What’s Good for the Goose: An Argument for the Symmetrical Application of the Petrillo Doctrine

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PRODUCT LIABILITY: Sophisticated User and Bulk Supplier Defenses – The Time for Their Use in Illinois is Now

Fall 2004
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President’s Message

By: Stephen J. Heine
Heyl, Royster, Voelker & Allen
Peoria

Fall is a busy time of year. Those of you who attended the IDC Fall Conference in beautiful Lake Geneva were certainly fortunate. Crystal clear skies, bright sun, balmy temperatures, sumptuous food and drink, good fellowship and superb presentations on a wide variety of topics were enjoyed by all.

Aleen Tiffany took the helm of the Fall Conference yacht as Mike Fusz was appointed associate circuit judge in Lake County in the week before the seminar. Despite some choppy seas caused by the last minute cancellation of a speaker and the need to find a substitute on less than twenty-four hours notice, Aleen and her committee crewed such that the seminar sailed smoothly along. (Enough of the sailing metaphors). Joe Postel’s presentation on additional insured endorsements and wading through Illinois coverage law (not another sailing metaphor of mine – this was Joe’s title) was as fine a presentation on the issues as can be made – and he kept it interesting despite the fact that cocktails on the pool deck awaited the attendees. It was a truly masterful performance.

Case Ellis provided valuable and interesting insights into the subject of jury selection and we thank him for stepping in at the last moment. Senator Kirk Dillard gave us a frank and objective discussion of the state of Illinois politics, tort issues and the legislature in general. Paul Price and Mike Shostock’s Point/Counterpoint focused on the medical liability issues currently being debated in Illinois in numerous forums with a practical bent for the practicing lawyer.

Greg Conforti, Creed Tucker, and John Piegore provided valuable insight in the tort, insurance, and evidence updates. For any of you unfortunate enough to deal with a federal grand jury subpoena, Vince Connelly provided a primer on what to do (and not) and who to call for advice. Judge Warren Wolfson provided a thoughtful and scholarly insight into evidence advocacy and Dennis Cotter kept all of us engaged in the mind-numbing calculations (for those of us who are mathematically challenged) involved in joint and several liability, comparative fault and contribution assessments.

The real show was the “war story” competition. For the second consecutive year, Doug Pomatto took the top prize with a story about a medical expert and a model of a brain (among other things) narrowly edging out John Huston’s hilarious rendition of a malpractice trial involving the wrongful death of a mouse and a plaintiff with tape on her nose.

If you were able to attend the Fall Conference, you know that it was one of the best ever. If you missed it this year set your sights on 2005 when we will return to Galena and Eagle Ridge.

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As I write this, I am off to the DRI Annual Meeting in New Orleans. Our Illinois organization is one of the most active of the DRI affiliated organizations. We have such a great venue for meetings in Chicago that the Louisiana Association of Defense Counsel, one of our sister groups, held its fall conference there in September. While in New Orleans, we will meet with other organizations in the North Central Region and others of similar size. We always return from the DRI meeting with new ideas and insights. We will share some of those in the next issue.
Editor’s Note

By: Rick Hammond
Johnson & Bell, Ltd.
Chicago

This issue of the Quarterly features several standout articles. “What’s Good for the Goose: An Argument for the Symmetrical Application of the Petrillo Doctrine by IDC members, Gordon Broom and Nathan Collins is a thought provoking and well reasoned argument regarding why Petrillo’s prohibition on ex parte communications with treating physicians should also apply to plaintiff’s counsel. If your practice is in any way affected by the requirements of Petrillo, this featured article is a must read.

If your practice concerns the defense of products liability claims, Robert Pisani’s Monograph, “Sophisticated User and Bulk Supplier Defenses – The Time for Their Use in Illinois is Now,” is also a standout in this issue. Mr. Pisani’s article provides an effective basis for arguing why it is patently unfair in a warnings case to hold suppliers of products or raw materials responsible for injuries to the employees of their customers, where the customer/employer is actually knowledgeable regarding those goods or raw materials, and has both the means and legal responsibility to protect their own workers.

Another products liability related article that you will find of interest is authored by Associate Editor, Joseph Feehan. In his piece, Joe examines the issue of sustaining a product’s action when the product/evidence involved in the occurrence was destroyed.

If insurance coverage is your focus, William McVisk’s column is the place to start. He reports on a recent Illinois case that gives an insurer the right to recoup its defense costs from an insured when it is adjudged that the insurer had no prior duty to defend the insured in an underlying law suit. Another insurance related article by first time author, Carlin Metzger, who does a very nice job in analyzing an insured’s right of recovery for replacement cost damages under a homeowner’s policy.

Finally, congratulations to IDC member, Michael Tootooian, who was awarded the pen that signed Senate Bill 2946 into law, and which amended the Illinois Civil Rights Act of 2003. Mr. Tootooian’s role in triggering the change in law is highlighted in the Quarterly’s Association News section.

As always, I invite you to submit any comments, compliments, or constructive criticisms that you may have regarding the Quarterly to me at hammondr@jbltd.com.
Featured Article

What’s Good for the Goose: An Argument for the Symmetrical Application of the Petrillo Doctrine

By: Gordon R. Broom and Nathan C. Collins
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Edwardsville

In Petrillo v. Syntex Labs., Inc., 148 Ill. App. 3d 581, 499 N.E.2d 952, 102 Ill. Dec. 172 (1st Dist. 1986) (“Petrillo”), the Court of Appeals for the First District adopted a rule prohibiting defense counsel – but not plaintiffs’ counsel – from engaging in ex parte communications with an injured plaintiff’s treating physicians. This article explores the rationale of the Petrillo decision and demonstrates why the Illinois courts' asymmetrical interpretation of the Petrillo decision is contrary to the principles upon which that decision is based.

INTRODUCTION

Fundamental to the fairness of any lawsuit is that the rules of discovery afford all parties equal access to evidence. Many courts, however, while acknowledging this principle in theory, have decided that, in the context of ex parte communications with physicians, some parties (plaintiffs) are more equal than others (defendants). Communications between attorneys and treating physicians have proven problematic for the courts because they implicate two substantial and often conflicting interests. On the one hand, defendants have an interest in discovering the knowledge and opinions of treating physicians by the most efficient and effective means available. On the other hand, plaintiffs have a countervailing interest in maintaining the sanctity of the physician-patient relationship, an interest that militates against allowing defense counsel unfettered access to the treater. The issue, then, is how to resolve this inherent tension between equal access to evidence and the plaintiff’s right to preserve certain medical information in confidence.

Jurisdictions considering this issue have fallen into two camps. Approximately half of the sampled jurisdictions have categorically banned defense counsel from conducting ex parte interviews, while imposing no reciprocal limitation on plaintiffs’ counsel. It is in this first camp that Illinois courts have pitched their tents. Petrillo v. Syntex Labs., Inc., 148 Ill. App. 3d 581, 499 N.E.2d 952, 102 Ill. Dec. 172 (1st Dist. 1986) (“Petrillo”). Courts in the second camp impose no (or negligible) limitations on ex parte physician interviews, having found that such communications enhance efficiency and fairness, and that categorical prohibitions are needlessly protective of a relationship that would not be impaired by ex parte interviews, since only a “foolish patient” would withhold relevant information from his or her physician on the supposition that it might be disclosed in a subsequent judicial proceeding. Federal courts are similarly split on this issue.

There is a third alternative, however, a middle ground suggested by the Petrillo decision itself that does not appear to have been considered, much less adopted, in any jurisdiction. Under this third alternative, rather than curtailing the current prohibition on ex parte communications, Illinois courts should expand the Petrillo Doctrine to encompass all attorney-physician communications, those of plaintiffs’ counsel as well as defense counsel. In this manner, the public...
policy interest in preserving plaintiffs’ privacy rights would be fully served, as would the public policy interest in restoring symmetry to a discovery scheme currently tilted in favor of plaintiffs. This proposal would have the added advantage of removing physicians from the advocacy process altogether, thereby strengthening physician-patient relationships.

DISCUSSION

I. The Goose: Petrillo and its Asymmetrical Interpretation

Petrillo: The Facts

The facts of Petrillo are unremarkable and provide little basis for defense counsel to distinguish their case. Tobin, counsel for the Petrillo defendant, a producer and distributor of infant formulas, conducted ex parte interviews with the plaintiff’s treating physician. Plaintiff’s counsel moved to bar any further such communications. The trial court granted the motion. Defense counsel persisted, was ultimately found in contempt, and appealed.7

On appeal, the court characterized the issue of ex parte physician contacts as one of first impression.

The Petrillo Presumption

Before reaching the merits of the parties’ arguments, the court made a “critically important” observation, to which it referred repeatedly in its opinion:

Tobin has failed, in both his brief and during oral argument, to identify a single piece of information or evidence which he is able to obtain through an ex parte conference that he cannot obtain via the conventional methods of discovery outlined by Supreme Court Rule 201.***. In addition, a thorough review of case law from other jurisdictions reveals that in not one instance has a court found that ex parte conferences were necessary in order to permit defense counsel to obtain information that they were unable to obtain through the regular channels of discovery. Thus, it is undisputed that ex parte conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery.8 (Some emphasis in original).

The court thus found that ex parte communications had no value as an information-gathering device. For Tobin, this was a less than auspicious point of embarkation upon an analysis that the court promised would pit the utilitarian value of ex parte conferences (which the appellate court had just a priori deemed nonexistent) against the sanctity of the physician-patient relationship.

The Public Policy Basis for the Petrillo Doctrine

Having already accorded ex parte conferences no utilitarian value, the court proceeded to determine whether there was any public policy that recognized the societal benefit of physician-patient confidentiality — a public policy that could then be weighed against the non-existent utilitarian value of ex parte communications. Public policy “should forbid***conduct which tends to harm an established and beneficial interest of the society the existence of which is necessary for the good of the public.”9 Because it had already found ex parte interviews to yield no practical benefit, the court essentially needed to make two findings in order to ban ex parte conferences: (i) that physician-patient confidentiality was established and beneficial (i.e., served public policy); and (ii) that ex parte interviews harmed physician-patient confidentiality.

For its “first indicia” that confidentiality was established and beneficial, the court traced the history of physician-patient confidentiality back to its venerable origins in the Hippocratic Oath,10 the principles of which are, the court found, embodied in modern ethical codes that prohibit physician disclosures except under compulsory process.11 The court declared that these canons of medical ethics demonstrated “without any question” that physicians should maintain patient communications in confidence, and concluded that it was “axiomatic that conduct which threatens the sanctity of that relationship runs afoul of public policy.”12

For its second “indicia” that public policy favors a prohibition on ex parte communications, the court looked to “the fiduciary relationship that exists between a patient and his treating physician.” This “fiducial” relationship arises by virtue of the trust and confidence patients necessarily place in their physicians when seeking medical advice and treatment. “It is evident***,” the court reasoned, “that ex parte conferences between defense counsel and a plaintiff’s treating physician threaten the fiduciary nature of the physician-patient relationship. Therefore, ex parte conferences should be barred as being against public policy.” Again, the court found it more or less axiomatic that attorney interviews violate the longstanding expectation of confidentiality enjoyed by patients seeking medical attention.13

This conclusion, too, seems unlikely to invite much controversy. Even Petrillo’s detractors would not seriously argue

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Good for the Goose (Continued)

with the proposition that confidentiality serves an important societal interest by ensuring frank communications between physician and patient, thereby facilitating effective medical treatment.

Implied Consent

Tobin argued that the plaintiff had waived any claim of confidentiality by filing suit and placing his physical condition at issue. The court acknowledged that by filing suit, a plaintiff-patient “implicitly consents to his physician releasing any of the medical information related to the mental or physical condition***at issue in the lawsuit.”14 To defense counsel at least, this implied waiver would seem to eliminate any basis for a plaintiff to control the methodology by which defense counsel obtains relevant medical information.

Not so, said the First District. Sometimes “consent” actually means “limited consent,” and sometimes “waiver” really means “partial waiver.”15 The court reasoned that “[t]he patient’s implicit consent***is obviously and necessarily limited; he consents only to the release of his medical information (relative to the lawsuit) pursuant to the methods of discovery authorized by Supreme Court Rule 201(a).”16 (Emphasis in original). Though to many this conclusion was far from obvious or necessary, the court nonetheless proceeded to explain this strange17 (though not unique) conclusion as follows:

[C]onfidentiality and patient consent are inextricably tied together; the relationship between a patient and his physician remains confidential only as long as a patient can rest assured that he must give his consent before any of the information disclosed during the physician-patient relationship is released to third parties. Indeed, at the very minimum, the confidential relationship existing between a patient and physician demands that information confidential in nature remain, absent patient consent, undisclosed to third parties. If such were not the case, then no confidentiality between a patient and his physician in fact exists.

It is for this reason that ex parte conferences between defense counsel and a plaintiff’s treating physician undermine the confidentiality of the physician-patient relationship. The physician, by engaging in such a conference, discusses the patient’s confidences without the consent of the patient***. [T]he confidentiality which once existed***is completely disregarded and the sanctity of the relationship existing between a patient and his physician is therefore destroyed.18

Proprietary Right to Evidence

Sensing some unfairness in all this, Tobin argued that allowing plaintiffs’ counsel to engage in ex parte communications, but prohibiting defense counsel from doing the same, was tantamount to granting plaintiffs a proprietary right in the testimony of the treating physician. The court— even as it did precisely that—denied doing any such thing, concluding that Tobin had “mis[d] the point.”19

[W]e are not prohibiting a treating physician from expressing his opinions in a deposition or from testifying in a court of law. Nor does our decision infer [sic] that a plaintiff has a right to stop his treating physician from testifying. In addition, it is obvious that a plaintiff, like a defendant, has no right to influence the opinion of the treating physician. That being the case, it is evident that we are not, through our decision to bar ex parte conferences between defense counsel and a plaintiff’s treating physician, granting a plaintiff a proprietary right in the testimony of his treating physician. To the contrary, we are merely imposing a prohibition on a single type of unauthorized practice which we believe not only jeopardizes the fiduciary relationships between a treating physician and his patient, but also, yields up no recognizable benefit with regard to the information and evidence obtained through its use.”20 (Emphasis added).

The court thus recognized that asymmetrical access to information can produce unfair results by giving one side an unfair advantage in collecting (and perhaps influencing) testimony. The court ultimately dismissed this concern, however, concluding that “there is no evidence in the record of any unethical, suspicious, or even questionable conduct on the part of the plaintiffs’ attorneys regarding the plaintiffs’ relationships with their treating physicians.”21 Again, the court based its rationale for the adoption of a sweeping new discovery limitation on the inadequacies of the record.

The Practical Advantages of Ex Parte Communications

Tobin also argued that, even if the record showed no specific pieces of otherwise non-discoverable information that were obtained via ex parte conferences, such conferences nonetheless yield practical benefits. For example, Tobin argued that ex parte conferences are an efficient and inexpensive way to gather information, eliminate potential witnesses, and assess settlement options at early stages in the litigation. The court was unimpressed by this argument. Giving it short
shift, the court suggested that an equally effective means of obtaining information would be through a deposition upon written questions pursuant to Supreme Court Rule 210 or requesting copies of medical records pursuant to Supreme Court Rule 214. Written answers and documents, the court concluded, were more or less equal to face-to-face interviews for fact-gathering purposes, and, should those methods prove insufficient, defense could always rely on depositions upon oral examinations.

The Holding
Tobin asserted an array of other arguments, and, in similar fashion, the court disposed of each. The court concluded:

“The sole issue before the Petrillo court was whether defense attorneys should be prohibited from engaging in ex parte communications. The court answered that question in the affirmative . . .”

These truths, combined with the fact that ex parte conferences threaten the sanctity of the physician-patient relationship, while producing no additional information (other than that which is already obtainable through the regular methods of discovery), compel us to find that modern public policy prohibits ex parte conferences between a plaintiff’s treating physician and defense counsel.”

The Petrillo court thus held that a ban on ex parte communications was necessary to protect the physician-patient relationship from the perceived threat that attorney contact posed to the physician-patient relationship and that, absent the safeguards afforded by formal discovery procedures, attorneys might seek, and unwitting physicians might disclose, confidential medical information beyond the scope of the implied waiver attributed to plaintiffs by virtue of their having filed a lawsuit that placed their medical condition at issue in the case.

II. The Gander: The Petrillo Basis for Symmetry

Neither the Petrillo court’s findings nor its reasoning compels an asymmetric limitation on defense counsel. The sole issue before the Petrillo court was whether defense attorneys should be prohibited from engaging in ex parte communications. The court answered that question in the affirmative, but the correlative issue – whether the prohibition should apply to plaintiffs’ counsel – was not before the court and has not been decided. In fact, the Petrillo decision itself contains ample support for the adoption of a symmetrical ex parte bar on communications with treating physicians.

Finding #1: Ex Parte Communications Yield No Practical Benefits

The Petrillo court repeatedly found that ex parte conferences yielded no practical benefits. Relying on an absence of evidence in the record that Tobin had acquired any information that could not have been obtained via formal discovery, the court concluded that ex parte communications are “incapable,” as a method, of yielding any benefit beyond that already available through formal discovery methods.

Some problems with the First District’s reasoning are immediately apparent. By requiring Tobin to produce a specific piece of otherwise non-discoverable information, the court presupposed that the exclusive yardstick for measuring the utility of a discovery method is the theoretical scope of information obtainable by that method. While this is certainly a valid consideration, it is not the sole measure of a method’s utility.

For example, in theory, an attorney could discover all relevant information through written interrogatories and requests for production, eliminating the need for depositions. Yet, few practitioners would elect to forego depositions simply because of their theoretical equivalence to other discovery methods. The reason for this is clear. Certain discovery methods are inherently more effective in eliciting information. In face-to-face communications, a lawyer can, among other things, respond to intangible cues such as the witness’ demeanor, or subtleties in the inflection of the witness’ voice, and can immediately follow-up on unexpected testimony. The fact that an interrogatory might theoretically capture the same information does not mean that depositions yield no practical benefit. So, too, with ex parte interviews. Informal interviews play a legitimate role in the investigation of a case, and in many

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circumstances, informal conversations may in fact be a more efficient and effective method of eliciting information, even if that information could theoretically be obtained by more formal means.

A seminal federal decision that was reached explained: [T]here are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses from the list completely.26

Other cases allowing *ex parte* communications are in accord.27 The purpose of the foregoing analysis is not to argue that the *Petrillo* court reached the wrong conclusion, but rather to highlight some of the considerations that militate against an asymmetrical discovery limitation. Indeed, this article assumes that the *Petrillo* court, by banning defense counsel from engaging in *ex parte* interviews, got it half right, and urges the courts to finish what the *Petrillo* court began by clarifying that the ban on *ex parte* contacts should be applied symmetrically.

Finding #2: Suspect Motives and a Proprietary Right to Testimony

The *Petrillo* court acknowledged that neither party to a lawsuit has a proprietary right to any witness’ testimony, including the testimony of treating physicians. Yet, the subsequent asymmetrical application of *Petrillo* seems wholly at odds with this principle. Under *Petrillo*, plaintiffs are entitled to pre-lawsuit and pre-discovery *ex parte* communications with the very witness who may ultimately prove to be a critical fact witness in the case. The defense, on the other hand, must wait, conduct written discovery, sift through the documentary and written information that the plaintiff’s attorney deems relevant, then depose the physician to obtain testimony that has already been privately discussed with the other side. The *Petrillo* court might not have granted plaintiffs outright fee ownership in physician testimony, but it certainly conveyed a lease with an option to buy.

Unlike the *Petrillo* decision, courts allowing *ex parte* communications often do find that allowing asymmetrical access to treating physicians affords plaintiffs an unfair proprietary interest in the physician’s testimony.”

As a general proposition,***no party to litigation has anything resembling a proprietary right to any witness’s evidence. Absent a privilege, no party is entitled to restrict an opponent’s access to a witness, however partial or important to him, by insisting upon some notion of allegiance***.

Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows***. [W]hile the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak.

The [physician-patient] privilege was never intended***to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time.28

The rationale of these cases further recognizes that *ex parte* communications are a two-way street.29 Allowing *ex parte* contacts risks not only that physicians will disclose confidential communications to attorneys, but also that attorneys will make improper communications to the treating physicians. Indeed, it is the latter communications that often seem to be courts’ true concern.30 However, are defense attorneys really interested in delving into immaterial aspects of a plaintiff’s medical records?31 Idle curiosity? Mischief?32 The *Petrillo* court found the record devoid of specific instances of misconduct by plaintiff’s counsel, but misconduct is not necessary...
The inchoate threat implicit in refusing or qualifying permission to speak to a witness in possession of privileged information operates to intimidate the witness, who is then placed in the position of withholding or divulging what he knows at his peril, and is itself a species of improper influence. It also enables the party so wielding the privilege to monitor his adversary’s progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny. The Court concludes that it would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purposes for which it exists.

Thus, a physician may feel compelled to give testimony favorable to the plaintiff – or may even believe that his or her fiduciary obligations require him to assume the posture of an advocate. Even such subtle means of influence should be condemned under the reasoning of Petrillo. Every attorney communication contains a seed of advocacy. The very questions one asks can telegraph the desired response or imply one’s theory of the case. This is not to say that a physician who picks up on such cues would necessarily seek to tailor his or her testimony to suit the attorneys’ theory. But he or she might. And, under Petrillo, the test does not appear to be actual influence, but only the potential for influence.

Not all courts have been so quick to indulge a presumption of impropriety on the part of defense counsel. The Alaska Supreme Court, for example, stated, “it suffices to say that we refuse to speculate about or impute such sinister motives to defense counsel or treating physicians.” Similarly, in Rios v. Texas Dept. of Mental Health and Mental Retardation, the Texas court reasoned:

Moreover, the concern seems to be premised on the fallacy that questionable conduct during an ex parte interview could only occur with defense counsel. Quite simply, policy considerations which support giving plaintiffs ‘inordinate control over witness’s disclosures and***allowing plaintiff[s] to monitor the work of defendants in preparing their case,’ act in favor of an unfair discovery process and are not persuasive.

Indeed, assuming that counsel for plaintiffs and defendants are similarly motivated to act properly or improperly, it is ex parte contacts by plaintiffs’ counsel that are the more troublesome. Given that the physician is, understandably, more likely to align his sympathies with the interests of his patients, it seems that physicians would be less susceptible to manipulation by defense counsel and might, on the other hand, be highly susceptible to suggestions by plaintiffs’ counsel as to how the physician’s testimony might advance his patient’s cause (or how, as a result of unfavorable testimony, he might himself incur adverse legal consequences).

**Practical Considerations**

The purpose of the foregoing analysis is to demonstrate that there is no basis in the Petrillo decision for the judiciary’s continued adherence to an asymmetrical discovery scheme, and that, in fact, the Petrillo decision is more consistent with the symmetrical approach advocated by this article. If Petrillo was decided correctly, or at least got it half right in prohibiting one party from engaging in ex parte communications, then neither party can be disadvantaged by a symmetrical ban on ex parte communications, because ex parte communications have no utilitarian value. Moreover, the overriding public policy consideration upon which the Petrillo court based its decision was the sanctity of the physician-patient relationship. More importantly, a symmetrical ban would have no adverse impact on that relationship. In fact, the opposite would be true. By applying the prohibition in a symmetrical manner, courts could restore physicians to their proper role as medical counselors and treaters – not unwitting advocates in an adversarial process.

Plaintiff’s counsel may object to the adoption of such a rule based upon perceived impracticalities. These objections, however, are without merit.

(1) A symmetrical rule would not unfairly inhibit plaintiffs’ counsel’s ability to assess the merits of their client’s lawsuit prior to filing a complaint.

Only a small fraction of lawsuits involve complex issues of causation that would even require a pre-suit medical assessment. For example, if a plaintiff were to suffer a broken leg in an auto accident, an ex parte conference with the treating physician is hardly necessary to assess causation or the merits of a claim. For those few cases that do involve problems of causation – preexisting conditions, for example – plaintiffs have an express statutory right to obtain their medical records within 30 days. Plaintiffs (or their attorneys) can thus obtain their medical records and submit them to an independent medical examiner, if necessary, for an assessment. Even if a plaintiff’s attorney is running up against a statute of limi-
Good for the Goose (Continued)

tations, the attorney can file suit to preserve the claim and thereafter effect service within a reasonable time after medical records are obtained and any third-party medical assessment is complete.

The Petrillo court specifically found that requiring the use of formal discovery methods does not impose an undue burden on a party, and that neither party has a proprietary right to a physician’s testimony. The addition of some minor procedural prerequisites to the initial collection of information is hardly a reason to maintain an asymmetrical discovery scheme.42

Moreover, if such objections have any validity – i.e., if a symmetrical prohibition would indeed deprive plaintiffs’ counsel of some practical benefit not considered by the Petrillo court – then perhaps the reasoning of Petrillo was flawed after all, and should be revisited.

(2) A symmetrical rule would not unfairly prejudice a plaintiff’s ability to support his or her claim with opinion testimony.

The adoption of a symmetrical rule does nothing to limit a physician’s ability to opine on relevant aspects of the plaintiff’s medical condition. A symmetrical rule would only limit the manner in which information is obtained from, or provided to, the treating physician.

Presumably, the physician’s opinion is what it is (i.e., it would be the same irrespective of the pendency of litigation). Therefore, neither side would be disadvantaged by a symmetrical prohibition. Like defense counsel, plaintiff’s counsel can obtain all the relevant medical records; have the benefit of the opinions of independent medical examiners; and discover the treating physician’s opinions by way of deposition. Just like defense counsel, Plaintiff’s counsel can obtain all information relevant to the plaintiff’s claim, without the need for ex parte conferences.43

Moreover, allowing either side asymmetrical access (in acquiring or disseminating information) to a treating physician imperils the physician-patient relationship by improperly injecting the physician into the adversarial process. As argued previously, a physician can be faced with an untenable situation when asked to testify on behalf of a patient, particularly when plaintiff’s counsel is providing the doctor with documentation and peering over the doctor’s shoulder. What if the physician disagrees with a plaintiff’s theory of causation? Would the doctor nonetheless feel pressure to give testimony favorable to his or her patient or to withhold unfavorable opinion or evidence? Would the doctor fear that he or she might themselves become embroiled in litigation? Would plaintiff’s counsel act to relieve the physician of any of these concerns if it meant the physician might give unfavorable testimony?

Might the prospect of litigation cause a physician to care for, treat or document his patient’s condition differently than he or she would otherwise do if there were no litigation? If so, does public policy support a discovery scheme that requires physicians to weigh the effect their treatment may have on their patient’s lawsuit against the treatment or absence of treatment the physician deems most appropriate?

(3) A symmetrical rule would not force the physician to compromise his fiduciary obligations to the patient.

The proposed symmetrical rule would not in any way limit the patient’s access to his or her treating physician. Nor would it limit the physician’s freedom to treat the patient as the physician deems appropriate. The rule would only limit the access of the patient’s attorney, and, as such, it would not implicate, much less interfere with, any of the physician’s fiduciary obligations. With respect to litigation, the physician’s only fiduciary obligation is to maintain the patient’s medical records in confidence. Any other fiduciary obligations devolv-

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“Even if a plaintiff’s attorney is running up against a statute of limitations, the attorney can file suit to preserve the claim and thereafter effect service within a reasonable time after medical records are obtained and any third-party medical assessment is complete.”

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communications with the treating physicians. Such measures could include the following:

1. Require in initial interrogatories that the plaintiff disclose all ex parte contacts between any treating physician and plaintiff’s counsel and move to bar any further ex parte contact with treating physicians by plaintiff’s counsel.

2. Inquire about ex parte meetings with plaintiff’s counsel or others than the patient at treating physician depositions.

3. Request all copies of documented communication between plaintiff’s counsel and treating physicians.

4. Object to any meeting between plaintiff’s counsel and physician prior to deposition. Describe in the record of the deposition the facts of any prior ex parte meeting.

5. File motions barring any physician who has had ex parte communication with plaintiff’s counsel from rendering favorable opinions to the plaintiff’s case on medical issues.

6. Insist that all physicians partaking in ex parte communication be identified and subject to Supreme Court Rule 213(f)(3) as controlled expert witness.

7. Attempt to have fees assessed for discovery deposition by a physician who has engaged in ex parte communication with the the plaintiff’s counsel charged to the plaintiff as those of a controlled expert witness.

CONCLUSION

Whatever the inadequacies of the record before the Petrillo court, the Illinois bar now has before it a record comprising almost two decades of experience with the Petrillo doctrine. And it is clear that the rule, however salutary in theory, has indeed resulted in plaintiffs enjoying something of a proprietary right in the testimony of treating physicians. Virtually all defense attorneys deposing a treating physician in accordance with the Petrillo limitations discover that the treating physician has already communicated with the plaintiff’s attorney, and has often viewed extrinsic records or opinions provided them by plaintiffs’ counsel. The current judicial interpretation of Petrillo has resulted in a discovery scheme skewed by the opportunity afforded plaintiffs’ attorneys to collect information and communicate to physicians outside the bounds of formal discovery. Yet, the Petrillo decision does not compel this imbalance. In fact, carried to its logical conclusion, the Petrillo court’s findings support a symmetrical prohibition that would restore fairness to Illinois’ discovery scheme. The authors, therefore, propose that Illinois courts clarify that Petrillo’s prohibition on ex parte communications with treating physicians applies to plaintiff’s counsel as well as defense counsel.

Endnotes

1. The phrase “What’s good for the goose is good for the gander” is derived from the Old English maxim: “What’s sauce for the goose is sauce for the gander.” Both phrases mean that “[b]oth must be treated exactly alike.” See www.bartleby.com, “Gander” (citing Cobham E. Brewer, Dictionary of Phrase and Fable (1898)).

2. Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

3. George Orwell, Animal Farm, (“All animals are created equal, but some animals are more equal than others.”).


Montana, Jaap v. District Court of the Eighth Judicial Circuit, 623 P.2d 1389 (Mont. 1981);
New Hampshire, Nelson v. Lewis, 534 A.2d 720 (N.H. 1987);
New Mexico, Church’s Fried Chicken v. Hanson, 845 P.2d 824 (N.M. Ct. App. 1992);
New York, Stoller v. Moo Young Jun, 499 N.Y.S.2d 790 (N.Y. App. Div. 1986);
North Carolina, Crist v. Moffat, 389 S.E.2d 41 (N.C. 1990);
North Dakota, Bohrer v. Merrill-Dow Pharmaceutical, Inc., 122 F.R.D. 217 (D.N.D. 1987);

(Continued on next page)
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Rhode Island, §5-37.3-4(b)(8); Pitre v. Carhan, 2001 WL 770941 (R.I. Super. 2001);
South Dakota, Schaffer v. Spicer, 215 N.W.2d 134 (S.D. 1974) (by implication);
Texas, Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Tex. 1994);
Virginia, §8.01-399;
Washington, Loudon v. Mhyre, 756 P.2d 138 (Wash. 1988) (en banc);
West Virginia, State ex rel. Kitzmiller v. Henning, 437 S.E.2d 452 (W. Va. 1993);

3 For jurisdictions allowing ex parte communications, see the following:
Alaska, Langdon v. Champion, 745 P.2d 1371 (Alaska 1987);
Colorado, Samms v. District Court, 908 P.2d 520 (Col. 1995);
Delaware, Green v. Bosworth, 501 A.2d 1257 (Del. Sup. Ct. 1985);
Georgia, Orr v. Sievert, 292 S.E.2d 548 (Ga. App. Ct. 1982);
Hawaii, HI ST §626-1, R. 504(3);
Kansas, K.S.A. § 60-427(d); see also Lake v. Steeves, 161 F.R.D. 441 (1994);
Colby v. Eli Lilly & Co., No. 81-1542 (D. Kan 1982); see also, Bryant v. Hilst, 136 F.R.D. 487 (D. Kan. 1991);
Kentucky, Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993);
Michigan, Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991);
Minnesota, Blohm v. Minneapolis Urological Surgeons, 449 N.W.2d 168 (Minn. 1989); Minn. Stat. §595.02 (1988);
Mississippi, Tinnon v. Martin, 716 So. 2d 604 (Miss. 1998);
Missouri, Brandt v. Medical Defense Associates, 856 S.W.2d 667 (Mo. 1993);
New Jersey, Stempler v. Speidell, 495 A.2d 857 (N.J. 1985);
Oklahoma, Seaberg v. Lockard, 800 P.2d 230 (Ok. 1990);
Oregon, Grimm v. Ashmanskas, 690 P.2d 1063 (Or. 1984);
Tennessee, Qurander v. Sutherland, 389 S.W.2d 249 (Tenn. 1965).

6 See Horner v. Rowan Cos., 153 F.R.D. 597 (S.D. Tex. 1994) (“[F] ederal courts that have dealt directly with this issue seem to be split.”).

7 Petrillo, 499 N.E.2d at 174.

8 Id. at 587.

9 Id. at 177. (Emphasis added.)

10 Id. at 177 (“[T]he confidentiality of the physician-patient relationship is rooted deep in history.”)

11 For example, the court quoted the AMA’s Principles of Medical Ethics, which requires physicians to “safeguard patient confidences within the constraints of the law,” and in the Opinions of the Judicial Council of the AMA, which in Section 5.05 of its Current Opinions, stated that physicians should not reveal confidential communications without the express consent of the patient, unless required to do so by law.

12 Id.


14 Id. at 179

15 Under other circumstances, courts have rejected the notion of a partial waiver. See Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1975), in which the court stated: “When a client voluntarily waives the privilege as to some documents that the client considers not damaging and asserts the privilege as to other documents that the client considers damaging, the rule compelling production of all documents becomes applicable. The reason behind the rule is one of basic fairness. The rationale of the rule was aptly stated in 8 Wigmore, Evidence, § 2327*** ‘He [the client] cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.”

16 Id. (emphasis in original).

17 Strange in that, at the time the Petrillo suit was filed, ex parte conferences were the norm. Therefore, the plaintiff had no legal basis for his presumed expectation of privacy once the lawsuit was filed.

18 Petrillo, 499 N.E.2d at 179.

19 Id.

20 Id.

21 Id.

22 Id. at 596.

23 Id.

24 Id.


26 Id.

27 See, e.g., Langdon v. Champion, 745 P.2d 1371, 1375 (Alaska 1987), (“Indeed, we believe that to disallow a viable, efficient, cost effective method of ascertaining the truth because of the mere possibility of abuse, smacks too much of throwing the baby out with the bath water.”); Samms v. District Court, 908 P.2d 520, 526 (Col. 1995) (en banc), (“A rule permitting informal communications between a defense attorney and a plaintiff’s treating physician promotes the discovery process by assuring that both parties have access to an informal, efficient, and cost-effective method for discovering facts relevant to the proceedings.”); Lovato v. Burlington Northern and Santa Fe Railway Co., 200 F.R.D. 448, 451 (D. Col. 2001) (“It is illogical to suggest this court can best protect against lengthier, more expensive and potentially more contentious proceedings by limiting counsel to formal discovery procedures which are inevitably harder to schedule and more time-consuming and costly both for the parties and deponent.”).

