electric company climbed up a utility pole and threatened to electrocute himself.[69] During that time, the electric company and the municipality decided to turn off the power line service by that utility pole, which was a major power line supplying electricity to many traffic signals and streetlights.[70] While the power was disconnected, the plaintiff was involved in an accident when another driver entered an intersection without stopping first due to the lack of lighting and a non-operating traffic control device. The plaintiff sued the municipality, the electric company, the former employee, and the other driver.[71] The trial court granted summary judgment in favor of the municipality and the electric company, and in affirming the summary judgment ruling, the First District held that it was not reasonably foreseeable that a driver would proceed through an intersection without stopping when the intersection has been rendered dark due to an emergency power shutdown.[72] Therefore, the lack of lighting and non-operating traffic lights were considered conditions and not the cause of the accident.

Intervening Act as a Defense to Proximate Cause

Whereas a condition often precedes any action on the part of a defendant in relation to determining the proximate cause of an incident that leads to a plaintiff's injuries, an intervening act is on the opposite end of the temporal spectrum. Intervening acts occur after a defendant's act or omission in the timeline leading up to the incident. An intervening cause is a defense that can often be overlooked by defense counsel in a proximate cause analysis. Intervening causes can break the causal chain between the defendant's alleged act or omission and the plaintiff's alleged injury. Where there is an intervening cause, the defendant's original act or omission is no longer the proximate cause of the alleged injury.

To constitute proximate cause, the injury must be of the natural and probable result of the defendant's negligence and of such character that an ordinarily prudent person ought to have foreseen it would probably occur, but it is not necessary that the negligent person might have foreseen the precise form of the injury.[73] An intervening and efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and therefore, it becomes the direct and intermediate cause of the injury.[74] However, the intervention of an independent act will not break the causal chain if the intervening act was foreseeable.

For example, a criminal act might not break the causal chain if the criminal act was foreseeable by the defendant.[75] In *Ney v. Yellow Cab*, an owner of a vehicle that was struck by a stolen taxicab sued the taxi company.[76] The taxi company claimed the criminal act of the thief was the intervening cause and moved to dismiss. The Illinois Supreme Court found that because one of defendant's employees had left the door unlocked with the key in the ignition, it was arguably foreseeable the cab may be stolen. The court found the issue of proximate cause was a decision for the jury.[77] In *Neering v. Illinois Central Railroad*, the Illinois Supreme Court held that an assault at a train station by a vagabond was foreseeable considering the condition of the train station.[78]

In *First Springfield Bank and Trust v. Galman,* the Illinois Supreme Court addressed the issue of what is foreseeable.[79] In *Galman*, a trucker illegally parked his truck in an area where parking was allowed at other times. An 18-year-old student crossed the street in front of the truck even though there was a crosswalk available. The student was hit by a car while crossing the street and sued the trucker and his employer, alleging the truck blocked his view.[80] The supreme court found the truck driver's actions were the cause in fact, but not the legal

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cause.[81] The court found the injury was not the type that a reasonable person would see as the likely result of his actions.[82]

In *Empress Casino Joliet Corporation v. Averus*, the First District recently provided a detailed analysis of the intervening cause doctrine and how it is applied.[83] The case involved a fire that severely damaged the Joliet Empress Casino in 2009. The plaintiff Empress Casino Joliet (Casino) filed suit against the defendant Averus alleging that Averus was negligent in failing to properly clean the ducts of the casino.[84]

Averus performed cleaning services to the casino, which included the removal of cooking grease and other combustible residue from the ductwork above the kitchen.[85] A welding contractor, Jameson, was preparing to weld a piece of sheet metal ductwork to the existing ductwork for a range exhaust hood that was being relocated in the kitchen area.[86] No one performed a "fire watch," and no one took precautions for "hot work."[87] The welder was aware grease was present in the ducts.[88] While welding, the grease inside the duct work caught fire.[89] The welding contractor's employee told the police that the ducts had accumulated nearly 15 years of cooking grease and for that reason the fire was uncontrollable.[90] The casino claimed Averus was negligent for failing to remove this grease.

