

CM REPORT

of Recent Decisions

2016 • Vol. 3

**6-Person Juror Law
Held Unconstitutional**

A Fire Storm Of Bad Faith

**Clausen Miller Announces
New Office In Wisconsin**

80th
Anniversary
**Clausen
Miller**_{PC}

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

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The CM Report of Recent Decisions

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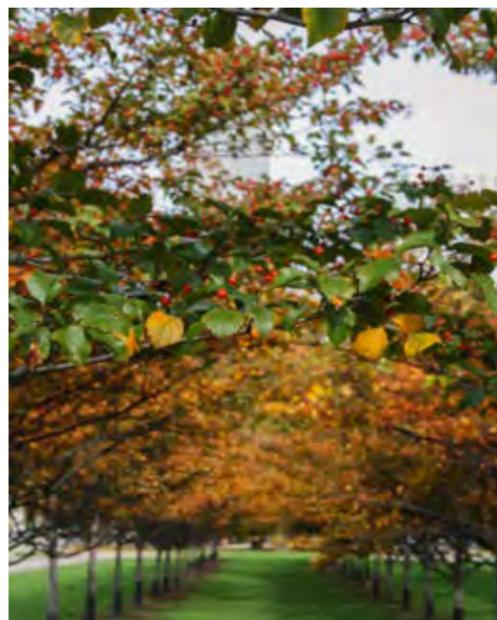
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Illinois Supreme Court Strikes A Blow For The Illinois Defense Bar—6-Person Juror Law Held Unconstitutional

by Melinda S. Kollross and Edward M. Kay

Introduction

In Volume 4 of our 2014 CM Report, CM partners **Scott Ritchie** and **Sava Vojcanin** alerted our friends in the industry to a new piece of legislation reducing the number of jurors in trials from 12 to 6. As Scott and Sava reported, this legislation reducing the number of jurors was opposed by the Defense Bar—and for good reason, as Scott and Sava pointed out in their report:

[S]imple math suggests that finding unanimity among 6 jurors compared to 12 is easier. It is for this reason that the Plaintiffs’ Bar has advocated this legislation. There is clearly a perception in the Plaintiffs’ Bar that with the burden of proof in civil cases they would rather have to persuade only 6 jurors than 12 jurors.

On September 22, 2016, the Illinois Supreme Court rejected the attempt of the plaintiffs’ personal injury bar to obtain smaller juries that would grant larger damage awards. The Illinois Supreme Court ruled 5-0 that the law was unconstitutional because the Illinois Constitution does not allow the legislature to alter the size of civil juries from 12 members.

The Supreme Court’s Analysis

The proponents of this legislation reducing the size of juries down to 6 maintained that this plaintiffs-favored

legislation did not violate any of defendants’ rights because there is no right under the Illinois Constitution to a jury composed of 12 jurors. Defendants, however, maintained there was such a right and bore a heavy burden before the Illinois Supreme Court in making this facial challenge that the statute was unconstitutional, as defendants had to show that there were no set of circumstances existing under which the Act would be valid. The Supreme Court’s decision made clear that defendants met this heavy burden.

The Supreme Court began its analysis by focusing on Article I, Section 13 of the Illinois Constitution, which states: “The right of trial by jury **as heretofore enjoyed** shall remain inviolate.” According to the Court, the construction of the phrase “as heretofore enjoyed” was the linchpin of its analysis on whether the plaintiffs-favored legislation was constitutional. The Supreme Court found that it had long interpreted the phrase “as heretofore enjoyed” to mean “the right of a trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois Constitutions.”

The Court reached back to a decision it issued in 1897, in which it identified certain features of a trial which could not be “dispensed with or disregarded” and among those features was a jury of 12. The Court noted that since that



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time, in other decisions, when juries were discussed, the Supreme Court often referred to the size of a jury as being comprised of 12 members—be it in civil or criminal trials.

Given this backdrop of common law, the Supreme Court next determined whether the drafters of the 1970 Constitution intended to maintain the right of a 12-person jury under the 1970 Constitution. In answering this question, the Supreme Court turned to the debates of the 1970 Constitutional Convention and found that from the debates there was “ample evidence that the drafters of the 1970 Constitutional Convention believed they were specifically preserving the right to a 12-person jury when they adopted the current Constitution.”

Plaintiffs, however, tried to salvage this plaintiff-favored legislation by contending that not all common law features of a jury trial were preserved in the 1970 Illinois Constitution. Plaintiffs argued that in describing the jury feature, the Supreme Court had on occasion used the phrase “12 men.” Plaintiffs argued that since the Supreme Court never held that “12 men” did not also refer to men and women, the fact that the Supreme Court used the “number 12” in its descriptions of a jury did not mean that the “number 12” was an essential element of a jury trial.

The Supreme Court gave short shrift to this attempt to salvage this legislation, holding that plaintiffs’ argument provided no support that the legislature could change the size of a jury without infringing on the right of trial by jury.