28 99 F.R.D. at 128.


30 See Felder, 139 F.R.D. at 90 (“Defendants are entitled, as a matter of justice, to fully explore decedent’s health without plaintiff unnecessarily intruding into the process and exerting undue pressure upon witnesses to censor their speech.”).

31 Felder v. Wyman, 139 F.R.D. 85 (D.S.C. 1991) (“[D]efendants presumably have no interest in discovering information irrelevant to the decedent’s medical condition and treatment as put at issue by this lawsuit. Such discovery would serve no useful purpose and would waste time and money better spent on other endeavors.”).

33 In *Felder v. Wyman*, for example, the court stated: “The court also finds it anomalous that plaintiff should contend that trust and confidence between a doctor and his or her patient is enhanced when the patient insists on sending his lawyer to monitor the doctor’s conversation under the implicit threat that the patient will sue the doctor or initiate disciplinary proceedings should the doctor reveal more than the patient wishes to make known about his health***. The obstructions to the investigation of the truth arising from plaintiff’s proposed rule are plain. Discovery is made more difficult and costly. Each contact between defense counsel and treating physicians would require that consent be obtained from the plaintiff and meeting times be coordinated with plaintiff’s counsel.” 139 F.R.D. at 89.


35 See also Ill. S. Ct. R., RCP 3.4 (prohibiting, among other things, obstructing access to evidence, requesting that a witness refrain from giving voluntary information, and inducing a witness to give false testimony).

36 In *Doe v. Eli Lilly*, supra, for example, the court recognized that “[t]he potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal . . .” The *Eli Lilly* court ultimately concluded that this danger could be remedied on a post hoc basis through the imposition of sanctions, a cure for asymmetry that is apparently foreclosed in Illinois by *Petrillo*. Even innocuous statements or turns of phraseology can influence opinions or even perceptions of facts. “There are no facts, only interpretations.” Friedrich Nietzsche, *Daybreak*.


42 The court reasons that depositions do not “create[ ] such a hardship that it is necessary for us to carve an exception into the well established rules of discovery.” *Petrillo*, 148 Ill. App. 3d at 602.

43 Indeed, this is the entire point of *Petrillo*: that *ex parte* conferences are unnecessary to obtain all relevant information.
Health Law

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What Every Litigator Needs to Know About Apparent Agency

It has now been more than a decade since the Illinois Supreme Court announced its holding in Gilbert v. Sycamore Mun. Hosp., 156 Ill. 2d 511, 622 N.E.2d 788 (1993). This landmark case declared that a hospital could be held vicariously liable under the doctrine of apparent authority for the negligence of a physician who was not a hospital employee. To date, legislative attempts to create statutory requirements for such apparent agency claims have failed. See Best v. Taylor Mach. Works, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997) (holding the latest statutory alternative, 735 ILCS 5/2-624, unconstitutional). Thus, Gilbert remains the enduring standard for these claims. This article provides a brief review of Gilbert, as well as an overview of recent cases seeking to interpret, clarify, or expand it.

* The author acknowledges the assistance of Maureen R. De Armond, a law clerk with Heyl, Royster, Voelker & Allen, in the preparation of this article.

Gilbert and the Doctrine of Apparent Agency

In an effort to create uniformity across Illinois on this matter, the Gilbert court addressed the issue of a hospital’s potential vicarious liability for the negligence of a physician acting as an apparent agent. The Gilbert court began by discussing its observations concerning the realities of modern hospital care. Relying heavily on cases from other states, notably Wisconsin and New Jersey, the Supreme Court explained that patients seeking medical help through emergency rooms today are unaware of the status of the various professionals working there; they rely heavily on the reputation of the hospital itself, and they would naturally assume attending staff to be employees of the hospital, unless given notice otherwise. Gilbert, 156 Ill. 2d at 521 (citing Arthur v. St. Peters Hosp., 169 N.J. Super. 575, 583, 405 A.2d 443 (1979)).

The Gilbert court continued, noting that emergency room patients in modern-day hospitals, who are unaware that professionals providing treatment may not be employees or agents of hospital, should not be prohibited from seeking compensation from any hospital offering emergency room care. Gilbert, 156 Ill. 2d at 522 (citing Pamperin v. Trinity Meml. Hosp., 144 Wis. 2d 188, 423 N.W.2d 848 (1988)). The Supreme Court then concluded that “liability attaches to the hospital only where the treating physician is the apparent or ostensible agent of the hospital. If a patient knows, or should have known, that the treating physician is an independent contractor, then the hospital will not be liable.” Gilbert, 156 Ill. 2d at 522.

Though Gilbert addressed emergency room negligence, the Gilbert test is applicable to claims based on the negligent conduct of physicians wherever it occurs. Malanowski v. Jabamoni, 293 Ill. App. 3d 720, 727, 688 N.E.2d 732 (1st Dist. 1997). The Malanowski court held: “we discern nothing in the Gilbert opinion which would bar a plaintiff, who could otherwise satisfy the elements for a claim based on apparent agency, from recovering against a hospital merely because the negligent conduct of the physician did not occur in the emergency room.” Id. Thus, while some apparent agency cases do focus on emergency room negligence, others, including some of the cases discussed below, analyze the acts of radiologists, anesthesiologists, neurologists, and other medical specialists and hospital professionals.

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* The author acknowledges the assistance of Daniel P. Hiser, a law clerk with Heyl, Royster, Voelker & Allen, in the preparation of this article.
The Gilbert Test

The Gilbert court set forth a three-prong test that courts should apply in cases where apparent authority may be at issue: (1) Holding Out: the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the allegedly negligent physician was an employee or agent of the hospital; (2) Appearance of Agency: the acts of the physician created the appearance of authority, the plaintiff must prove that the hospital had knowledge of and acquiesced in those acts; and (3) Justifiable Reliance: the plaintiff acted in reliance upon the conduct of the hospital or its agent. Gilbert, 156 Ill. 2d at 525. Illinois plaintiffs must be able to satisfy all three prongs to successfully hold a hospital vicariously liable on an apparent agency claim. Robers v. Condell Med. Ctr., 344 Ill. App. 3d 1095, 1097, 801 N.E.2d 1160 (2d Dist. 2003) (citing Churkey v. Rustia, 329 Ill. App. 3d 239, 245, 768 N.E.2d 842 (2d Dist. 2002)).

1. Holding Out

In James v. Ingalls Meml. Hosp., 299 Ill. App. 3d 627, 701 N.E.2d 207 (1st Dist. 1998), the First District affirmed summary judgment for the defendant hospital based upon the unambiguous language contained in a signed consent form. In this case, the plaintiffs sought to hold the hospital vicariously liable for the malpractice of an attending obstetrician/gynecologist. The plaintiff had read and signed an “Emergency Care/Hospitalization Consent, Authorization for Release of Information and Assignment of Benefits” form shortly after her admission, which included the following disclaimer:

The physicians associated with SEA and the physicians on staff at this hospital are not employees or agents of the hospital, but independent medical practitioners who have been permitted to use its facilities for the care and treatment of their patients. I have had the opportunity to discuss [sic] this form, and I am satisfied I understand its contents and significance. I may withdraw my consent at any time. James, 299 Ill. App. 3d at 629.

The James court noted that while it did not find the existence of an independent contractor disclaimer in a consent form always dispositive on the issue of “holding out,” such a formality was an important factor to consider. James, 299 Ill. App. 3d at 633. The James court continued, noting that having a patient sign such a form with express language would make it very difficult for a plaintiff to prove the first element of the Gilbert test. Ultimately, the James court concluded that the plaintiff had failed to meet this burden; she simply knew or should have known that the defendant physician was an independent contractor. Id.

In Churkey v. Rustia, 329 Ill. App. 3d 239, 768 N.E.2d 842 (2d Dist. 2002), the Second District also upheld summary judgment in favor of defendants. The plaintiff claimed to have suffered permanent brain damage resulting from receipt of the wrong type of anesthesia and sued the hospital on an apparent agency theory. The court questioned whether the plaintiffs had “raised a genuine issue of material fact as to the first element of Gilbert; whether the hospital ‘held out’ [the defendant physician] as its agent.” Churkey, 329 Ill. App. 3d at 243. As in James, the plaintiff in this case had signed a consent form, this one clearly listed the anesthesiologist’s group as independent contractors. In its holding, the Churkey court explained that the plaintiff presented no specific facts to support her assertion that prior to her surgery she believed the anesthesiologist was an employee of the hospital. The court noted that even though a plaintiff is not required to prove her case at the summary judgment stage, the court held that this plaintiff had not presented any factual basis that would arguably entitle her to judgment in her favor. Churkey, 329 Ill. App. 3d at 244-45. The Churkey court concluded that in light of the absence of facts showing that the hospital held out the anesthesiologist as its employee, combined with the signed consent form, it was clear that the plaintiff did not present any factual basis for her claims. Churkey, 329 Ill. App. 3d at 245.

In 2003, the Second District Court of Appeals decided Robers v. Condell Med. Ctr., 344 Ill. App. 3d 1095, 801 N.E.2d 1160 (2d Dist. 2003). The Robers court evaluated whether the defendant hospital acted in a manner that would lead a reasonable person to conclude that the physician was an employee or an agent of the medical center. In this case, the physician sublet the office in a building that was owned by the defendant medical center. The medical center had no knowledge of the physician’s presence in their building, the physician was not on staff at defendant medical center, and he was not an employee of the hospital. The Robers court held that the fact that the defendant physician retained office space in a building owned and operated by the defendant hospital was not enough to create a genuine issue of material fact. Further, the Robers court held that no reasonable person would have believed that the physician was “an employee or agent” of the hospital simply because he leased space in a building bearing the hospital’s name. Robers, 344 Ill. App. 3d at 1098.

The Robers court distinguished the facts in its case from those in McCorry v. Evangelical Hosps., Corp., 331 Ill. App. 3d 668, 771 N.E.2d 1067 (1st Dist. 2002). The hospital in McCorry published literature referring to physicians who worked (Continued on next page)
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at the hospital as its physicians and claiming that the expertise of those physicians made the hospital a desirable place to seek medical care. This list included defendant neurosurgeons who maintained an office connected to the hospital. The McCorry court found that the hospital held itself out as the principal for the defendants and subsequently overturned the motion for summary judgment which had been granted in favor of the defendant hospital. McCorry, 331 Ill. App. 3d at 672, 675.

2. Appearance of Agency

The McCorry court also briefly discussed the issue of appearance of agency. McCorry explained that under Gilbert, a court must determine whether the appearance of agency led to the relationship between the plaintiffs and the allegedly negligent defendant physician. In McCorry, the court held that the fact that the plaintiff’s personal physician referred him to the neurosurgeon consultation was not, in itself, sufficient to require judgment in favor of the hospital. McCorry, 331 Ill. App. 3d at 673-74 (citing Scardina v. Alexian Bros. Med. Ctr., 308 Ill. App. 3d 359, 719 N.E.2d 1150 (1st Dist. 1999)). The McCorry court also considered that the plaintiff had presented evidence that “the hospital advertised itself in a manner that might lead a reasonable person to conclude that the hospital accepted responsibility for its choice of doctors to give the advertised health care, and thus that the doctors acted as the hospital’s agents.” McCorry, 331 Ill. App. 3d at 675. Further, defendant hospital presented no evidence that it had informed the plaintiff that the neurosurgeon was an independent contractor. Along this line of reasoning, some courts, such as the Fourth District in Kane v. Doctors Hosp., 302 Ill. App. 3d 755, 762, 706 N.E.2d 71 (4th Dist. 1999), purport that under Gilbert no requirement exists that a plaintiff must make a direct inquiry into the status of physicians working in a hospital. Instead, the burden is on the hospitals to put their patients on notice if an attending professional is an independent contractor.

3. Justifiable Reliance

The James court also discussed the third prong of the Gilbert test, which requires a patient’s justifiable reliance upon the conduct of the hospital or its agent. In James, the First District held that the plaintiff failed to meet her burden in establishing the element of reliance because she did not in fact rely on any representations of the hospital or the doctor in going to Ingalls Memorial Hospital. James, 299 Ill. App. 3d at 635. The compelling facts mentioned in reaching this conclusion were that the plaintiff admitted in her deposition that she went to Ingalls because it was very near to her home, that she would have gone there even if she had known that the emergency room physicians were not employees of Ingalls, and that she went there because she thought public aid required her to see a physician at that particular hospital. These admissions were read by the court as dispositive in their finding that there was no material fact as to whether the plaintiff acted in reliance upon the conduct of the hospital or its agent, as required by Gilbert. James, 299 Ill. App. 3d at 635.

The McCorry court also examined the justifiable reliance prong of the Gilbert test. Here, the court criticized an earlier First District case, Butkiewicz v. Loyola Univ. Med. Ctr., 311 Ill. App. 3d 508, 724 N.E.2d 1037 (1st Dist. 2000). In Butkiewicz the court had affirmed summary judgment for the defendant hospital charged with responsibility for its radiologist’s negligence because the plaintiff’s personal physician referred him to the hospital for treatment. In that case the plaintiff had explicitly testified that he did not trust the hospital and he trusted only his personal physician. The court in McCorry found that the Butkiewicz court had focused improperly on the plaintiff’s reasons for choosing the hospital, rather than the plaintiff’s reasons for accepting treatment from the allegedly negligent physician. The McCorry court found that Butkiewicz misapplied Gilbert, and had used reasoning inconsistent with what had been adopted by the Supreme Court in Gilbert. In clarifying the justifiable reliance prong, the McCorry court explained that if a plaintiff shows that he relied in part on the hospital when he accepted treatment from an allegedly negligent doctor, he has met the reliance element of the proof needed to hold the hospital liable under the theory of apparent agency. McCorry, 331 Ill. App. 3d at 674-75.

In Scardina v. Alexian Brothers Medical Center, 308 Ill. App. 3d 359, 719 N.E.2d 1150 (1st Dist. 1999), the court essentially made it easier for the plaintiffs to satisfy the justifi-
able reliance prong of the Gilbert test. Here, the First District held that nothing in Gilbert suggested that a plaintiff must make an independent determination of whether to rely on a particular hospital for treatment. Citing Kane, the Scardina court explained that the fact that a plaintiff originally went to a hospital due to an appointment made by a personal physician was inconsequential to the plaintiff’s ability to establish the reliance element. Ultimately, the Scardina court held that without more, the mere fact that a personal physician sent the plaintiff to a particular hospital did not, as a matter of law, preclude the plaintiff’s reliance on that hospital to provide for his care. Scardina, 308 Ill. App. 3d at 366.

An additional case addressing the third prong of the Gilbert test dates back to 1994. Monti v. Silver Cross Hosp., 262 Ill. App. 3d 503, 637 N.E.2d 427 (3d Dist. 1994). The Monti court had the opportunity to discuss the complicating factor, in reference to justifiable reliance, of an unconscious patient. In this case the plaintiff was thrown from a horse, rendered unconscious, and taken to an emergency room by ambulance. Silver Cross Hospital had only one neurosurgeon on staff, who had informed the hospital in writing that all emergency room patients with closed head trauma should be transferred to Loyola Medical Center because he would be unavailable during the time at issue. The plaintiff in this case was not transported as directed until 12 hours after she originally arrived at Silver Cross. In applying the Gilbert test, the Monti court addressed the perplexing application of the justifiable reliance prong to a case where the plaintiff was unconscious during her entire stay at defendant hospital. If taken too literally, the Gilbert test would seem to preclude any unconscious patient from recovering on the theory of apparent agency, because they could not justifiably rely on the hospital to provide complete emergency room care, rather than upon a specific physician, if they were unconscious. The Monti court quickly precluded such outcomes by permitting the element of justifiable reliance to be transferred from unconscious patients to those persons responsible for them. The Monti court held that those responsible for the plaintiff sought care from Silver Cross, and thus, a jury could find that they, rather than the plaintiff, had relied upon the fact that complete emergency room care would be provided through the hospital staff. Monti, 262 Ill. App. 3d at 507-08.

Wheaton’s Reverse Apparent Agency Theory

One final case worth mentioning is Wheaton v. Siwana, 341 III. App. 3d 929, 793 N.E.2d 978 (5th Dist. 2003). In this case, the plaintiff presented a unique argument and use of the Gilbert doctrine, arguing that a treating physician should be stopped from making the argument that he was a hospital employee, and should instead be found to be an independent contractor. The plaintiff in Wheaton was compelled to advance this argument because the hospital in question was a local public entity subject to the Local Governmental and Governmental Employees Tort Immunity Act (“Act”) (745 ILCS 10/1-101 et seq.), which mandated a one-year statute of limitations for malpractice claims. The plaintiffs had filed their complaint against the defendant physician after that statute had expired, resulting in their initial suit being dismissed as untimely. If this defendant physician was found to be an independent contractor, the Act would not apply and the statute of limitations would be two years, thus eliminating the issue of timeliness. Consequently, the plaintiff argued that because the physician exercised his own professional judgment in treating patients, he could not properly be found to be a hospital employee since he was not subject to the hospital’s control. The Wheaton court rejected this argument, finding that simply because an employee exercises independent professional judgment in carrying out his or her job duties, does not mean the employer automatically lacks the required control to establish an employment relationship. Wheaton, 341 Ill. App. 3d at 937.

However, the Wheaton court did not close the door on future plaintiffs pursuing this reverse apparent agency theory. The plaintiff’s weakness in this case was the compelling evidence that the defendant physician was clearly a salaried employee of the hospital, not the novel legal theory the plaintiff had pursued.

Conclusion

Though medical malpractice will likely remain an important legislative topic, until the Illinois legislature enacts an alternative to Gilbert that passes constitutional muster, Gilbert will likely continue to set forth the test Illinois courts will apply in apparent agency situations. While the Supreme Court has shown little interest in altering this seminal case, it will be ever important to monitor the appellate courts as they meddle, even if only slightly, with Gilbert’s boundaries and application.
Workers’ Compensation Report

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Sidewalk and Parking Lot Falls

In Litchfield Health Care Center v. Industrial Comm., 349 Ill. App. 3d 486, 812 N.E. 2d 401, 285 Ill. Dec. 581, an employee of a nursing home parked her car in a parking lot maintained by the respondent. She walked into her place of employment and clocked in. She realized she had forgotten an item necessary for work, and then returned to her car to obtain that item. There is no dispute that the item that she was retrieving from her car was necessary for her to do her job.

When she was walking to her car with a co-employee, she stepped onto a sidewalk, tripped and fell. The claimant stated that because the concrete was not level, she rolled her ankle and sustained an injury, which led to surgery.

Exhibits were introduced into evidence, which included photographs. The photographs showed varying heights in the adjoining sidewalk slabs. The arbitrator found that the petitioner sustained injuries that arose out of her employment. The Industrial Commission reversed. A circuit court reversed the decision of the Industrial Commission and reinstated the arbitrator’s award, which found compensability.

The main issue before the appellate court was whether or not the injury arose out of the claimant’s employment. The appellate court discussed the various categories of risk, of which there three types: 1) risks that are distinctly associated with the employment, 2) personal risks, and 3) a neutral risks, which have no particular personal or employment characteristics. In applying this analysis, the appellate court determined that the risk of tripping on the sidewalk is a neutral one and therefore the question of whether the injury arose out of her employment rested on a determination of whether she was exposed to a risk to a greater extent than to which the general public was exposed.

The appellate court found that the Industrial Commission’s finding of no compensability was against the manifest weight of the evidence. The appellate court determined that the claimant was exposed to a defective sidewalk, which created a risk of tripping more frequently than the general members of the public. Where an injury to an employee takes place in an area that is the usual route to the employer’s premises, and if that route has special risks or hazards, the hazard becomes part of the employment. A dissenting justice argued that the Industrial Commission’s determination that there was no special hazard or risk was not against the manifest weight of the evidence.

In Margaret Vill v. Industrial Comm., 351 Ill. App. 3d 798, 814 N.E.2d 917, 286 Ill. Dec. 691 (1st Dist. 2004), the claimant was a security officer who entered the employee parking lot and parked her car in a place that was very narrow. The claimant claimed that she had to squeeze out of her car because there was only six inches between her car and the car next to her. Upon exiting the car, she claims she twisted her knee before the knee hit the ground.

The medical records and other witnesses contradicted the testimony of the claimant. The arbitrator found that a compensable accident took place, but the Industrial Commission reversed the decision, which was later confirmed by the circuit court.

The appellate court confirmed the decision of the Industrial Commission, finding that the Industrial Commission’s denial was not against the manifest weight of evidence. It noted the inconsistent history of how the accident occurred and the finding made by the Industrial Commission that there was no defect in the parking lot that caused the injury.

Both decisions underscore the necessity of a thorough investigation to determine first whether or not the claimant initially stated that a defect caused the injury, and second, whether an actual defect existed. Early investigation is imperative as well as the examination of all initial reports and medical records that document how the incident occurred.

About the Author

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How Good is a Ghere Objection?

Workers’ Compensation practitioners who attend and take evidence depositions of treating and examining physicians have become familiar with what is known as a Ghere objection. This objection originated in the appellate court decision of Ghere v. Industrial Comm., 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (4th Dist. 1996).

In Ghere, a treating physician had never treated an injured worker for an alleged heart condition. The records never mentioned any heart condition. At an evidence deposition of the treating physician, the claimant’s attorney asked causal connection questions with respect to the heart condition. The appellate court concluded that the employer’s attorney was truly surprised. It held that the physician’s causation opinion had gone beyond the contents of the medical records and because the opinion was not previously and appropriately disclosed, the opinion was not admissible. In Homebrite Ace Hardware v. Industrial Comm., 351 Ill. App. 3d 333, 814 N.E.2d 126, 286 Ill. Dec. 476 (5th Dist. 2004), an employee was injured when lifting buckets. He felt pain in his low back and was treated for low back pain, including a herniated disc. He returned to work with restrictions.

It does not appear that there was any mention of any neck problem in the six to eight week period after the accident. The petitioner testified that he had never experienced any neck problems before the injury, but was eventually referred to a neurosurgeon, who treated him for the low back as well as for the cervical pain as it developed. Prior to an evidence deposition, the treating neurosurgeon did not provide either the petitioner or the respondent’s counsel with a report or opinion regarding the causal connection between the accident and both the neck and low back problems.

At the deposition, the neurosurgeon testified that there was causal connection between both the neck and low back problems and the work accident. This testimony was made over a Ghere objection. The neurosurgeon also testified that the claimant was in need of neck surgery, which had not taken place because it was not authorized.

The arbitrator found a causal connection and ordered the respondent to authorize the neck surgery. The Industrial Commission and the circuit court both affirmed the arbitrator’s decision.

The appellate court noted that Ghere did not set forth a bright-line rule that undisclosed opinion testimony constitutes a surprise. The appellate court felt that the neurosurgeon’s records contained details about treatment of the claimant’s neck and therefore, the employer was put on notice that the neurosurgeon might testify as to the causal connection between the neck condition and the work accident. Accordingly, the employer’s argument that this testimony and opinion should have been excluded was rejected.

It is worth noting that with respect to evidentiary rulings involving Industrial Commission cases, those rulings will not be disturbed absent an abuse of discretion. According to Trettenero v. Police Pension Fund of the City of Aurora, 333 Ill. App. 3d 792, 776 N.E.2d 840, 267 Ill. Dec. 468 (2nd Dist. 2002), an abuse of discretion occurs where no reasonable person would take the view adopted by the lower tribunal.

“The appellate court concluded that the employer’s attorney was truly surprised. It held that the physician’s causation opinion had gone beyond the contents of the medical records and because the opinion was not previously and appropriately disclosed, the opinion was not admissible.”

As many workers’ compensation practitioners have realized for several years, any defense to a workers’ compensation claim that involves laying in the weeds and making a Ghere objection may not be successful and is not recommended. It would appear that if the body part that is in controversy in the workers’ compensation claim is mentioned by a treating doctor in his or her records, this could be sufficient to put the employer on notice of the potential opinion.
Employment Law Issues

By: Kimberly A. Ross
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Gender Discrimination

Punitive Damages Award Excessive Considering Employer’s Prompt Action to Remedy

In Lust v. Sealy, Inc., 2004 U.S. App. LEXIS 18830, 2004 WL 1965667 (7th Cir. September 7, 2004), Tracey Lust sued her employer Sealy, Inc., for sex discrimination in violation of Title VII, 42 U.S.C. § 2000a et. seq. A jury returned a verdict in her favor, awarding her $100,000 in compensatory damages and $1 million in punitive damages. Pursuant to 42 U.S.C. § 1981a(b)(3)(D), which places a ceiling of $300,000 on the total damages that may be awarded in an employment case against the largest employers, the district court judge reduced the total award to $300,000 and added $1,500 in back pay, which is not within the statutory meaning of “damages” pursuant to 42 U.S.C. § 1981a(b)(2). Sealy appealed, asserting that no reasonable jury could have found sex discrimination.

The Seventh Circuit disagreed, noting that there was reason for a jury to find that Sealy discriminated against Lust because of her gender. Lust was a highly regarded sales representative who had been with Sealy since 1992. In 2000, Lust was passed over for a promotion that would have moved her from Madison, Wisconsin, to Chicago. The promotion went to a younger man. Sealy promoted Lust shortly after she filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC).

The record showed that Lust’s supervisor had a history of making sexist remarks regarding her hair color and marital status. Lust’s supervisor also admitted that he didn’t consider recommending her for promotion because she had children. The supervisor stated he did not think she would want to relocate her family, despite her indications to the contrary.

The court noted that if Lust’s supervisor had no input into the decision to not promote her to the Chicago position, his sexist attitudes would be irrelevant because they could have no causal relation to the discrimination of which Lust complained. However, while Lust’s supervisor did not decide who would be promoted, he did recommend Lust’s male competitor for the promotion. The court found that the jury could have inferred that Lust’s male competitor was the only person her supervisor recommended and, as a result, they gave great weight to the recommendation.

The court, while mindful that a subordinate’s influence, even substantial influence, over the supervisor’s decision is not enough to impute the discriminatory motives of the subordinate to the supervisor, noted that such imputation is permitted if the supervisor was the subordinate’s “cat’s paw.” Therefore, if Lust would not have been turned down for the promotion had it not been for her supervisor’s recommendation – a recommendation that the Seventh Circuit found the jury could reasonably find was motivated by sexist attitudes – then her supervisor’s sexism was a cause of her injury.

The court further rejected Sealy’s argument that had Lust been given the Chicago promotion she would have had to deal with foul-mouthed customers. Sealy argued that several years earlier Lust forfeited an account to another sales representative after enraging a customer whom she could not divert from talking about the strip bar he owned and his sexual activities. The court noted that this argument reinforced Sealy’s stereotypical thinking and assumed women could not deal with foul-talking men. The court found that a reasonable jury could find that Sealy would not have made such an assumption of a man’s ability to deal with such difficult customers.

When awarding damages, the district court noted that the jury’s original compensatory damages award of $100,000 was 1/11th of the total damages awarded by the jury. Therefore, the district court allocated $27,000, or 1/11th of the $300,000, to compensation for Lust’s emotional distress and awarded $273,000 in punitive damages. Sealy argued the

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* The author acknowledges the assistance of Jennifer L. Colvin, an associate with Cremer, Kopon, Shaughnessy & Spina, LLC, in the preparation of this article.
district court’s award of punitive damages should be reduced because punitive damages may not be awarded against an employer in a Title VII case on the basis of discriminatory acts by its managerial employees if those acts are contrary to the employer’s good faith efforts to comply with Title VII. Sealy pointed to a variety of efforts it made to comply with the statute, including prompt promotion of Lust after discovering she believed herself to be a victim of sex discrimination. The Seventh Circuit found Sealy waived this argument by failing to request a jury instruction on the good faith defense.

The Seventh Circuit also rejected Sealy’s argument that the award of punitive damages offended due process. The court pointed out that the ratio of punitive to compensatory damages ceased to be an issue of constitutional dignity when Congress set a limit on the total damages that could be awarded.

The Seventh Circuit, however, was persuaded by Sealy’s argument that the punitive damages award was excessive given the prompt steps it took to correct the discriminatory denial of promotion. Concerned that upholding an award of the maximum damages allowed by the statute in a case of relative slight, because quickly rectified, discrimination would impair marginal deterrence, the court found that the maximum award reasonable in this matter was $150,000. Accordingly, the court affirmed the judgment, except to the award damages, and found Sealy was entitled to a new trial unless Lust accepted a remittitur of the excess of those damages over $150,000.

### Title VII

**Arbitration Clause Enforceable in Title VII Dispute**

In *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004), Felicia Winiecki signed a contract agreeing to arbitrate any disputes arising out of her employment when she went to work for Oblix in September 2000. Winiecki was terminated in April 2002. She believed that the discharge and other acts violated Title VII. The district court denied Oblix’s motion to compel arbitration over the matter, and Oblix appealed after its motion to reconsider was denied.

Winiecki defended the district court’s decision by arguing that the arbitration agreement did not cover disputes about compensation or discrimination. The Seventh Circuit reversed the decision and found this argument unavailing by noting the contract specifically stated “any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be resolved exclusively by binding arbitration.” *Winiecki*, 374 F.3d at 490. The court found “arising out of or relating to” was inclusive of Winiecki’s contention that her discharge was discriminatory.

The Seventh Circuit also rejected the district court’s belief that the arbitration clause, as part of a form contract, might be called unconscionable because the clause and the rest of the agreement were offered on a take-it-or-leave-it basis, and Oblix did not promise to arbitrate all of its disputes with Winiecki. The court determined that the arbitration clause was supported by consideration—that being Winiecki’s salary. The court found arbitration was as much a part of her employment agreement as salary and commissions. Therefore, the court reversed the decision of the district court and remanded with instructions to refer the parties to arbitration.

### Sexual Harassment

**Eighth Circuit Finds Defendant Entitled to Modified Faragher/Ellerth Affirmative Defense**

In *McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004), Jamie McCurdy began her employment as a dispatcher with the Arkansas State Police (ASP) in April 2002. At this time, McCurdy received a copy of the personnel manual, which contained a section prohibiting sexual harassment and detailing how to redress perceived harassment.

Shortly after McCurdy began her employment, a sergeant fondled her breast, played with her hair and told her he was “turned on” by her. McCurdy reported the incident to the highest ranking sergeant on the force on the same evening it occurred. This sergeant reported the incident to his supervisor.

(Continued on next page)
who instructed the sergeant to make sure McCurdy and the accused harasser had no contact. Management also reassigned McCurdy’s radio duties so she would have no contact with the accused harasser.

ASP also reported McCurdy’s allegations to the Special Investigation Unit (SIU), which concluded the sergeant violated the ASP’s workplace harassment policy. The SIU recommended the sergeant be demoted to the rank of corporal, seek counseling for his behavior and be placed on probation for one year. However, the disciplinary review board found McCurdy’s complaint unfounded. Despite this finding, the review board recommended the sergeant be demoted for violating ASP’s policy regarding improper conduct.

The review board’s recommendation was forwarded to the ASP’s director for a final determination. The director terminated the sergeant for deliberately lying or making false statements while being questioned during the internal investigation. The sergeant appealed his termination and was reinstated to the demoted position of corporal.

McCurdy sued the ASP for the alleged sexual harassment perpetrated against her by the sergeant. The district court held ASP could not be vicariously liable for the sergeant’s conduct and granted summary judgment to the ASP based on its entitlement to an affirmative defense. On appeal, the Eighth Circuit determined that regardless of whether the single incident involving McCurdy and the sergeant met the high threshold for actionable harm under Title VII, the ASP’s assertion of an affirmative defense shielded it from liability. When considering employer liability for supervisor harassment when no tangible employment action is taken against the plaintiff, the employer is entitled to raise the Faragher/Ellerth affirmative defense. Burlington Indus., Inc. v. Ellerth, 524 U.S. 951, 118 S. Ct. 2365 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998). Two elements are necessary to raise the defense: (1) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Id.

The Eighth Circuit flatly rejected McCurdy’s argument that the ASP failed to conduct a proper investigation and take proper remedial action, which would have negated the first element of the affirmative defense. McCurdy also contended the affirmative defense was unavailable to the ASP because it could not prove she unreasonably failed to take advantage of any preventative or corrective opportunities it provided.

The court rejected McCurdy’s argument regarding the second prong by determining the ASP was entitled to a modified Faragher/Ellerth affirmative defense despite its inability to prove the second element. The Eighth Circuit reasoned that in crafting the Faragher/Ellerth affirmative defense, the United States Supreme Court did not hold employers strictly liable for single incidents of supervisor sexual harassment. The court noted the theme of Title VII is for employers to “nip harassment in the bud.” McCurdy, 375 F.3d at 772. It found that to reach the conclusion that the affirmative defense was unavailable in single incident cases in which an employee takes advantage of preventative or corrective opportunities and the employer takes swift and effective action in response would effectively create strict liability for employers in single incident cases, which would be contrary to the Supreme Court’s prior holdings.

The Eighth Circuit further noted to hold otherwise would make the promise of an affirmative defense in single incident cases not involving a tangible employment action illusory. The result would hold effective employers liable for single incidents of supervisor harassment while allowing other employers an affirmative defense for multiple and ongoing incidents of harassment.

ADEA

Plaintiff Fails to Establish a Prima Facie Case of Age Discrimination

In Sembos v. Philips Components, 376 F.3d 696 (7th Cir. 2004), Athanasios Sembos began working for Philips Components in 1978. In September 1998, Philips notified Sembos that it was selling a substantial portion of its components division to Beyerschlag Centralab Components (BCC) and many jobs
would be lost. After the sale of Philips was announced, Sembos’ supervisor and a BCC executive offered him a position with BCC. Sembos agreed to accept the position if his pension benefits would be the same as he received from Philips. Sembos maintained that he was promised if the benefits package was not equivalent he could remain employed at Philips.

Sembos rejected BCC’s offer and decided to continue his employment with Philips after learning BCC’s pension benefits were not equivalent. Philips and BCC agreed Sembos’ services would be contracted out to BCC for a six-month period with Philips reserving the right to terminate him when the period ended. During the six-month period, Sembos expressed interest in eight positions at Philips, but never actually applied for any of the positions. When the six-month period ended, Sembos was terminated. Sembos was 51 years old at the time of his termination.

Sembos filed suit for age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. Summary judgment was granted in favor of Philips. On appeal, the Seventh Circuit affirmed the district court’s finding that Sembos failed to establish a prima facie case of age discrimination.

In order to assert a prima facie case of age discrimination, a plaintiff must establish he: (1) was a member in a protected group; (2) sought a position or a transfer for which he was qualified; (3) was not hired; and (4) a substantially younger person who was similarly situated was hired. See, Zaccagnini v. Charles Levy Circ. Co., 338 F.3d 672 (7th Cir. 2003). The Seventh Circuit affirmed the district court’s conclusion that Sembos failed to establish the second and fourth prongs.