Averus claimed that any allegedly negligent act on its part merely furnished a condition and was not the proximate cause of the fire.[91] Averus alleged the acts of the welder who welded the ductwork in the presence of grease without a fire watch, fire extinguisher, or fire blanket present constituted an intervening cause that broke any causal connection between any alleged act on Averus' part and the casino's damages.[92] The trial court granted summary judgment to Averus, in part, on the argument that its actions only involved a condition, and not a cause of the accident.[93]

The appellate court noted it is well-established law in Illinois that if the negligence charged does nothing more than furnish a condition by which the injury is made possible, and the act that causes the injury is a subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury.[94] The appellate court agreed with the trial court that Averus' conduct was not the legal cause of the injury, but merely created a serious condition to exist.[95] If Averus was negligent in not cleaning the inaccessible ductwork, the independent acts of other actors served as legal cause of the injury.[96] It was not reasonably foreseeable that an individual would observe grease present in a duct, and nevertheless proceed to apply fire to that duct in the form of welding in the absence of any fire prevention equipment and despite expressly acknowledging that such work was dangerous.[97]

Proximate cause is generally a question of fact.[98] However, where a defendant can show as a matter of law that the intervening act was unforeseeable, the defendant may prevail on summary judgment.[99] Courts have stated that where reasonable people may differ on issues of causation, the issue should never be determined as a matter of law.[100] The United States Court of Appeals for the Seventh Circuit, applying Illinois law, stated that where it cannot be determined as a matter of law that the intervening acts were not foreseeable, it is a question for the jury.[101]

In *Mack v. Ford Motor Company,* the First District provided an example of how the court addresses these issues. The case involved a pedestrian who was struck and killed by another car while helping to move to the highway shoulder a disabled car that was manufactured and sold by the defendant.[102] The trial court found that the defendant had, at most, created a condition, not a legal cause of the accident. On appeal, however, the court found that the defendant's conduct was more than a mere condition.[103] The appellate court found that the conduct placed the plaintiff in a position of danger, and the stopped vehicle led to her death.[104] The court stated that, to escape liability pursuant to this theory, the defendant must show that the intervening act was unforeseeable as a matter of law.[105] The appellate court reversed the trial court and found that the jury should decide the issue of causation.[106]

When the intervening cause defense is available, it is appropriate for defense counsel to file a motion for summary judgment. The intervening cause determination is one that can be made as a matter of law.[107] Many attorneys raise intervening cause as an affirmative defense. In theory, this should not be necessary because where a defendant denies causation, that defendant is always allowed to challenge causation.[108]

The issue that arises for defense counsel if summary judgment is denied is whether or not they still have the right to raise the intervening cause defense at trial. The Illinois Pattern Instructions on proximate cause do not include the defense of intervening cause.

As set forth above, the first sentence of Illinois Pattern Instruction 15.01, titled "Proximate Cause-Definition and Use," reads: "When I use the expression proximate cause I mean a cause that in the natural and ordinary course of events, produces plaintiff's injury."[109] Immediately thereafter, a bracketed sentence follows and reads: "It need not be the only cause, nor the last or nearest cause, it is sufficient if it combines with another cause resulting in the injury."[110] Since the August 2021 revisions, a second bracketed paragraph to the instruction can be included, and if there is an intervening cause defense, defense counsel must request that it be included, particularly the second sentence. It reads:

> [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 [something] [or] [someone] else may also have been a cause of the injury. However, if you decide that the defendant's conduct was not a proximate cause of the plaintiff's injury, then your verdict should be for the defendant.][111]

The Notes on Use state that "This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death."[112]

Since the intervening cause defense is part of proximate cause analysis, it must be considered by whoever is determining proximate cause. It is incumbent on defense counsel to ensure that the trier of fact is provided with the defense and the tools needed to interpret and decide it. To this end, defense counsel may also consider submitting a non-IPI instruction on intervening cause as the intervening cause defense, as set forth in the case law, is not fully contained in any IPI instruction. This instruction may give the jury a more complete understanding of the analysis. Even if the trial court does not allow the instruction, tendering the instruction will build the record for a possible appeal.

Complications in Proximate Cause Analyses in Medical Malpractice Cases

One final area of personal injury law where significant focus is placed on the element of proximate cause is in medical malpractice cases. To prevail in a medical negligence claim, a plaintiff must show: (1) the standard of care in the medical community by which the physician's treatment was measured; (2) that the physician deviated from the standard of care; and (3) that a resulting injury was proximately caused by the deviation from the standard of care.[113]

A defendant being sued for medical negligence is permitted to present evidence, if any exists, that a nonparty medical provider was the sole proximate cause of the plaintiff's injuries, so long as the defendant medical provider was also not clearly a cause of the injuries. This is often referred to as the "empty chair" defense. In the context of medical negligence actions, the Illinois Supreme Court in *Leonardi v. Loyola University of Chicago* affirmed that a pleading which denies that an injury was the result of or caused by the defendant's conduct is sufficient to permit the defendant to raise the sole proximate cause defense.[114] In other words, a defendant doctor or healthcare provider can argue that there is an entirely separate culpable party responsible for the plaintiff's injuries as long as they have some supporting evidence.