Learning Point: This unanimous decision by the Illinois Supreme Court preserving a defendant’s right to 12 jurors shows that the plaintiffs’ personal injury bar doesn’t always get everything it wants in this State. The unanimous nature of this decision and the Supreme Court’s strong language that a jury of 12 people was an essential element of the right of a trial by jury has persuaded the plaintiffs’ personal injury bar to “throw in the towel” on any further attempts to pass future legislation establishing 6-person juries. The plaintiffs’ personal injury bar has recognized that any such attempts would be a waste of time given this Supreme Court decision.

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education (“CLE”) and/or Continuing Education (“CE”) credit. You will find available courses listed below. Please view the complete list of individual course descriptions at www.clausen.com/education/ for information regarding the state specific CE credit hours as well as course and instructor details.

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Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

CLAUSEN MILLER WELCOMES FORMER SIDLEY AUSTIN PARTNER LISA HAUSTEN TO ITS APPELLATE AND BUSINESS LITIGATION PRACTICE GROUPS

Clausen Miller is proud to announce that experienced appellate practitioner and business litigator **Lisa A. Hausten** has joined the firm's Chicago office as a Partner. A graduate of the University of Chicago Law School, Lisa practiced law at Sidley & Austin for over twenty-six years before starting her own firm, where she continued to litigate business matters and appeals. Lisa is an experienced litigation attorney, having tried cases in state and federal courts as well as before administrative tribunals. She has handled all types of matters from injunctions to jury trials.

In addition to her trial practice, Lisa has extensive experience before the Illinois Appellate and Supreme Courts. Her

success as an appellate lawyer started early in her career when she argued and won a unanimous decision from the Illinois Supreme Court four years out of law school in the landmark case of *Searle Pharmaceuticals, Inc. v. Dept. of Revenue*, 117 Ill.2d 454 (1987). She has continued a successful appellate practice for more than two decades.

The breadth of Lisa's experience extends beyond the courtroom. She has served as an arbitrator in civil matters, a lecturer for the Illinois State Bar Association and the Chicago Bar Association, and the keynote speaker at the AIG's Americas Women's Forum. Lisa also teaches pretrial advocacy at the University of Chicago Law School.

Lisa has resolved and litigated a wide range of commercial disputes including matters involving breach of fiduciary duty, challenges to state and federal statutes, contract, covenants not-to-compete, defamation, dissolution of business partnerships, First Amendment, fraud, fraudulent transfers, indemnification, landlord and tenant, malicious prosecution, misappropriation of trade secrets, mortgage foreclosure, real estate, tax, title insurance actions, unjust enrichment, and whistle blower actions.

Lisa has represented corporations, manufacturers, educational institutions, professional athletic organizations, large utility companies, insurance companies, title insurance companies, newspapers, television networks, not-for-profit organizations and individuals.

Melinda S. Kollross, Co-Chair of Clausen Miller's Appellate Practice Group, is looking forward to introducing Lisa to the firm's clients. Melinda stated "not only does Lisa have a stellar legal resume encompassing the highest quality trial and appellate work, but she also has such a friendly personality and engaging sense of humor that one can almost forget what a powerhouse litigator she is. And that is truly a winning combination for Clausen Miller clients in and out of the courtroom."



JOSEPH FERRINI ARGUES BEFORE THE SUPREME COURT OF THE STATE OF ALABAMA

Joseph Ferrini recently presented oral argument on behalf of an appellant before the Supreme Court of the State of Alabama. This is a rare achievement as the Alabama Supreme Court grants oral argument in less than 1% of its cases. The argument related to whether the Alabama trial court correctly compelled the state court action to be arbitrated in Dusseldorf, Germany under German substantive law. The appeal involved issues of scope of an arbitration provision, forum selection, choice of law, public policy, and procedural and substantive arbitrability. In advance of oral argument, the Supreme Court issued eight questions on these topics that it wanted the attorneys to address.

The oral argument was held in the auditorium of Faulkner State Community College in Bay Minette,

Alabama and took place in front of state court judges, members of the Baldwin County Bar Association and hundreds of students from area high schools.

Joe serves as appellate counsel at trials around the country, providing support to trial attorneys as needed and helping with error preservation efforts. Joe has litigated appeals in federal and state courts, including Alabama, Illinois, Indiana, New York, New Jersey and the Seventh, Eighth and Tenth Circuits. Joe has briefed appeals concerning Coverage, Property, Business/Commercial Litigation, Arbitration, Personal Injury Defense and Product Liability.