The court determined Sembos failed to present any evidence that he was qualified for any of the eight jobs he submitted an interest in obtaining, whereas Philips presented evidence he was not qualified for the positions. The court also noted that only two of the eight positions were filled with younger candidates. Further, the court looked at the testimony of Philips’ hiring managers, who testified that they would not have considered Sembos a viable candidate. Therefore, even if Sembos was qualified and capable of establishing a prima facie case, Philips was entitled to summary judgment because it presented a legitimate nondiscriminatory reason for its refusal to hire Sembos.

Lastly, the court rejected Sembos’ claims he should be treated as if he applied for 89 other positions within Philips, none of which he applied for, that were filled during his loaned employment period. The court found an employer cannot be held liable for failing to hire a person who does not apply for a job.

Age/Race/Retaliation
Employer’s Proffered Reason for Failing to Select Employee for Position Was Not Pretext

In Holmes v. Potter, 2004 U.S. App. LEXIS 19256, 2004 WL 2039169 (7th Cir. September 14, 2004), Rochester Holmes began working for the United States Postal Service (USPS) in 1974. While serving as a general supervisor, Holmes applied for a vacant position as a manager. When he learned he had not been selected, he filed an EEOC charge claiming discrimination.

Sometime in 1991, Holmes took sick leave. While on sick leave he was selected for a position as a maintenance programs specialist. Holmes had not applied for or expressed interest in the position. After using up his sick leave, Holmes went on leave without pay until he was terminated in 1992. Holmes’ termination was challenged in a civil suit that resulted in a settlement agreement. Pursuant to the settlement agreement, Holmes was reinstated to the position of supervisor.

Twice in 1996, Holmes applied for a vacancy as a manager in a vehicle maintenance position. A three-member panel selected finalists for the position. Holmes was not selected as a finalist, and thereby was not selected for the position. As a result, Holmes brought suit in 1999 claiming race and age discrimination, as well as retaliation for filing a claim of discrimination. Holmes’ claims were disposed of when the district court granted the USPS’ motion for summary judgment.

On appeal the parties did not contend that Holmes failed to make a prima facie showing of discrimination or retaliation. Rather, they focused their arguments on pretext, which could be proved by showing that the USPS’ explanation had no basis in fact, that the explanation was not the real reason for the adverse action, or that the stated reason was insufficient to warrant the adverse action. The USPS maintained the finalists for the manager position were selected because those individuals were better qualified than the other applicants. The litmus test used by the USPS in selecting the finalist was current knowledge and recent experience in the position being offered or related job experience.

Holmes attempted to show the litmus test was pretext for discrimination by claiming that current experience in vehicle maintenance was not posted as a requirement for filling the position. The court noted that the USPS, ultimately relying on factors other than the posted minimum qualifications, did not discriminate. The court further found discrimination was not shown by the vacancy announcement being posted twice.

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Employment Law Issues (Continued)

Holmes also pointed to another African-American applicant who had served six details as manager of vehicle maintenance as a qualified applicant who was not selected. The court rejected Holmes’ argument, noting it was undisputed that Holmes did not have current experience in managing vehicle maintenance and significantly less experience than the finalist for the position.

The court also rejected Holmes’ statistical argument, which showed there were eight African-American applicants, one Hispanic applicant and four Caucasian applicants. Ultimately, the three finalists were Caucasian. The remaining Caucasian applicant had prior EEOC activity. While the court found the statistical evidence relevant, it determined that it was not dispositive without other evidence of pretext.

Moreover, the court found it worth noting that two of the panel members expressly stated that they did not know Holmes’ race and were not aware of any prior EEOC activity. The third panel member, an African-American male over the age of 40, stated he did not know Holmes and did not discriminate against him on any basis. While the court noted that an employer’s lack of knowledge about a protected category usually “rings a death knell for discrimination claims,” it declined to assume the third panelist was unaware of Holmes’ protected status. Holmes, 2004 U.S. App. LEXIS 19256 at *16. Nonetheless, the Seventh Circuit determined the facts clearly supported the granting of summary judgment.

Age Discrimination

Termination for Violation of Residency Requirement Not Pretext for Age Discrimination

In Gusewelle v. City of Wood River, 374 F.3d 569 (7th Cir. 2004), the city of Wood River, Illinois, hired Delmar Gusewelle in 1981 as a golf course equipment mechanic. The city of Wood River maintained a residency requirement and gave Gusewelle one year to move from his home in the neighboring town of Edwardsville. About a year after being hired, Gusewelle began staying two nights a week at his family’s farm in Wood River, in which he had a one-third-ownership interest. Although his wife stayed in Edwardsville, Gusewelle paid his income taxes, voted, and registered his car and driver’s license using the Wood River address. He did not inform any city employee about his dual residency. This arrangement continued nearly 20 years until he was terminated for violating the residency regulation. Prior to his termination, Gusewelle was considered an excellent and outstanding employee.

Gusewelle was 67 at the time of his termination. After he was terminated, Gusewelle reapplied for his job and promised to comply with the residency requirement. His offer was rejected and he was replaced with an employee approximately 25 years younger. Gusewelle then brought suit against the city and the city’s manager alleging he was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The district court granted summary judgment in favor of the defendants, finding Gusewelle failed to show a genuine issue of fact on the question of whether the defendants’ proffered reason for his termination was pretextual.

On appeal, the Seventh Circuit found Gusewelle had established a prima facie showing of discrimination since his age fell in a protected class, he was qualified for the position, he suffered an adverse employment action and similarly situated employees not in the protected class were treated more favorably. Despite this finding, the court determined that Gusewelle’s claim failed due to the defendants’ legitimate nondiscriminatory reason for terminating him.

The court found that the city’s claim that Gusewelle was fired for violating the residency requirements well supported, thereby shifting the burden back to Gusewelle to show that the articulated reason was merely pretextual. Gusewelle supported his pretext argument by maintaining that his dual residency was no secret and by having such knowledge the city ratified the arrangement. The court rejected this argument, finding there was no evidence that any specific individual knew about Gusewelle’s living arrangement.

Gusewelle also argued pretext could be found in the city’s refusal to allow him a grace period to comply with the residency requirement. However, the court noted that the city’s personnel rules stated that one who violated the requirement would be terminated. The court determined that abiding by the terms of the ordinance is not evidence of pretext. The court also found the city’s explanation for not rehiring Gusewelle – it could not feel certain Gusewelle would not violate the rules again – was a nondiscriminatory reason.

Additionally, the court rejected Gusewelle’s argument that he was not in violation of the residency requirement by finding the city reasonably believed he violated the requirement. The city’s personnel rules defined residence as a person whose primary residence lies within the corporate limits of the city. The court found the city’s belief that their rule required Gusewelle to maintain his primary residence in Wood River sound.
Retaliation
Case Remanded to Determine Whether Indefinite Suspension Became Actual Termination

In Thomas v. Guardsmark, Inc., 381 F.3d 701 (7th Cir. August 27, 2004), Guardsmark, Inc., hired Carl Thomas as a security officer for its CITGO oil refinery in September 1998. In November 2001, an investigative reporter for a local news station contacted Thomas in connection with a story about regulation of the security industry in Illinois. In an on-camera interview, Thomas stated a fellow Guardsmark security officer bragged about a felony conviction. Thomas opined that convicted felons should not be trusted to provide security at installations that are likely terrorist targets, such as oil refineries.

Eight days after the interview was broadcast, Guardsmark informed Thomas that he was indefinitely suspended because of his unauthorized interview. Guardsmark ceased to compensate or allow Thomas to perform services for the company upon notification of his suspension. Thomas filed suit alleging retaliatory discharge in violation of Illinois public policy. On appeal, the Seventh Circuit reversed and remanded to the district court for further development of the record regarding Thomas’ employment status after Guardsmark indefinitely suspended him in November 2001.

At issue was whether Thomas filed his claim in a timely manner. When Guardsmark hired Thomas in 1998, Thomas signed an employment agreement stating that any legal action arising out of his employment must be brought within six months of the date the cause of action arose or it would be time-barred.

Guardsmark argued that Thomas was barred from bringing his claim because he filed his complaint nearly a year after his suspension. Guardsmark characterized the date of Thomas’ suspension as the date his discharge became effective. Accordingly, Guardsmark argued that Thomas was aware of his alleged injury at that time and the six-month time period for filing a complaint began to run.

The appellate court rejected Guardsmark’s argument, noting that under Illinois law, only an actual termination can support an employee’s retaliatory discharge claim. In Illinois, a plaintiff states a claim for retaliatory discharge only if he alleges that he was: (1) discharged; (2) in retaliation for his activities; and (3) that the discharge violates a clear mandate of public policy. See, Zimmerman v. Buchheit of Sparta, Inc., 164 Ill. 2d 29, 645 N.E.2d 877 (1994). The appellate court further recognized Illinois courts’ holding an employees’ suspension does not qualify as a “discharge” for the purposes of a retaliatory discharge action.

The appellate court declined to find Thomas’ retaliatory discharge claim barred on the theory that Guardsmark’s action in November 2001 was equivalent to a discharge. The court noted that if it accepted Guardsmark’s argument it would invite employers to manipulate their communications with employees so as to avoid liability. Rather than fire employees and risk a retaliatory discharge action, employers would have an incentive indefinitely to “suspend” them in the hope that they would not realize that they had been discharged until after the limitations period expired.

However, the court also recognized that if Thomas’ indefinite suspension was or became an actual discharge, the contractual limitations period began to run at that point in time. Thus, Thomas could avoid the limitations period only if his indefinite suspension in November 2001 did not constitute an actual discharge but became an actual discharge at some point prior to his filing suit. The court concluded it lacked sufficient information to determine when, if ever, Thomas’ indefinite suspension became an actual discharge. Therefore, the court remanded the case for continued discovery.

“The court found that the city’s claims that Gusewelle was fired for violating the residency requirements well supported, thereby shifting the burden back to Gusewelle to show that the articulated reason was merely pretextual.”
Case Note

By: Robert T. Park
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Medical Write-Offs: The Iowa Holding

The Illinois Supreme Court has allowed leave to appeal in Arthur v. Catour. In Arthur, the Third District Appellate Court, in a case of first impression, held that the plaintiff could recover the full amount billed for medical services, even though part of that amount had been written off by the providers based on their contracts with the plaintiff’s group medical insurer. The court found that this result was dictated by the collateral source rule, which holds that benefits received from a source wholly independent of the tortfeasor will not diminish the damages otherwise recoverable.

Recently, the Iowa Supreme Court dealt with the same question in Pexa v. Auto Owners Insurance Co. Under Iowa law, an insured claiming underinsured motorist (“UIM”) benefits can sue the insurer and obtain a jury determination of the amount of damages sustained.

After being injured in an accident involving an intoxicated driver, Raymond Pexa settled with the adverse party’s insurer for the policy limits of $100,000. He then sued his own carrier, Auto Owners Insurance Company, seeking UIM benefits.

The Pexa case proceeded to jury trial using a special verdict. The jury was first asked whether the plaintiff had proven damages proximately caused by the vehicle accident, and answered “yes.” It was then asked to state the amount of damages broken down into five categories: (1) past medical expenses, (2) past loss of use of body, (3) past pain and suffering, (4) future loss of use of body, and (5) future pain and suffering.

The amount of $15,950.39 was entered on the first line for past medical expenses. The jury found $12,300 each for past loss of use of body and past pain and suffering, but awarded nothing for future damages in categories (4) and (5). The total award was $40,550.39, much less than the $100,000 received from the tortfeasor’s insurer. Thus, the plaintiff received nothing from his own UIM insurer.

The trial court ruled that the plaintiff’s recovery for past medical expenses would be limited to the amount paid to his health care providers, but that he could still introduce evidence of the billed amount because that figure was probative of the extent of his injuries. The jury was not told that the plaintiff’s health insurer and Medicare paid his bills. The jury was instructed that, in determining Mr. Pexa’s damages, it should consider:


[(t)he reasonable value of necessary hospital charges, doctor charges and prescriptions from the date of injury to the present time. It is stipulated that the total amount of these bills is $41,544.34 and that, due to adjustments, the amount the plaintiff may recover for this item is $15,950.39.]

On appeal, the plaintiff contended that the trial judge erred in limiting his recovery to the amount paid for medical services. He argued that this limitation violated the collateral source rule; that the Iowa Supreme Court found that common law bars evidence of compensation received by an injured party from a collateral source, and the obligation to make full restitution for injuries caused by a tortfeasor’s negligence is not reduced because of such payments.

The court rejected the plaintiff’s argument in this regard, saying:

We do not think this rule is implicated in the present case because the court did not reduce the plaintiff’s recovery by the amounts paid by a collateral source; rather, the court limited the plaintiff’s recovery to those amounts. A proper calculation of the plaintiff’s medical expenses must precede a determination of their recoverability; only the latter issue implicates the collateral source rule.

The court noted that a plaintiff is entitled to recover the reasonable and necessary costs of medical care, and that the plaintiff has the burden of proving that amount. Unless it has been paid, the amount charged is not evidence of proper value.

About the Author

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of the services rendered in the absence of proof that the billed sum was fair and reasonable. An expert may testify on this issue, but the jury is not bound by that testimony but may be guided by its own judgment in such matters. Had the plaintiff provided such testimony, the jury would have had an adequate evidentiary basis to award the billed charges.\(^7\)

Based on these principles, the court rejected the defendant insurer’s contention that an injured party’s recovery should be limited to the amount actually paid for past medical services. Damages are measured by reasonable value, which can be established either by payment or by other evidence. Because the defendant had stipulated that the amount billed was fair and reasonable, the trial court erred in limiting the plaintiff’s recovery to the amount paid.

Nevertheless, this finding of error did not require reversal because, even if the medical expenses had been the full $41,544.34 rather than only $15,950.39, the total damages would have been less than the $100,000 the plaintiff previously recovered, so he would still not have been entitled to any UIM benefits. Further, since the jury knew the full amount billed, it was allowed to consider that amount in regard to the plaintiff’s contention that he had received severe injuries and to support his other damage claims. Thus, the plaintiff was not prejudiced by the error in limiting his recovery for past medical care.\(^8\) The court also rejected other claims of error.\(^9\)

The Iowa Supreme Court’s decision in \textit{Pexa} suggests the following answer to the question of how Illinois should handle the issue of medical write-offs. First, the jury should be instructed that the plaintiff is entitled to recover the reasonable value of necessary medical care, and should be advised of the amounts that were billed by the plaintiff’s health care providers. Second, the jury should be told the lesser amounts actually paid for medical care, that the difference was due to provider adjustments, and that the amounts paid are presumed to be reasonable and necessary.\(^10\) Finally, if seeking to recover more than the paid amounts, the plaintiff must present expert testimony to show the services rendered had a higher value. The defendant would be allowed to cross-examine the expert with regard to the amounts actually accepted in full satisfaction of the providers’ charges.

Such a holding would be in harmony with present Illinois law, would not violate the rule that collateral source payments do not diminish a plaintiff’s right of recovery, and would be consistent with comments made in \textit{dicta} by the majority in \textit{Arthur}.\(^11\) We will have to wait and see how the Illinois Supreme Court chooses to deal with this issue.

\textbf{Endnotes}


5. Id. at *3.

6. Id. at *4.

7. Id.

8. Id. at *5.

9. Id. at *6 through *11.


11. “Finally, amicus asserts that if plaintiff is allowed to submit evidence regarding the billed charges, defendants should be permitted to present evidence that the healthcare providers accepted a reduced amount as full payment. Amicus argues that the amount accepted as payment is the best indicator of the reasonable value of the medical services provided. We do not disagree, but this issue is beyond the scope of the certified question presented on appeal.” \textit{Arthur v. Catour}, 345 Ill. App. 3d at 808, 281 Ill. Dec. at 247, 803 N.E.2d at 651.

\textit{Under Iowa law, an insured claiming underinsured motorist ("UIM") benefits can sue the insurer and obtain a jury determination of the amount of damages sustained.}
Civil Rights Update

By: David A. Perkins and Maureen R. De Armond
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**John Doe v. City of Lafayette:**
The Seventh Circuit Weighs-in on a Municipality’s Right to Protect Children from Pedophiles

The United States Court of Appeals for the Seventh Circuit decided the case of *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) in late July 2004. Taken as a whole, this case discussed the First and Fourteenth Amendments, weighed the rights of the individual against constitutionally limited powers of local government, and emphatically noted the compelling interest governmental entities have in protecting minors from child predators. In addition to the lively civil rights and civil liberties debate between the majority and the minority, this case also serves as a guide for how cities and municipalities may deal with pedophiles.

**Factual Background**

John Doe admitted that he had a history of criminal behavior regarding children dating back to 1978. He conceded that he was a sex addict with a proclivity toward children. He had numerous arrests and convictions ranging from child molestation to various misdemeanors including: voyeurism, exhibitionism, and window peeping. He was last convicted in 1991 for attempted child molestation. This conviction resulted in four years of house arrest and four years of probation. Since this 1991 arrest, Doe had received various types of out-patient treatment for sex addiction.

In January 2000, Doe admitted having inappropriate sexual thoughts about children. Doe acted on these thoughts when he drove to a park where he saw five youths in their early teens and watched them for about thirty minutes from a distance. At this time, Doe had fantasies about exposing himself to or having sexual contact with the children. By Doe’s own admission, he went to the park to “cruise” for children. However, after watching the children for a time, he realized that there were too many potential witnesses, so he went home.

After he left the park, Doe became upset about the incident, called his therapist, and eventually shared the experience with his sex-offenders group. Sometime later, Doe’s former probation officer received an anonymous call that Doe had been in a park watching children. The probation officer forwarded this information to the Lafayette police department, who, in turn, contacted Vicki Mayes, Superintendent of the Lafayette Parks and Recreation Department, and Dr. Ed Eiler, Superintendent of the Lafayette School Corporation. On February 2, 2000, Superintendents Mayes and Eiler each sent Doe letters informing him that he was prohibited from entering any of the City’s parks for any reason and prohibited him from going on school grounds; neither ban included a termination date.

Doe challenged only the ban on public parks, alleging that the park ban violated his First Amendment right to free speech and his Fourteenth Amendment substantive due process rights.

**First Amendment**

Perhaps the most surprising legal discussion in this case is the stark contrast between the majority and the dissent in their analyses of the First Amendment challenge. The majority discarded Doe’s First Amendment challenge quickly and decisively. The majority noted that for a First Amendment violation to occur, there must be some form of expressive speech or conduct that was intended to convey a message. The court held that Doe had not articulated any form of expressive conduct which was impinged by the City’s ban. Doe had not claimed that the ban was overly broad because it prohibited

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**About the Authors**

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too much speech or expression. Indeed, there was no evidence that Doe had ever used the City’s parks for expression in the past and had no clear intention of doing so in the future.

The Seventh Circuit carefully noted the monumental importance of the First Amendment, but added that the United States Supreme Court had “never” extended its protections to non-expressive conduct. Writing for the majority, Judge

**“The Seventh Circuit clearly asserted its support for governmental efforts to protect ‘the most vulnerable members of society’ – children.”**

Ripple declared: “[w]e have nothing approaching ‘expression’; instead, we have predation.” Doe, 377 F.3d at 19. The majority barely even addressed Doe’s contention that the park ban punished him for his thoughts – noting simply that the City was not bound to wait until this plaintiff committed yet another crime of child molestation to act. Doe, 377 F.3d at 24, FN 8.

However, the minority, written by Judge Williams and joined by Judges Rovner and Wood, discussed the First Amendment issues at great length. The minority focused its discussion on the importance of protecting the freedom of thought. Their stance was that Doe should not have been punished for merely thinking about a crime, especially when no children were actually harmed in the process. Their view was that Doe’s trip to the park did not rise to the level of “action” of sufficient gravity to justify being banned from the City’s parks. The minority argued that the resulting park ban was akin to punishment for mere – though admittedly inappropriate – thoughts.

The majority accepted that Doe acted on his thoughts by physically driving to a park, seeking out, and watching children. The minority disagreed, contending that Doe had done no wrong apart from having sexual thoughts about children, which must be a protected right, even if it is repugnant to society. The majority based its decision, in part, on Doe’s own admittance that what physically stopped him from exposing himself to or molesting a child that day was the rather fortunate fact that there were simply too many children at the park to be able to get away with it.

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**Fourteenth Amendment: Procedural Due Process**

Various City officials held *ex parte* discussions and conferences resulting in the ban. Doe was never informed about or made party to this process. Doe was never given the opportunity to plead his case, tell his side of the story at trial, in an informal hearing, or appeal directly to a local court or tribunal. Here emerged a fairly compelling violation of procedural due process. Inexplicably, Doe did not bring such a claim, he instead exclusively pursued a substantive due process claim.

While the majority noted this bizarre absence in passing, the minority spent some time discussing issues that most accurately describe procedural due process violations, despite the fact Doe had set forth no such claim. The minority began this discussion by noting that while the majority characterized the park ban as a “civil exclusion,” it was clearly punitive in nature and it was too broad in both scope and duration. The park ban expressly prohibited Doe from entering any property deemed a part of the Lafayette Park system – which, in reality, included much more than just parks (such as public baseball diamonds, swimming pools, zoos, and golf courses). The park ban also contained no termination date and could potentially be indefinite. The minority pointed to a total lack of procedural safeguards (such as periodic review of the necessity of the ban and any established procedure to test the accuracy of the relied upon information leading to the ban). Had Doe brought a procedural due process claim, he would have been able to make the many compelling arguments the minority discussed, none of which had to be addressed by the majority.

**Fourteenth Amendment: Substantive Due Process**

Substantive due process is supposed to protect individuals from “the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” Doe, 377 F.3d at 28. There is a basic two-step process in determining whether there has been a substantive due process violation. First, a court must provide a careful description of the liberty interest the plaintiff seeks to have protected. Second, a court must decide whether the interest was fundamental. If there was a fundamental interest, a court must apply strict scrutiny; if there was no fundamental right, a court then looks to the rationality test.

In this case, the Seventh Circuit had a hard time determining exactly what type of liberty interest Doe wanted protected. The court ultimately determined that Doe was asserting a right to enter parks to loiter or for other innocent purposes. The court then found that such a right was not of the same import as the established fundamental rights (these include: the right to have children, to direct the education and upbringing of one’s child).
Civil Rights Update (Continued)
dren, to marital privacy, to use contraception, to bodily integrity, and to abortion). The majority entertained the argument that Doe sought protection of his general right to intrastate travel, but refused to hold that Doe had a fundamental right to loiter in all places deemed public. Doe, 377 F.3d at 42-43.

If no fundamental right is found, then courts apply the rationality test, which simply asks whether the ban is rationally related to a legitimate governmental interest. On this point, even Doe conceded that the City’s interest in protecting children from predators was not merely legitimate, it was compelling. In dictum, the court went on to illustrate that even if Doe had had a fundamental right to loiter in parks, the ban would still have survived an application of strict scrutiny – which tests whether there is a compelling governmental interest and whether the restraint has been narrowly tailored to serve that interest. Here, the majority made its point clear: the City had a greater interest in protecting its children than any interest Doe may have had in going to its parks. The City would have prevailed regardless of the level of scrutiny applied. The minority did not challenge this view.

Local Governments Take Heed

The minority’s constitutional discussion provides some insight into what the holding of a borderline case might look like, especially if there were disputed facts, less restrained city officials, the imposition of a greater punishment, or a plaintiff with no prior convictions.

On the matter of First Amendment rights, the majority was quite comfortable concluding that Doe’s record, admissions, and actions were sufficient to justify the City’s reaction. The minority, however, drew greater attention to the distinction between thoughts and actions – foreshadowing that a case with disputed facts or with a plaintiff who had no criminal convictions might warrant a more serious discussion on this matter. Another First Amendment variable could come into play if there was evidence of any truly expressive speech or conduct. In this case, Doe did not claim that the park ban deprived him of his right to expression. With a different plaintiff, one who frequently used the parks to express himself (through poetry, dance, speech, etc.), there could be a more serious First Amendment claim.

Regarding procedural due process, this case serves as an example of attorney oversight. Doe’s strongest claim would have been that he was punished by the City, yet had not been charged with any crime and had not been present at any of the discussions resulting in the ban. Despite Doe’s silence on this matter, all the Seventh Circuit Judges concurred: this should have been part of Doe’s case against the City. Though waived by Doe, the minority took the liberty of briefly discussing procedural due process concerns. The minority viewed the park ban as abusive for being too geographically and temporally broad. Doe, 377 F.3d at 50. Further, the minority noted that Doe had not been made a party to the discussions that resulted in the ban. Local governments will want to take into consideration the minority’s concerns when dealing with similarly situated plaintiffs.

The substantive due process deprivation could become a more serious matter in future cases where local governments impose bans or other forms of restrictions that are more broad or restrictive than necessary. It could be possible for a government to be too zealous and impose a ban that a court would find insufficiently tailored to the government’s interest. Despite the majority’s insistence that the ban in this case would have survived even strict scrutiny, it would be prudent for local governments to consider the breadth and depth of any bans they consider imposing.

Collectively, the minority’s concerns can be viewed as a series of suggestions for municipalities to follow, if they want to avoid liability when dealing with future individuals of Doe’s ilk.

Conclusion

As with other civil rights cases, Doe considered the competing interests of the individual and society. The Seventh Circuit clearly asserted its support for governmental efforts to protect “the most vulnerable members of society” – children. Doe, 377 F.3d at 43. The majority opinion was fairly cut and dry – thus avoiding the necessity of providing an extensive legal analysis of the First and Fourteenth Amendment issues. This was an especially facile stance for the majority to take, partly because this case was completely void of disputed facts, the plaintiff freely admitted all his past and then present thoughts and actions, the public officials acted with reasonable restraint, and Doe conceded that he had not even visited a park for any reason since 1990, excluding the 2000 visit at issue here.

Where the majority clearly articulated its willingness to side with local governments in this case, the minority used this opportunity to voice its fear that constitutional rights may be easily neglected or diminished in inherently provocative, sensitive, and emotional cases involving the sexual abuse of children.
Insurers May Recover Defense Costs When Court Finds No Duty to Defend

An insurer owes a duty to defend its insured if the underlying complaint creates the potential for coverage. If the insurer breaches the duty to defend, it will be estopped from denying a duty to indemnify the insured on the basis of coverage defenses. When insurers are in doubt about whether there is a duty to defend, they have two options: defend the insured subject to a reservation of rights, or refuse to defend and bring a declaratory judgment action to determine their rights and obligations under the policy.

In General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co., the insurer chose an alternative route: it offered to defend the insured while reserving its right to seek reimbursement for defense costs if a court found that it was not obligated to defend the insured, and simultaneously filed suit, seeking a declaration that it did not owe a duty to defend. When the court ruled that there was no defense duty, the insurer sought to recover the costs it had advanced for the defense. In a decision that raises numerous questions, the First District Court of Appeals ruled that the insurer had a right to recover the fees it advanced.

Background

The City of Chicago and Cook County sued Midwest Sporting Goods, the insured, for creating a nuisance by selling guns to inappropriate purchasers. Midwest tendered its defense to General Agents Insurance Company of America (“Gainsco”), which denied coverage, but agreed to defend subject to a reservation of rights. After the usual lengthy letter citing to policy provisions supporting its basis for denying coverage, Gainsco wrote that it would provide a defense to the suit “without waiving any of its rights and defenses, including the right to recoup any defense costs paid in the event that it is determined that the Company does not owe the Insured a defense . . . .” Gainsco agreed to allow the insured to select its own defense counsel because of the “competing interests” between the insurer and the insured with respect to coverage. It also sued, seeking a judgment declaring that it had no duty to defend or indemnify the insured.

The court ruled that Gainsco had no duty to defend, and this judgment was upheld on appeal. Gainsco then sought to recoup more than $40,000 it had paid to Midwest’s attorneys to defend the suit.

Midwest objected to the attempt to recoup the defense costs it paid, arguing that Gainsco had paid the defense costs pursuant to the insurance contract, and the insurance contract did not provide for recoupment of defense costs by the insurer. The court rejected this argument, finding that it misconstrued the payments Gainsco had made. As the court explained, Gainsco denied from the beginning that it had any duty to defend Midwest, but offered to pay for Midwest’s defense while the court considered its declaratory judgment action seeking to determine whether it did, in fact, have a duty to defend, with the qualification that it would seek reimbursement of the costs if it was found that it was not obligated to defend.

The Majority Decision

The court relied primarily on the California Supreme Court’s decision in Buss v. Superior Court, in which the court allowed an insurer to recover the costs it expended defending parts of the action against the insured as to which it was not obligated to defend. In Buss, the underlying plaintiff asserted 27 causes of action against the insured, which tendered the defense to its insurer. The insurer concluded that there was a

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Insurance Coverage (Continued)

potential for coverage, so it accepted the defense. However, it reserved its right to deny coverage and to recover the costs of defending claims that were not within its coverage. The insured acknowledged the reservation of rights and formalized the arrangement in a written agreement. The court ruled that the insurer is not required to pay to defend claims that are not even potentially covered, and most of the fees incurred related to these non-covered claims. It reasoned that the insurer “did not bargain to bear these costs. To attempt to shift them would not upset the arrangement. [Citation omitted.] The insurer therefore has a right of reimbursement.”

The court in General Agents also relied on two federal decisions which had concluded that the insurer could recover the costs of its defense if it reserved the right to do so, even though there was no evidence that the insured had agreed to the reservation. In Walbrook Insurance Co. v. Goshgarian & Goshgarian,9 the insurer denied coverage and filed an action for a declaration that it did not owe a defense. The insurer offered to pay the insured’s defense costs pending the resolution of the declaratory action, but reserved the right to seek reimbursement if the court decided there was no duty to defend. The insured accepted the tendered payments but protested that the insurer had no right of reimbursement. The court ruled that the insurer was entitled to recover the costs of the defense, noting that despite its objection to the insurer’s reservation of the right to reimbursement, it knew that the insurer intended to seek reimbursement if it won the declaratory action when they accepted the payment of defense costs. In reaching this decision, the court considered the conflicting authority in California and other states concerning whether a unilateral reservation of rights would be effective, and noted that the modern trend is to find unilateral reservations of rights to be effective without the insured’s consent.10 The court found that there was no doubt that the insured knew that the insurer planned to seek reimbursement of its defense costs if it was found not to have a duty to defend. While they objected to the reservation of the right to seek reimbursement, they also accepted $500,000 in defense costs from the insurer. The court considered such conduct “inconsistent with their objections, as they are refusing to accept the agreement yet retaining the fruits of it.”11 The court concluded that the acceptance of defense payments constituted an “implied agreement to the reservation.”12

The other case the General Agents court considered was Grinnell Mutual Reinsurance Co. v. Shierk,13 in which the insurer sought to recover the costs to defend an insured under a homeowner’s policy for an incident in which the insured husband shot the insured wife in the face, and was later convicted of aggravated assault in a court martial proceeding.14 In Grinnell, the reservation of rights letter specifically reserved the right to seek reimbursement of defense costs. The court noted that there was no Illinois authority concerning the recoupment of costs, but was persuaded that the Illinois Supreme Court would follow the reasoning in Buss and other cases and would allow the insurer to recover its defense costs if the insurer proved that it had specifically reserved the right to recover its costs.15 It also agreed with Walbrook that the reservation of the right to seek recovery of defense costs did not require the insured’s express consent.16

The insured in General Agents argued that the court should not follow Buss and Walbrook because it would give the insurer too much leverage. The insured reasoned that if an insurer wrongfully refuses to defend the insured, it loses its policy defenses, but if the insurer defends subject to a reservation of rights, it usually does not recover the amounts it paid for the defense. However, if the insurer were allowed to recover its defense costs, it would be allowed to “challenge its duty to defend risk free, with no loss of policy defenses and with the potential to recoup unlimited defense costs.”17 The court looked to the reasoning of Walbrook that if the insureds had asked the insurer to make an election of either defending without the right to recoup defense costs before accepting any defense funds, such an election would be forced.18 The court agreed with this analysis, holding that if the insured “refused to accept the funds on the conditions Gainsco imposed, it could force Gainsco either to defend without a right of reimbursement, or to deny a defense and risk losing all policy defenses if a court found it in breach of the insurance contract.”19

“While they objected to the reservation of the right to seek reimbursement, they also accepted $500,000 in defense costs from the insurer. The court considered such conduct ‘inconsistent with their objections, as they are refusing to accept the agreement yet retaining the fruits of it.’”
The court also noted that the insured was not in a worse position than it would have been without the offer, since the insured was allowed to choose its own counsel, and without the offer, the insured would still have been uncertain who would ultimately pay its defense costs. Additionally, it would not have had the use of the insurer’s money while the parties litigated the claim. Thus, the court found that Gainsco had not made the payments pursuant to the insurance contract, but had done so “as an accommodation.”

The Dissenting Opinion

Justice McBride strongly dissented, arguing that Illinois case law did not support the decision to allow the insurer to recover its costs. Justice McBride noted that the insurer’s duty to defend arises from the express undertaking to do so in the insurance contract, which provides that the insurer has “the right and duty to defend, at [the insurer’s] expense” any claim under the policy. However, no comparable provision in the policy provided for reimbursement of costs in the event that a court finds no duty to defend.

Justice McBride correctly noted that the insurer’s traditional choice is not between defending subject to a reservation of rights and not defending and risking the loss of its policy defenses; it is between defending subject to a reservation of rights and filing a declaratory action seeking a determination of whether it is obligated to defend. The insurer is only stopped from denying coverage if it fails to do either one and is later found to have had the obligation to defend. Gainsco chose to do both – defend subject to a reservation of rights and file a declaratory action – but also reserved its right to recoup its defense costs, which is not provided for in the policy. Justice McBride reasoned that since Illinois law provided the option of filing a declaratory action without forwarding defense costs, the insurer “should not be allowed to create a third option the insured never agreed to or anticipated.”

Justice McBride also noted that under Illinois law, parties to a contract cannot go outside the terms of the contract to recover money damages based on quasi-contract principles, citing to LaThrop v. Bell Federal Savings and Loan Ass’n, and Industrial Lift Truck Service v. Mitsubishi International.

Justice McBride also disagreed with the majority’s suggestion that the insured should have turned down the defense to force the issue, noting that “only in hindsight did either party learn that there was no duty to defend. To tell an insured that it cannot accept defense payments because of some language that was slipped into a five page reservation of rights letter again seems wrong, particularly when Illinois precedent gives an insurer the right to file a declaratory judgment to dispute coverage.”

Conclusion

Both Justice McBride and the majority opinions make some good points, but it is difficult to see why an insurer should not be allowed to recoup costs advanced to the insured which, it later turns out, the insurer did not owe. Before Gainsco was able to seek reimbursement for its costs, it first had to establish that it had no duty to defend the insured. Under Illinois law, the duty to defend is quite broad, and the insurer must defend whenever a comparison of the underlying complaint with the policy reveals even a potential for coverage. Thus, an insurer cannot obtain a judgment finding that it has no duty to defend, and has no opportunity to seek reimbursement from the insured, unless it can prove that there is no potential for coverage. If the insurer does not even have the potential of owing coverage, it may well question why it should not be able to recoup money it advanced to the insured while the issue of its duty to defend was litigated.