In *Leonardi*, Michela Lopez went into premature labor and went to Loyola University Medical Center where she was under the supervision of Dr. Tierney.[115] Due to complications that occurred during delivery, Lopez underwent a difficult childbirth and decompensated while in the hospital. She subsequently died about four years later.[116] Dr. Tierney died after plaintiff filed suit. Dr. Tierney's estate then reached a settlement with the plaintiffs who dismissed the estate from the lawsuit.[117] The case continued to trial against the hospital and various individual physicians, all of whom denied they were negligent.[118] At trial, the defendants asserted that Dr. Tierney was the sole proximate cause of the decedent's injuries.[119] The jury returned a verdict for the defendants.[120] The Illinois Supreme Court upheld the verdict and gave the following reasoning:

> In any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that defendant proximately caused plaintiff's injury. The element of proximate cause is an element of the plaintiff's case. The defendant is not required to plead lack of proximate cause as an affirmative defense. Obvi-

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> ously, if there is evidence that negates causation, a defendant should show it. However, in granting the privilege of going forward, also called the burden of production, the law in no way shifts to the defendant the burden of proof.
>
> *** The sole proximate cause defense merely focuses the attention of a properly instructed jury *** on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of plaintiff's injury.[121]

The *Leonardi* decision recognized the defendant's right not only to rebut evidence tending to show that the defendant's acts were negligent and the proximate cause of the claimed injuries, but also to endeavor to establish that the conduct of a third person, or some other causative factor, was, in fact, the sole proximate cause of the plaintiff's injuries, assuming some competent evidence is presented.[122] The "some evidence" standard is a recognition of the existence of a "factual question," which must be left to the jury to resolve.[123] The evidence may be slight, but a reviewing court may not reweigh it or determine if it should lead to a particular conclusion.[124]

After *Leonardi*, the Illinois Supreme Court decided *McDonnell v. McPartlin*, where it further clarified the *Leonardi* decision in finding that not only can a defendant assert the "empty-chair" defense against a nonparty physician but also the defendant is not required to demonstrate that the nonparty physician's conduct was professionally negligent.[125] However, this clarification had no real impact because the "empty-chair" defense is of no use if the defendant medical provider is a cause of the plaintiff's injuries. Given the relationship between negligent conduct and proximate cause, "there is a pronounced tendency when considering one to include the other."[126] In *McDonnell*, the court reasoned that "[t]he second paragraph of IPI Civil No. 12.04 properly reflects a defendant's right to attempt to negate a single element of the plaintiff's medical negligence claim, i.e., the element of proximate cause."[127]

In *Tabe v. Ausman*, the issues involved a spinal compression and possible faulty MRI.[128] The defendant doctors argued at trial that a nonparty neuroradiologist was the sole proximate cause of the plaintiff's injury.[129] The trial court allowed the defendant doctors to give the long form IPI Civil No. 12.04 even though no evidence was presented that the doctors relied on the neuroradiologist.[130] The jury found for the defendant doctors and issued a general verdict.[131] When multiple defenses are raised, a general verdict rendered by a jury creates a presumption that the jury found in favor of the winning party on every defense raised – also known as the "two-issue" rule.[132] The "two-issue" rule forecloses any claim of prejudice that arises from an allegedly erroneous instruction when no special interrogatories are answered by the jury to explain their verdict.[133] However, the trial court granted a new trial believing that it erroneously permitted the defendant doctors to give the sole proximate cause instruction.[134]

Without special interrogatories in *Tabe*, there was no resolution by the jury as to whether the plaintiff proved negligence based on the MRI films disclosing a nerve compression. The First District reasoned that it was unable to determine whether the sole proximate cause instruction made any difference.[135135] "If there was no negligence, then instructing on sole proximate cause did not matter."[136136] As a result, the First District ruled that a new trial was not warranted based on the sole proximate cause instruction because the jury might well have concluded that the defendant doctors were not negligent in returning its general verdict in their favor.[137]