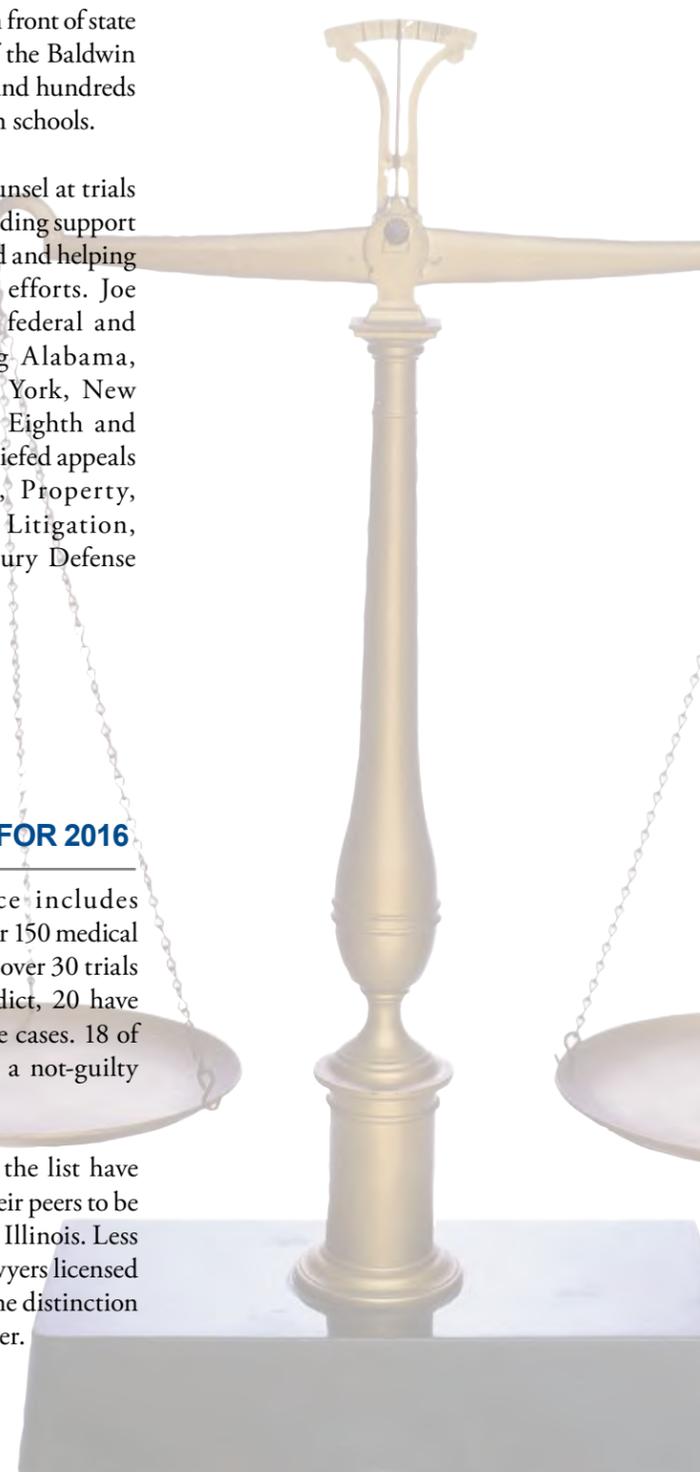
RYERSON NAMED LEADING LAWYER IN ILLINOIS FOR 2016

The Law Bulletin Publishing Company, through its subsidiary Leading Lawyers of Chicago, has named Clausen Miller's **Thomas Ryerson** as a 2016 Leading Lawyer for Medical Malpractice and PI Defense.

Tom is best known locally for defending physicians in medical malpractice trials. He is best known nationally for representing major property and casualty insurers and medical/professional liability insurers in large case litigation, including products liability, toxic tort, municipal liability and insurance coverage/bad faith litigation.

Tom's trial experience includes handling to resolution over 150 medical malpractice cases. Of his over 30 trials concluded by a jury verdict, 20 have been medical malpractice cases. 18 of the 20 cases resulted in a not-guilty verdict for Tom's client.

The lawyers selected for the list have been recommended by their peers to be among the top lawyers in Illinois. Less than five percent of all lawyers licensed in Illinois have received the distinction of being a Leading Lawyer.





**CLAUSEN MILLER ANNOUNCES
NEW OFFICE IN WISCONSIN**

Clausen Miller is proud to announce the opening of an office in **Appleton, Wisconsin**. Located in the Fox Valley region, the new office enhances the Firm’s ability to offer its full array of legal services throughout Wisconsin including all state and federal courts.

The office, located at 4650 W. Spencer Street, is managed by Clausen Miller’s Wisconsin licensed partner **Patrick Breen**. Pat brings a unique perspective to understanding and addressing his clients’ needs and concerns. Prior to joining Clausen Miller P.C., Pat spent over fifteen years in senior level positions in corporate legal departments. In those roles, he managed domestic and international litigation including product liability, employment, commercial and antitrust matters, advised on employment matters and negotiated a wide variety of commercial agreements including purchase and supply, dealer distribution and asset purchase agreements. Pat also provided counsel on regulatory

matters related to product safety and product recalls and oversaw numerous government investigations.

Pat is an experienced trial lawyer, having tried cases in state and federal courts and before the Illinois Court of Claims and the Illinois Civil Service Commission. His litigation practice deals with product liability, commercial, employment and construction litigation.

Headquartered in Chicago, the Firm also maintains U.S. offices in New York, New Jersey, Indiana and Southern California. Clausen Miller LLP is located in London, England, in the heart of the global insurance market. Clausen Miller P.C. is also the founding member of Clausen Miller International, a cooperative of leading independent law firms with affiliates in Paris, Rome, Brussels, Dusseldorf and Berlin that practice in all aspects of insurance and reinsurance law.