The insurer’s plight would be more sympathetic if the forced election posited by the majority opinion – defend under a reservation of rights or fail to defend and potentially lose its coverage defenses – was real. However, as Justice McBride pointed out, an insurer has another choice: it can file a declaratory action seeking to determine its coverage obligations, in which case it will not lose its coverage defenses if it is later found to be obligated to defend.

Justice McBride emphasized that the insurance policy gives the insurer the right to defend the insured as well as the duty, apparently suggesting that the insurer’s exercise of this right should prevent it from being reimbursed. Yet while the insurer undertook to pay for the defense, it did not exercise its right to control the defense, since it allowed the insured to keep its own counsel because of the competing interests between the insurer and the insured. Ordinarily, the insurer’s duty to defend brings with it the right to control the insured’s defense. However, where there is a conflict between the interests of the insured and those of the insurer, the insurer must give up this right to control by allowing the insured to retain its own counsel, as Gainsco did. Thus, Gainsco took on the burden of defending the insured without the concomitant right to control the defense.

This is not to say that Gainsco received no benefit from taking on the insured’s defense. As Justice McBride noted, neither the insurer nor the insured knew in advance how the coverage action would turn out. Given the uncertainties of litigation, there was always the possibility that Gainsco would be found to have a duty to both defend and indemnify Midwest. Thus, even if it did not control the defense, Gainsco had an interest in seeing to it that the case was properly defended.

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Insurance Coverage (Continued)
so that if it did have to indemnify Midwest, the amount of its indemnity obligation would be minimal.

Based on the majority opinion, the insurer does have the right to seek reimbursement for its defense costs, provided that it is found to have no duty to defend and its reservation of rights letter specifically reserved the right to seek recoupment of defense costs. The insurer can reject this offer, and insist that the insurer waive its right of recoupment, in which case the insurer has the option of either defending without the right of reimbursement or filing a declaratory action to seek a declaration of its duty to defend.

The opinion in General Agents did not emphasize the fact that Gainsco gave up its right to control the defense by allowing the insured to retain its own defense counsel, but this point seems crucial. If the insurer had retained its own defense counsel, or failed to give the insured the option to obtain its own choice of counsel, the insured would have given up its right to control the defense, and the equities would swing back to the insured. Thus, if an insurer intends to seek reimbursement of its costs on the basis of General Agents, it would be well advised to give the insured the right to choose its own defense counsel.

Endnotes
1 349 Ill. App. 3d 529, 812 N.E.2d 620 (1st Dist. 2004).
2 349 Ill. App. 3d at 530, 812 N.E.2d at 621.
3 Id.
4 Id.
6 349 Ill. App. 3d at 531, 812 N.E.2d at 621.
8 16 Cal.4th at 51, 65 Cal.Rptr.2d at 376, 939 P.2d at 776. It is unlikely that an Illinois court would have held that the insurer was not obligated to defend the non-covered claims, so long as at least one of the claims was covered. Under Illinois law, an insurer has the duty to defend the entire action, even though only one of the theories of recovery asserted against the insured is covered. Lyons v. State Farm Fire and Cas. Co., 349 Ill. App. 3d 404, 407, 811 N.E.2d 718, 722 (5th Dist. 2004)
10 726 F. Supp. at 783-84. The court considered Val's Painting v. Allstate Ins. Co., 53 Cal.App.3d 576, 586-87, 126 Cal.Rptr. 267 (1975) (Authorities split on whether unilateral reservation of rights is effective. Under California law, insurer does not lose right to claim non-coverage unless it is shown that the insurer intentionally waived a known right or acted in such a manner as to cause the insured to reasonably believe that the insurer had relinquished the right and the insured detrimentally relied on such conduct.); Crawford v. Ranger Ins. Co., 653 F.2d 1248 (9th Cir. 1981) (Under Hawaiian law, insurer did not waive its right to disclaim coverage by providing defense without first securing insured's consent to a reservation of rights letter); and Draft Systems, Inc. v. Alspach, 756 F.2d 293, 296 (3d Cir. 1985) (Under Pennsylvania law, reservation of rights letters do not require insured's assent.)
11 726 F. Supp. at 784.
12 Id. The court noted, however, that it was not deciding whether the insureds could have forced the insurer to elect whether to defend without seeking reimbursement or refuse to defend. 726 F. Supp. at 784, n.3.
14 996 F. Supp. at 836.
15 996 F. Supp. at 839.
16 Id.
17 General Agents, 349 Ill. App. 3d at 533, 812 N.E.2d at 623.
18 349 Ill. App. 3d 533-34, 812 N.E.2d at 623-24, citing to Walbrook, note 10, supra, 726 F. Supp. at 784, n.3.
19 349 Ill. App. 3d at 534, 812 N.E.2d at 624.
20 Id.
21 Id.
22 Id.
23 349 Ill. App. 3d at 535, 812 N.E.2d at 624.
24 Id.
25 349 Ill. App. 3d at 535, 812 N.E.2d at 624-25.
26 349 Ill. App. 3d at 535, 812 N.E.2d at 625.
27 68 Ill. 2d 375, 391, 370 N.E.2d 188, 195 (1977) (“Where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application.”)
28 104 Ill. App. 3d 357, 360, 432 N.E.2d 999, 1002 (1st Dist. 1982) (“The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests.”)
29 349 Ill. App. 3d at 537, 812 N.E.2d at 626.
31 State Farm Fire & Cas. Co. v. Martin, 186 Ill. 2d 367, 373, 710 N.E.2d 1228, 1231 (1999) (Options of defending under reservation of rights and seeking declaratory judgment are “separate and distinct.” Insurer may either defend or seek declaratory judgment to avoid estoppel.)
32 349 Ill. App. 3d at 537, 812 N.E.2d at 626. (“Because Gainsco exercised its ‘right’ to defend, it agreed to defend, and the policy provides it will be at Gainsco’s ‘expense,’ it is not entitled to reimbursement of its expenses in defending its insured.”)
33 349 Ill. App. 3d at 530, 812 N.E.2d at 621.
35 Id.
36 349 Ill. App. 3d at 537, 812 N.E.2d at 626.
Evidence and Practice Tips

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Court Properly Denied Motion to Dismiss Product Liability Action Even Though Product Involved in Occurrence Was Destroyed

In Stringer v. Packaging Corp. of America, 2004 Ill. App. LEXIS 1084 (4th Dist. September 1, 2004), the plaintiff, Kenneth Stringer, filed a strict liability complaint against the defendant, Packaging Corporation of America ("PCA"), seeking to recover for injuries he sustained when a box containing 30 dozen eggs broke. On May 14, 2001, the plaintiff was working for an IGA Foodliner grocery store. At the time of the accident, the plaintiff was unloading boxes of eggs from a refrigerated delivery truck to a refrigeration room at the store. As he was unloading one of the boxes, the box ripped and broke. The plaintiff tried to catch the box before it hit the ground and, as a result, injured his back. The plaintiff was treated for back injuries and ultimately underwent lumbar fusion surgery.

The allegedly defective box was manufactured by PCA. Fifteen days after the accident, on May 29, 2001, one of the plaintiff’s co-workers disposed of the box by placing it in a trash compactor. The plaintiff was still in the hospital at the time and did not know the box was being destroyed.

PCA filed a motion for sanctions pursuant to Supreme Court Rule 219(c) that requested the court either (1) bar the plaintiff from introducing direct and circumstantial evidence regarding the condition of the allegedly defective box or (2) dismiss the strict product liability count of the complaint. PCA also filed a motion to dismiss pursuant to 735 ILCS 5/2-619(a) (9), arguing that because the box was unavailable, PCA could not inspect it and thus would suffer significant prejudice.

In response to PCA’s motion, the plaintiff filed an affidavit in which he stated: (1) the box was destroyed without his knowledge or consent; (2) he was physically unable to prevent the box from being destroyed because he was in the hospital at the time; and (3) the box was not unique because it was identical to other boxes manufactured by PCA for use in IGA stores to transport 30 dozen eggs.

The trial court denied PCA’s motion for sanctions. PCA then filed a motion to reconsider or in the alternative, a motion for a Supreme Court Rule 308 finding. In support of these motions, PCA filed the affidavit of Daniel Hofer, general manager of supply services for PCA. In the affidavit, Hofer stated that without the actual box involved in the accident, it would be impossible for PCA to determine if it actually manufactured the box, locate another box from the same manufacturing lot, determine whether the packer improperly set up the box or damaged it during setup, or determine the cause of the alleged box failure. The trial court denied PCA’s motion to reconsider but agreed to certify the following question pursuant to Supreme Court Rule 308(a):

In a product liability action, an allegedly defective box was destroyed by plaintiff’s employer through no fault of the plaintiff. The defendant filed a motion to bar evidence and dismiss the case on the basis that the box was unavailable for examination and testing. Did the trial court err in denying the defendant’s motion? Stringer, 2004 Ill. App. LEXIS 1084 at *1-2.

The Fourth District Appellate Court affirmed the trial court’s decision to deny the motion for sanctions and motion to dismiss. The Stringer court stated:

The facts in this case are distinguishable from the facts in the cases PCA cites in support of its claim that Stringer should be subject to sanctions. Here, almost immediately following Stringer’s injury and while he was still hospitalized, the box was destroyed by a third

(Continued on next page)

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Evidence and Practice Tips (Continued)

party over whom Stringer had no control. In the cases
PCA cites, the plaintiffs had control over either (1) the
product’s destruction or (2) the product itself***.

***Rule 219(c) permits sanctions only where a party
unreasonably fails to comply with a discovery order.
A party who had nothing to do with the destruction of
evidence cannot be said to have unreasonably failed to
comply with a discovery order. Before noncompliance
can be unreasonable, a party must have been in a posi-
tion to comply. Here, the destruction of the box cannot
be imputed to Stringer. As discussed above, nothing
in the record suggests Stringer ever had control over
the box or the ability to comply with PCA’s discovery
request. While we acknowledge PCA may experience
difficulty in preparing a defense without the box, the
trial court’s decision to deny PCA’s motion for discovery
sanctions was not an abuse of discretion. Simply put,
no discovery violation occurred here. 2004 Ill. App.
LEXIS at *8-9.

Court Properly Allowed Architect
to Provide Opinion Testimony Regarding
Golf Course Safety Despite Architect’s
Lack of Experience in Golf Course
Design and Architecture

App. 3d 553, 812 N.E.2d 496, 285 Ill. Dec. 676 (1st Dist.
2004), the plaintiff filed a negligence action against Palos
Country Club after allegedly being struck in the head by a golf
ball while she was a passenger in a golf cart. The plaintiff was
injured on May 14, 1995, while riding in a golf cart operated
by her sister, Maria Shirley. Shirley testified that a golf ball
struck the plaintiff in the head as Shirley drove a golf cart
near the pro shop and cart return area. The plaintiff testified
that she had no memory of the accident. The plaintiff suffered
a traumatic brain injury and claimed she experienced diffi-
culty sleeping, uncontrollable muscle spasms, and decreased
memory and coordination.

At trial, two golf course employees testified that golf balls
occasionally had struck the pro shop and cart return areas
prior to the plaintiff’s accident. The plaintiff’s expert witness,
architect Michael Eiben, testified over the defendant’s objec-
tion that the area where the plaintiff was injured was unsafe
due to congestion, the number of golf-related activities, and
proximity to the golf course. Eiben based this opinion on
his experience and training in architecture, as well as his
knowledge of the Building Officials and Code Administrators’
building code (BOCA). Eiben believed that the defendant
could have made the area safe by moving the pro shop and cart
return area farther from the golf course. Alternatively, Eiben
said that the defendant could have constructed a 20-foot-high
barrier between the course and the congested areas. Eiben
noted that, although the defendant placed a fence near the golf
course to offer some protection, the protection was minimal.
On cross-examination, Eiben admitted he lacked experience
in golf course design and architecture.

The jury found the defendant negligent and awarded the
plaintiff $457,995.13. The jury also found the plaintiff 30
percent contributorily negligent and reduced the award to
$320,596.60. On appeal, the defendant argued that Eiben’s
opinion testimony that the area was unsafe should have been
excluded because Eiben lacked unique architectural experi-
ence in golf course design and safety. The First District Ap-
pellate Court rejected the defendant’s argument and affirmed
the jury verdict. The Sullivan-Coughlin court stated:

Defendant does not argue that Eiben was unqualified
in the area of general architecture or the BOCA code.
Rather, the defendant maintains that Eiben was required
to have specialized knowledge in golf course design to
qualify him to make opinions about the safety of the
defendant’s course. Defendant does not cite authority in
support of its argument. Nor do we find that such special-
ized expertise was required under the facts of this case.
Eiben’s testimony did not concern the safety and design
of the golf course but rather the safety and design of the
area outside the course. Also, the defendant was afforded
the opportunity to cross-examine Eiben and present its
own expert, someone with specialized knowledge in golf
course design. We do not believe the trial court abused
its discretion by allowing Eiben’s opinion testimony.
Sullivan-Coughlin, 349 Ill. App. 3d at 558-59.
A Long-Awaited First Interpretation of Section 1201(a) of the Digital Millennium Copyright Act

I. Introduction


II. Background of the Digital Millennium Copyright Act

In 1998, Congress enacted the DMCA (codified at 17 U.S.C. § 1201 et seq.) to “deal with special problems created by the so-called digital revolution,” and to allow the United States to apply the standards called for under the World Intellectual Property Organization Copyright Treaty. See, In re Aimster Copyright Litig., 334 F.3d 643 at 655 (7th Cir. 2003); Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). The DMCA was a reaction to the “piracy” concerns of the film, music and software industries. The members of those industries possessed particularly valuable copyrights, and modern technology such as broadband Internet connections. Cheap CD burners made their works particularly susceptible to unauthorized duplication and distribution. (See, Tom Regan, Internet Access and New Copyright Law Head for a Collision, The Christian Science Monitor, Nov. 12, 1998, at B2).

In general, the DMCA created new causes of action for copyright holders who alleged that their works had been appropriated. While copyright infringement itself has, of course, historically been actionable, the DMCA went a step further and forbade the circumvention of the technological “locks” that copyright holders place on digital media. For example, the Copyright Act of 1976 (“the Copyright Act”) makes it illegal to copy and sell a compact disc (“CD”) on which one does not hold the copyright, and the DMCA further outlaws the use or trafficking of any means used to “circumvent” the piracy protection placed on a CD. By way of analogy, it has always been illegal to steal a bicycle, and passing the DMCA is similar to then enacting a law to also make it illegal to pick bicycle locks or to distribute tools that facilitate the picking of bicycle locks.

As with most new legislation, the DMCA generated immediate controversy. Groups such as librarians, journalists, academics, consumer advocates, third-party software vendors, artists and others feared the new legislation would impede or eliminate certain “fair use” of copyrighted works that they had long counted on in their legitimate endeavors. Further, music fans felt concerned that the DMCA’s broad language would make it a criminal offense to evade certain compact disc anti-piracy protections in order to make “mix CDs,” and the Electronic Frontier Foundation, a prominent technological advocacy group, noted that merely employing a method to get around a scheme on certain Disney DVDs, which prevented the viewer from fast-forwarding through commercials, would be illegal under the DMCA.

Given the newness of the DMCA, and the lack of case law (Continued on next page)}
Technology Law (Continued)

interpreting it, such fears have been, in part, relatively theoretical. However, even the threat of liability under the DMCA has had, according to the legislation’s critics, a chilling effect. For example, in September 2000, an industry trade group used threats of DMCA litigation to prevent the presentation of a paper at an academic conference because of fears that doing so would facilitate copying. (See, Pamela Samuelson, Anticircumvention Rules: Threat to Science, SCIENCE, Sept. 14, 2001). Similarly, in July 2002, Hewlett-Packard (“HP”) threatened a team of computer science researchers who discovered a security flaw in HP’s software with DMCA litigation if they made their findings public. (See, Dan Gillmor, HP Backs Off Threat, But Why Did They Even Make It? SAN JOSE MERCURY NEWS, August 3, 2002, at 1).

Now, with the Chamberlain decision, a considerable amount of the uncertainty over the application of the DCMA should be cleared up. Indeed, Illinois defense counsel with technology clients should be aware that, under Chamberlain, the DMCA is not nearly as far-reaching as those who had feared its enactment and those who had threatened its use.

III. Chamberlain Group, Inc. v. Skylink Techs., Inc.

The Chamberlain case involved two competing manufacturers of automatic garage door openers (referred to in the district court decision as “GDOs”). One of the manufacturers (Skylink) marketed a “universal” GDO remote control unit, which could be programmed by its owner to open a wide variety of garage doors made by other manufacturers, including GDOs made by Chamberlain. While this feature is common in the GDO industry (such third-party remote controls being useful if the original control is broken or misplaced) a certain new GDO made by Chamberlain (the “Security+” model) had been intentionally designed to be opened only by remote control units made by Chamberlain. Despite the measures taken by Chamberlain, Skylink designed and marketed a remote control that did an end run around Chamberlain’s security code scheme, and could open even Security+ model GDOs.

As the district court in Chamberlain noted, the GDO industry has a long history of “universal transmitters being marketed and sold to allow homeowners an alternative means to access any brand of GDO.” Chamberlain, 292 F. Supp. 2d at 1042. Moreover, the marketing of such third-party “aftermarket” products is well established in numerous industries, from automobiles to computers to consumer electronics. Nevertheless, Chamberlain filed suit against Skylink, alleging, inter alia, that its competitor had violated § 1201(a)(2) of the DMCA, which provides that:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that –

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title. See, 17 U.S.C. § 1201(a)(2).

Chamberlain alleged that the Skylink remote control violated the DMCA by circumventing the protective measures included in security software embedded in Chamberlain GDOs, that the Skylink product had no commercially significant purpose other than to circumvent Chamberlain’s security measures, and that Skylink marketed its remote controls for the purpose of circumventing Chamberlain’s security measures.

The DMCA had been enacted with the intent of preventing software and other pirates from evading technological safeguards designed to prevent the unauthorized duplication of copyrighted works. For example, an unscrupulous retailer who sought to evade copy-protection mechanisms on DVDs so that he or she could duplicate them and sell the pirated copies would clearly run afoul of the anti-circumvention provisions contained in § 1201(a)(2). Yet Chamberlain had made no allegation that Skylink was attempting to make unauthorized duplications and/or distributions of its embedded GDO software. And indeed, Skylink was not. Instead, Chamberlain asserted that the mere act of circumventing its security code scheme was, in and of itself, a violation of § 1201(a)(2)—regardless of the alleged interloper’s intent. In other words, Skylink’s intent was not to circumvent in order to copy, but rather to circumvent in order to use in a historically recognized and industry-accepted way. Nevertheless, Chamberlain argued that the DMCA prohibited Skylink’s actions. Chamberlain and Skylink filed competing motions for summary judgment on the issue. The district court denied Chamberlain’s motion, and granted Skylink’s. Chamberlain appealed the summary
judgment in favor of Skylink. On August 31, 2004, the Federal Circuit affirmed the district court’s decision, in what it noted was a case of first impression.

The Federal Circuit’s holding allays many of the fears that DMCA commentators had had about the legislation’s potential reach. First, the court emphatically said that, contrary to the suggestion made by Chamberlain, the DMCA does not confer any new property rights to copyright holders. It merely accompanied that circumvention.

Third, the Federal Circuit’s decision aligned with the fairly consistent deference that courts have afforded to the concept of fair use. The Federal Circuit recognized that the DMCA, by its explicit language, does not “affect rights, remedies, limitations, or defenses to copyright infringement, including fair use.” Chamberlain, 381 F.3d at 1200. Indeed, the court rejected Chamberlain’s argument that the mere use of circumvention technology to access works that should otherwise be accessible to the public or consumers under the Copyright Act violated the DMCA.

Finally, the Federal Circuit provided a clear road map of factors to be considered by one wishing to state a claim under § 1201(a)(2):

A plaintiff alleging a violation of § 1201(a)(2) must prove:

1. ownership of a valid copyright on a work,
2. effectively controlled by a technological measure, which has been circumvented,
3. that third parties can now access without authorization, in a manner that
4. infringes or facilitates infringing a right protected by the Copyright Act, because of a product that
5. the defendant either
   (i) designed or produced primarily for circumvention;
   (ii) made available despite only limited commercial significance other than circumvention; or
   (iii) marketed for use in circumvention of the controlling technological measure.

A plaintiff incapable of establishing any one of elements (1) through (5) will have failed to prove a prima facie case. Chamberlain, 381 F.3d at 1203.

The court’s belief that copyright holders should not be allowed to use the DMCA to foreclose the public’s right to access copyrighted works for longstanding, accepted and legitimate ends guided the Federal Circuit’s holding. As the court provides a new cause of action, one for the circumvention of technological measures designed to prevent access to copyrighted works.

Second, and relatedly, a DMCA claim can only be put forth properly when accompanied by an allegation that the circumvention actually infringed a copyright. Merely alleging circumvention, when that circumvention had been undertaken for an otherwise legitimate end, would be insufficient to state a cause of action under the DMCA. As the Federal Circuit put it, “[a] copyright owner seeking to impose liability on an accused circumventor must demonstrate a reasonable relationship between the circumvention at issue and a use relating to a property right for which the Copyright Act permits the copyright owner to withhold authorization.” Chamberlain, 381 F.3d at 1204. In other words, the Federal Circuit declined to read the DMCA as creating a new property right, or even a new freestanding tort such as “digital circumvention.” Instead, it explained that the DMCA provided for a new cause of action—circumvention—if actual copyright infringement accompanied that circumvention.

For example, an unscrupulous retailer who sought to evade copy-protection mechanisms on DVDs so that he or she could duplicate them and sell the pirated copies would clearly run afoul of the anticircumvention provisions contained in § 1201(a)(2).”

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Technology Law (Continued)

put it, a contrary interpretation of the statute would “allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.” Chamberlain, 381 F.3d at 1201. The Chamberlain court’s reasoning recognized that such an interpretation of the DMCA would decimate the aftermarket products industry, abrogate longstanding concepts of fair use and lead to antitrust and monopoly consequences that Congress could not have intended. As such, the Federal Circuit sensibly declined to adopt it.

In sum, the Federal Circuit’s decision sought to strike a balance between the competing interests of copyright holders in controlling the dissemination of their works, and the right of the public to make recognized, legitimate use of those works. To those ends, the Chamberlain court concluded that the DMCA “prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.” Chamberlain, 381 F.3d at 1202. (emphasis added). The court acknowledged that such a holding might “create some uncertainty and consume some judicial resources,” but nevertheless felt it was the only way to achieve that important balance. Chamberlain, 381 F.3d at 1203.

IV. Conclusion

The Federal Circuit’s decision in Chamberlain establishes some of the boundaries and an analytical foundation for future DMCA disputes. It demonstrates that the DMCA is arguably not the sea of change in copyright law that its critics had feared it would be – or at least that courts should decline to implement it in such a way. No matter, any attorney with clients who use copyrighted technology should become familiar with Chamberlain and its import.

Recent Decisions

By: John P. Lynch, Jr.
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

Second District Finds No Great Distinction Between Negligent and Willful and Wanton Conduct


Kimberly Kirwan died after experiencing an allergic reaction to walnuts while at Bar Louie, an establishment in Riverwoods. On March 7, 2001, at 9:26 p.m., a 9-1-1 call was placed to the Lincolnshire-Riverwoods Fire Protection District reporting the allergic reaction and that Kimberly was having a hard time breathing and staying awake. At 9:31 p.m. the ambulance arrived. According to the plaintiff’s complaint, within six minutes of their arrival on the scene, the paramedics knew that Kimberly’s condition was getting progressively worse and that there was limited time in which to provide the proper emergency medical treatment in order to prevent anaphylactic shock. Kimberly’s airway allegedly did not close for at least five minutes after arrival of the paramedics, but the proper care was not begun until seven minutes after their arrival on the scene.

The administrator of the Kirwan’s estate sued the operat-

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The court rejected the defendants’ argument that the com-
plaint was insufficient because it failed to plead any facts
describing their conduct during the first seven minutes they
arrived on the scene. The court stated that it is not the rule in
Illinois that a plaintiff must plead every conceivably relevant
fact. The court also dismissed the argument that the absence
of allegations referring to the specific standard operating
procedures the defendants violated rendered the complaint
insufficient. Noting the defendants’ failure to cite any authority
for that proposition, the court stated the plaintiff specified the
ways in which the defendants violated the standard operating
procedures and did not need to identify the procedures them-
selves. The court concluded by suggesting that the defendants
pursue their arguments by way of summary judgment.

In a spirited dissent, Justice O’Malley argued that the
plaintiff simply affixed the parlance of “willful and wanton”
to alleged conduct that is no more than negligent to circumvent
the EMS Act. He argued that the appellate court’s decision
was in direct conflict with the policy behind the Act and noted
that if this complaint was sufficient, then every complaint
alleging medical malpractice should also contain a count of
willful and wanton conduct.

**Private Land Owner Owes Duty to
Travelers on Adjacent Roadway**

*Raffen v. International Contractors, Inc.*, 349 Ill. App. 3d
229, 811 N.E.2d 229 (2nd Dist., June 3, 2004)

Dean Raffen was killed when he was thrown from a car in
which he was a passenger. The car, being driven by his sister,
was traveling on a frontage road in Elmhurst when it collided
with a car driven by defendant, Michael Brophy. Brophy was
exiting the driveway of defendant International Contractors,
Inc. (ICI). Next to the driveway was a snow pile that prevented
Brophy and the decedent’s sister from seeing each other. ICI
moved to dismiss the plaintiff’s complaint contending that
as a landowner, it owed no duty to travelers on an adjacent
roadway. The trial court granted the motion, but the Appellate
Court, Second District reversed.

When deciding whether a defendant owed a duty to a
plaintiff, courts consider: (1) the foreseeability of the injury,
(2) the likelihood of the injury, (3) the magnitude of the bur-
den in guarding against the injury, and (4) the consequences
of placing the burden on the defendant. Foreseeability arises
when the injury is likely enough to occur that a reasonably
thoughtful person would take it into account in guiding his
conduct. Here, the appellate court found that common sense

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indicated that a snow pile large enough to block one’s view of oncoming traffic may indeed interfere with a motorist’s ability to see cross-traffic and cause an accident. The court found that a reasonably thoughtful person piling snow at the edge of a frontage road would take that into account and would alter his actions accordingly.

As to the second prong of the analysis, the court found that likelihood was not a certainty or a possibility, but a probability. The court opined that the injury was probable because the snow prevented the motorists from seeing each other. As to the magnitude of the burden in guarding against the injury, the court found that the injury could have been avoided if ICI had piled the snow somewhere other than at the edges of the driveway. Piling the snow in one location instead of another the court concluded, without discussing any factual basis for the statement, is certainly not a great burden.

Lastly, the court considered the consequence of placing the burden on ICI. Generally, a landowner owes a duty to those traveling on an adjacent roadway by virtue of his landowner status and the theory that the landowner is in the best position to prevent the accident. However, if a third party was in the best position to guard against the plaintiff’s injury, there is no justification for imposing liability on the landowner. The court determined that ICI was in the best position to prevent the accident. The court reasoned that property owners routinely enter and exit their own property and therefore, are in the best position to observe potential hazards and eliminate them. Thus, viewing the allegations in a light most favorable to the plaintiff, the court held that ICI’s motion to dismiss should have been denied because the plaintiff’s complaint set forth a cause of action.

**Destruction of Product Does Not End Product Liability Claim**

*Stringer v. Packaging Corporation of America, 2004 WL 1987221 (4th Dist., September 1, 2004).*

In the course of his employment, Kenneth Stringer was unloading boxes inside a refrigeration room, when the boxes ripped and broke. He tried to catch a box before it hit the ground and he injured his back in the process. He ultimately required fusion of some of his vertebrae as a result. Before he returned to work, one of the plaintiff’s co-workers, Louis Baumgartner, disposed of the box, which was allegedly manufactured by defendant, Packaging Corporation of America, (PCA). The box was destroyed sometime between May 14, 2001 (the day of the accident) and May 29, 2001 (the day the plaintiff returned to work).

In May 2003, Stringer filed a strict liability complaint against PCA. Shortly thereafter, PCA filed a motion to bar evidence and to dismiss the complaint, which the trial court denied. PCA filed a motion to reconsider, which the court also denied. However, the court certified the following question for interlocutory review, pursuant to Supreme Court Rule 308(a):

In a product-liability action, an allegedly defective box was destroyed by plaintiff’s employer through no fault of the plaintiff. The defendant filed a motion to bar evidence and dismiss the case on the basis that the box was unavailable for examination and testing. Did the trial court err in denying the defendant’s motion?

The Fourth District Appellate Court answered the certified question in the negative.

PCA’s motion asked the trial court to impose sanctions upon Stringer by either (1) barring both direct and circumstantial evidence as to the condition of the allegedly defective box or (2) dismissing the strict product liability count of his complaint. PCA also filed a motion to dismiss pursuant to Section 2-619 (a)(9) of the Code of Civil Procedure, arguing that the box that allegedly caused Stringer’s injury was unavailable, PCA could not inspect the box and would thus suffer significant prejudice.

In response to PCA’s motion, Stringer filed an affidavit in which he averred that the box was destroyed without his knowledge or consent, he was unable to physically prevent it from being destroyed, and the box was not unique since it was identical to other boxes manufactured by PCA. Stringer also filed Baumgartner’s affidavit in which he averred that he witnessed Stringer’s injury, inspected the box and noticed that the box was ripped, that the box was destroyed long before Stringer was able to return to work, and the box was identical to other boxes used at their place of employment.

After PCA’s motion was denied, it filed a motion to reconsider and, alternatively, a motion for a Supreme Court Rule 308 finding. In support of those motions, PCA filed the affidavit of Daniel Hofer, General Manager of Supply Services for PCA. Hofer asserted that without the actual box it would be impossible to determine if PCA manufactured the box, find a box from the same manufacturing lot, determine whether the packer improperly handled the box or determine the cause of the alleged failure.

Potential litigants have a duty to take reasonable measures to preserve the integrity of relevant and material evidence. In a strict-product liability case, the preservation of the allegedly defective product is important to both the proof and
the defense of the case. However, if evidence is destroyed, altered or lost, a defendant is not automatically entitled to a specific sanction. Instead, the trial court should consider the particular factual circumstances to determine what, if any, sanction is appropriate. An order to dismiss with prejudice or the imposition of a sanction that results in a default judgment should be used only in those cases where a party’s actions show a deliberate, contumacious, or unwarranted disregard of the court’s authority.

Here, almost immediately following Stringer’s injury and while he was still hospitalized, the box was destroyed by a third-party over whom Stringer had no control. While Supreme Court Rule 219(c) permits sanctions where a party unreasonably fails to comply with a discovery order, a party who had nothing to do with the destruction of evidence cannot be said to have unreasonably failed to comply with such an order.

PCA also argued the case should be dismissed because without the box, it would essentially be denied due process and fundamental fairness. This request relied heavily on the Hofer affidavit, which was filed along with PCA’s motion to reconsider. The affidavit, however, was not properly before the trial court on the motion to reconsider. Motions to reconsider are retrospective in nature. When a party seeks to have a motion to reconsider granted on the grounds of newly discovered evidence, the movant must provide a reasonable explanation why the evidence was not available at the time of the original hearing. The court explained that trial courts should not permit litigants to stand mute, lose a motion and then frantically gather evidence to show that the court erred in its ruling.

Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency require that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be. The court also noted that PCA had the option to, but did not, move to re-open the proofs so that the Hofer affidavit could be properly considered by the trial court. As such, the court concluded that the trial court did not err in denying PCA’s motion to dismiss.

Defendant’s Personal Financial Information Held Not Discoverable


Jill Manns filed a negligence action against Theodore Briell alleging personal injuries arising out of an automobile accident. During pre-trial discovery, Manns sought information regarding the defendant’s personal financial affairs. Briell refused, contending that the information was irrelevant and immaterial to any issue in the lawsuit and was not subject to discovery until a judgment is entered against him exceeding the limits of his liability insurance policy. The trial court ordered Briell to produce the information and held his attorney in contempt for refusing to produce the request materials. The defendant and his attorney appealed and the appellate court reversed.

The complaint sounded in negligence and sought only compensatory damages. Briell denied all allegations of negligence. The plaintiff propounded interrogatories and a request to produce. The interrogatories contained many of the standard interrogatories approved in Illinois for matrimonial cases and requested detailed information on the defendant’s financial

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affairs. The request to produce sought the production of the defendant’s tax returns and all documents indicating income and assets. Briell answered the interrogatories and requests to produce that did not seek personal financial information. After the plaintiff’s motion to compel was granted, the defendant filed a motion for reconsideration or, in the alternative, a contempt citation and $1.00 fine for purposes of facilitating appellate review of the discovery order. The trial court denied the defendant’s motion to reconsider but granted the request for a contempt citation.

Supreme Court Rule 201 establishes the scope of permissible pre-trial discovery and states that a party may obtain through discovery any matter relevant to the subject matter involved in the pending action. Discovery should only be utilized to illuminate the actual issues in the case. A trial court does not have discretion to order discovery of information that does not meet the threshold requirement of relevance to matters actually at issue in the case. For purposes of discovery, relevance includes not only that which is admissible at trial, but also that which leads to admissible evidence.

The appellate court here found that only two matters were at issue in the pending case: liability for the collision and the amount of damages, if any, suffered by the plaintiff as a result of the defendant’s negligence. The defendant’s financial information was not relevant to either issue. The plaintiff’s argument that the defendant’s financial resources were relevant to how she prepares and evaluates the value of her case, especially for a potential settlement, was rejected. Her claim that the value of the case might exceed the $100,000 limits of the defendant’s liability insurance coverage did not persuade the court.

The court further rejected the plaintiff’s argument that since discovery into the existence and amount of a defendant’s liability insurance was discoverable, discovery into a defendant’s financial affairs should be permitted. However, the existence and amount of a defendant’s insurance are subject to discovery because they are deemed to be related to the merits of the matters in litigation as they: (1) apprize the plaintiff of rights, otherwise unknown, arising from the automobile accident; (2) comport with the public policy of the State of Illinois to protect persons injured by the negligent operation of motor vehicles; and (3) allow for a realistic appraisal of cases and a sounder basis for settlement. Liability insurance exists solely for the purpose of protecting a party injured by the negligence of the policyholder. Certain rights created by liability insurance policies are bolstered by the laws of this state requiring drivers to have such policies, which inure to the benefit of injured parties. That is the reason those policies are relevant to litigation involving the negligent operation of motor vehicles.

As for a defendant’s financial assets, a plaintiff only has rights to that information after a judgment is entered. At that point, a plaintiff becomes a judgment creditor and clearly has an enforceable right to a defendant’s assets and can proceed in supplementary proceedings to discover those assets. It is the established public policy in this state to permit pre-trial discovery on a defendant’s liability insurance policy, but no comparable public policy favors discovery of a defendant’s financial assets before a judgment has been entered against him where only compensatory damages are sought. To require the pre-trial disclosure of a defendant’s assets, even as an aid to settlement, would be a serious invasion of privacy. Because no public policy requires disclosure of those assets, a defendant’s rights to privacy in his financial affairs is paramount.