Another example of the "two-issue" rule in a medical negligence case is *Robinson v. Boffa*.[138] In *Boffa*, the defense asserted two proximate cause defenses. The first proximate cause defense was that the decedent's preexisting health problems, which were extensive, caused the decedent's death. The defendant testified that the decedent died from multisystem organ failure, beginning with the decedent's impaired kidney function.[139] The second proximate cause defense was the failure of another provider to precisely pinpoint the location of a tumor on a colonoscopy report.[140] The defendant argued that the colonoscopy report misled him as to the precise location of the tumor during the first surgery and should have been identified by the other provider.[141]

The plaintiff argued that the trial court erred in admitting evidence of the decedent's medical history and allowing the defendant to argue that another doctor was the proximate cause of the decedent's death.[142] The appellate court found no error in the trial court's instruction to the jury of the defendant's proximate cause defense or in the defense arguing

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the decedent's medical history was a proximate cause because the defendant is not required to plead lack of proximate cause.[143] The appellate court also found that defense counsel presented competent evidence through the defendant that the sole proximate cause of the decedent's death was some other causative factor, namely, the decedent's preexisting medical condition.[144]

Lastly, the "lost chance" or "loss of chance" theory in medical malpractice actions is when a plaintiff alleges her medical providers have negligently deprived the plaintiff of a chance to survive or recover from a health problem, or where medical malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff.[145] The plaintiff only has to establish a lost chance of survival, not that she would have survived absent the provider's negligence.[146] The plaintiff does not need to prove that she would have enjoyed a greater than 50% chance of survival or recovery in the absence of the alleged malpractice.[147] As it relates to the element of proximate cause, the lost chance doctrine does not relax or lower a plaintiff's burden of proving causation. Rather, the doctrine comports with the traditional proximate cause standard, requiring that the plaintiff prove that the defendant's negligence more probably than not caused the plaintiff's injury.[148]

In *Holton v. Memorial Hospital*, the defendant hospital in a medical malpractice trial sought to prove that there was no medical negligence involved in causing the plaintiff's injuries, which included paraplegia and related medical problems, as a result of treatment for what was mistakenly believed to be a cancerous tumor.[149] In addition to that claim, the defendant sought to blame the damages on the conduct of several physicians who had settled the claims brought against them and were not parties at trial.[150] The supreme court brushed this argument aside thusly:

> A defendant is not automatically entitled to a sole proximate cause instruction wherever there is evidence that there may have been more than one, or concurrent, causes of an injury or where more than one person may have been negligent. Instead, a sole proximate cause instruction is not appropriate unless there is evidence that the sole proximate cause (not 'a' proximate cause) of a plaintiff's injury is conduct of another person or condition.[151]

In *Aguilera v. Mt. Sinai Hospital Medical Center*, the plaintiff alleged through two expert witnesses that an earlier CT scan of the decedent would have triggered the necessity of surgical intervention and potentially saved his life.[152] The plaintiff's experts admitted that a neurosurgeon would have been required to decide whether an operation was necessary. At trial, two other neurosurgeons testified that "even with an earlier CT scan, surgery would not have been appropriate."[153] The jury found in favor of the plaintiff, but the trial court entered judgment *non obstante veredicto* (*n.o.v.*) because the plaintiff presented no evidence to show that the decedent's treatment would have been any different had the omitted steps been taken.[154] In affirming, the appellate court found that, "[t]he absence of expert testimony that . . . an analysis of an earlier CT scan would have led to surgical intervention or other treatment that may have contributed to the decedent's recovery create[d] a gap in evidence of proximate cause fatal to the plaintiff's case."[155]

In 2021, the Illinois Supreme Court affirmed the *Holton* decision in the case of *Bailey v. Mercy Hospital & Med. Ctr.*, again recognizing the lost chance

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doctrine, and reiterating that the doctrine is consistent with traditional concepts of proximate cause.[156] The supreme court confirmed that proximate cause is still a necessary element that a plaintiff must prove and that these newer doctrines, such as the lost chance doctrine, do not relax, lower, or otherwise alter a plaintiff's burden of proving causation.[157]

Conclusion

A complete understanding of the proximate cause element in a personal injury case is necessary for a defense attorney to analyze both liability and the arguments and defenses available. The recent changes in the IPI and the regular evolution of case law requires constant vigilance, review, and analysis. To wit, the jury instructions on proximate cause changed considerably without notice or hearing in the last year with the loss of IPI Civ. No. 12.04 and 12.05 and the revisions to IPI Civ. No. 15.01. Couple those significant changes with the appellate court and supreme court opinions in the last four years that have touched on the issue of sole proximate cause alleged among multiple parties, the analysis of condition versus cause, and the lost chance doctrine, and the opportunity to misunderstand and misapply prevailing law exists if a defense attorney misses a new opinion. There is no question that "proximate cause" will continue to be a battleground element in personal injury cases in which both plaintiffs and defendants will argue and push to gain the upper hand on behalf of their clients.