ESPOSITO WRITES ON PREMISES LIABILITY

Paul V. Esposito has written an article on premises liability published in the July/August 2016 **issue of the CBA Records**, the magazine of the 20,000-member Chicago Bar Association. The article explains how to counter plaintiffs’ attempts to limit premise liability defenses.

Clausen Miller PC is proud to announce the opening of an additional office location



**Appleton, Wisconsin
4650 West Spencer Street**

Expanding Clausen Miller’s full line of legal services through our new office in Wisconsin

CM WINS DEFENSE VERDICT IN COOK COUNTY MEDICAL MALPRACTICE CASE

A Cook County jury rejected Plaintiff's wrongful death claims against an internal medicine physician and his practice group, both represented by CM partner **Robert L. Reifenberg** and senior associate **Kathleen M. Klein**. The doctor and his group were the sole defendants.

Plaintiff, a registered nurse herself, brought suit on behalf of her husband, who was admitted as a hospital inpatient for unrelated respiratory complaints. The patient had been followed for several years for an abdominal aortic aneurysm, which by the time of the admission had grown to over six centimeters. On the third day of the hospital admission, the patient began to complain of abdominal pain. The aneurysm ruptured, which was detected via CT scan that evening. However, the patient died while a vascular surgeon was en route to the hospital. Plaintiff asked for \$3 million in damages for the patient's death, including grief and loss of society on behalf of the widow and their eight children.

Plaintiff claimed that the diagnosis was delayed in the face of classic symptoms of rupture, including back pain. Once a CT was ordered, it was documented as

a "routine" study rather than "STAT," or ASAP. Plaintiff contended that the defendant physician ordered the CT scan routine, which delayed diagnosis and treatment of the rupture.

The defense successfully argued that the physician ordered the CT on a STAT basis, and notwithstanding the documentation of the CT as "routine" in the chart, the CT was actually carried out as a STAT study. The defense also established that an open aneurysm repair could not have been completed in the time that Plaintiff proposed, and that due to many comorbidities, the decedent had virtually no chance of surviving an open surgery, regardless of when it was performed. Counsel obtained key testimony throughout discovery from the treating physicians, and was able to elicit testimony from the treating witnesses, over and above retained expert testimony, to establish these defenses.

A novel issue in the case was Plaintiff's pursuit of a "lost chance of survival" legal theory, which does not have model Illinois Pattern jury instructions. However, the jury did not reach the issue of damages, as they returned a unanimous verdict in favor of the defendant physician and his group.

NEEL AND BRYER WIN SEVENTH CIRCUIT APPEAL INVOLVING ADA DISCRIMINATION CLAIMS

Clausen Miller partners **Paige Neel** and **Dan Bryer** won affirmance from the Seventh Circuit Court of Appeals of summary judgment entered in favor of a Chicagoland school district. The plaintiff had sued the district claiming that she was discriminated and retaliated against and that the district failed to accommodate her purported disability. Paige and Dan filed a motion for summary judgment relative to these claims, which the District Court granted, holding that the plaintiff was not a qualified individual with a disability and that she abandoned her job. The Seventh Circuit unanimously

affirmed this decision, finding that the plaintiff could not perform the essential functions of her position and that she abandoned her job by cutting off all contact with the district while she was out on medical leave. This appeal was decided on the briefs alone, without oral argument, thereby affording the clients a quicker and less costly resolution of the matter.

For more information on this or any other labor and employment matters, please contact **Paige Neel** at 312-606-7852 or **Dan Bryer** at 312-606-7475.

HOEY SECURES DISMISSAL OF INSURANCE PRODUCER

CM partner **Jim Hoey** recently obtained the dismissal of an insurance producer in a lawsuit filed in Danville, Illinois.

The Insured caused a car accident which resulted in serious injuries to another driver. The injured driver sued the Insured. The Insured's exposure was far in excess of the Insured's liability policy. The Insured sued his producer alleging that the producer should have known of his significant assets and offered him a liability policy with adequate limits.

Hoey filed multiple Motions to Dismiss based on the principle that a producer's duty is to exercise reasonable care to

procure the coverage that is requested. Higher limits of insurance were not requested by the Insured.

The court granted our Motions to Dismiss. No appeal was taken. The learning point is to establish the limited duties of insurance producers and aggressively pursue Motions to Dismiss when appropriate. For more information concerning the successful defense of insurance professionals, please contact Jim at 312-606-7493 or jhoey@clausen.com

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of an additional office location



Michigan City, Indiana 200 Commerce Square

Expanding Clausen Miller's full line of legal services
through our new office in Indiana

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CM/SPECIAL ALERT Focus on Indiana

Indiana Supreme Court Clarifies Duty Owed By Social Hosts And Defines "Foreseeability"

by *Kimbley A. Kearney*

In *Rogers vs. Martin*, No. 02505-1603-CT-114, the Indiana Supreme Court sought to clarify the scope of the duty owed by a social host to a guest and in so doing "charted a definitive path" by defining foreseeability in the context of a duty analysis.