In Case of First Impression, Appellate Court Rules Defendant Bears Burden of Proving Limitations Period Expired to Obtain Dismissal with Prejudice under Supreme Court Rule 103(b)


In December 2002, Randall Smith filed a five-count complaint against Menold Construction, Inc. under theories of breach of contract, common law fraud, a violation of the Consumer Fraud Act, theft and conversion and aggravated home repair fraud. On June 11, 2003, Menold was served. In July 2003, the defendant filed a motion to dismiss the plaintiff’s complaint for several reasons, including lack of due diligence and service of process pursuant to Supreme Court Rule 103(b). In his request for dismissal under Rule 103(b), Menold asserted that the plaintiff’s complaint should be dismissed with prejudice because “the appropriate statute of limitation has expired.” Although the plaintiff did make some attempts to serve the defendant, the trial court found them insufficient to establish due diligence and dismissed the complaint with prejudice. The court found it significant that the plaintiff knew from prior litigation where the defendant was located and who its attorneys were and that the plaintiff did not check whether service had been accomplished because he “had other things to do.”

The plaintiff has the burden of showing reasonable diligence in service of process. In ruling on a Rule 103(b) motion,
a court may consider the following non-exclusive factors: (1) the length of time used to obtain service of process; (2) the plaintiff’s activity; (3) the plaintiff’s knowledge of defendant’s location; (4) the ease with which the defendant’s whereabouts could have been ascertained; (5) the defendant’s actual notice or knowledge of the pendency of the suit or the lack of the prejudice to the defendant; (6) special circumstances that would affect the plaintiff’s efforts; and (7) actual service on the defendant. Additionally, while the court may consider the defendant’s lack of prejudice, the defendant does not have the burden to establish he was prejudiced by the delay.

The court noted that it had previously found that the plaintiff had a non-delegable duty to (1) assure the clerk issued the summons, (2) deliver the summons to the process server for service, and (3) see the process server made a prompt and proper return. The court found that the plaintiff’s efforts in this respect were lacking, that he knew where the defendant was located and knew who the defendant’s attorneys were and their location. Moreover, the defendant had no knowledge of the case until it received service, although it did not appear to suffer prejudice from the delay. The plaintiff was proceeding pro se, but the record indicated that he was familiar with the legal process. Finally, the court noted that the plaintiff served the defendant more than five months (23 weeks) after his complaint had been filed and that other courts have found the plaintiff lacked due diligence where a delay of similar length occurred. Accordingly, the appellate court found that the trial court did not abuse its discretion in finding the plaintiff lacked due diligence in serving the defendant.

However, the plaintiff also contended that the trial court erred in dismissing his case with prejudice because the statutes of limitation had not run on the breach of contract, common law fraud, and theft and conversion claims. The court noted that the defendant’s petition simply stated the dismissal should be with prejudice because the statutes of limitations had run. No law or facts were offered in support of this conclusion. Indeed, neither party addressed the statutes of limitations in their briefs. The defendant argued that the plaintiff forfeited this argument by failing to raise it in the trial court and, in any event, the plaintiff was the party responsible for addressing the statutes of limitation at the Rule 103(b) hearing.

While the case law is clear that the plaintiff has the burden showing reasonable diligence, the question of who has the burden of proving the statute of limitations has expired with a Rule 103(b) motion is a matter of first impression. The court found that a dismissal with prejudice under Rule 103(b) is similar to a dismissal pursuant to Section 2-619(a) (5) of the Code of Civil Procedure, which allows dismissal on the ground that the action was not commenced within the time limited by law. With such a motion, the defendant bears the initial burden of going forward on the motion. The burden then shifts to the plaintiff, who must establish that the ground asserted either is unfounded as a matter of law or requires a resolution of material fact before it is proved. As such, the court found that with a Rule 103(b) motion, the defendant bears the initial burden of demonstrating the statute of limitations period has expired before the burden is shifted to the plaintiff. The court found that the defendant’s conclusory statement that the applicable statutes of limitations has expired was insufficient to meet its initial burden and the case was remanded to the trial court for a hearing consistent with the opinion.
Reimbursement of Defense Costs: Creating Rights Beyond the Policy Language in a “Reservation of Rights” Letter


The insured was sued as a defendant in a lawsuit and tendered the lawsuit to the insurer to defend and indemnify it pursuant to the policy of insurance. The insurer responded with a letter reserving its rights as to its duties to defend and indemnify the insured. Further in the letter the insurer wrote that it would pay defense costs but was reserving rights to be reimbursed for the defense costs should a court find it had no duty to defend the insured. The letter did not identify or cite to any provision of the insurance policy as a source of this “right to reimbursement.” Concurrently, the insurer filed a declaratory judgment action seeking a declaration that it owed no duty to defend the insured from the lawsuit, which was decided in its favor. The insurer then attempted to seek recovery of the defense costs it had paid prior to the court’s ruling that it had no duty to defend the insured. The trial court granted its motion for defense costs and entered judgment in favor of the insurer and against the insured.

The First District Court of Appeals affirmed, holding that in the circumstances of this case, the insured knew, at the time it accepted the payments for the defense costs, that the insurer intended to seek recovery of those defense costs. Under those facts, if the court found that the claims were not covered, the insurer may recover any payments made for the claims not covered by the policy.

The insured seeks review in the Illinois Supreme Court, claiming that the First District’s decision conflicts with State Farm Fire & Casualty v. Martin, 186 Ill. 2d 367, 710 N.E.2d 1228 (Ill. 1999); LaThrop v. Bell Federal Savings & Loan Assn., 68 Ill. 2d 375, 370 N.E.2d 188 (Ill. 1977); and Conway v. County Casualty, 92 Ill. 2d 388, 442 N.E.2d 245 (Ill. 1982). Further the insured asserts, as did the dissent in the First District, that this is a case of first impression in Illinois and is worthy of consideration by the Supreme Court.

The insured argues that the First District holding creates new law regarding “reservation of rights” letters, which will be applicable to all policyholders and insurers in Illinois, not just the parties to this litigation. The insured further claims that the First District’s holding is tantamount to allowing an insurance company to create any right it chooses simply by including it in a reservation of rights letter even though no such right exists in the policy.

The insured contends that the First District ruling is incompatible with and in contravention of the Martin case, which allows an insurer two options when a complaint is filed against an insured alleging facts within or potentially within the scope of coverage. According to that case, the insurer can either defend under a reservation of rights letter and seek declaratory judgment or simply seek declaratory judgment regarding coverage. The insured claims that the First District decision in this case has changed that well-settled law.

The insured further argues that the First District’s opinion contravenes LaThrop, which held that where a specific contract governs the relationship of the parties, the doctrine of unjust enrichment has no application. Thus, according to the insured, the insurer was not entitled to recover defense costs on the theory of unjust enrichment, which in effect the First District opinion now allows.

Additionally, the insured argues that the Supreme Court’s holding in Conway, that an insurer’s duty to defend its insured arises from the contract of insurance, has been destroyed by

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the First District’s opinion which allows the insurer to unilaterally create a new right via a reservation of rights letter.

Finally, the insured argues that the First District opinion is erroneous because it creates a new theory of recovery, which it calls “accommodation” and which has no basis in Illinois law. The insured states that the First District in fact did not hold that the insurer was entitled to reimbursement of defense costs based on the theory of contract law, unjust enrichment, or some other recognized theory of recovery. Rather, the First District held that the insurer’s right to reimbursement is based on an accommodation for which the First District provided no reference to Illinois law nor any other legal authority.

Pizza Delivery Accident Tosses Food Delivery Exclusion from Policy


At issue is the language of an automobile insurance policy issued by the plaintiff to an insured (“Progressive insured”) whose son, while driving her car to deliver pizza, struck a pedestrian. The policy issued by the plaintiff states under part 1 “liability to others” that “coverage under this part 1, including but not limited to, delivery of magazines, newspapers, food or any other products.”

The pedestrian filed suit against the Progressive insured seeking damages for injuries he sustained from the accident. The plaintiff is defending the lawsuit under a reservation of rights letter.

The plaintiff further avers that under the defendant and the Second District’s reasoning, courts can never find that an exclusion is an exclusion that applies to both the insured and any omnibus insured, it is not in violation of that public policy. Thus, the plaintiff argues that as long as an exclusion is based upon certain activities rather than categories of insureds it does not violate the public policy expressed in Section 7-317(b)(2).

The plaintiff further avers that under the defendant and the Second District’s reasoning, courts can never find that an exclusion can be enforced against an omnibus insured even though the exclusion could be enforced against a named insured.

Finally the plaintiff argues that the Second District has expanded the coverage in a personal automobile policy for injuries that an omnibus insured caused while using the car for commercial deliveries, thereby transforming the policy from a personal automobile policy into a commercial automobile policy. Expanding the coverage as the Second District has will ultimately cause insurers to increase prices for basic liability insurance because commercial activities include greater risk and will have to be underwritten for greater risk resulting in a higher premium. That result is contrary to the public policy of mandating insurance for all Illinois vehicles according to the plaintiff.

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Supreme Court Watch  (Continued)

No Set Off for Medical Bills Paid from Pension


The defendant issued a policy of automobile liability insurance to the deceased, a Chicago Fire Department paramedic, who was struck and fatally injured by an uninsured motor vehicle. The City of Chicago paid the medical bills incurred by the deceased, pursuant to the Illinois Pension Code, 40 ILCS 5/22-306. The plaintiff, the deceased’s wife, made a claim with the defendant under the deceased’s policy for $100,000 of uninsured motorists coverage for injuries and wrongful death associated with the accident. The deceased’s policy stated “any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured under any worker’s compensation, disability benefits, or similar law.” Pursuant to the set-off provision, the defendant set off against the $100,000 per person limit of uninsured motorists coverage, the $76,612.10 of medical expenses paid by the City of Chicago and tendered the plaintiff a check for $23,387.90.

The plaintiff brought a declaratory judgment action against the defendant seeking a ruling that the defendant is not entitled to any set off against the uninsured motorists coverage of the deceased’s policy because the set off violates the public policy of Illinois and, as written, does not apply to the benefits paid on behalf of the deceased by the City of Chicago.

The trial court granted the defendant’s motion for judgment on the pleadings and entered judgment in favor of the defendant. The First District reversed the judgment of the trial court, entering judgment for plaintiff. The appellate court held that the defendant failed to explicitly include payments from the pension in the set off provision and that such payments were not encompassed by the language of that provision.

“The appellate court held that the defendant failed to explicitly include payments from the pension in the set off provision and that such payments were not encompassed by the language of that provision.”

that they should come under the “any similar law” part of the provision in the policy at issue.

The defendant also argues that the First District’s opinion is directly contrary to *State Farm Mut. Auto. Ins. v. Murphy*, 263 Ill. App. 3d 100, 635 N.E.2d 533 (1st Dist. 1994) and is inconsistent with *Scudella v. Illinois Farmers Ins. Co.*, 174 Ill. App. 3d 245, 528 N.E.2d 218 (1st Dist. 1988) and *Pearson v. State Farm Mut. Auto. Ins.*, 109 Ill. App. 3d 649, 440 N.E.2d 1070 (1st Dist. 1982). The defendant argues also that the trial courts will need direction on which opinion from the First District to follow – the *Murphy* case or the decision in the case at bar.

As to *Pearson* and *Scudella*, the defendant argues that the offset was allowed in those cases under similar circumstances, and thus, the First District’s decision is in error.
Professional Liability

By: Martin J. O’Hara
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Understanding the Limitation of
Goran v. Glieberman

One of the most misunderstood concepts in the area of legal malpractice involves determining under what circumstances the incurrence of attorneys’ fees in an underlying action constitutes actual damages for purposes of satisfying the damages element of a legal malpractice claim. This determination is absolutely critical for both plaintiffs’ attorneys and defense attorneys because it often goes to the central question of whether a claim for legal malpractice has accrued, and if so, when the statute of limitations began to run. A recent decision from the Second District Court of Appeals demonstrates the importance of knowing under what circumstances the incurrence of attorneys’ fees in an underlying action will constitute actual damages, thereby triggering the applicable two-year statute of limitations. York Woods Community Association v. Walter J. O’Brien II, 2004 Ill. App. LEXIS 1098, 2004 WL 2029924 (2d Dist. September 7, 2004).

To fully understand this issue, it is important to begin with the First District Appellate Court’s decision in Goran v. Glieberman, 276 Ill. App. 3d 590, 659 N.E.2d 56, 213 Ill. Dec. 426 (1st Dist. 1995), a decision that is routinely miscited and misunderstood by practitioners. The factual situation in Goran was very unique, and it was this uniqueness that attorneys overlook when considering Goran. In Goran, the plaintiff, Ruth Goran, was represented by the defendant, Herbert Glieberman, in an appeal from an adjudication of marriage dissolution and child custody. Glieberman filed an appellant’s brief with the appellate court, but thereafter withdrew from the appeal. Goran then hired another law firm, Greenburg & Hermann, to represent her in the appeal. Greenburg & Hermann filed a reply brief and appeared at oral argument. In addition, Greenburg & Hermann were required by the appellate court to “redo Glieberman’s brief and the record on appeal to bring them into compliance with court rules.” Id. at 591-92. Greenburg & Hermann did so, but Goran lost her appeal nonetheless.

Thereafter, Goran filed a malpractice action against Glieberman. More than two years thereafter, Glieberman filed a third-party complaint for contribution against Greenburg & Hermann. Greenburg & Hermann moved to dismiss the third-party action, contending that Glieberman was required to file the action within two years of being sued by Goran. The trial court granted the motion to dismiss and Glieberman appealed.

In determining whether Glieberman’s action was timely, the Goran court first had to determine when Goran’s cause of action against Glieberman accrued, which controlled whether Glieberman had to bring his contribution action within two years of the time he was sued, or five years. Greenburg & Hermann asserted that Goran’s cause of action did not accrue until the appellate court issued its opinion in Goran’s appeal, which would result in Glieberman’s action being controlled by a two-year statute of limitations. Conversely, Glieberman contended that Goran’s cause of action began to run at the time she incurred attorneys’ fees for Greenburg & Hermann to “redo” Glieberman’s brief. This time frame would result in Glieberman’s third-party contribution action being subject to a five-year statute of limitations.

The appellate court agreed with Glieberman, and held that Goran’s cause of action accrued at the time she incurred fees to bring the defective brief into compliance. The court specifically held:

The undisputed facts indicate that Goran incurred actionable damages when she paid $1,297 in attorney fees to bring the briefs into compliance. We conclude that her cause of action accrued at that point; Goran knew or should have known of her cause of action no later than

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Professional Liability (Continued)

December 1990 when Greenburg & Hermann were required to duplicate Glieberman’s effort. \textit{Id.} at 596.

Having concluded that Goran’s cause of action accrued in December 1990, the \textit{Goran} court held that Glieberman’s action was controlled by a five-year statute of limitations. The court thus reversed the trial court’s dismissal of Glieberman’s third-party complaint.

Many practitioners either misread or misunderstood the holding in \textit{Goran}. Following \textit{Goran}, many attorneys began asserting that whenever attorneys’ fees were incurred because of a lawyer’s negligence or alleged negligence, a cause of action for legal malpractice accrued at the time the fees were incurred. These attorneys failed to recognize that the fees paid in \textit{Goran} directly resulted from a specific finding by the appellate court that the briefs filed by Glieberman were defective.

However, the court in \textit{Lucey v. Law Offices of Pretzel & Stouffer}, 301 Ill. App. 3d 349, 703 N.E.2d 473, 234 Ill. Dec. 612 (1st Dist. 1998), attempted to correct this misinterpretation. In \textit{Lucey}, the plaintiff, Lawrence Lucey, sought advice from the defendant law firm regarding whether he could solicit clients of his employer prior to resigning his employment. The defendant law firm advised Lucey regarding the solicitation of the employer’s clients. After Lucey resigned, one of the clients of his former employer transferred its business to his new company. In August 1989, the former employer brought an action against Lucey for breach of fiduciary duty.

Lucey initially retained the defendant law firm to represent him in that matter. He subsequently terminated the law firm and, in July 1995, filed a legal malpractice action against the firm relating to the advice he received prior to leaving his employment. The defendant moved to dismiss the action based on the statute of limitations. The defendant argued that the statute of limitations began to run in August 1989 when the plaintiff was sued by his former law firm. Because the plaintiff did not file his legal malpractice action until 1995, the defendant asserted that the then-applicable five-year statute of limitations barred the action. Finding that the only harm asserted by Lucey was the filing of the suit against him in August 1989, the trial court determined that the cause of action accrued in 1989. The trial court therefore dismissed the claim as untimely.

The \textit{Lucey} court reversed. The court held that not only was the plaintiff’s legal malpractice action not barred by the statute of limitations, but, in fact, the cause of action had never accrued. The court held that Lucey had not incurred any actual damages because the complaint brought against him by his former employer remained pending. Because Lucey might still prevail in that action, it was premature for him to bring an action against the law firm for malpractice.

In so holding, the \textit{Lucey} court specifically rejected the argument that the cause of action accrued when Lucey began expending legal fees to defend himself against his former employer’s claims. The \textit{Lucey} court distinguished such fees from the fees present in \textit{Goran}. The \textit{Lucey} court found that the attorneys’ fees incurred in \textit{Goran} resulted from a finding by the appellate court that the brief filed by Glieberman was deficient. In contrast, although the attorneys’ fees incurred by Lucey resulted from the advice given by the defendant law firm, there had not yet been a finding by any court that such advice was negligent. The \textit{Lucey} court specifically held:

Thus, the \textit{Goran} holding is a limited one: the incurring of additional attorney fees may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel’s neglect (such as through a ruling adverse to the client to that effect). We reject the parties’ assertion that subsequently incurred attorney fees will, in every case, automatically give rise to a cause of action for legal malpractice against former counsel. \textit{Id.} at 355.

Because it was still possible that the plaintiff would prevail in the suit brought against him by his former employer, any damages resulting from the defendant’s alleged negligence was speculative and uncertain, and therefore could not constitute actual damages for purposes of a legal malpractice claim.

Despite the clear statement by the \textit{Lucey} court that the \textit{Goran} holding was very limited, the holding in \textit{Goran} continued to be misapplied. In \textit{York Woods}, York Woods Community Association, an unincorporated association, retained the law firm of O’Brien & Associates to incorporate the association. O’Brien & Associates purported to do so, creating a not-for-profit corporation also named the York Woods Community Association. In January 1998, a resident of York Woods filed a lawsuit against the not-for-profit corporation challenging whether it had been properly incorporated. That matter ultimately proceeded to trial and the not-for-profit corporation prevailed. At about the same time, two other residents of York Woods filed an action similarly alleging that the not-for-profit corporation had not been incorporated validly. The not-for-profit corporation was granted summary judgment in that matter.

Thereafter, the two suits were consolidated on appeal. The appellate court reversed both decisions, holding that the
not-for-profit corporation had not been established validly, and therefore could not succeed to the powers of the unincorporated association. The decision of the appellate court was issued in April 2002.

In July 2002, the unincorporated association filed a legal malpractice action against O’Brien & Associates resulting from its failed attempt at incorporating the not-for-profit corporation. O’Brien & Associates moved for summary judgment, asserting that the limitations period began to run in January 1998, when the first lawsuit was filed against the not-for-profit corporation. The trial court rejected the defendant’s argument, finding that factual issues precluded summary judgment on the statute of limitations issue. However, the trial court granted summary judgment in favor of O’Brien & Associates on the basis that the unincorporated association lacked standing to pursue a malpractice action against a law firm.

The parties cross-appealed the trial court’s order. The appellate court initially held that the not-for-profit corporation had standing to pursue the action. The appellate court also held that the trial court had properly applied the statute of limitations.

The York Woods court rejected the defendant’s assertion that the plaintiff had been on notice of its injury as of January 1998, as a result of incurring attorneys’ fees because of O’Brien & Associates’ improper legal services. Following Lucey, the York Woods court held that the mere incurrence of attorneys’ fees does not automatically give rise to a cause of action for legal malpractice. Rather, incurring additional attorneys’ fees may trigger the running of the statute of limitations only where it is clear at the time the additional fees are incurred that the fees are directly attributable to former counsel’s neglect. York Woods, 2004 Ill. App. LEXIS at *13.

The York Woods court held that when the fees were incurred by the not-for-profit corporation to defend against the initial lawsuit, “it was not at all clear that those fees were directly attributable to defendants’ malpractice” because the not-for-profit corporation had not yet been declared invalid. Id. At that point, the damages remained speculative and no cause of action had accrued. The cause of action first accrued, and the plaintiff first sustained actual damages, when the appellate court determined that the not-for-profit corporation had not been properly incorporated. Because the plaintiff brought its cause of action within two years of the appellate court’s decision, its claim for legal malpractice was timely.

With the decisions in Lucey and York Woods, practitioners should recognize and appreciate the very limited holding of Goran. Only where attorneys’ fees have been incurred specifically as a result of a court finding that the attorney was negligent, do such fees constitute actual damages for purposes of a legal malpractice action. Where no such finding has been made, a cause of action does not accrue merely because attorneys’ fees are incurred, and the statute of limitations does not begin to run. Hopefully, this clarification will reduce unnecessary motion practice in legal malpractice actions.

“In Lucey, the plaintiff, Lawrence Lucey, sought advice from the defendant law firm regarding whether he could solicit clients of his employer prior to resigning his employment.”
Property Insurance

By: Carlin Metzger
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Replacement Cost Coverage in the Homeowner’s Policy:
Can An Insured Replace Damaged or Destroyed Property at a Location Other Than the Original Premises?

There is an inherent tension between the insured and the insurer in any insurance claim. The insured generally seeks to maximize recovery, while the insurer will vigilantly enforce an insurance policy’s terms to limit recovery to exactly what the policy allows. Because of this inherent tension, insurance policies are carefully drafted and contain numerous conditions and limitations on an insured’s recovery. The tension between the insurer and insured clearly manifests itself in the context of homeowners insurance and, in particular, the repair or replacement of an insured’s damaged or destroyed property following a loss.

Homeowners’ policies are contracts of indemnity and generally are written to cover the actual cash value of the insured property at the time of loss. Third Establishment, Inc. v. 1931 North Park Apartments, 93 Ill. App. 3d 234, 417 N.E.2d 167 (1st Dist. 1981). Most property policies written today grant the insured the option of obtaining “replacement cost coverage” in addition to providing coverage for the actual cash value of the damaged or destroyed property. See, Allendale Mut. Ins. Co. v. Bull Data Sys., No. 91 C 6103, 1994 U.S. Dist. LEXIS 18543 (N.D. Ill. 1994). This option for enhanced coverage is subject to conditions that the insured must satisfy, and subject to limitations on what the insurer must pay. These conditions and limitations are a source of frequent disputes between the insurer and its insured. Questions frequently arise as to whether the insured must complete rebuilding prior to recovery of replacement proceeds, whether upgrades to the property are permitted under a replacement cost provision, and the proper determination of the standard to measure replacement costs.

What happens when the homeowner decides to replace damaged or destroyed property in an entirely different location than the original property? One result is that the numerous pre-conditions to the recovery of replacement cost coverage outlined in the standard replacement cost policy are frequently confused with limitations on the amount that the insured is entitled to recover. While several insurers have argued that the insured should not be entitled to replacement cost coverage where the damaged structure is replaced in a different location than the original, this position has been largely rejected by the courts. Courts addressing this issue have held that the insured is entitled to replacement cost coverage even when the replacement property is located off the original premises, as long as the insurance policy’s remaining conditions are satisfied. This article discusses whether the insured has a right to replace damaged or destroyed property at a completely different location than the original insured premises, assuming that all other substantive requirements of the replacement cost policy have been met.

I. Replacement Cost Coverage

Property insurance coverage is intended to “place the insured as near as possible to the position occupied just prior to the loss as if the loss hadn’t occurred.” FSC Paper Corp. v. Sun Ins. Co., 744 F.2d 1279, 1283 (7th Cir. 1984). Prior to the development and application of the concept of depreciation in property claims, the courts had adopted a straightforward “new for old” analysis in assessing loss. If an insured’s property was destroyed, the insured would receive an amount necessary to rebuild the home or replace its contents in new condition. This formula did not take into account the insured property’s loss of value over time - depreciation. By not taking into account depreciation, the courts’ former adoption of “new property for old” granted a windfall to an insured. See, Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 353 (Ind. 1982). To avoid this situation, the terms of insurance policies were altered to specifically provide for reimbursement only for the actual

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To cope with the reality that depreciation remained an insurable interest, replacement cost policies were developed to provide coverage for both the actual cash value of damaged property as well as the return of the deducted depreciation value. Hess v. North Pac. Ins. Co., 122 Wa. 2d 180, 859 P.2d 586 (Wash. 1993); Couch on Insurance 3d § 176:56 (1998). Thus, replacement cost provisions usually allow for the full cost to repair or replace damaged property without deducting for depreciation. Higginbotham v. American Family Insurance, 143 Ill. App. 3d 398, 493 N.E.2d 373 (1986). The insurance industry recognized that depreciation was an insurable risk that is secondary to actual cash value reimbursement. F.S.C. Paper Co. v. Sun Insurance Company of New York, 744 F.2d 1279 (7th Circ. 1984). Replacement cost insurance permits recovery for the actual value of property at the time of loss, without deduction for deterioration, obsolescence, and similar depreciation of the property’s value. Id.

II. Conditions on Recovery of Replacement Cost

Replacement cost provisions in insurance policies add back depreciation, but always place conditions on entitlement and limits on the amount the insured is entitled to recover. For example, property insurance policies generally restrict an insured’s recovery to the actual cash value of the loss unless and until the insured actually repairs or replaces the damaged or destroyed property. See, e.g., Hilley v. Allstate Ins. Co., 562 So. 2d 184 (Ala., 1990). The replacement property must be of like kind and quality and must be for equivalent use. Id. It is important to distinguish, however, between conditions precedent to replacement cost coverage, and limitations on amount the insured is entitled to recovery. Typically, replacement cost provisions in a property insurance policy restrict the insured’s recovery of replacement costs to the smallest of: (1) the policy limit; (2) the cost to replace the damaged property with equivalent property on the same premises; or (3) the amount actually and necessarily spent to repair or replace the damaged Structures with equivalent construction and for equivalent use. We will not be liable for Replacement Cost until actual repair or replacement is completed with equivalent construction and for equivalent use.

HOW LOSSES ARE SETTLED

Building Structures.

We will pay the cost to repair or replace the damaged property with equivalent construction and for equivalent use without deduction for depreciation if, at the time of loss, the amount of insurance for the Structures covered by this Policy is 80% or more of the Replacement Cost.

* * * *

But, we will pay no more than the smallest of the following:

(1) the Limit of Liability in this Policy for the Structures; or
(2) the cost to replace the damaged Structures with equivalent construction and for equivalent use on the same premises; or
(3) the amount actually and necessarily spent to repair or replace the damaged Structures with equivalent construction and for equivalent use.

We will not be liable for Replacement Cost until actual repair or replacement is completed with equivalent construction and for equivalent use.

* * *

Paragraphs (1), (2) and (3) provide three different alternative amounts that the insured may recover. Each paragraph also sets forth preconditions to recovery. Generally, the terms “Repair,” “Replace,” or “with equivalent construction and for equivalent use” are not defined by the policy. There is no express statement or explanation of where replacement must take place. Nonetheless, some insurers have argued that “repair or replace” must mean on the same premises as the original property. In certain cases, the insurers have argued that replacement of the property “on the same premises” is a precondition to recovery of replacement cost. This has proved to be a losing proposition, as the courts have repeatedly held that construction of a structure on the same premises is not a precondition to recovery of replacement cost.

(Continued on next page)
Property Insurance (Continued)

III. Location of the Insured’s Replacement Property is not a Condition to Recovery, but May Affect the Amount of the Insurer’s Liability

In S & S Tobacco & Candy Co. v. Greater New York Mut. Ins. Co., 224 Conn. 313, 617 A.2d 1388 (Conn. 1992), the Connecticut Supreme Court addressed a dispute between a warehouse owner and its insurer over the depreciated value of a fire-damaged warehouse. Following the warehouse fire, S & S Tobacco & Candy decided that it would be more economically efficient to rebuild its warehouse on another piece of property than to replace the original where the original warehouse had stood. The company acquired a piece of property across town, and built a larger warehouse. The parties agreed that in order to recover the replacement cost of the property, the insured had to actually rebuild the property. The disagreement was focused on whether the insured could recover the replacement cost if it rebuilt the warehouse at a different location.

Like the sample provision cited above, the replacement cost provision in this case stated that the amount of insurer’s liability was limited to the least of:

1. the amount of this policy applicable to the damaged or destroyed property;

2. the replacement cost of the property or any part thereof identical with such property on the same premises and intended for the same occupancy and use; or

3. the amount actually and necessarily expended in repairing or replacing said property or any part thereof.

The insurer seized on the requirement in Section (2) of the provision which requires replacement of the property “on the same premises,” and argued that this applied to the entire replacement cost provision. The insurer argued that the insured could not rely on Section (3) under the circumstances of the claim because the policy limited its liability to “the smallest of the . . . amounts specified in the three subparagraphs.”

The court agreed with the insurer that the policy requires the property to be actually repaired or replaced, but held that the policy does not require replacement to be made on the same premises. Id. at 1391. Furthermore, the court stated that the policy’s requirement in paragraph (2) of the replacement cost Section that the replacement property be “on the same premises” was intended to affect the amount the insurer was obligated to pay rather than to function as a precondition to payment. Id. The court stated that the provision “by its own terms addresses the amount of the defendant’s liability rather than the conditions that the plaintiffs must meet to establish their entitlement to coverage.” Id. In any scenario, the insured cannot recover more than the limits of the policy as set forth in paragraph (1). The policy limit sets an absolute ceiling. If the cost to repair or replace the damaged property is less than the policy’s limits, the insured’s recovery will then be the lesser of two amounts. The insured can recover the full cost to replace the property at a different location only if it is less than the cost to repair or replace the property at its original location. Id.

The court in Blanchette v York Mut. Ins. Co., 455 A.2d 426 (Maine 1983), came to a similar conclusion. It held that a homeowner could recover the replacement cost for a fire loss even though the replacement home was not built upon the same premises as the destroyed home.

“The court in Blanchette held that a homeowner could recover the replacement cost for a fire loss even though the replacement home was not built upon the same premises as the destroyed home.”

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property since the insured did not rebuild the home “on the same premises” as the original. The insurer argued that the phrase “on the same premises” should be read into each of the three alternatives set forth in the replacement cost provision, essentially arguing that replacement on the original premises was a precondition to recovery of the replacement cost. Without a detailed discussion, the court rejected this argument and sided with the homeowners, allowing a recovery of the policy limit of $15,000. *Id.*

The courts in *S & S Tobacco & Candy Co.* and *Blanchette* both came to the conclusion that the insured was entitled to the replacement cost of the property built on a site other than the original based on the plain language of the policy. The court in *Johnson v Colonial Penn Ins. Co.*, 127 Misc. 2d 749, 487 N.Y.S. 2d 285 (1985) took a slightly different tack in reaching the same conclusion, finding the policy *ambiguous* as to whether the insured was required to build replacement property on the original premises.

In *Johnson*, the policy again limited the insured’s recovery to: (1) the policy limit; (2) the cost to replace the damaged property with equivalent property on the same premises; or (3) the amount actually and necessarily spent by the insurer for replacement property. The insured chose to rebuild away from the original premises, and the insurer limited its payment to the insured to the actual cash value of the damaged property. The court noted that the words “on the same premises” were found in one of the alternative reimbursement provisions, and found that the policy was “ambiguous.” *Id.*

The court relied on the general maxim that “any ambiguity in an insurance policy will be construed against the insurer and in favor of the insured,” and ruled in favor of the insured. *Id.* at 287. The court added that the specific inclusion of the words “on the same premises” in two clauses (but not the one at issue) required “a finding that its absence . . . was intentional.” *Id.*

The court explained that the second alternative is a “hypothetical amount” to be applied if the replacement property actually built exceeds the reasonable value of what it should cost to repair or replace the damaged property on the same premises. *Id.* The third alternative is “not hypothetical,” and is based on the actual cost of the replacement property, no matter where it is built. *Id.*

One final case is interesting because the insurer’s application (or misapplication) of the policy’s replacement cost provision actually led the insurer to pay more than its true obligation. In *Huggins v. Hanover Ins. Co.*, 423 So 2d 147 (Ala. 1982), the insureds elected to rebuild their home in a new location after their insured home was completely destroyed by fire. Like the cases discussed above, the insurer’s liability under the replacement cost provision was limited to: (1) the policy limit; (2) the cost to replace the damaged property with equivalent property on the same premises; or (3) the amount actually and necessarily spent by the insured for replacement property.

The insureds bought a new home in a different location for $79,900. An insurance adjuster determined that the full replacement cost of the destroyed home was $106,366.21, that the applicable depreciation was $21,266.21, and that the actual cash value was $85,100. The policy limit was $120,000. Going above and beyond the call of duty in this case, the insurer offered an actual-cash-value settlement of $85,000 to the insureds. The insureds filed suit to recover the withheld depreciation (in other words, the full $106,366.21 replacement cost of the original home).

The courts in various other jurisdictions, the court noted that the replacement cost provision was concerned with the amount of recovery and was not a condition precedent to recovery. *Id.* The court held that the term “replacement” had to be given its common interpretation. *Id.* The court observed that while the new house did not take the place of the fire-damaged house in the same physical location, it did serve the same function as a previous home and might be considered a substitute. *Id.* Thus, the court concluded that the $79,900 paid for the new home was the amount actually and necessarily spent to replace the damaged building, and was therefore the amount the insured was entitled to under the policy’s replacement cost provision. *Id.*

**IV. Conclusion**

Each of these decisions - and certainly the decision in *Huggins* - demonstrate the importance of the distinction between a pre-condition to recovery and a limitation on the amount an insured is entitled to recover under the replacement cost provisions in property insurance policies. Due to the complexity of the policy language, these concepts are often confused in assessing replacement cost property claims. Property insurance policies generally do require an insured to actually repair or replace the property, and require that the repair or replacement be made with property of equivalent construction or use. These conditions to the recovery of replacement cost coverage or the depreciation hold-back should not, however, be confused with a requirement that the insured replace the damaged or destroyed property on the same premises as the original.
Commercial Law

By: James K. Borcia
Tressler, Soderstrom, Maloney & Priess
Chicago

Corporations Beware –
Seventh Circuit Reverses Dismissal of Securities Fraud Claims Relating
to Forward-Looking Statements

Asher v. Baxter Int’l Inc., 377 F. 3d 727 (7th Cir. 2004)

The Seventh Circuit recently reversed the dismissal of a securities fraud claim for the failure to state a claim. The defendant, Baxter, released projections of its financial results for the year 2002 on November 5, 2001. On July 18, 2002, Baxter released its second quarter financial results for 2002, in which sales and profits did not match its analysts’ expectations. Baxter’s stock price subsequently fell from $43 to $32 per share.