(Endnotes)

1 Illinois Pattern Jury Instruction, Civil No. 12.04 (2009).

2 *Id.*

3 IPI Civil No. 12.05 (2009).

4 *Id.*

5 IPI Civil No. 15.01 (2009).

6 IPI Civil No. 15.01 (2021).

7 *Id.*

8 *Id.*

9 *Douglas v. Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶¶ 3-5, 13.

10 *Douglas*, 2018 IL App (1st) 162962, ¶¶ 8-9.

11 *Id.* ¶ 10.

12 *Id.* ¶¶ 15-16.

13 *Id.* ¶ 17.

14 *Id.* ¶ 18.

15 *Id.* ¶ 19.

16 *Id.* ¶ 20.

17 *Id.* ¶ 1.

18 *Id.* ¶ 60.

19 *Id.* ¶¶ 34-64.

20 *Id.* ¶ 35.

21 *Id.* ¶ 36.

22 *Id.* ¶ 37.

23 *Id.*

24 *Id.* ¶¶ 35, 37.

25 *Id.* ¶¶ 39-45 (discussing *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444 (2009); *Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 591 (2010)).

26 *Id.* ¶¶ 39-40, *citing*, *Nolan*, 233 Ill. 2d at 419-45.

27 *Ready*, 238 Ill. 2d at 372-73.

28 *Douglas*, 2018 IL App (1st) 162962, ¶¶ 41-43.

29 *Id.* ¶ 44.

30 *Id.* ¶¶ 47-57. *See also Clayton v. County of Cook*, 346 Ill. App. 3d 367 (1st Dist. 2003); *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360.

31 *Id.* ¶¶ 57-58.

32 *Id.* ¶ 60.

33 *Id.* ¶¶ 63-64.

34 *Id.* ¶¶ 72-74.

35 *Id.* ¶¶ 86-87.

36 *Id.* ¶ 123.

37 *Id.* ¶ 125.

38 *Id.* ¶ 123.

39 *Id.* ¶¶ 123-24.

40 *Id.* ¶¶ 126-29.

41 *Id.* ¶¶ 133-34.

42 *Doe v. Alexian Bros. Behavioral Health Hosp.*, 2019 IL App (1st) 180955.

43 *Alexian Bros*., 2019 IL App (1st) 180955, ¶¶ 17-21.

44 *Id.* ¶ 33.

45 *Id.*

46 *Id.*

47 *Id.* ¶ 15.

[48] *Id.* ¶ 34.

[49] *Id.* ¶ *36.*

[50] *Id.*

[51] *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992); *Young v. Bryco Arms*, 213 Ill. 2d 433, 466 (2004); *Brettman v. Virgil Cook & Son, Inc.*, 2020 IL App (2d) 190955, ¶ 91.

[52] *Young*, 213 Ill. 2d at 446.

[53] *Id.*

[54] *Id.*

[55] *Brettman*, 2020 IL App (2d) 190955, ¶ 93.

[56] *Id.* ¶ 93.

[57] *Id.*

[58] *Id.*

[59] *Strutz v. Vicere*, 389 Ill. App. 3d 676, 677 (1st Dist. 2009).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 680.

[63] *Id.*

[64] *Id.* at 681.

[65] *Id.*

[66] *Thompson v. County of Cook*, 154 Ill. 2d 374, 380 (1993).

[67] *Thompson*, 152 Ill. 2d at 380.

[68] *Id.*

[69] *Quirke v. City of Harvey*, 266 Ill. App. 3d 664, 666 (1st Dist. 1994).

[70] *Quirke*, 266 Ill. App. 3d at 666.

[71] *Id.* at 667.

[72] *Id.* at 670.

[73] *Neering v. Illinois Central Railroad*, 383 Ill. 366, 381 (1943).

[74] *Neering*, 383 Ill. at 381; *Ney v. Yellow Cab*, 2 Ill. 2d 74, 79 (1954).

[75] *Ney*, 2 Ill. 2d at 79.

[76] *Id.* at 76.