Facts

In *Rogers vs. Martin*, 48 N.E.2d 318 (Ind. App. 2016), the Indiana Court of Appeals reversed summary judgment in favor of a social host sued for the wrongful death of an adult guest. The homeowner, Martin's, live-in boyfriend bought a keg of beer using her debit card associated with a bank account into which they both made deposits. The beer was served at a birthday party attended by about 50 people. Martin went to bed at 2:00 a.m., with about 10 guests remaining at the party. Her boyfriend woke her about an hour later to tell her he had punched a guest, Chambers, in the nose. When Martin went to check on Chambers, she found him lying unconscious, bleeding from the nose. She confirmed that Chambers was still alive by checking his pulse and breathing. She then went back to bed as her boyfriend and Chamber's party

companion carried him to the door. Later that night, when Martin learned that Chambers and his friend were still on the premises, she instructed her boyfriend to get them to leave. Shortly thereafter, the police found Chambers dead in Martin's yard.

Chamber's estate sued Martin for violation of the Indiana Dram Shop Act and failing to render aid to the decedent. The Dram Shop claim was founded on the boyfriend's alleged intoxication when he struck Chambers. Under the Dram Shop Act, a person who furnishes an alcoholic beverage to an adult is not liable for damages caused by the impairment or intoxication of that person unless (1) the person furnishing the alcohol had actual knowledge that the person being served was "visibly intoxicated;" and (2) intoxication was the proximate cause of the death, injury or damage complained of.

Analysis

The Court of Appeals reversed summary judgment in favor of the homeowner on the Dram Shop claim because there was a "possibility" that he drank from a pitcher of beer Martin had placed



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on a poker table. The Supreme Court held summary judgment on the claim was proper because Martin and her boyfriend “jointly possessed the same alcohol” and, therefore, she did not “furnish” alcohol to him within the meaning of the Dram Shop Act.

On the second cause of action, the Court of Appeals concluded that “the social host/guest relationship is a special relationship,” like that between a passenger and a common carrier or an innkeeper and guest and a social host has a duty to render assistance to an injured social guest in her home regardless of the cause of the injury.

The Supreme Court affirmed the decision but on different grounds. After examining the Indiana cases that have interpreted the scope of the duty owed by a premises owner for the past twenty-five years, the Court observed inconsistencies in how the courts evaluated the scope

of the duty owed. To help define the limits of the duty, it held that, when a premises liability claim is premised on activities on the land (rather than a condition of the land), foreseeability is the “critical inquiry in determining whether the landowner’s duty exists” under the circumstances. It held: that, with respect to duty, foreseeability involves an evaluation of the “general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected – without addressing the specific facts of the occurrence.” In other words, “the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.”

Applying this test, the Supreme Court concluded that Martin could not be held liable for her boyfriend’s assault on Chambers because that was a criminal act which she had no reason to foresee. She did, however, owe

Chambers a duty to protect him from exacerbation of an injury occurring in her home. The Court left it to the jury to decide whether Martin was negligent for failing to call the police or take other affirmative action and whether negligence was the proximate cause of Chamber’s death.

Learning Point: It remains to be seen whether the Indiana Supreme Court’s new test for determining whether a premises owner owes a duty to an invitee will provide any real clarification to the lower courts. The Supreme Court was concerned about the “lack of well-defined limits” on the scope of the duty but it does not seem likely that evaluating duty in terms of whether “reasonable persons would recognize it and agree that it exists” is likely to help gauge those limits. Chances are good that this new duty test will be interpreted broadly by the courts and will result in an expansion of the liability of social hosts. ♦

A Fire Storm Of Bad Faith

by Lisa A. Hausten

In today’s competitive market place, developing and protecting confidential information is critical to a company’s survival and growth. Confidentiality agreements and covenants not-to-complete are of some assistance at the start of a relationship, but an employee that subsequently steals confidential information to start a new business or sell to a competitor must be prosecuted swiftly. In addition to a variety of common law remedies, an employer may pursue an action under the Illinois Trade Secrets Act (the “Act”). But what happens if a former employee legitimately goes into competition with his prior employer and the employer files an anticompetitive action in bad faith to bankrupt the fledgling company before it gets off the ground? Section 5 of the Illinois Act provides that the prevailing party may recover attorney’s fees if the action was brought in bad faith. Bad faith, however, is not defined in the Act. The Illinois Appellate Court, First District was called upon to define the term for purposes of the Act in the recent case of *Conxall Corp. v. Iconn Systems et al.*, 2016 IL App (1st) 140158.

Facts

Plaintiff Conxall manufactures cable and connector assemblies used in electronic devices. Plaintiff agreed to sell third-party defendant Mine Safety Appliances (“MSA”) cable assemblies and panel mounts for incorporation into a firefighter’s mask manufactured by MSA. Plaintiff and MSA collaborated on a design

and plaintiff began shipping parts to MSA. Eventually MSA became dissatisfied with the quality of plaintiff’s products and MSA looked to defendant, iCONN Systems, LLC (“iCONN”), to start manufacturing the products. Defendant had been started by some of plaintiff’s former executive-level employees and several of plaintiff’s manufacturing employees subsequently went to work for defendant. MSA provided defendant with the quality control specifications, design drawings and plaintiff’s 3D models. The specifications and drawings bore MSA legends, but there was no label on the 3D models.