The plaintiffs filed suit contending that the $43 price per share was a result of materially misleading projections that Baxter had not rectified until July 18, 2002. The plaintiffs filed a purported class action for all investors who purchased Baxter stock during the subject time period. Baxter moved to dismiss the claim.

The district court granted Baxter’s motion to dismiss under the safe harbor created by the Private Securities Litigation Reform Act of 1995, 15 USCA Sec. 77z-1 et seq. (“PSLRA”). The plaintiffs appealed to the Seventh Circuit. The Seventh Circuit reversed the dismissal and remanded the case back to the district court.

The Seventh Circuit held that the issue of whether Baxter had fallen under the safe harbor provision could not be determined on the pleadings. Baxter had projected during 2002, that the business would yield revenue growth in the “low teens” compared with the prior year, that earnings per share growth would be in the “mid teens” and that operating cash flow would be at least $500,000,000. The plaintiffs alleged that these projections were materially false because: (1) Baxter’s renal division had not met its internal budgets in years; (2) economic instability in Latin America adversely affected Baxter’s sales; (3) Baxter had closed plants; (4) the market for some of Baxter’s products was over-saturated; (5) sales of one of Baxter’s divisions had fallen short of internal predictions; and (6) in March 2002 one of Baxter’s divisions had experienced a sterility failure in the manufacture of a major product.

In its analysis, the Seventh Circuit looked to the statutory safe harbor provision, which forecloses liability if a forward-looking statement “is accompanied by meaningful, cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.” 15 USCA Sec. 77z-2(c)(1) (A)(i). The court struggled with what was meant by the term “meaningful cautionary statements.” Baxter had issued a number of statements in its 2004 Form 10-K filing. In that filing, Baxter noted that its statements: (1) were not historical facts, but forward-looking statements; (2) were based upon on the company’s current expectations and involved numerous risks and uncertainties, including interest rates, technological advances, economic conditions, demand in market, acceptance risk, new plant start-ups; and (3) provided additional specific company information. The court agreed that the cautionary statements did not have to cover all of the subsequent events, as the statute did not require prescience. The court held that as long as Baxter revealed the principal risks, the fact that some other event caused problems could not give rise to liability. The court noted that there cannot be “fraud by hindsight.”

The plaintiffs responded to Baxter’s defense by arguing that Baxter’s cautionary statements could not save Baxter because they were not included in the press releases and oral statements alleged in the complaint. The court found that if this were a pure securities suit, then the plaintiffs’ argument would be correct. However, since the plaintiffs were suing on a fraud-on-the-market claim, which presumes that other people read the cautionary statements and made credit recommendations that influenced the price, that argument could not work because an investor who invokes the fraud-on-the-

About the Author

James K. Borcia is a partner with the Chicago firm of Tressler, Soderstrom, Maloney & Priess, and is active in the firm’s litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.
market theory must acknowledge that all public information is reflected in the price of the stock.

Nevertheless, the court refused to affirm dismissal of the claim based upon the cautionary statements. The court first noted that boilerplate warnings would not suffice. The cautions must be tailored to the risks that accompany the particular productions. Second, the court held that the cautions need not identify what actually goes wrong and causes the projections to be inaccurate. However, the court found that it could not rule as a matter of law that Baxter’s cautionary statements fell under the safe harbor provision.

Baxter’s statements included some general information and some specific company information, but no information that was dispositive. The court found that analysis of the issue of whether Baxter could have made the cautions more helpful by disclosing the assumptions behind the statements is not required because the PSLRA does not require the most helpful caution. It is enough to identify the important factors that could cause actual results to differ materially from those in the forward-looking statement.

The court further held that it was enough to point to the principal contingencies that could cause actual results to depart from the projections. The court found that Baxter’s language may be insufficient, as it could not be determined that the items mentioned in Baxter’s cautionary language were the “important” sources of variance, or that they included the major risks Baxter objectively faced when it made its forecast.

The court explained that when a failure in one of Baxter’s product lines occurred in the spring of 2002, Baxter did not change its forecast. Baxter had argued that all of its projections dealt with the entire calendar year 2002, and by year-end, its performance was close enough to the projections that any difference was immaterial. The court refused to address this argument at the pleading stage and held it would be necessary to determine whether the differences between the projections and the outcome were material necessary to explore Baxter’s actual results for the entire year, and to then analyze whether plaintiffs’ allegation that Baxter used gimmicks to report extra revenue in 2002 had any merit.

This decision stresses the importance for corporations to use caution both in the preparation of forward-looking statements as to its business future and in the disclosure of risks associated with those statements. While the safe harbor provision in the PSLRA provides some comfort, corporate officials must be diligent in making sure that there are sufficient cautionary statements disclosed and updated to satisfy the statutory criteria.

The Defense Philosophy

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

The Blast Furnace Bar Exam

There are things that should be memorialized before they drift off into the realm of urban legend. The fall 1960 bar examination is one of those things.

This was the old three-day exam. It was a full day on Wednesday, a full day on Thursday and a half day on Friday. Our session was conducted at the Northwestern Law School’s brand new McCormick Hall. It had not yet officially opened, and someone at Northwestern assumed that the air conditioning could wait for the spring of 1961. That someone was wrong.

Tuesday, September 6, 1960, was and still is the hottest September 6 on record – 97°. On Wednesday, the first day of the examination, the temperature reached a record 100°, and the Thursday high, also a record, was 96°. It then cooled considerably on Friday.

I went down on the “L” on Wednesday morning expecting the worst. I kidded myself into believing that having spent 19 of my 27 summers in the toasty climes of Peoria, Springfield and Decatur, this would be no problem for me. I was wrong. It was terrible, and the electric fans that Northwestern provided only succeeded in blowing papers around.

It got so bad that the man next to me, who was taking the test for the third time, stripped down to a pair of striped boxer shorts and a sleeveless undershirt. About the time he reached

(Continued on next page)
The Defense Philosophy (Continued)

In this state, a kindly lady with a Southern accent told him that he had to put his clothes back on or leave the examination. He put his clothes back on and passed.

Our little group from the University of Illinois went through without a failure. That was a surprise as with one exception (not me) we were not considered particularly bright. As I understand it, the pass-fail ratio for that exam was comparable to other, more temperate, exams.

This taught me a great deal about the ability of human beings to march on through bad circumstances. As far as I know, no one walked out. While it was uncomfortable we all simply settled down and focused on the exam.

All this led me to think of the old, almost forgotten adage of the trial lawyer: You never try the case you prepare. Something always changes. One of the early witnesses might go off on a tangent. One of your witnesses might totally fold. A trial lawyer must learn to accommodate to changed circumstances and “plug on” to the end. Thus, I feel that my experience with the Blast Furnace bar exam served me well in the years to follow.

After all, it can hardly be worse than those two days.

Welcome ... New IDC Members

Stacy Dolan Fulco
Cremer, Kopon, Shaughnessy & Spina
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- Sponsored by: Kimberly Ross

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- Sponsored by: Michael Holy

About the Author

John L. Morel concentrates his practice in civil trial and appellate practice, as well as insurance law, at his Bloomington firm of John L. Morel, P.C. He received his B.A. from Western Illinois University and his J.D. from the University of Illinois. Mr. Morel is a member of the McLean County, Illinois State, and American Bar Associations. He is also a member of the IDC, FDCC, DRI, National Association of College and University Attorneys and the Illinois Appellate Lawyers Association. Mr. Morel sits on the Board of Directors for the IDC.

Alternative Dispute Resolution

By: John L. Morel
John L. Morel, P.C.
Bloomington

Many insurance carriers now recommend that their counsel attempt to resolve litigation through mediation. More and more circuits are also recognizing the utility of mediation, even mandatory mediation. Mediation should be encouraged and recommended by counsel. It is cost effective and less “combative” than litigation. It is also less time consuming. Counsel for the respective parties usually cooperate and make the effort to resolve the case through mediation. There are some who, due to a misunderstanding of the process, and others who believe participation in the process is an indication that they have a weak case, will refuse to mediate or will do so in bad faith, particularly if it is court-ordered mediation.

Generally speaking, mediation, whether mandatory or otherwise, reduces the friction inherent in many settlement negotiations. As to mandatory mediation, however, trial courts should only order it when counsel for the respective parties feel that it will or may be fruitful. The process will otherwise be a waste of time and money.

Too often, one attorney in multiparty litigation makes a mockery of the process by participating other than in good faith. If defense counsel has not consulted with the insurance representative, the particular company of the self-insured, he or she has not represented the client properly, and his or her
conduct is an affront to the court. If a client will not participate in any negotiations, counsel should advise the court at the outset that any order providing for mediation will not bring the desired results.

Several studies have indicated that an initial mediation between the parties, although not successful in resolving the dispute, can nonetheless reduce the initial level of dispute/conflict between the parties. Such conflict reduction is important because jury verdicts are unpredictable, even when counsel feels confident in his or her evidence and oratorical skills. Guilty and not guilty verdicts and certain awards of damages may come as a complete surprise. The risk to clients in that context, depending upon how egregious the jury finds the evidence, is something to be avoided. If the circumstances so permit and counsel concur, the resolution of the case by mediation eliminates the uncertainty and the risk.

The courts, obviously, must regulate their respective dockets and calendars. In doing so, several Illinois circuits allow mediation at the discretion of the trial court. (11th Judicial Circ. Ct. R. 105(c), 16th Judicial Circ. Ct. R. 15.11). For example, some provide that mediation will be mandatory for certain actions. Others require leave of court to set some hearings without completing the mediation.

Adoption of these rules reflect growing recognition by Illinois courts that mediation helps to resolve disputes without subjecting the parties to the expense and the possible hostility of litigation. Any mediation ordered, however, should only follow an opportunity for all counsel to indicate to the court their willingness to participate on behalf of their clients, in good faith, and objectively. Arbitration of disputes is very often in the best (or at least better) interest of clients, but court-ordered mediation without the input of the respective counsel oftentimes will not foster the cooperation necessary to resolve the litigation.

Although it is undisputed that mediation is less expensive and time consuming than litigation, it does not magically align the parties or eliminate their adversarial positions. Mediation, mandatory or voluntary, may be inappropriate when the parties have demonstrated an inability to cooperate on most issues. These factors would likely preclude a resolution of the litigation.

Trial courts should recognize that mandatory mediation is not appropriate for all disputes. Before entering any such order, a court should review the nature of litigation, the position of the respective parties on the issue, and their willingness to participate in good faith. Some attorneys believe that court-ordered mediation constitutes an abuse of discretion if the presiding judge does not take the considerations referenced above into account.

Mediators must be familiar with certain precepts. Those mediators who understand and apply the following will have more success in settling disputes.

- Successful mediators develop the ability to set aside all preconceptions and observe an elemental “how” of things. Such awareness requires emptying one’s mind of suppositions, opinions and prejudice.
- Inevitably, differences of opinion and interest arise along with the certainty of conflict. That conflict contains opportunity both for resolution or stalemate. Mediators should recognize these differences and optimize the chances for resolution.
- In each situation, there is a confluence of circumstances. Attention to detail and observation of predicaments should lead to discernment and better judgment by the mediators.
- Mediators should indulge in a quiet exercise of intelligence, credibility and sincerity—guiding with a light touch, flexibility and freedom of form. Mediation should be shaped on discipline and knowledge.

Those of you who participate, or wish to, as mediators, should have or develop these attributes in order to achieve success in your endeavors.
Legislative Update

By: Gregory C. Ray  
Craig & Craig  
Mattoon

Although the leadership on both sides of the aisle continues to talk about medical malpractice, everyone appears also to be posturing for the November elections. There appears to be no expectation of any meaningful developments, no matter what your viewpoint. The press releases continue to flow heavily. The IDC has no special insight on where, when or how the issues will be addressed. The attention of the IDC leadership has instead focused on the judicial elections and especially the Supreme Court race in the Fifth Appellate District.

Fifth District Supreme Court Candidates Reception

On September 2d, the IDC hosted a candidate’s forum at the Collinsville Holiday Inn for Supreme Court candidates Appellate Court Justice Gordon Maag and Circuit Judge Lloyd Karmeier. IDC President Glen Amundsen presided over the event with the assistance of past President Gordon Broom. Approximately 80 lawyers from the Metro East and the surrounding area were fortunate to be able to meet and talk individually to the candidates and attend a presentation by each candidate.

Justice Maag made an energetic and even impassioned presentation, reminiscing about his past, from his childhood years in East St. Louis and Alton to his impressive post-high school academic achievements both in undergraduate and law school, with an intervening four-year stint in the 101st Airborne Division of the Army. More significantly perhaps, Justice Maag told of his first five years in the practice of law with the Walker & Williams defense firm, as well as his next five years in the practice of law with a Madison County plaintiff’s firm. He became an Associate Judge of Madison County, quickly moving to service as a trial judge in the Civil Division. He was appointed to the appellate bench in 1992 and elected in 1994. Justice Maag observed that the judicial system in the Metro East area, and perhaps especially in Madison County, needs some adjustment, especially in the areas of class action and medical malpractice. The loss of physicians in the Metro East area has been a major media topic for a number of months. Justice Maag acknowledged the need for some change.

Judge Karmeier is a native of Washington County, who grew up on a family farm. He commented about his “country lawyer” background. He attended the University of Illinois and attained a Bachelor’s Degree and Juris Doctor, graduating from the Law School in 1964. He clerked for Illinois Supreme Court Justice Byron House while also practicing law part time, which was permitted back in those days. He has served as State’s Attorney of Washington County and was elected to the circuit court in 1986.

He noted that because Washington County is a small county, his former firm faced multiple conflicts in his early years as a Judge. Due to this, he was assigned to the criminal felony trial docket in St. Clair County and served most of the first three or four years of his judicial career in that capacity. He has since presided primarily in Washington County, with occasional assignments in neighboring counties within the circuit. Judge Karmeier spoke of the need for a level playing field for the parties and the need for diversity on the court, noting that it would be no more fair to have seven defense lawyers on the Supreme Court than it would be to have seven plaintiff’s lawyers on the court.

Following the candidates’ comments, there was a cocktail hour hosted by the IDC PAC. Judge Karmeier was kind enough to stay and offer a few comments. Guests of honor were Pete LaBarre and his wife, Melinda. Gordon Broom presented a plaque to Pete recognizing and honoring him for his 22 years of service as the IDC PAC Treasurer, which covers the time frame from the PAC’s inception to the present. Pete has retired from the practice of law and now from active work as the IDC PAC Treasurer. Greg Ray has recently succeeded

About the Author

Gregory C. Ray is a partner with firm of Craig & Craig in its Mattoon office. He is a 1976 graduate of the University of Illinois Law School. He is an officer of IDC and a member of the IDC and Illinois Appellate Lawyers Association. He has served as a member of the Board of Directors of IDC and is a past Editor-in-Chief of the IDC Quarterly. His primary practice areas include trials of tort matters, appellate practice, and workers’ compensation defense. Mr. Ray is the immediate Past President of the IDC.
Pete in that role.

The IDC is very pleased to have had the opportunity to host the Candidates Reception. Closely contested Supreme Court races are rare in this State. We are grateful and again extend our thanks to Justice Maag and Judge Karmeier for taking time to address the membership and contribute to the kind of dialogue that enhances and provides both leadership and prestige to our profession.

Association News

**IDC Quarterly Editor-in-Chief, Rick Hammond Receives National Award**

The International Association of Special Investigation Units (IASIU) recently honored IDC member Rick Hammond for his nearly ten year contribution as the columnist of “Legal Update” which appears in each issue of their international publication “SIU Awareness.” He was recognized on September 30 during the 19th Annual IASIU Seminar & Expo on Insurance Fraud, held in Pittsburg.

Founded in 1984 by a handful of insurance industry fraud investigators, the International Association of Special Investigation Units (IASIU) is a non-profit organization. “Rick’s column has provided many years of insight and observation to insurers regarding the changing law as it pertains to insurance fraud and bad faith,” noted Matthew Cole, IASIU board member and State Farm Insurance Company team manager. “His column has been credited with guiding numerous insurers through the pitfalls and mine fields of potential bad faith while they undertake an insurance fraud investigation.”

Rick has long been active in IDC leadership and in addition to service as Editor-in-Chief of the IDC Quarterly, he serves on the IDC Board of Directors. He previously served as executive director of the Insurance Committee for Arson Control, a national insurance trade association, and currently serves as their general counsel, and as general counsel for the International Association of Arson Investigator’s Foundation. He is also the former head of the Chicago office of the Illinois Department of Insurance.

Rick has recently been appointed as an Equity Shareholder with Johnson & Bell, Ltd. and can be reached at: Johnson & Bell, 55 East Monroe Street, Suite 4100, Chicago, Illinois 60603. Phone: 312-984-3425; Fax 312- 372-9818, E-mail: hammondr@jbltd.com

**Governor’s Pen for IDC Member**

IDC member, Michael W. Tootooian, from the law firm of Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C., recently received a pen used by Governor Blagojevich to sign Senate Bill 2946 which amended the Illinois Civil Rights Act of 2003. This bill deleted, inter alia, the recovery of punitive damages against units of State, county or local government for violations of this Act. The Act provides a statutory cause of action against units of State, county or local government for discriminatory conduct. Among the relief provided for a violation of this Act was the recovery of punitive damages. Prior to this Act, no federal or state legislation or case law permitted the recovery of punitive damages against any unit of State, county or local government, and, in fact, the recovery of punitive damages was prohibited. To allow claims for punitive damages to proceed against units of government under this Act would have placed tremendous financial exposure on taxpayers, since punitive damages are generally not insurable.

The deletion of punitive damage language from this Act came about when Mr. Tootooian invited Senator John Cullerton, the Chair of the Senate Judiciary Committee, to be the featured speaker at the November 12, 2003 meeting of the Chicago Bar Association Tort Litigation Committee. Mr. Tootooian was the Chair of that committee for the 2003-2004 year. During the presentation, Mr. Tootooian expressed a concern about the burden this legislation would impose on government entities throughout the state. Senator Cullerton put Mr. Tootooian in contact with Senator Harmon, the original sponsor of this bill. After a series of telephone conversations discussing the issue, Senator Harmon agreed that the punitive damages provision should be deleted from the Act.

The amendments to the Illinois Civil Rights Act of 2003, which included the deletion of the recovery of punitive damages, were passed unanimously by the Senate (56 to 0) and the House (114 to 0). The amendments become effective January 1, 2005.

Senator Harmon sent a letter to Mr. Tootooian in July informing him that the Governor had signed Senate Bill 2946, which amended the Illinois Civil Rights Act of 2003, and enclosed a pen actually used by the Governor to sign this Bill.

**Abbey Named “Legal Elite” by Peers**

David J. Abbey a member of the Illinois and Florida Bar, has been named one of Florida Trend’s Legal Elite honorees in the Civil Trial practice area as recognized by his peers. Florida Legal Elite represents the top 1.6% of Florida Bar members who practice in the state.
Association News (Continued)

IDC/PAC Honors Alfred (Pete) LaBarre

The IDC/PAC held a meeting at the Holiday Inn, Collinsville to honor Alfred (Pete) LaBarre for his 22 years of service as the IDC PAC Treasurer, which covers the entire life time of the PAC to date. Pete has retired from the practice of law and now from active work as the IDC PAC Treasurer. Greg Ray has recently succeeded Pete in that role.

Pictured: Gordon Broom, Alfred (Pete) LaBarre and Greg Ray.

Winner of the Young Lawyers Writing Contest

Stephen Heine, IDC President presented $1,000 to the winner of the Young Lawyers Writing Contest, Maureen DeArmond.
THE IDC MONOGRAPH:

SOPHISTICATED USER AND BULK SUPPLIER DEFENSES – THE TIME FOR THEIR USE IN ILLINOIS IS NOW

Robert P. Pisani
McKenna Storer
Chicago, Illinois
I. Introduction

One of the most vexing problems for defendants in failure to warn based product liability cases involve defendants who supply products or other raw materials to industry or other companies. These product or material recipients are the business customers of the suppliers. In turn, these suppliers are subsequently named as defendants in product liability suits, often filed by the employees of their customers. Most of these cases do not involve consumer goods or the types of things that an ordinary consumer would purchase from a retailer or other similar seller. Frequently, the purchasing entities are very large companies with employees or consultants that have vast knowledge relating to safety, or industrial hygiene expertise relating to the raw materials they purchase and use.

These purchasers are normally quite knowledgeable about their internal, often proprietary, manufacturing activities as well as the constituent products or raw materials they purchase from the supplier defendants. They are at least as knowledgeable as the defendant suppliers are about the potential dangers associated with the use of the constituent raw materials or products. If these entities are the plaintiff’s employers, they have regulatory duties in addition to moral, ethical and legal responsibilities to learn and know about the constituent products used in their workplace, and to which their employees may be exposed or otherwise encounter. The same is true with regard to the end products they manufacture and sell to their customers.

Most of the time, the claims by the plaintiffs do not involve defective products as that phrase is commonly understood. In fact, there is usually nothing “wrong” with the products or raw materials supplied by the defendant suppliers. Instead, these cases typically involve failure to warn type claims. Such claims assert that the plaintiff was injured because the constituent supplier defendant did not warn the ultimate user, often the employees of the purchaser/employer, about the purported dangerous propensities of the goods or raw materials supplied. As it relates to these types of supplier defendants, such claims are particularly frustrating because there is often no practical means by which these supplier defendants can communicate directly with the individual employee plaintiffs who sue them.

If they do warn, these defendants attempt to warn the “ultimate user” indirectly by way of supplying material safety data sheets or other written information to the employer. Sometimes this information fails to trickle down to the employee plaintiffs. In other words, even if they warn, the supplier defendants are still potentially liable because the warnings simply did not reach the plaintiffs, notwithstanding the duty of their employers to provide this information, or information like it, to their employees. The employers, who are best positioned to protect their workers, and who have the ultimate responsibility to do so, may ignore the warnings and advice of their suppliers. This situation places the supplier defendants in a precarious position as it increases their liability risk when, practically speaking, they can take no effective steps to minimize this risk short of refusing to sell to their customers. There is a real lack of fairness in such circumstances.

To deal with this anomaly, courts have begun to recognize an exception to the general duty to warn the end user. When a supplier defendant provides products or raw materials to their customers or other similar entities who are knowledgeable about the potential dangers associated with exposure or use, it is enough for those supplier defendants to provide the information directly to the customer in order to satisfy any duty to warn the ultimate user.

Further, even if the suppliers do not overtly warn, if the suppliers’ customers already have adequate knowledge relating to the purported hazard at issue in the case and a responsibility to act on it, reiterating what is already known is pointless, thus there is no need to warn further. Either way, the duty to warn the ultimate end user, be it the customer’s employees or the ultimate purchasers of their customers’ products, is obviated.

To accomplish this end, the defenses which the courts have been adopting across the United States are known as “sophisticated user” and/or “bulk supplier.” There are very few cases in Illinois which discuss these defenses, perhaps because they are simply not being asserted here. This Monograph argues that the time has come for defense counsel to begin to consider opportunities to assert these defenses. We can and should persuasively argue that their use is both fair and equitable when one considers the practical realities of supplying goods and raw materials to knowledgeable industrial purchasers, as well as the role the defendant suppliers’ customers have in being responsible employers or suppliers to

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the actual end users. Doing so accomplishes the overall goal of tort resolution by placing the focus of liability on those best positioned to prevent the harm.

To help gain a better understanding of these defenses, this Monograph will discuss their use in a variety of states, including an in-depth look at many cases. This is done to help provide a road map for the defense practitioner to use in marshaling their evidence and providing trial courts with the perspective of real world experiences that these cases provide. There are themes which may be discerned from the cases that should help us focus on when and where their use should be attempted.

II. Sophisticated User

The starting point for any discussion of both the sophisticated user and bulk supplier defenses is Goodbar v. Whitehead Brothers. Goodbar, although decided more than 20 years ago, remains one of the leading cases, and the court’s decision in this case provides the foundation for the assertion of either defense.

Goodbar involved the Lynchburg Foundry, a large manufacturer of metal castings. The firm had approximately 4,500 employees in three different locations. The injury causing materials alleged in Goodbar consisted of silica sand. Lynchburg Foundry utilized in excess of Ten Million tons of silica sand each year as part of their manufacturing process. The sand was always delivered to the foundry unpackaged in railroad cars. The cars would be emptied onto conveyor belts or pneumatic transporters upon delivery to the foundry, for purposes of conveying the silica sand to silos for on site storage.

Plaintiffs, employees of the foundry, sued the suppliers of silica sand and other silica containing materials. They alleged that they had contracted silicosis, a disease associated with inhalation of fine silica dust necessarily created when the silica was used as part of regular foundry operations. The plaintiffs’ basic claim was that the sand suppliers failed to warn of the dangers associated with exposure to this dust. At the time the claims were being subjected to summary judgment analysis, and the only pending claims sounded in negligence and implied warranties.

The defendants, in moving for summary judgment, admitted that the plaintiffs had no knowledge of the dangers associated with exposure to silica dust, and that the plaintiffs’ exposures in the foundry were adequate to give rise to the disease, silicosis. The thrust of the defendants’ argument was that silicosis was an occupational lung disease about which the foundry industry generally, and Lynchburg Foundry in particular, had been knowledgeable since the 1930s. Further, they argued that only the employer, Lynchburg Foundry, could effectively communicate any warnings about silica related disease and the methods to employ to avoid injury to their employees. Plaintiffs countered by simply relying on the general rule that the sand supplier defendants owed a non-delegable duty to warn the “end users” about the dangers associated with the silica they supplied to Lynchburg Foundry, the end users being the Foundry’s employee plaintiffs.

The court provided a detailed analysis of the issues and its thought process in ultimately granting summary judgment in favor of the silica sand supplying defendants. The court began by looking to § 388 of the Restatement (Second) of Torts which provides as follows:

§ 388. Chattel known to be dangerous for intended use.

One who supplies directly or through a third person, a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.
Here, because the defendants assumed for purposes of their summary judgment motions that the plaintiffs had no knowledge regarding the dangers of exposure to silica, the court proceeded on the basis that the first two prongs of the Restatement test were met. The court then focused on the requirements of subparagraph (c), analyzing whether defendants failed to exercise reasonable care in relying on the employer, Lynchburg Foundry, to supply its employees with the necessary information relating to silica.

In order to assess the reasonableness of the defendants’ conduct, the court looked to the comments to § 388 of the Restatement, in particular Comment n, from which it distilled six factors to be balanced in determining the reasonableness of the conduct of the supplying defendants:

- The dangerous condition of the product;
- The purpose for which the product is used;
- The form of any warnings given;
- The reliability of the third party as a conduit of necessary information about the product;
- The magnitude of the risk involved; and
- The burdens imposed on the supplier by requiring that he directly warn all users.

The court noted that a balancing of these factors is required because the Restatement recognized that no single set of rules could exist which would automatically cover all situations.

Of critical importance to the court’s analysis, and the one observation that is probably the most significant basis for the existence of both the sophisticated user and bulk supplier defenses is the court’s focus on the following portion of comment n:

> Critical in my view is the recognition that “[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly when it is their duty to do so.”

The court’s recognition of this commonly held belief is critical to this and every other case applying these defenses. In fact, the court noted that if the duty to warn was always non-delegable, it would effectively negate § 388 of the Restatement (Second) of Torts. The bottom line is that reliance on others is an acceptable means to avoid liability, so long as the reliance is reasonable under the circumstances.

Ultimately, the court agreed with the defendants’ main argument: there was no duty to warn employees of knowledgeable industrial purchasers as to product or raw material related hazards. The court found that if the danger at issue was related to the product or raw material, and is clearly known to the purchaser/employer, then the supplier defendant had no duty to warn the ultimate users, i.e., the employees of the supplier’s customer. Instead, the court found that it was the employer’s responsibility to guard against the known danger by either warning its employees or providing whatever protections were necessary: “[w]hen the supplier has reason to believe that a purchaser of the product will recognize the dangers associated with the product, no warnings are mandated.”

With the above in mind, the court began its analysis of facts. The court found that there was no question as to the extensive knowledge held by Lynchburg Foundry about the hazards associated with inhaling silica dust, the disease silicosis, and the proper means by which to protect its employees. The foundry’s safety director was deposed and acknowledged the foundry’s knowledge about silicosis as evidenced by the official proceedings of the American Foundrymen’s Society (“AFS”). AFS is a foundry industry trade organization dedicated to creating and disseminating information relating to the foundry industry, including health and safety issues associated with exposure to materials used by foundries, beginning decades ago.

The court specifically found that the foundry possessed “intimate knowledge” of silicosis since before the plaintiffs worked there, and had developed methods to attempt to control the problem of dust emissions since that time. One of the officers of Lynchburg Foundry took part in AFS meetings. The defendants proffered an affidavit from an industrial hygienist active in the foundry industry. This affiant described the problems of silica dust exposure in the foundry industry as having been commonly known in that industry since the early 1900s, including a discussion of preventative measures and other things calculated to lessen the risk to foundry workers.

The court also observed the existence of state laws compelling protective measures relating to dust control and ventilation in work places. The court also focused on Lynchburg Foundry in particular, noting the existence of prior workers’ compensation claims against it by its employees for silicosis. Additional evidence of actual knowledge on the part of the foundry included industrial hygiene surveys performed by the foundry’s insurers and the testimony of a number of safety directors at the foundry regarding their own knowledge of silica dust related throughout the time the plaintiffs in Goodbar were employed there.

The court also looked to capital spending and other measures taken by the foundry to deal with the silicosis hazard in the workplace over the years. Finally, the court noted the passing of the Occupational Safety & Health Act which
created the Occupational Safety & Health Administration (“OSHA”). OSHA issued regulations pertaining to silica dust exposures generally, the foundry industry in particular, respiratory protective equipment and the like. The court discussed the fact that there had been a number of OSHA inspections performed at the foundry where excess silica dust exposures were found, which were the subject of citations issued to the foundry by OSHA.

Regarding the burden of proof for asserting the defense, the plaintiffs argued that the defendants made no effort to determine the state of the foundry’s knowledge before suit was filed. In other words, the plaintiffs sought the imposition of a requirement that the defendants show that they had actual knowledge of the foundry’s sophistication before suit was filed. Significantly, the court did not impose such a requirement.

“The bottom line is that reliance on others is an acceptable means to avoid liability, so long as the reliance is reasonable under the circumstances.”

In further support for the decision, the trial judge described in detail the difficulties the material supplier defendants faced in a situation involving suits by employees of their customers, and the practical impediments to warning these plaintiffs in a direct way. They included: (1) the fact that identification of the ultimate users or persons exposed would require constant monitoring by the suppliers, given turnover in the customer’s work force, a near impossible burden; (2) the fact that the materials at issue here were delivered in bulk, not smaller containers such as bags or boxes on which some type of warning could be placed; (3) the fact that no written product warnings placed on the rail cars or other bulk supply vehicles could ever reach the workers actually utilizing the materials because of how the suppliers’ customers unloaded and stored the materials; (4) the fact that only the employer/customer would be in a position to provide appropriate housekeeping, training and warnings to its workers on a continuous basis necessary to reduce the risk associated with exposure to the materials; (5) the fact that the suppliers were positioned such that they were effectively required to rely on the customer to convey any safety information provided to the employees as direct contact was effectively impossible; (6) the fact that there were many different suppliers, each of which would otherwise be required to deal with the “awesome task” of instructing the customers’ employees; and (7) the fact that, in a real world setting, it was not realistic to believe that the suppliers could exert pressure on a large industrial customer to enable the supplier defendants themselves to educate the employer/customers’ workers about relevant health hazards.

In sum, the Goodbar court looked at the practical issues associated with extending failure to warn liability to suppliers when it was effectively impossible for them to warn the ultimate user directly, something that is particularly acute in the workplace setting. The court approved the defendants’ reliance on the employer/customer, noting that only the employer could ensure workplace safety through various mechanisms, including training, supervision and the use of appropriate safety equipment.

The court was likewise impressed with the testimony of representatives of the suppliers. The court believed that it was appropriate for the suppliers to simply assume knowledge of the relevant dangers associated with the use of silica sand by virtue of the Foundry’s membership and active participation in the AFS. The court also found persuasive the perception of the suppliers that the Foundry would never allow representatives of the suppliers to come into the foundries and train workers there.

The key to the Goodbar decision is the fact that the defendants were able to demonstrate sufficiently to the court why it is that requiring product warnings to directly reach the employee/ultimate users was impractical under the circumstances, and ultimately futile. The court’s focus on the foundry’s extensive knowledge of the potential health hazards associated with the use of the materials supplied, and the means by which to prevent exposures and otherwise reduce the risk to its workers, effectively excused the defendants from their direct warning obligation. This is significant as apparently no product warnings at all were provided to the Foundry until possibly the mid-1970s, when material safety data sheets became available if requested by the customer.

The value of an in-depth analysis of Goodbar is clear. The court in that case identified significant facts which may be present in almost any case involving plaintiffs who are employed by the defendants’ customers in an industrial setting. This includes: memberships in relevant industrial associations, the existence of state laws requiring the protection of workers from hazards which are the same or similar as that which
may exist in another case, the existence of a safety department or safety related personnel at the customer/employer’s workplace whose responsibility it is to provide safety related guidance and information to workers and company executives, evidence of industrial hygiene or related inspections by the employer’s insurers and possibly documents demonstrating discussions relating to the conclusions of those inspections and similar information, the existence of relevant OSHA regulations, evidence of OSHA inspections and enforcement activities relating to the hazards at issue in another case, and other similar factors.

There are many other examples of cases where courts have either adopted or rejected the sophisticated user defense. Another more recent case that is also getting attention by the courts is Bergfeld v. Unimin Corporation. This is another case that involved a foundry, this time the John Deere Dubuque Works in Iowa. The defendant in that case also supplied silica sand to an employer whose employee claimed to have contracted silicosis due to exposure to silica dust in the workplace.

The plaintiff argued that the supplier failed to warn that the National Institute for Occupational Safety and Health ("NIOSH"), a quasi-governmental body, recommended in 1974 that the exposure limit to silica be reduced by half. The OSHA exposure limit was never changed. Plaintiff focused so heavily on the reduced NIOSH recommended exposure limit ("REL") because there was evidence that the plaintiff was never exposed in excess of the OSHA exposure limit, called a permissible exposure limit ("PEL"), which was twice the REL.

The court looked to Iowa law, noting that state also had adopted § 388 of the Restatement (Second) of Torts relating to the duty to warn. The district court had found the employer to be a sophisticated user of silica which relieved the sand suppliers of a duty to warn both the employer and the plaintiff about the dangers of exposure to the materials supplied. Plaintiff conceded generalized knowledge of the potential dangers of exposure to silica dust on the part of the employer, but argued a lack of sufficient sophistication, claiming that the employer was unaware of the NIOSH recommendation to lower the regulatory exposure level.