[77] *Id.* at 83-84.

[78] *Neering*, 383 Ill. at 381.

[79] *First Springfield Bank and Trust v. Galman*, 188 Ill. 2d 252 (1999).

[80] *Galman*, 188 Ill. 2d at 254-55.

[81] *Id.* at 259.

[82] *Id.* at 260-61; *See also Smith v. Hancock*, 2019 IL App (4th) 180704 (where collision is unavoidable for one party, that party is entitled to summary judgment on the issue of proximate cause); *Arnold v. Norfolk Southern Railway Co.*, 2016 IL App (4th) 150655 (sole proximate cause of railroad crossing collision was not the absence of lights and gates but plaintiff's failure to look and yield to the approaching train).

[83] *Empress Casino Joliet Corp. v. Averus*, 2020 IL App (1st) 192071.

[84] *Empress Casino Joliet Corp.*, 2020 IL App (1st), ¶ 1.

[85] *Id.* ¶ 5.

[86] *Id.* ¶ 6.

[87] *Id.*

[88] *Id.* ¶ 9.

[89] *Id.* ¶ 6.

[90] *Id.* ¶ 22.

[91] *Id.* ¶ 9.

[92] *Id.*

[93] *Id.* ¶ 1.

[94] *Id.* ¶ 45.

[95] *Id.* ¶ 50.

[96] *Id.*

[97] *Id.*

[98] *Davis v. Marathon Oil*, 64 Ill. 2d 380, 395 (1976).

[99] *Id.*

[100] *Wright v. General Motors*, 479 F.2d 52, 53 (7th Cir. 1973).

[101] *Id.*

[102] *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52 (1st Dist. 1996).

[103] *Mack*, 283 Ill. App. 3d at 61.

[104] *Id.*

[105] *Id.* at 57.

[106] *Id.* at 61.

[107] *Galman*, 188 Ill. 2d at 263.

[108] *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 94 (1995).

[109] IPI Civ. No. 15.01 (2021).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Purtill v. Hess*, 111 Ill. 2d 229, 241-242 (1986).

[114] *Leonardi*, 168 Ill. 2d at 92-94.

[115] *Id.* at 88.

[116] *Id.* at 91.

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[117] *Id.*

[118] *Id.*

[119] *Id.* at 91-92.

[120] *Id.* at 91.

[121] *Id.* at 93-94.

[122] *Id.* at 101.

[123] *Tabe v. Ausman*, 388 Ill. App. 3d 398, 405 (1st Dist. 2009).

[124] *Leonardi*, 168 Ill. 2d at 100.

[125] *McDonnell v. McPartlin*, 192 Ill. 2d 505, 511 (2000).

[126] *McDonnell*, 192 Ill. 2d at 522.

[127] *Id.* at 521.

[128] *Tabe*, 388 Ill. App. 3d at 399-402.

[129] *Id.* at 401.

[130] *Id.* at 401-402.

[131] *Id*, at 401.

[132] *Id.* at 398-99; *See also Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating*, 2015 IL App (1st) 1333, ¶ 5.

[133] *Strino v. Premier Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 904-905 (1st Dist. 2006).

[134] *Tabe*, 388 Ill. App. 3d at 401-402.

[135] *Id*. at 404-405.

[136] *Id.* at 404.

[137] *Id.* at 405.

[138] *Robinson v. Boffa*, 402 Ill. App. 3d 401 (1st Dist. 2010).

[139] *Robinson*, 402 Ill. App. 3d at 408.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 408-409.

[143] *Id.* at 407-408; *See also Leonardi*, 168 Ill. 2d at 94.

[144] *Robinson*, 402 Ill. App. 3d at 408.

[145] *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 111 (1997).

[146] *Holton*, 176 Ill. 2d at 106-107.

[147] *Id.* at 119.

[148] *Bailey v. Mercy Hospital and Medical Center*, 2021 IL 126748, ¶50.

[149] *Holton*, at 99-104.

[150] *Id.* at 132-34.

[151] *Id.* at 134; *See also Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 62 (citing *Holton*, 172 Ill. 2d at 134).

[152] *Aguilera v. Mount Sinai Hospital Med. Ctr.*, 293 Ill. App. 3d 967, 969-70 (1997).

[153] *Aguilera*, 293 Ill. App. 3d at 975.

[154] *Id.*

[155] *Id.*

[156] *Bailey*, 2021 IL 126748, ¶ 56.

[157] *Id.* ¶¶ 8, 56.