When plaintiff discovered defendant was supplying MSA with the same parts, plaintiff sued defendant, and certain employees who had previously worked for plaintiff, for allegedly misappropriating trade secrets with respect to the overall design and manufacturing processes of the parts. The case went to trial and a jury returned a verdict in favor of defendants. Plaintiff moved for judgment notwithstanding the verdict and defendants filed a motion for attorney’s fees alleging plaintiff’s action had been brought in bad faith. The court denied all motions and specifically found that there was sufficient circumstantial evidence to support a finding that plaintiff’s claims had not been brought in bad faith.

Of particular interest on appeal was whether the court applied the correct legal standard in determining whether



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plaintiff's claims had been brought in bad faith under Section 5 of the Illinois Trade Secrets Act—a question of first impression.

Analysis

Section 5 of the Illinois Trade Secrets Act (the “Act”) provides in relevant part that if “a claim of misappropriation is made in bad faith * * * the court may award reasonable attorney’s fees to the prevailing party.” 765 ILCS 1065/5 (2008). Bad faith is not defined under the Act. In a divided opinion, the Appellate Court proposed two different standards for determining bad faith under the statute. As discussed below, the majority (Justices Rochford and Hoffman) hold that the appropriate standard is one “guided but not constrained” by the case law construing bad faith in the context of Illinois Supreme Court Rule 137, which penalizes litigants who bring false, vexatious or harassing lawsuits, not the *SASCO* test employed in federal and California state courts.

Defendants argued that plaintiff acted in bad faith under the two-prong test adopted by the California Court of Appeals in *SASCO v. Rosendin Electric, Inc.*, 207 Cal. App. 4th 837 (Ct. App. 2012), which requires a showing that: (1) plaintiff’s claim was objectively specious, and (2) plaintiff’s claim was maintained with subjective bad faith. Justice Delcort agreed finding that the comments to the Uniform Trade Secrets Act (upon which the Illinois Act is based) suggest that an award of attorney’s fees is appropriate “as a deterrent to specious claims of

misappropriation.” Uniform Trade Secrets Act § 4, Comment (2015). Justice Delcort reasoned that the Illinois Act requires a finding of subjective bad faith “since a person or entity cannot be deterred from engaging in conduct that they do not know they are engaging in.” ¶ 36. Justice Delcort rejected the “frivolous standard” used to determine bad faith under Rule 137 as being too demanding since it would require the falsity of the claim to be readily ascertainable on its face. A specious claim, by contrast, may appear superficially meritorious, but subsequent evidence can be considered to determine its falsity. The latter standard arguably encompasses a broader range of claims as it permits consideration of facts beyond the pleading stage. After adopting the two-prong test for bad faith, Justice Delcort went on to analyze at length the evidence in the record, concluding that defendant had made a strong case for attorney’s fees.

While Justice Rochford agreed that the denial of attorney’s fees should be reversed and remanded for further proceedings, he vehemently disagreed with the test articulated by Justice Delcort and his review of the evidence. In his concurring opinion, Justice Rochford emphasized that Justice Delcort’s review of the evidence was dicta and the evidence was not analyzed under the bad faith standard adopted by the majority. In construing bad faith, Justice Rochford relied on conventional principles of statutory interpretation that require an undefined term in a statute be given its

ordinary and commonly understood meaning. Justice Rochford further noted that only bad faith is referenced in Section 5; there is no mention of “objective speciousness” anywhere in the Act.

Justice Rochford went on to point out that in adopting the two-prong test for bad faith, the *SASCO* court relied on the comment to the fee provision in the Uniform Trade Secrets Act which was not adopted by the Illinois legislature. Moreover, the majority of states that have interpreted bad faith in their own state trade secrets acts have rejected the two-prong test adopted by the federal and California courts. As a result, Justice Rochford embraced the test espoused by the Illinois Supreme Court in *Krautsack v. Anderson*, 223 Ill.2d 541 (2006). In *Krautsack*, the Court was called upon to define bad faith for purposes of awarding attorney’s fees under Section 10a(c) of the Consumer Fraud and Deceptive Business Practices Act. The Court utilized the “frivolous standard” used to determine bad faith under Illinois Supreme Court Rule 137.

The purpose of Rule 137 is to penalize claimants who bring false, vexatious or harassing actions. Accordingly, Rule 137 requires pleadings and documents filed with the court to be well grounded in fact and be warranted by existing law or a good-faith argument for the extension or modification of the same and not be interposed for any improper purpose such as to harass, delay or needlessly increase the cost of litigation. The

Krautsack Court evaluated bad faith in light of these requirements and stated that Rule 137 should be considered a useful guide, not a limitation on the imposition of fees. Accordingly, Justice Rochford held that in “determining whether bad faith exists in a given case [under the Act], the trial court may consider and be guided by the body of case law construing Rule 137, but is not constrained by Rule 137.” ¶ 99. Other improper conduct by a party during the course of the litigation that runs afoul of the purposes of Rule 137 may also be considered. Justice Rochford observed that the trial court is in the best position to evaluate the demeanor of the witnesses and evidence and he discouraged the trial court from being guided by Justice Delcort’s discussion of the evidence which was analyzed under the *SASCO* test. Justice Rochford supported remand because in his opinion it was unclear what standard the trial court used to determine bad faith.