The appellate court affirmed the entry of a directed verdict in favor of Badger Mining, finding that the supplier could not governmental regulations on the subject.

As in Goodbar, Deere’s manager of industrial hygiene served as the Deere representative to the AFS, and even served on AFS’ industrial hygiene committee. The industrial hygienist testified that he was aware of the efforts by NIOSH to decrease the regulatory exposure standard, and admitted it would not be necessary for a sand supplier to provide Deere with that information because Deere already knew about it and had considered it.

Following the rationale described in Bergfeld, the Court of Appeals of Wisconsin in Haase v. Badger Mining affirmed the grant of a motion for directed verdict. Haase also involved a foundry, Neenah Foundry, and a claim of silicosis associated with exposure to silica sand supplied by Badger Mining during its use in the foundry process. The plaintiff brought a failure to warn claim asserting both negligence and strict liability theories.

At trial, during the plaintiff’s case in chief, the former safety directors for Neenah Foundry testified that the foundry was knowledgeable of the hazards associated with the use of raw materials in the foundry industry. The managers were encouraged and trained to keep up on safety issues through attendance at seminars and a review of governmental literature. Significantly, there was testimony that the employer did not rely on the silica supplier for information concerning the control of silica hazards or the methods to be used to protect their employees, apparently making their own decisions regarding these issues.

The appellate court affirmed the entry of a directed verdict in favor of Badger Mining, finding that the supplier could not

**“Plaintiff conceded generalized knowledge of the potential dangers of exposure to silica dust on the part of the employer, but argued a lack of sufficient sophistication, claiming that the employer was unaware of the NIOSH recommendation to lower the regulatory exposure level.”**
be found liable for failing to warn the plaintiff, because it legitimately expected the employer to institute the necessary safety precautions based on how it used the sand supplied by Badger Mining. In doing so, the trial court noted that the employer was the entity obligated to provide a safe workplace to its employees, and was in a far better position than a remote supplier to ascertain what employees were at risk for exposure and to warn them or minimize such risks.

The court looked to the Restatement (Third) of Torts, § 5\textsuperscript{10} to reject the strict liability theory. Again the court focused on the fact that this employer was knowledgeable within a knowledgeable industry, that members of management had been individual members of the AFS and had frequently attended meetings and seminars relating to foundry hazards in worker protection. There was a finding that the employer spent significant time and resources keeping current relating to safety issues and changes in relevant regulations.

Note that while the Wisconsin Supreme Court affirmed the result,\textsuperscript{11} it rejected the appellate court’s discussion of the Restatement (Third) of Torts, § 5. The Wisconsin Supreme Court found that section of the Restatement had no applicability. It focused on liability to component part suppliers whose products are integrated into the final products created by third parties. The court observed that sand was not “integrated” in to the castings Neenah Foundry created and sold. The supreme court held that the sand’s condition underwent a substantial and material change from its original, as shipped, non-dangerous condition, by virtue of the foundry process.

Nevertheless, the manner in which the appellate court examined the evidence relating to the employer’s sophistication is consistent with Goodbar and again provides a useful template to the defense practitioner who attempts to assert the sophisticated user defense.

Silica is not the only material to which the sophisticated user defense has been successfully applied. In \textit{Curtis v. M&S Petroleum, Inc.},\textsuperscript{12} the product involved was the chemical benzene. There, a number of refinery workers claimed to have been exposed to excessive amounts of benzene, arising out of their employment with Barrett Refining Corporation (“BRC”). The manufacturing process there required the use of a product called heavy aromatic distillate which was supplied by a defendant, DuPont. When the employer sought this material from DuPont, DuPont informed the employer by letter that it would provide product stewardship support before any shipments could be made.

DuPont also provided the OSHA benzene standard, discussing the regulatory exposure limits to benzene, as well as information relating to monitoring for exposures, methods of regulatory compliance, information regarding medical surveillance and information to be provided to employees. Subsequently, DuPont sent a senior technical engineer to the employer to explain how to handle the chemicals safely, to review the regulatory standard, and to answer any questions concerning the chemicals. After the visit, the engineer wrote to the employer, reiterating the dangers of benzene and identifying six safety issues that needed to be addressed before DuPont would ship any of the material to the refinery. Eventually, DuPont began shipping materials, accompanied with material safety data sheets.

Soon after the refinery went into operation, workers began to become ill. The employer hired a safety manager who also became ill. After reviewing the safety materials supplied by DuPont, the BRC safety manager concluded that there was a benzene exposure issue at the plant. BRC management denied that the specific OSHA regulations relating to exposure monitoring applied to them. Nevertheless the safety manager obtained monitoring equipment which demonstrated exposures in excess of the regulatory limits. Eventually, the plaintiffs filed suit against DuPont and others, alleging a failure to warn them about the dangers associated with benzene.

The trial court, sitting in diversity and applying Mississippi law, dismissed DuPont as a defendant. Plaintiffs appealed to the Fifth Circuit Court of Appeals. DuPont asserted Restatement (Second) of Torts, § 388 as its primary basis for justifying the grant of summary judgment. In affirming the grant of summary judgment, the court found that DuPont was reasonable in relying on the employer because DuPont had provided product stewardship before making any shipments, had met with the employer relating to the safe handling procedures for the chemicals, required that safety issues be resolved before any shipments were provided and performed other measures. The court concluded by finding that DuPont had discharged its duty to warn by providing warning information to the employer.\textsuperscript{13}

Some states take a fairly relaxed approach to applying the sophisticated user defense. In \textit{Damond v. Avondale Industries, Inc.},\textsuperscript{14} a Louisiana court reviewed the denial of a summary judgment motion brought by a silica sand supplier. There, a sandblaster claimed to have contracted silicosis while using sand supplied to the employer by the defendant. In its short opinion, the court characterized the issue as whether the supplier had a duty to warn the ultimate user/plaintiff of the dangers associated with exposure to silica while sandblasting. The court focused on the supplier defendant, noting that it was in the business of simply selling ordinary sand which was collected, dried and separated according to size. The court noted that the sand itself was not unreasonably dangerous. Instead, the court found that the danger was not the sand, but
the use to which it was put by the employer and the plaintiff.

To show sophistication on the part of the employer sufficient to relieve the supplier of a duty to warn the employee, the court focused solely on the existence of OSHA regulations governing the use of silica sand. The court found that these regulations provided detailed instructions on safe use of sand for abrasive blasting. The court held that the employer was presumed to know of the dangers of the use of sand simply because of the existence of OSHA regulations regarding the use to which they put the sand. Significant to the court was the fact that the supplier had no control over how the employer would use the materials it supplied. As a result, it found no duty to provide the employee plaintiff/ultimate user with a warning.

In *J.P. Cowart, Jr. v. Avondale Industries*, the court looked to *Damond* and again reversed the failure to grant a summary judgment to a sand supplier. In attempting to distinguish *Damond*, the plaintiff in *Cowart* argued that *Damond* involved OSHA regulations concerning sandblasting operations, rather than foundry operations which were at issue in *Cowart*. The court rejected that argument, noting the regulations were more general in nature, and were not simply confined to sandblasting operations. Further evidence submitted to the court included the fact that the foundry plant manager testified that the employer had a safety department responsible for assuring compliance with OSHA regulations.

The court found that the employer was aware of the need to protect its workers from health hazards associated with the use of silica, and did so by providing personal protective equipment and ventilation systems within the foundry. It should be recognized that, unlike *Goodbar* above, the defendant here did provide material safety data sheets and other warnings on their invoices (and packaging to the extent possible). Because the court found the employer was a sophisticated user of silica, there was no need to warn further.

Another good example of the use of the sophisticated user defense is *Purvis v. PPG Industries, Inc.* In that case, the ultimate purchaser was an owner and employee of a dry cleaning business. Plaintiff claimed to have been injured by exposure to perchloroethylene (“perc”), a dry cleaning solvent. A variety of defendants were sued including the manufacturer of the perc and a distributor. Defendant PPG formulated and manufactured perc and shipped it in tanker trucks to various distributors.

One of the distributors repackaged the perc in its own drums, and held it out as its own product. The customers of this distributor could choose drums which were labeled or unlabeled. Unlabeled drums were to be sent only to customers it believed to be knowledgeable regarding perc, and who it felt could be relied upon to convey safety and warning information. PPG had no way to know who the ultimate user would be, and no way to directly provide product information or warnings to the ultimate user. PPG did provide warnings to the distributors. It was undisputed that the plaintiff never received any warnings from any defendants regarding perc. The trial court granted summary judgment in favor of PPG and the plaintiff appealed.

Plaintiff’s primary argument was that she, as ultimate user, was owed a duty to warn by the manufacturer, notwithstanding the practical problems present in such a direct communication. In affirming summary judgment, the court looked to § 388 of the Restatement (Second) of Torts, and in particular subsection (c). In so doing, the court focused on comment l to the Restatement:

The supplier’s duty to exercise reasonable care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge. If he has done so, he is not subject to liability, even though the information never reaches those for whose use the chattel is supplied. The factors which determine whether the supplier exercises reasonable care by giving this information to third persons through whom the chattel is supplied for the use of others, are stated in Comment n.

In looking at § 388 and the comments, the court in *Purves* distilled the following test it found applicable to the issue of whether the sophisticated user defense applied: “[t]he supplier must have a reasonable belief that the user will learn of the chattel’s dangerous condition through such warning as the supplier may have furnished to the third person.”

The court held that when a manufacturer made reasonable efforts to convey warnings and/or product information, and that due to circumstances beyond its control, that information was not passed on to the ultimate user, the manufacturer was justified in relying upon the third party to perform its duty. In essence, the court held that PPG’s duty to warn was discharged by warning the downstream distributors. In affirming the grant of summary judgment, the court focused on the practical realities of the supply scenario (described above), something common in an industrial setting.

The court found that manufacturers of some products have no real effective way to provide product information or warnings to the ultimate user of the materials they place into the stream of commerce. The court recognized that in such instances, these manufacturers must be able to rely on the downstream distributors to pass along this information. As the court recognized, “so long as the manufacturer has a reasonable basis to believe that the distributor will pass along
the product information or warnings,” no liability exists.\textsuperscript{19} Later the Alabama Supreme Court addressed a slightly different situation in \textit{Ex Parte Chevron Chemical Company}.

There, the plaintiffs sued the manufacturer of plastic pipe used to transport natural gas. Plaintiffs alleged a failure to warn regarding the risk of static electricity, triggering a gas explosion during installation of the pipe. The defendant, Chevron, warned the plaintiffs/employees.

The court affirmed the grant of summary judgment, both on the negligence and strict liability theories of the plaintiffs. The court looked to the fact that the danger involved, i.e., the risk of static electricity build up during pipe installation, was common knowledge among pipe installers. The court was influenced by the fact that the employer provided the same substantive information to its employees as it had been provided by its pipe supplier, Chevron. With regard to the strict liability claim, the court found that in a failure to warn context, the analysis provided in § 388 of the Restatement (Second) of Torts worked in conjunction with § 402A of the Restatement (Second) of Torts. The court effectively utilized the § 388 analysis in determining whether the failure to provide warnings directly to the plaintiffs made the pipe at issue “unreasonably dangerous.”

A very recent example of the sophisticated user defense being utilized successfully, but outside the industrial goods context, occurred in \textit{First National Bank & Trust Corporation v. American Eurocopter Corporation}.

Here, the plaintiff's decedent was killed when his head was struck by a helicopter rotor as he disembarked from a helicopter owned by his employer. The issue of the height of helicopter rotor blades varying after landing and while the blades slowed, known as “blade flap,” was well known to owners and operators of helicopters of this type. Despite the dangers of disembarking while the rotors were decelerating, the helicopter manufacturer placed no warnings on the helicopter itself and no warnings were made by the manufacturer directly to the employer/owner.

However, the flight manual provided by the manufacturer did recommend boarding and deplaning after the rotors stopped. Despite this information, Conseco, the employer of the decedent, as well as the owner of the subject helicopter and employer of the pilots, adopted a policy which allowed people to disembark from the helicopter before the blades slowed to a halt in order to eliminate perceived delays to executives associated with disembarking from the helicopter. The pilots were well aware of the risks inherent in exiting the helicopter. They had even overruled the employer’s disembarking policy at times depending on weather conditions.

The helicopter manufacturer moved for summary judgment, arguing that it discharged its duty to warn as a matter of law. The court affirmed, using what it called a sophisticated intermediary analysis (as distinguished from a sophisticated user analysis), noting the two were quite similar.\textsuperscript{22} The court looked to Indiana law, noting that the duty to warn the end user was typically non-delegable. However, it found there was a potential exception in the context where a product is sold to

\begin{quote}
\textit{The court held that the employer was presumed to know of the dangers of the use of sand simply because of the existence of OSHA regulations regarding the use to which they put the sand. Significant to the court was the fact that the supplier had no control over how the employer would use the materials it supplied.}
\end{quote}

sold plastic pipe to Mobil Gas for use as a natural gas pipeline. The court described a commonly known danger in the industry that static electricity build-up could cause a fire, unless wet rags are used to ground the pipe during the purging process, which in turn was part of the normal installation procedure.

Notwithstanding the common knowledge in the industry, Chevron provided Mobil Gas a bulletin regarding this precise installation issue. The employer in turn, provided a safety manual to employees which also addressed the specific issue. Apparently the warning information provided by Chevron was never directly provided to the plaintiffs/employees. A gas explosion occurred during the installation of the piping, which was not performed pursuant to the employer or Chevron’s guidelines.

Chevron moved for summary judgment, arguing the application of § 388 of the Restatement (Second) of Torts. Chevron asserted its non-liability position by focusing on industrywide knowledge relating to the static electricity build-up risk, the fact that it warned the employer, and the fact that the employer...
an intermediary with sophistication or knowledge equal to that of the manufacturer. If the manufacturer adequately warned the intermediary and the manufacturer could reasonable rely on the intermediary to warn the ultimate consumer, this duty could be discharged.

In this instance, the court found that Conceco employed professional pilots who were licensed and trained, and who understood the dangers of blade flap. The court also recognized that there were no direct warnings by the manufacturer of the helicopter, but found this to be inconsequential, as the pilots had actual knowledge of the issue from their training and materials provided to them. Finally the court found that it was reasonable for the helicopter manufacturer to expect the pilots to pass on the warnings regarding blade flap. As the pilots did warn company executives that the disembarkation policy was unsafe and recommended changes, with the employer/owner basically ignoring their professional advice, the court found that there was no duty on the part of the helicopter manufacturer to warn the ultimate user, the plaintiff’s decedent.

Another case of interest involves a situation where the federal government is the intermediary. In *Morgan v. Brush Wellman, Inc.*, former and current employees at a U.S. Government nuclear armament facility brought product liability claims against beryllium oxide suppliers. The defendant, Brush Wellman, supplied beryllium containing materials to the nuclear armament factories at Oak Ridge, TN for use by employees of U.S. government contractors at that facility. Plaintiffs claimed to have contracted berylliosis due to their exposures.

The court considered a summary judgment to the beryllium supplier defendants asserting the sophisticated user defense. The court noted that the dangers associated with exposure to beryllium had been well known since the early 1950s. Even before the existence of OSHA in the early 1970s, the federal government was involved in creating an exposure standard for persons using the beryllium containing material at government facilities. Once OSHA was enacted, it too adopted exposure standards relating to beryllium. The Department of Energy which owned and operated the nuclear facilities at Oak Ridge also imposed safety requirements on its contractors and their employees.

The supplier defendants argued that, under Tennessee law, a supplier could reasonably rely on a sophisticated purchaser to warn about the dangers associated with the products supplied, thus relieving the suppliers of a duty to warn the ultimate user. In granting summary judgment, the trial court concluded that the U.S. government and its contractors were sophisticated users of beryllium. It noted that the United States government agencies were involved in creating and enforcing comprehensive safety programs relating to beryllium exposures. In fact, the court found the U.S. government to be a sophisticated user of beryllium as a matter of law, and essentially ended its analysis of the issue at that point.24

A recent case may ultimately rival *Goodbar* in terms of its status as the leading case for the defendants: *Humble Sand & Gravel, Inc. v. Gomez*.25 There, the Texas Supreme Court reversed a verdict for a plaintiff in a sandblasting case and remanded for a new trial. The *Humble* court carefully analyzes the issue of sophisticated user in a non-bulk supply context.

_“Despite the dangers of disembarking while the rotors were decelerating, the helicopter manufacturer placed no warnings on the helicopter itself and no warnings were made by the manufacturer directly to the employer/owner.”_
posure to quartz containing dusts, including dusts created by abrasive blasting with flint, knowledge going back over hundreds of years. Also developed at trial was evidence of knowledge as to these same matters within the abrasive blasting industry. Nevertheless, there was evidence that neither the plaintiff nor supervisory personnel for the employer fully appreciated the health risks at issue.

While the appellate court acknowledged the exceptions to the general rule relating to the duty to warn the ultimate user, and in particular, the sophisticated user defense, the court found that whether the defense was available was almost always a fact question. This fact specific evaluation was to focus on the reasonableness of the supplier’s reliance on a third party to communicate the warning information.

According to the appellate court, in order for the defense to apply, the intermediary must have information, knowledge or sophistication equal to that of the manufacturer or supplier, and that the manufacturer must be able to reasonably rely on the intermediary to warn the ultimate user. In this context, the court found that reliance is reasonable only if the intermediary knows or should know the product’s dangers. Actual or constructive knowledge could arise where the supplier either has provided adequate explicit warnings of the dangers or where the information relating to the dangers was available in the public domain. The court noted that reliance on constructive knowledge was problematic where the dangers of the product were more severe. In other words, the more serious the danger, the less likely that reliance on constructive knowledge would operate to enable the defense to work.

The appellate court went on to find that a supplier cannot fully discharge its duty to warn by simply instructing or warning an employer, where the practical means of warning the end user exists. This is significant because the practical result of the appellate court decision was to effectively hold that the sophisticated user defense was unavailable where shipments were made in a way other than through bulk supply. This is because the ability to directly warn the end user exists through the printing of warning on bags or similar packaging.

The Texas Supreme Court took a different approach. First, it determined whether there was a duty to warn owed by the supplier to the employer, its customer. In deciding that no such duty was owed here, the court outlined the state of societal and industry knowledge relating to the relevant hazards. It concluded that the relevant hazards were common knowledge within the abrasive blasting industry. It found this inquiry to be a question of law for the court.

Yet, the court acknowledges, and appears to assume for purposes of the opinion, that the plaintiff did not know of the full scope of the potential dangers. In fact it noted evidence that it was widely believed that workers in the abrasive blasting industry did not know of the relevant dangers and/or routinely failed to utilize the correct safety equipment under the circumstances.

Regardless, the court found that generalized industry knowledge was enough to relieve the flint supplier of a duty to warn its customer, the employer, of the potential dangers associated with the flint Humble supplied. In fact, the court held that, the reason that the abrasive blasting contractors, like the plaintiff’s employer, so readily disregarded the risks to their employees associated with silica containing materials was not because of lack of information, but instead was due to lack of care on their part.

Next, the court endeavored to decide the issue of whether there was a duty to warn the end user plaintiff. The defendant urged the court to adopt a simple rule which would negate the duty to warn in all cases where an employee of a defendant’s customer was the plaintiff based on the common law duty of employers to provide a safe workplace. The court rejected what it saw as a blanket exception to the duty to warn. It did so even though the court seemed to agree that the employer is typically the most well placed third party to provide safety information and training to its employees, and to convey any information it had regarding the products and materials used by its employees.

The court went on to discuss § 388 of the Restatement (Second) of Torts, yet refused a literal reading of the section, particularly subsection (b), the part of section § 388 that focuses on whether the supplier had a reason to believe the plaintiff would be unaware of the risks at issue. It held such a test too simplistic and too easily used to relieve suppliers with any responsibility to supply information to end users.

The court found comment n to § 388 of the Restatement (Second) of Torts instructive, and quoted it in its entirety. The court then interjected some real world, day to day reality into the analysis by recognizing that the defendant’s customer, the employer in this instance, often had multiple sources for the same materials. Thus it rejected an individual supplier by supplier, vis a vis, the specific plaintiff type analysis. Instead, the court found the relevant question to be whether the suppliers, like Humble, had a duty to warn abrasive blasters generally.

In other words, the court generalized the analysis and asked whether the abrasive supplier industry has a duty to warn abrasive blasters.

With the stage set, the court begins its analysis, focusing on Goodbar and its progeny, in conjunction with the Restatement (Third) of Torts: Products Liability, § 2(c) and comment I to that section. The court opined that this section of the new Restatement was similar to § 388 of the Restatement...
(Second) of Torts, and comment n in particular. Restatement (Third) of Torts: Products Liability, § 2(c) provides as follows:

§ 2. Categories Of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

* * *

c is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

That part of Comment I relevant to subsection (c) is as follows:

Depending on the circumstances, Subsection (c) may require that instructions and warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm. There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user. Thus, when the purchaser of machinery is the owner of a workplace who provides the machinery to employees for their use, and there is reason to doubt that the employer will pass warnings on to employees, the seller is required to reach the employees directly with necessary instructions and warnings if doing so is reasonably feasible.

The Gomez court cited with approval the six factors identified in Goodbar as the things courts should use to guide their analysis as to the reasonableness of the supplier defendant’s reliance on the employer to convey warnings. To those six, the court added the traditional factors used by courts generally to determine whether any defendant owes a duty to a given plaintiff, things such as foreseeability, social utility, magnitude of the burden imposed, etc. The court recognized that utilizing the factors involved a balancing of them based on the circumstances of the case. It was not simply a math exercise, counting up the factors present or not, and deciding which side has a majority of factors present.

The court then discussed each factor present. Although recognizing the danger of exposure to silica dust, it coupled the analysis of the danger involved by relating that danger to the defendants’ purported failure to warn. The court recognized that in a bulk supply situation, the likelihood of danger being associated with the defendant’s failure to warn the ultimate user was low relative to a non-bulk supply situation. Obviously with packaging type warnings, the concept of actually reaching the end user makes them feasible. Yet in making this comparison, the court reiterated that the focus was on the relevant industry as a whole, not simply this plaintiff and this defendant.

The court also looked at feasibility, but not in a simplistic way. It recognized that printing warnings on bags or similar packaging was obviously feasible. But, it indicated that correct analysis needed to go further. It asked whether the bag warnings were a feasible medium by which to communicate effectively with the customer’s workers, not simply whether it was possible to print words on a paper bag. It looked to the evidence presented by the plaintiff at trial regarding the abrasive blasting industry and the knowledge of relevant dangers. It indicated some doubt as to whether the silica related injuries in that industry were the result of inadequate warnings by material suppliers as opposed to the working conditions within the control of the employers.

The court also addressed the issue of the reliability of employer/employees to warn their own employees. It recognized that the evidence at trial was that employers in the abrasive blasting industry were in a far better position to warn their employees and decrease relevant risks than the abrasive suppliers. While the evidence at trial was that employers routinely disregarded their duty to provide a safe work place, the court observed that there was no evidence that safety would be improved by supplier warnings under the circumstances presented.

The court observed that its decision was made in the context of what it called a “comprehensive regulatory scheme,” that being OSHA regulations applicable to the industry. The court believed that if the OSHA regulations were followed and enforced, a safe work environment would exist. Instead, it found the regulations to be routinely ignored, over which the supplier defendant had no control. Finally, it found that in a general sense, requiring a supplier to warn in some way
would help to avoid injuries, but also thought requiring suppliers to warn end users in the industrial use context would also diminish the incentives for employers to provide a safe work place.

Ultimately, the court wisely recognized that the tort system should be designed to “impose responsibility on the parties according to their ability to prevent the harm.” It noted that if employers routinely disregard their responsibilities to their workers to provide safe places to work, requiring direct warnings to the employees would be pointless. Yet, the court concluded that, on the record presented, there were too many unanswered questions in order to decide whether Humble had a duty to directly warn its customer’s employees, including Gomez.

Nevertheless, the court defined the basic question as one of duty, a question that is normally an issue of law for the court. Rather than requiring the plaintiff to prove the existence of a duty, the court shifted the ultimate burden to the supplier defendant to show that the warning that the plaintiff claimed should have been used would have been ineffective. It did this for several reasons, including the fact that some duty to warn is generally assumed, that suppliers are better positioned to have more of an idea of the general state of knowledge of its customers relating to the specific dangers at issue than an individual plaintiff, and lastly to create uniformity for future cases.

The significance of Gomez is clear. It recognizes and accepts the every day realities in the market place of the interaction between suppliers and their customers on the one hand, and that of the customers and its employees on the other. Employers will nearly always be much better placed than any supplier to provide a safe workplace and to protect their workers. The court also recognized that most suppliers have many customers, and that it is effectively impossible for each supplier to actually investigate and assess each and every customer’s level of sophistication, and tailor each warning accordingly. That explains the court’s focus on the specific industry, not just the plaintiff’s employer.

The court made the issue one of duty for the court to decide. This makes seeking summary judgment a more realistic prospect, assuming that discovery shows that the industry is genuinely sophisticated, not just the specific customer/employer at issue. The focus on the relevant industry, not simply the specific employer at issue, makes for a more manageable task for counsel. It is likely that the suppliers themselves look to the intended customers’ industry for guidance on several issues relating to their customer relationships, not just what the customers know for warnings purposes. As addressed above, industry associations are an excellent source for information regarding industry knowledge. OSHA regulations and industry guidelines are similarly focused on industries, not specific employers or plaintiffs. Thus, the Gomez court’s focus is both appropriate and more realistic than that suggested by courts that reject the sophisticated user defense and associated principles.

Not all courts have embraced the sophisticated user defense. Courts rejecting its application have not flat out rejected it as much as they have made its operation a practical impossibility. An example of where a court took a strict approach to the applicability of this defense occurred in Gray v. Badger Mining, another silicosis case in the foundry context.

In Gray, the plaintiff worked at a foundry and claimed silicosis as a result of exposure to silica sand. Interestingly, the warning claim here did not just involve warnings related to silicosis hazards, but instead the type of personal protection devices which were appropriate for protection against exposure to silica.

Evidence developed that the supplier at issue had done specific internal research for its own purposes (i.e. protection of its own employees) relating to the type of respirators which were appropriate. The defendant supplier argued that the employer, Smith Foundry, was aware of the dangers associated with silica exposure through its involvement with the American Foundrymen’s Society, and information received from the government and other industry sources. The supplier also argued that the foundry relied on the respirator suppliers for information relating to appropriate respirator choices, not sand suppliers. The silica supplier moved for summary judgment and that motion was denied. That ruling was appealed and reversed by the appellate court. Plaintiff then appealed to the Supreme Court of Minnesota.

The Minnesota Supreme Court acknowledged the principles contained in the Restatement (Second) of Torts, § 388. The court recognized that, in Minnesota, a supplier had no duty to warn the ultimate user if it had reason to believe that the user would realize the dangerous condition at issue. Stated another way, the court found the sophisticated user defense could apply if the plaintiff’s knowledge was the same as that of the supplier defendant, a rather unlikely scenario. Not surprisingly, under the facts of this case, the court found the plaintiff’s knowledge was inferior to that of the sand supplier, Badger Mining.

The court also looked at the nature of the relationship between the employer/customer, Smith Foundry, and the sand supplier, Badger Mining; and addressed it separately from what it saw as the sophisticated user issue, calling this the sophisticated intermediary defense. The court held that this sophisticated intermediary defense was available only where
the supplier could show it used reasonable care in relying on the intermediary to give the warning to the ultimate end user. To discharge the duty to warn in such circumstances, the supplier had to show that the customer/employer had equal knowledge as that of the supplier, or by showing that it educated the customer by virtue of adequate warnings.

While the supplier in this case presented evidence of sophistication on the part of Smith Foundry, the kind of information which the cases discussed above found to be adequate, this court found such evidence inadequate. The particular issue which seemed to trouble the court was the information relating to appropriate respiratory protection. There was no evidence that the employer, Smith Foundry, knew what Badger Mining knew about the dust masks and their effectiveness. The court found there to be questions of fact relating to both the equality of knowledge and the adequacy of warnings Badger Mining supplied, and reversed the grant of summary judgment. The court distinguished *Hasse*, a very similar case discussed above, by simply noting that no concession was made by the employer about not relying on sand suppliers for safety information.

As seen above, the sophisticated user is a valuable tool for the defense to use in attempting to interject some reality into the typical legal analysis used by courts to determine what, if any, duty to warn is owed by a product or material supplier in the context of supplying industrial goods to industrial users, not goods intended for consumers. Yet there are some difficulties, the primary one being that it is often possible to reach the end user with some semblance of information. This is because product packaging is such that there is some likelihood that the ultimate user will actually see or handle the packaging and thus the warning printed on the packaging. This is a key distinction between the sophisticated user and bulk supplier defenses.

### III. Bulk Supplier Defense

As will be demonstrated below, the bulk supplier defense is in many respects quite similar to the sophisticated user defense. The basis for both defenses is effectively the same. However, there is one critical difference which the courts seem better willing and able to grasp. The critical difference between the scenarios is the notion that, in a situation where industrial products and materials are being supplied to third parties in bulk, there is no practical way to communicate directly with the employees of the entities to whom shipments are made. This is because there is no packaging on which a warning or similar information can be placed and seen by those workers/end users.

As a result, the courts appear more willing to genuinely consider the applicability of the bulk supplier defense, and allow it to operate to foreclose liability to these types of manufacturers and suppliers. Also, the factual context for the cases applying this defense is more broad, encompassing a larger variety of scenarios.

A good starting point for the discussion of the bulk supplier defense is *Hoffman v. Houghton Chemical Corporation*. *Hoffman* involved an explosion and fire at an ink factory in Marlborough, MA. Plaintiffs alleged that the suppliers of chemicals to Gotham Inc., their employer, were responsible for the fire. The chemical supplying defendants supplied the chemicals in different ways, including 55 gallon drums, and by way of tanker trucks, which unloaded the supplied chemicals into large underground storage tanks located on Gotham’s premises.

The supplying defendants all supplied the employer Gotham with material safety data sheets. The defendants perceived Gotham to be a knowledgeable purchaser of their materials. They believed Gotham to be able to understand the warnings provided, including proper storage methodologies by the use of grounding devices in order to avoid static electricity. The court noted that many of the employees there were Portuguese, with limited knowledge of English. The employer had Portuguese speaking personnel provide relevant warnings in Portuguese to those workers. The employer also had a small library of materials relating to relevant safety issues, and eventually issued its own material safety data sheets to its customers regarding the end products it formulated, using the chemicals supplied by the defendants.

There was no evidence that the defendants knew that Gotham failed to enforce the safety precautions the defendants recommended. The plaintiffs were injured as a result of a worker transferring flammable chemicals from a grounded pump in the production area to a rusty old drum which was ungrounded. After a jury trial, the trial judge instructed the
To the bulk supply issue:

It is useful to see how the trial court instructed the jury as to the bulk supply issue:

The Massachusetts Supreme Judicial Court noted some confusion in the case law distinguishing between the “bulk supplier doctrine” and the “sophisticated user defense.” The court found that the bulk supplier doctrine allowed a manufacturer-supplier of bulk products to discharge its duty to warn end users of a product’s hazards by reasonable reliance on an intermediary. By way of contrast, the court described the sophisticated user defense as one which protects suppliers from liability for failing to warn when the end user knows or reasonably should know of the product’s dangers.

For the bulk supplier doctrine to apply, the court found that the product must be delivered in bulk to an intermediary. As such, the court held that the relevant focus was on the intermediary’s knowledge of a given product or materials’ hazards and its ability to pass on the appropriate warnings to the ultimate users. The court found that the sophisticated user defense required no intermediating relationship, and did not involve how the products at issue were supplied, focusing instead on the end users’ level of sophistication. The court found that the bulk supplier doctrine allowed a finding that the duty to warn had been satisfied or discharged, and the sophisticated user defense allowed for a determination that no duty was owed at all.

It is useful to see how the trial court instructed the jury as to the bulk supply issue:

I’m also going to now instruct you with regards to this duty to warn on a – the Bulk Transfer Doctrine. A bulk manufacturer or supplier of a product has no duty to issue warnings to the ultimate user if the warnings it has given to the immediate purchaser are adequate and sufficient and it, that is, the manufacturer or supplier has no reason to anticipate any negligence or other fault on the part of the immediate purchaser.

You may find that [the] defendants complied with their duty to warn if they had no indication that the immediate purchaser, which would be Gotham in this case, was inadequately trained, or unfamiliar with the product, or incapable of passing on its knowledge about the product to the ultimate users of the product. The application of this doctrine turns on the reasonableness of the defendants’ reliance on Gotham to provide adequate warnings. If you find that the product here was delivered in bulk and that the immediate purchaser was in the best position to monitor the provision of warnings to its individual employees or users, and train its individuals [sic] and employees, you may find that the supplier of a bulk product had no duty to warn individual users of the purchaser or the individual employees of the purchaser of the product’s dangerous properties.

Just as in the sophisticated user context, to assess the applicability of the bulk supplier doctrine, the Massachusetts court looked to the Restatement (Second) of Torts, § 388, Comment n. In so doing, the court focused on the issue of whether the chemical suppliers had a reasonable assurance that the information they provided to the employer would reach those whose safety depends on having it, i.e. the employees/plaintiffs. The court found that this was a fact intensive inquiry without any possibility of a bright line rule being available to determine when a supplier’s reliance on an intermediary was reasonable.

The court looked at six factors to determine reasonable reliance, the same factors elicited by the Goodbar court:

(1) The dangerous condition of the product;
(2) The purpose for which the product is used;
(3) The form of any warnings given;
(4) The reliability of the third party as a conduit of necessary information about the product;
(5) The magnitude of the risk involved; and
(6) The burden imposed on the supplier by requiring that he directly warn all users.

In generally approving the jury instruction referenced above, the court held that there were few more appropriate circumstances to which to apply the principles described in Goodbar and other cases than in the context of bulk sales. The court noted the practical problems associated with the nature and function of bulk products as being quite different from other consumer and industrial goods, thus requiring separate considerations. The court recognized that bulk products are both received and stored in bulk by the intermediary, who then repackages or reformulates the materials, something beyond the control of the suppliers. Even if the products and materials could be labeled by the supplier, any such labels would be unlikely to reach the end user in these circumstances.

The court also noted that materials shipped in bulk often have multiple uses, making the concept of imposing a duty to warn all foreseeable end users directly was unwise. The court observed that the intermediary/customer is frequently involved in a different industry than the primary supplier, with different means of production. As such, the court found the ultimate end users to be a “remote and varied lot.” The court

jury on a defense it called the “bulk transfer doctrine”. The jury found for the defendants and the plaintiffs appealed.

The Massachusetts Supreme Judicial Court noted some confusion in the case law distinguishing between the “bulk supplier doctrine” and the “sophisticated user defense.” The court found that the bulk supplier doctrine allowed a manufacturer-supplier of bulk products to discharge its duty to warn end users of a product’s hazards by reasonable reliance on an intermediary. By way of contrast, the court described the sophisticated user defense as one which protects suppliers from liability for failing to warn when the end user knows or reasonably should know of the product’s dangers.

For the bulk supplier doctrine to apply, the court found that the product must be delivered in bulk to an intermediary. As such, the court held that the relevant focus was on the intermediary’s knowledge of a given product or materials’ hazards and its ability to pass on the appropriate warnings to the ultimate users. The court found that the sophisticated user defense required no intermediating relationship, and did not involve how the products at issue were supplied, focusing instead on the end users’ level of sophistication. The court found that the bulk supplier doctrine allowed a finding that the duty to warn had been satisfied or discharged, and the sophisticated user defense allowed for a determination that no duty was owed at all.

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The court also noted that materials shipped in bulk often have multiple uses, making the concept of imposing a duty to warn all foreseeable end users directly was unwise. The court observed that the intermediary/customer is frequently involved in a different industry than the primary supplier, with different means of production. As such, the court found the ultimate end users to be a “remote and varied lot.” The court
found that a duty to warn the customers’ employee/end users would be “indeed crushingly, burdensome.”

The Hoffman court also recognized that the intermediary vendee, typically the employer of the plaintiff, is often a large company with an independent obligation to provide adequate safety for its employees, with the bulk supplier rarely having any control over the intermediary’s personnel or day to day safety operations. As the court observed, a bulk supplier is simply unable to constantly monitor all of the places receiving the goods supplied in bulk and ought not to be required to continuously and systematically train those ever changing workers.

Lastly, the court specifically addressed the jury instruction referenced above. The court took issue with the notion of the jury assessing whether the bulk supplier or the immediate purchaser was in the best position to convey information relating to the product or materials’ dangers. The court found that all that would be required to determine whether the bulk supplier discharged its duty to warn would be for the jury to evaluate the reasonableness of a bulk supplier’s reliance on the intermediary, what it called an objective standard. The inquiry was to be focused on the knowledge of the purchaser, not that of the supplier. Given the volume of Gotham’s knowledge regarding the safe handling of the chemicals at issue, the court affirmed the judgment for the defendants.

One subject matter of litigation which has given rise to a number of cases asserting the bulk supplier defense relates to temporomandibular joint implants. An example of this is In re TMJ Implants Product Liability Litigation. This case involved multi-district litigation relating to claims by TMJ implant users against suppliers of polytetrafluoroethylene powder and fluorinated ethylene propylene film used to manufacture TMJ implants. Plaintiffs claimed injury as a result of the way their bodies interacted with the constituents of the implants. These implants were manufactured by a company called Vitek. These chemical constituents are commonly known as Teflon.

The opinion provides a good factual background for how Vitek was created and the reasoning behind the incorporation of Teflon into these implants. Significantly, one of the founders of Vitek had been an employee for DuPont, one of the defendants in the litigation and the supplier of Teflon. DuPont never thoroughly tested whether Teflon was appropriate for medical applications, in particular, implants such as those at issue in the case.

Eventually, DuPont learned that Vitek was exploring medical applications of DuPont’s Teflon products and sent Vitek a letter. In the letter, DuPont stated that the Teflon materials it sold were for industrial purposes only, and that no long term studies had been done to determine whether they were appropriate for use in medical or surgical purposes. In fact, DuPont required the president of Vitek to acknowledge these facts by way of signing a disclaimer.

DuPont sought summary judgment as a defendant in these cases, asserting a variety of defenses, including the bulk supplier defense. In beginning its discussion, the district court found it undisputed that the constituent chemicals were not defective in the traditional sense and meaning of that term. The court somewhat combined the analysis of both the bulk supplier and sophisticated user defenses. Its starting point was § 388 of the Restatement (Second) of Torts. Its focus was on whether the warning DuPont supplied to the intermediary, Vitek, was sufficient. For this, the court looked to the six factors identified in Goodbar.

The court balanced the six factors, and found as a matter of law that DuPont had acted reasonably in relying on Vitek to communicate warnings to the end users, i.e., Vitek’s customers that used the TMJ implants. The court noted that DuPont had informed Vitek that these chemicals were intended for industrial purposes only, and that there was not sufficient research to determine whether medical or surgical uses could be recommended. The court found significant the fact that DuPont had required Vitek to sign a disclaimer recognizing that DuPont made no representations relating to the appropriateness of these chemicals for the uses intended by Vitek. The court noted that Vitek was required by federal law to provide warnings, and was reasonable for DuPont to rely on Vitek to fulfill its regulatory duties in that regard.

Lastly, the court found that the burden to warn the customers of DuPont’s customers would be extreme as there was no feasible way of affixing a warning label to the chemicals DuPont supplied. The plaintiffs suggested that an alternative type of warning could have been provided by DuPont, for example a package insert to be provided to persons with the implants. The court rejected this suggestion, given that Vitek was already required to provide that information and failed.

The court concluded its analysis of the bulk supplier defense with the following observation:

Although there may be shades of difference between these rules as they are applied by courts, the fundamental tenant is that a manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to the ultimate users warnings regarding any dangers associated with the product. The court rejected the notion that Vitek was not sophisticated by noting the significant academic credentials of the officers of Vitek, and their long history of being involved in
relevant scientific research, as well as other indicia of their vast knowledge. Vitex’s founders and lead executives had been either employed by DuPont for a period of time or performed experiments involving the use of Teflon for purposes of implantation in humans. Vitex has sought and obtained FDA approval for their TMJ implants. All of these things convinced the court that Vitex was a highly knowledgeable entity and that DuPont’s reliance on Vitex was reasonable. Note that this was multi-district litigation. The court specifically found that the summary judgment it ordered was applicable to claims based on Illinois law.43

Another example of the operation of the bulk supplier defense occurred in Wood v. Phillips Petroleum Company.46 Here, the plaintiff appealed the grant of summary judgment in favor of various chemical companies in a case arising out of a benzene exposure claim. The defendants asserted the bulk supplier defense, among others. Plaintiff’s decedent had been employed by Monsanto. The chemical defendants had supplied Monsanto with benzene in bulk, and argued that Monsanto was familiar with the properties, hazards and methods of safe use of benzene, and were thus best positioned to warn its employees.

In affirming the grant of summary judgment, the court looked to pre-existing Texas case law, and boiled the relevant test down to this: “Whether a bulk supplier has a reasonable assurance that its warning will reach those endangered by the use of its product.”47

The court characterized the toxicity of benzene as commonly known in the petrochemical industry, and included Monsanto as part of that industry. It looked to a report from the American Petroleum Institute in 1948 regarding the health effects of benzene as evidence of the pervasiveness of this information within the industry. The court further found that the evidence presented demonstrated that Monsanto was well aware of the types of engineering controls, personal protective devices and other actions needed to protect its workers from exposures to benzene. As a result, the court determined that the defendants reasonably relied on Monsanto to provide information to its workers and to provide a safe work place. In essence, the court concluded that the cause of injury was the failure of the employer to protect its workers, rather than the chemical supplying defendants failing to warn the employees/end users directly.

Another interesting case, this one applying the law of Utah, is House v. Armour of America, Inc.48 House involved the death of a Utah Department of Corrections officer who was shot and killed while wearing body armor during a shoot out with some fugitives. The plaintiff sued DuPont, the supplier of Kevlar, a bullet resistant material, as well as Armour of America, the manufacturer of the bullet resistant vest at issue in the case. The claim by the plaintiff was that the plaintiff’s decedent died, despite using the vest, because there was no warning directed to the decedent as to the limitations and capabilities of the vest. Apparently there was no doubt that the type of ammunition used by the fugitives could not be stopped by the vest at issue.

When the Department of Corrections decided to purchase bullet resistant vests, research was done as part of the decision as to which of the variety of vests on the market to buy. Armour and Company provided brochures which distinguished between the various grades of body armor and included limitations in terms of the types of rounds a given vest could withstand.

At first, the defendants asserted the sophisticated user defense. The use of this defense was rejected because of conflicting evidence relating to both the decedent’s and his employer’s knowledge of the limitations and capabilities of the vests. DuPont, however, also asserted the bulk supplier defense. DuPont successfully argued that it was only a bulk supplier of Kevlar to Armour, and that this material was not inherently dangerous. With this simple argument, the court determined that DuPont had no duty or opportunity to warn the ultimate user about the levels of protection afforded by such vests using Kevlar as constituent.

Another case, this one asserting Nevada law, is Fisher v. Professional Compounding Centers of America, Inc.49 This case arose out of the plaintiff’s consumption of the diet drug fen-phen. The fen-phen actually consisted of two separate drugs: fenfluramine and phentermine. When the plaintiff was first prescribed the medications, her physician prescribed them separately and advised the plaintiff to take them together. Eventually it was discovered that the drugs could be compounded by a pharmacist, and such a pharmacist was located.

In July 1997, the FDA issued a public health advisory, recommending close monitoring of patients using these drugs because of fears relating to a relationship between the drugs and heart disease. Within months, a number of the major producers of fen-phen withdrew the drugs from the market. Apparently, the source of the fenfluramine component of the drugs involved here was not a major U.S. drug manufacturer, but instead an Italian company called Alfa. This company had formerly owned a subsidiary named ICFI which produced fenfluramine in bulk in Italy. Alfa distributed it to companies in the United States, reportedly for research and development purposes, not consumer use.

Additionally fenfluramine was also sold by Alfa to another Italian company which did export it for human consumption. This Italian exporter named Messeca sold the fenfluramine
to U.S. companies, who passed it on to the Professional Compounding Centers, which created the fen-phen used by the plaintiff. Alfa claimed that Messerca and Professional Compounding conspired to bring the fenfluramine into the United States, without Alfa’s permission or knowledge.

After determining Nevada law applied, the court focused on the defendants’ summary judgment motions, and in particular their assertion of the bulk supplier doctrine. The U.S. District Court addressed the argument that the State of Nevada had not yet adopted the defense. The court agreed with the policy reasons supporting the doctrine which was that an intermediary was better positioned to warn the ultimate consumer of dangers associated with the product than an entity supplying to others in bulk. It also recognized that warnings by the bulk supplier attached to large deliveries could not reasonably be expected to reach consumers/ultimate users. It further observed that there was no ability for the bulk supplier to control the marketing, labeling, and distribution of the product assembled with the constituents provided by the bulk supplier.

Nevertheless, the court denied summary judgment in this case because of case law suggesting that, in order for the doctrine to apply, the bulk supplier had to reach a level of reasonable certainty that its customers knew of the inherent dangers associated with the product supplied in bulk and would warn users about those dangers. The court found that a defendant could meet that burden by showing it took some reasonable steps to ascertain that its customers were knowledgeable.

Here there was no evidence that the purported bulk suppliers took any steps to determine whether they were selling to intermediaries sophisticated enough to pass information about the materials along to their customers. In fact, no warnings at all were disseminated by the bulk suppliers in this case, a fact the court found critical.

By way of comparison, in Whitehead v. Dycho Company, Inc., the plaintiff sued chemical suppliers after being injured, resulting from an explosion caused by a chemical called naphtha. The defendants were manufacturers and distributors of the naphtha which had been supplied to the plaintiff’s employer, Magnavox. Magnavox purchased the naphtha from two distributors, who in turn purchased it from the chemical manufacturer defendants. Plaintiff brought a warnings claim, alleging a failure to warn the ultimate user of the naphtha, such as herself, of the dangerous propensities of the naphtha.

The manufacturer defendant supplied constituent chemicals which were blended by the distributor defendants into the naphtha. The shipments of the constituent chemicals were made in bulk, and accompanied by warning placards pursuant to U.S. Department of Transportation regulations. Material safety data sheets were also provided to the distributors by the manufacturers. The manufacturers did not sell any chemicals directly to the plaintiff’s employer. The distributors of naphtha to Magnavox blended and mixed the constituent components pursuant to guidelines created by Magnavox’s employees. The evidence was that these employees were aware of the highly flammable nature of the materials. The 55 gallon drums containing the naphtha were stored by Magnavox away from its production buildings. Supervisors would fill small pump type containers bearing no labels or warnings from the storage area for use by Magnavox production employees.

The injury in question occurred because Magnavox employees were required to launder their work clothes. Assembly line workers such as the plaintiff were provided with naphtha to help them clean their work clothes at home. The trial court granted summary judgment, finding the defendants owed no duty to warn the plaintiff because Magnavox was “a skilled sophisticated, industrial purchaser in bulk from the defendants,” and because the defendants could reasonably rely on Magnavox to warn its employees of the dangers of the naphtha. The appellate court reversed and the defendants appealed.

The Tennessee Supreme Court affirmed the grant of summary judgment. The court looked to § 388 of the Restatement (Second) of Torts, in part, for affirming the grant of summary judgment. The court found significant the provision of material safety data sheets to the distributors, who in turn supplied them to the plaintiff’s employer. As part of the evidence of the employer’s superior knowledge, the court focused on the fact that the employer prepared its own specifications for the naphtha products purchased from the distributors. The court noted that this demonstrated to its satisfaction that the defendants could reasonably rely on the employer to convey information relating to the hazards of naphtha to its employees. Unlike Fisher above, the court did not require any effort on the part of the manufacturing defendants to determine whether the distributing defendants were passing along the information the manufacturers provided to the distributors.

One of the earliest cases applying the bulk supplier defense was Jones v. Hittle Service, Inc. This case involved death claims arising out of a propane gas explosion on a farm. Defendants included Hittle Service, the distributor of the propane to the farmers, and other chemical companies who supplied bulk propane to Hittle.

Apparently the explosion occurred due to a leak in one of the supply pipes at the farm. At least one of the plaintiffs noticed a foul odor in the days prior to the explosion. The odor was not as intense as it might have otherwise been; therefore it was attributed to something other than propane. The allegation was that the propane was not sufficiently odorized or that
the odor had dissipated such that it was not attributable by the plaintiffs to the gas prior to the explosion.

The plaintiff’s liability argument was that the defendants knew about the potential for odor dissipation and failed to warn about it. The court characterized the question regarding the duty owed by the bulk suppliers as whether they owed an independent duty to warn the ultimate consumer about the problem of odor dissipation, an end user who was unknown to them. The court recognized that a situation involving an

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entity supplying in bulk to a retail distributor was in an entirely different position from one that sold packaged commodities or who dealt directly with the ultimate consumer. In a packaging scenario, the court found it feasible for the manufacturer to include warnings on the packaging. In a situation involving bulk sales, the court found that an adequate warning to the distributor is all that could reasonably be required.

The court decided that the distributor’s failure to pass along those warnings was a break in the chain of causation. The court held that bulk suppliers selling to a distributor in bulk fulfilled the duty to warn owed to the ultimate consumer when the bulk supplier determined whether the distributor to whom the material is sold is adequately trained, familiar with the properties of the materials as well as the safe methods for handling them, and is capable of passing this knowledge along to the distributor’s customers.

In this instance, the evidence clearly demonstrated that the distributor was very knowledgeable. It belonged to the local LP Gas Association, was regularly visited by the state fire marshal, and kept a library on propane. The principal of the distributor testified at trial that he was able to pass along any information relating to propane safety requested by customers. Contrary to some cases, the court acknowledged that propane was very dangerous, yet it did not let the purported degree of danger influence its decision as to who in the chain of distribution was best able to provide warnings and information to the ultimate consumer.

In *Alm v. Aluminum Company of America*, the Texas Supreme Court addressed the bulk supplier issue for the first time. *Alm* involved a bottle closure system that applied aluminum bottle caps to carbonated soft drink bottles. Alcoa sold such a capping machine to a local bottler. The bottler purchased the bottle caps from a third party, who used Alcoa designed caps under a licensing agreement with Alcoa. The plaintiff was injured when a bottle cap exploded. The plaintiff purchased the bottle at a supermarket, which in turn purchased it from the local bottler. Plaintiff sued the supermarket, the local bottler and Alcoa. Alcoa lost, and it appealed.

One of the arguments to support liability was that Alcoa knew that its capping machine could misapply caps and had a duty to warn of the hazards associated with that situation. Alcoa argued that it had warned the local bottler of this situation, and did not owe a duty to warn the ultimate purchaser. In assessing whether there was a duty in this case to warn the ultimate purchaser, the court stated that a manufacturer supplier could, in certain situations, rely upon an intermediary to communicate warnings to the ultimate users. Whether that would satisfy the duty to warn depended on whether the manufacturer had reasonable assurance that its warnings would reach those endangered by its products.

The court determined that the applicable test would be multi-factorial including whether the distributor was adequately trained, whether the distributor was familiar with the properties of the product and its safe use, and whether the distributor was capable of passing on its knowledge to consumers. The court held that Alcoa was like a bulk distributor in that it was difficult for it to directly warn consumers of the bottle cap hazard, as it had no real way to know who they were.

The evidence in this case was that there was a warning given to the local bottler in the Alcoa owner’s manual distributed with the capping machine. Additionally, Alcoa developed a slide presentation for the local bottlers, discussing the potential for danger, as well as posters and similar materials. However, Alcoa did not prove what it did to ascertain the body of information possessed by the particular bottler in this instance, and it could not show what specific efforts were undertaken to educate that bottler.

For that reason, the court found too many fact issues surrounding the actions of Alcoa in warning the local bottlers, including the co-defendant in this case, and remanded for a
new trial. In other words, the court found that there was a fact issue as to the adequacy of Alcoa’s warnings to the co-defendant bottler, and thus a fact issue as to whether Alcoa adequately discharged its duty to warn the ultimate consumer, the plaintiff.

A leading case affirming the use of the bulk supply doctrine is Adams v. Union Carbide Corporation. In Adams, the plaintiff was an employee of General Motors, who alleged that Union Carbide failed to warn GM employees regarding the dangerous propensities of a chemical used by GM as part of their assembly process, toluene diisocyanate (“TDI”). Plaintiff claimed to have contracted asthma as a result of exposure to TDI. Union Carbide, asserting the bulk supplier defense, sought and received summary judgment from the district court and the plaintiff appealed.

The evidence was that TDI was supplied to GM beginning in the late 1960s by way of bulk liquid shipments made by tanker trucks or rail cars. The trucks or rail cars would be unloaded into storage tanks on GM’s premises, with the TDI pumped in as needed from the storage tanks to the manufacturing areas. Union Carbide was aware of the dangers associated with exposure to TDI vapors, and prepared a manual specifically addressing these concerns to GM when shipments began. Included in the manual were what would now be characterized as material safety data sheets, and information directed specifically to potential exposures by GM employees. There were meetings between GM and Union Carbide regarding the safe handling of TDI. Eventually, the plaintiff became ill and was ultimately found permanently disabled due to exposure to TDI.

The Adams court, like so many others, relied on § 388 of the Restatement (Second) of Torts, and specifically comment n of the Restatement, to recognize that a duty to warn the ultimate user could be discharged by a manufacturer’s reasonable reliance on a third party, in this case, GM. The evidence in this case was that GM repeatedly updated its information regarding TDI as received from Union Carbide. That, coupled with the fact that GM had its own independent duty to provide a safe work place to its employees, combined to convince the court that it was reasonable for Union Carbide to rely on GM to convey the information provided to its employees as a matter of law.

The counter-argument made by the plaintiff was quite simple: GM never informed her of the safety related information. The court of appeals rejected this argument, finding the key issue was not whether the information was actually provided to GM’s employees by GM. Instead, the court asked whether Union Carbide’s reliance on GM to relay the information was reasonable in light of GM’s independent duty to provide a safe work place, and given Union Carbide’s actions in conveying information regarding TDI to GM for the express purpose of dissemination to GM’s employees. Thus, the focus was on the supplying defendant and its relationship with the intermediary/employer, not on the individual plaintiff’s state of knowledge nor on the action or inaction of the employer.

There are a multitude of other cases in many jurisdictions recognizing the validity of the bulk supplier defense. The vast majority of courts utilizing this defense are willing to allow its assertion by way of summary judgment. They take a refreshingly realistic view of the day to day relationships between entities supplying in bulk to other industrial users in determining whether it is appropriate to require the bulk supplier to somehow reach the unknowable persons who end up using the materials or are exposed to them, be it the employees of the bulk suppliers’ customers or the customers of the intermediaries’ customers. This view happens to be not only consistent with both § 388 of the Restatement (Second) of Torts and § 2(c) of the Restatement (Third) of Torts: Products Liability, but serves to effectively codify both.

IV. Sophisticated User and Bulk Supplier in Illinois

Surprisingly, there are very few reported cases discussing Illinois law as it relates to these defenses. It is unknown whether the necessary facts have simply not been presented to a court for consideration, or if trial courts have rejected these efforts, and that such rulings have simply not made it to the appellate courts. The relative paucity of case law cries out for defendants to seriously consider opportunities to assert these defenses at the summary judgment stage.

The first and only Illinois case which directly addresses the issues discussed in this Monograph is Venus v. O’Hara. In Venus, the plaintiffs sued O’Hara, an exterminator, for property damage and personal injury. O’Hara spread naphthalene flakes in their home in an effort to rid the plaintiffs of an animal in their attic. Plaintiffs claimed that the naphthalene flakes caused injuries.

The defendant later filed a third party indemnity claim against Wil-Kil Pest Control, the entity which sold the naphthalene to the vendor which sold them to O’Hara, as well as Kenova Chemical Company and Benlo Chemicals, Inc. O’Hara alleged that Kenova sold naphthalene flakes in bulk to Benlo, which in turn sold them in bulk to Wil-Kil. Benlo and Kenova ultimately moved for summary judgment, arguing first that there was no evidence that the naphthalene flakes they sold were actually sold to Wil-Kil and used in the plaintiff’s home. The court disposed of this assertion, finding
fact questions relating to that issue.

Benlo and Kenova then asserted the bulk supplier defense as to the indemnity claim, a claim based on strict liability. They argued that any naphthalene flakes they would have distributed to Wil-Kil were distributed in bulk, and that they bore no liability to O’Hara because they had no control of the warnings or labels placed on the containers which Wil-Kil used. Further, they asserted that they had no control over what O’Hara was told about the safety concerns and thus what O’Hara’s customers, the plaintiffs, knew. The trial court granted the summary judgment motions and O’Hara appealed.

The First District Appellate Court noted that there were no Illinois cases directly addressing the issue. After quoting § 388 of the Restatement (Second) of Torts, the court decided that § 388 only required a supplier to provide adequate warnings to its immediate vendee. It was the failure to do so which could make that supplier liable to the ultimate user. The court noted that the direct duty to warn would "rarely extend beyond the communication of the warnings to the immediate vendee, since, as a practical matter, the vendor has neither the means of controlling the vendee’s subsequent actions nor the opportunity to provide warnings directly to the ultimate user."

After examining cases from other states, the court concluded that the rationale described in those cases, and that contained in § 388 of the Restatement (Second) of Torts, was consistent with principles of strict liability in Illinois. Ultimately the court found that a duty to warn the ultimate user on the part of a bulk supplier could be discharged by simply warning the next party in the chain of distribution. Here, Kenova and Benlo argued that they owed no duty to O’Hara, because they had a right to rely on Wil-Kil to provide warnings to the plaintiffs.

Although approving of the bulk supplier defense, the court reversed the grant of summary judgment. The court focused on a lack of facts to demonstrate that Benlo and Kenova fulfilled their duty to warn Wil-Kil, as there were questions as to whether they actually supplied Wil-Kil with any information regarding the naphthalene flakes. It found that there were no facts to justify their reliance on the expertise of subsequent distributors, nor was the danger associated with naphthalene so common as to obviate the need to warn at all.

Interestingly, the Venus court discussed written discovery responses which suggested that Kenova did supply some information to Benlo relating to the health effects of over exposure to naphthalene. It was uncontested that Benlo did not pass this information along to its immediate vendee, Wil-Kil. Nevertheless, as to Kenova, the court noted that there was a fact issue as to whether the warnings that Kenova made to Benlo were adequate.

Venus is significant in that it is the one and only Illinois case specifically addressing the bulk supplier defense. The Venus court embraced the policy rationale behind the applicability of the bulk supplier defense. Although it found fact questions, Venus does stand for the proposition that a bulk supplier can discharge its duty to warn the ultimate user by providing the adequate warnings to its immediate vendee. There is no requirement such as discussed in some of the cases above that the bulk supplier endeavor to determine the state of knowledge of others in the chain of distribution. It need simply provide enough information to the entity with which it has direct contact. Given the court’s approval of § 388 of the Restatement (Second) of Torts, the sophisticated user defense also appears ripe for adoption by Illinois courts.

Another case, this one from the Seventh Circuit Court of Appeals, also arguably addresses the bulk supplier defense. In Manning v. Ashland Oil Company, the plaintiff was injured after using lacquer thinner to clean tar from her kitchen floor. She sued Yenkin Majestic Paint Company, the direct supplier of the lacquer thinner to Woolco, the retailer which sold it to the plaintiff; and Century Industries, the entity which repackaged lacquer thinner into retail size containers which it then sold to Yenkin. Ashland Oil Company was the last defendant. It was the bulk supplier of lacquer thinner to Century Industries.

At the request of Century Industries, Ashland duplicated a sample blend of lacquer thinner, and sold it in bulk to Century, which in turn sold it to Yenkin. When Yenkin sold the lacquer thinner to its vendee, Woolco, it used a label that Century Industries had developed, which indicated that lacquer thinner could be used as a solvent for cleaning tar. At trial, the parties agreed that lacquer thinner was an inappropriate chemical to be used for this purpose. The district judge entered directed verdict in favor of Ashland and the plaintiff appealed.

The Seventh Circuit looked to § 388 of the Restatement (Second) of Torts for guidance as to the issue. In doing so, the court focused on subsection (a) as being the dispositive portion of this Restatement section under these facts. The evidence at trial showed that Ashland had no reason to know that Century had recommended an inappropriate use for lacquer thinner. Thus the court concluded that Ashland had no reason to know the plaintiff’s intended use. Plaintiff argued that Ashland was liable none the less because it did not inspect the label used by its customer, Century.

The court declined to decide whether Illinois would require a bulk supplier to inspect its customers’ labels, because they found that Ashland had reasonably relied on Century to communicate warnings to its customers. Century had represented itself as being as knowledgeable as manufacturers concerning the propensities of the chemicals it repackaged. Century’s rep-
resentatives, with whom Ashland had dealt in the past, knew that lacquer thinner had a low flash point and was flammable. It found that the product had been properly labeled for use by Ashland as a lacquer thinner, and that it was not foreseeable that Ashland’s customer would add an inappropriate use to an otherwise adequate label.

The only other case which addresses the sophisticated user and bulk supplier defenses is *Styck v. DuPont*. This was a temporomandibular joints implant case with a fact pattern similar to *In re TMJ Implants Product Liability Litigation* discussed above. This order granted DuPont’s summary judgment motion. DuPont made several arguments, including asserting both the sophisticated user and bulk supplier defenses as dispositive in this case.

DuPont had argued that it owed no duty to the plaintiff, because it sold raw materials in bulk to an FDA regulated manufacturer, which had its own federal statutory and state common law duties to provide a safe product. It further argued that it had no responsibility to investigate and test a product manufactured by others. The defendant cited to both *Manning* and *Venus* discussed above, and asserted that it, as a bulk supplier, could rely on the expertise of middlemen (here Vitek) to warn remote users such as the plaintiff. Plaintiff countered by claiming Illinois law would not allow a defendant like DuPont to rely on the expertise of middleman or its customers because the duty to warn the plaintiff was non-delegable.

Ultimately, the district court found that DuPont simply owed no duty to the plaintiffs. It characterized DuPont’s arguments concerning bulk supplier, sophisticated user and other defenses as ultimately focusing on one concept, that DuPont was simply not responsible for a product it did not create.

The above appears to be the sum total of Illinois cases directly discussing these defenses. The lack of case law on this issue seems strange, particularly as the one Illinois court discussing the bulk supplier defense, and the two federal courts applying what they perceive to be Illinois law, seemingly approved of the applicability of the ideas behind the Restatement (Second) of Torts § 388. This fact provides another reason for defendants in Illinois to look for opportunities to assert what is clearly a sound, common sense view of a real world situation.

V. Conclusion

As demonstrated from the above discussion, the basic premise for the applicability of these defenses is simple. People and companies must be able to rely on others to convey information they have, or should have, to those who need to have it. The principles which provide the foundation for these rules are based not only on good common sense, but also fairness.

In an industrial context, it is patently unfair in a warnings case to hold suppliers of products or raw materials responsible for injuries to the employees of their customers, where the employer is actually knowledgeable regarding those goods or raw materials, and has both the means and legal responsibility to protect their workers. This is particularly true in the bulk supply situation, where the bulk supplier simply has no practical means to communicate with the ultimate end user, let alone even know who that person may be.

The sophisticated user and bulk supplier defenses help to focus the attention on the parties best able to prevent the harm, one of the theoretical goals of the tort liability system. Plaintiffs should recover from those who are genuinely responsible for causing harm, not parties who are supposedly liable based on the application of failure to warn related concepts which appear designed more for consumer goods related products liability litigation than the context of supplying industrial or other sophisticated entities. The existence of both, the Restatement (Second) of Torts § 388, and the Restatement (Third) of Torts: Products Liability § 2(c), demonstrate that there should be some recognition of the practical realities of this unique situation. Fairness and justice require the protections potentially available by utilizing these defenses which should be implemented whenever possible.

Endnotes


2 Restatement (Second) of Torts § 388 (1965).

3 Comment n is by far the longest comment to § 388 and states, in its entirety as follows:

n. Warnings given to third person. Chattels are often supplied for the use of others, although the chattels or the permission to use them are not given directly to those for whose use they are supplied, as when a wholesale dealer sells to a retailer goods which are obviously to be used by the persons purchasing them from him, or when a contractor furnishes the scaffolding or other appliances which his subcontractor and the latter’s servants are to use, or when an automobile is lent for the borrower to use for the conveyance of his family and friends. In all such cases the question may arise as to whether the person supplying the chattel is exercising that reasonable care, which he owes to those who are to use it, by informing the third person through whom the chattel is supplied of its actual character.

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. The question remains whether this method gives a reasonable assurance that the information will
reach those whose safety depends upon their having it. All sorts of chattels may be supplied for the use of others, through all sorts of third persons and under an infinite variety of circumstances. This being true, it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel, or of the precautions which must be exercised in using it in order to make its use safe. There are, however, certain factors which are important in determining this question. There is necessarily some chance that information given to the third person will not be communicated by him to those who are to use the chattel. This chance varies with the circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. Modern life would be intolerable unless one were permitted to rely to a certain extent on others’ doing what they normally do, particularly if it is their duty to do so. If the chattel is one which if ignorantly used contains no great chance of causing anything more than some comparatively trivial harm, it is reasonable to permit the one who supplies the chattel through a third person to rely upon the fact that the third person is an ordinary normal man to whose discredit the supplier knows nothing, as a sufficient assurance that information given to him will be passed on to those who are to use the chattel.

If, however, the third person is known to be careless or inconsiderate or if the purpose for which the chattel is to be used is to his advantage and knowledge of the true character of the chattel is likely to prevent its being used and so to deprive him of this advantage—as when goods so defective as to be unsalable are sold by a wholesaler to a retailer—the supplier of the chattel has reason to expect, or at least suspect, that the information will fail to reach those who are to use the chattel and whose safety depends upon their knowledge of its true character. In such a case, the supplier may well be required to go further than to tell such a third person of the dangerous character of the article, or, if he fails to do so, to take the risk of being subjected to liability if the information is not brought home to those whom the supplier should expect to use the chattel. In many cases the burden of doing so is slight, as when the chattel is to be used in the presence or vicinity of the person supplying it, so that he could easily give a personal warning to those who are to use the chattel. Even though the supplier has no practicable opportunity to give this information directly and in person to those who are to use the chattel or share in its use, it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving the information which is obviously necessary to make the chattel safe for those who use it and those in the vicinity of its use.

Here, as in every case which involves the determination of the precautions which must be taken to satisfy the requirements of reasonable care, the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them (see § 291), and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result (see § 293). Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given to him to those who are to use it unless he knows that he other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them. There are many statutes which require that articles which are highly dangerous if used in ignorance of their character, such as poisons, explosives, and inflammables, shall be put out in such a form as to bear on their face notice of their dangerous character, either by the additional coloring matter, the form or color of the containers, or by labels. Such statutes are customarily construed as making one who supplies such articles not so marked liable, even though he had disclosed their actual character to the person to whom he directly gives them for the use of others, and even though the statute contains no express provisions on the subject.

4 591 F. Supp., at 557.
5 591 F. Supp., at 561.
6 29 USC §§ 651-678
7 319 F.3d 350 (8th Cir. 2003).
9 266 Wis.2d 970, 669 N.W.2d 737 (Wi. App. 2003).
11 Wis. 2d __, 682 N.W.2d 389, 394 (2004).
12 174 F.3d 661 (5th Cir. 1999).
13 174 F.3d, at 676.
14 718 So. 2d 551 (La. App. 4 Cir. 1998)
15 792 So. 2d 73 (La App. 4 Cir. 2001)
16 502 So. 2d 714 (AL 1997).
17 Restatement (Second) of Torts, § 388, comment l (1965).
18 502 So. 2d, at 719.
19 Id. at 722.
20 720 So. 2d 922 (Ala. 1998).
21 Slip Op. 02-2274 (7th Cir. 8/9/2004).
22 Id. at 15.
24 Id., at 718.
25 Slip Op. No. 01-0652 (September 17, 2004).
27 Id., at 496-498.
29 Id., at p. 24.
30 Id., at p. 31.
31 Id., at p. 32, fn 51.
32 Id., at 32. See also Restatement (Third) of Torts: Products Liability § 2(c), comment 15 (Reporters’ Note at 96) (1998).
33 Restatement (Third) of Torts: Products Liability § 2(c) (1998).
34 Restatement (Third) of Torts: Products Liability § 2(c), comment I (1998).
35 Gomez, at p 22.
36 Id., at 40.
37 676 N.E.2d 268 (Minn. 2004).
38 Id., at 279-280.
40 434 Mass., at 629, 731 N.E.2d, at 854.
41 434 Mass., at 629, fn 9, 731 N.E.2d, at 854.
42 434 Mass., at 632, 751 N.E.2d, at 856.
44 872 F. Supp., at 1029.
45 872 F. Supp. at 1030-1034.
47 119 S.W.3d, at 874.
50 755 S.W.2d 593 (Tenn. 1989)
52 717 S.W.2d 588 (Tex. 1986).
53 717 S.W.2d, at 592.
54 737 F.2d 1453 (6th Cir. 1984).
56 127 Ill. App. 3d, at 25, 468 N.E.2d at 409, 82 Ill. Dec. at 147.
57 721 F.2d 192 (7th Cir. 1983).
58 The relevant portion of Restatement (Second) of Torts, § 388(a) states as follows:
“knows or has reason to know that the chattel is or is likely to be
dangerous for the use for which it is supplied”
60 See note 43, above.