Interestingly, although Justice Hoffman agreed with Justice Rochford that bad faith should be determined in accordance with the cases construing Rule 137, he disagreed with remand. In Justice Hoffman’s opinion, the record below demonstrated that the trial court had conducted a hearing on the motion for attorney’s fees under the proper standard. Moreover, from a factual standpoint, Justice Hoffman could not conclude that there was sufficient evidence to establish plaintiff’s claims were frivolous or brought in bad faith. In the absence of an abuse of discretion, he concluded the decision of the trial court should stand. In light of the remand, however, Justice Hoffman admonished the trial court to make its decision without regard to the appellate court’s view of the evidence.

Learning Points: As the majority of other state courts have adopted their own pre-existing tests for determining bad faith, it is safe to assume that in Illinois bad faith will be governed in accordance with Illinois Supreme Court Rule 137. Recognizing that to be the case, it is imperative that an employer pursuing a claim for misappropriation of trade secrets present a complaint pled with sufficient particularity. Practically speaking, that means the complaint should identify the trade secrets at issue, the contours of the confidential relationship, and the specific circumstances under which the secrets were misappropriated. By articulating these facts, even if the ultimate suit is not successful, the well-pled complaint should blunt any claim for attorney’s fees against plaintiff employers. ♦



Products Exclusions Bar Coverage For “Pill Mill” Claims Against Pharmaceutical Distributors

by Melinda S. Kollross



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Introduction

The Eleventh Circuit holds that two insurers have no duty to defend pharmaceutical distributor insureds in a West Virginia lawsuit alleging that the companies contributed to a prescription drug abuse epidemic, finding that the policies’ products exclusions clearly exclude coverage for claims tied to the companies’ pharmaceuticals. *Travelers Property Casualty Co. of America et al. v. Anda Inc. et al.*, No. 15-11510-B (11th Cir. Aug. 26, 2016)(unpublished).

Facts

Anda, Inc. and its parent company, Watson Pharmaceuticals, Inc. (collectively “Anda”) distribute pharmaceuticals. The State of West Virginia sued Anda and other pharmaceutical companies in West Virginia state court alleging that the companies have contributed to prevalent opioid drug abuse among the State’s citizens by supplying drugs to “Pill Mills” (pharmacies that dole out prescriptions to patients without any legitimate need), costing the State hundreds of millions of dollars for related treatment, prevention and law enforcement efforts.

Anda purchased a number of CGL policies from various insurers between 2001 and 2013, including Travelers and St. Paul. The Travelers and St. Paul policies both contain exclusions for product liability claims. The insurers filed a declaratory judgment action seeking a determination that they have no duty to defend or indemnify Anda in the underlying West Virginia action. On cross-motions for summary judgment, the district court concluded that because the State did not assert claims “for bodily injury” or “because of bodily injury” but sought economic loss damages only, the subject policies did not afford coverage. It accordingly granted summary judgment to the insurers. Anda filed a motion for reconsideration which was denied, and this appeal followed.

Analysis

The Eleventh Circuit did not reach the issue of whether West Virginia alleged only economic loss damages, rather than damages due to bodily injury. Instead, the Court turned to the products exclusions in the Travelers and St. Paul policies, which respectively preclude coverage for bodily injury

“arising out of” or damage that “results from” Anda’s products.

The policies are governed by California law, which interprets “arising out of” and “results from” similarly. Only a minimal causal connection or link between the products sold or distributed by an insured and the alleged injury to the plaintiff is required. The injuries alleged by the State in the West Virginia action “have, at the very minimum, a ‘connection with’ Anda’s products,” wrote U.S. District Judge Richard W. Story, who was sitting on the Eleventh Circuit by designation. At bottom, the State claims that Anda and the other pharmaceutical distributors have so flooded the market with their products that West Virginia suffers from an opioid epidemic. As a result of that epidemic, the State has suffered monetary losses that it now seeks to recover. The causal connection between Anda’s products and the injuries alleged by the State is sufficient to meet the low bar set by California law. The Court accordingly concluded that all of the underlying claims, if covered at all, fall within the subject Products Exclusions, which render any coverage inapplicable.

The Court drew parallels between this case and *Taurus Holdings Inc. v. U.S. Fidelity and Guaranty Co.*, 367 F.3d 1252 (11th Cir. 2004), in which the Court ruled that a handgun manufacturer was not entitled to insurance coverage for municipalities’

claims that it had contributed to gun violence through negligent marketing and distribution, due to the presence of a product liability exclusion in its policy. As in *Taurus*, the Court interpreted the exclusionary language here broadly and imposed a low bar for causation. That bar was clearly met as West Virginia’s claims of damages resulting from an opioid epidemic cannot be divorced from Anda’s products.

Learning Point: Products liability exclusions barring coverage for bodily injury “arising out of” or damage that “results from” the insured’s products will likely apply to preclude coverage in cases where the damages sought by the plaintiff(s) are even minimally connected to the insured’s products. ♦



TCPA Exclusion Found Also To Apply To Conversion And Fraud Claims

by Don R. Sampen

Introduction

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, prohibits the transmitting of unsolicited advertisements by facsimile, and imposes statutory damages of \$500 per violation. Where a CGL policy contains an exclusion for TCPA liability, the question sometimes arises whether that exclusion also will apply to a plaintiff's other causes of action based on the same conduct. In *Mortesa "marty" Fayezi & American Awning and Window Co. v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, the First District Appellate Court held that it would. The case also addresses a procedural issue under Illinois law concerning the use of affidavits under a statute that permits their use for limited purposes in support of a motion to dismiss.

Facts

The insurer in this case, ICC, provided commercial general liability coverage for Pat's Pizzeria, Inc. In 2006, Pat's transmitted unsolicited advertisements by facsimile to some 3636 recipients. One of the recipients subsequently brought a class action under the TCPA seeking statutory damages. A second count of the complaint alleged common law conversion. A third count alleged violation of the Illinois Consumer Fraud Act, 815 ILCS 505/2. Pat's tendered defense of the case to ICC, which denied coverage. It did so based on an exclusion under its policy

for any liability "arising out of" the TCPA. Subsequently, Pat's reached a settlement with the plaintiffs for \$500 per fax, or \$1,818,000, payable solely out of the proceeds of Pat's liability insurance coverage. The court in the underlying action approved the settlement.

Plaintiffs then brought the instant action against ICC in an attempt to recover the settlement amount. In response to ICC's motion to dismiss based on the TCPA exclusion, the plaintiffs filed an amended complaint claiming, "on information and belief," that the particular policy on which ICC relied for the 2005-06 policy year, was a renewal of an earlier policy that did not contain that exclusion.

The amended complaint further alleged that ICC did not give adequate notice to Pat's of the TCPA exclusion when added in 2005. And the plaintiffs claimed that the allegations in the underlying action "raised the potential" for TCPA violations in earlier years where no exclusion applied, which ICC would be obligated to defend.

ICC filed a motion to dismiss under 735 ILCS 5/2-619(a)(9), attaching an affidavit by an underwriter stating that the policy for 2005-06 was the first policy issued to Pat's and was not a renewal of any earlier policy. Based on that affidavit, which went unrefuted, and the TCPA exclusion, the trial court dismissed, and the plaintiffs took this appeal.

Analysis

The 2-619 Affidavit

In an opinion by Justice Joy V. Cunningham, the First District affirmed. The court first addressed the plaintiffs' procedural argument that the affidavit supporting ICC's section 2-619 motion did not raise "affirmative matter" as allowed by that section, but rather improperly sought to address the essential issue of liability.

The Appellate Court disagreed. It observed that, under *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341 (2010), a defense that "completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact" may be the subject of an affidavit in support of a section 2-619 motion. The affidavit here, moreover, qualified.

In addition, the Appellate Court agreed with ICC that the plaintiffs' failure to oppose the affidavit, or to file an affidavit under Supreme Court Rule 191(b) seeking the opportunity to take discovery on the issue of prior coverage, barred them from taking discovery on that subject. The court rejected plaintiffs' argument that compliance with Rule 191(b) is not always necessary where the movant is relying on the absence of evidence supporting its opponent's claim, as was ICC here. Case law so stating, said the Court, does so in a summary judgment context, not on a motion to dismiss.

Dismissal here based on the affidavit therefore was proper.

Counts II and III

Plaintiffs further contended that, even if the TCPA exclusion were held to apply to the TCPA count of their underlying complaint, it should not be held to apply to the conversion or Consumer Fraud Act counts.

The Appellate Court rejected this argument based in part on *G.M. Sign, Inc. v. State Farm Fire & Casualty Co.*, 2014 IL App (2d) 130593, where a similar argument was made. There, as here, the only facts pleaded in the underlying complaint in support of a different cause of action, were facts that also established a violation of the TCPA. Moreover, said the Court, the allegations of the underlying complaint were not vague or uncertain as to what was being claimed. Thus, all three counts were clearly predicated on the same facts, namely, Pat's transmission of unsolicited fax advertisements in March of 2006. All three counts therefore asserted liability arising out of the TCPA, implicating the TCPA exclusion.

The First District Appellate Court therefore affirmed the dismissal in favor of ICC.

Learning Points:

- (a) An affidavit in support of a section 2-619 motion is proper if it negates the cause of action or refutes crucial conclusions of law or conclusions of material fact.
- (b) Case law suggesting that compliance with Rule 191(b) concerning unavailable facts is unnecessary in anticipation of summary judgment, does not apply to a section 2-619 motion to dismiss.
- (c) A policy exclusion for liability arising out of violations of the TCPA also excludes coverage for common law or other statutory claims, if the factual basis for such claims would constitute a violation of the TCPA. ♦



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CONTRIBUTION AND INDEMNITY

LANDLORD NOT ENTITLED TO INDEMNITY FOR OWN CONDUCT

BC Osaka, Inc. v. Kainan Invest. Groups, Inc., 2016 Ind. App. LEXIS 204 (Ind. App.)

After restaurant patron sued landlord and tenant for negligence, landlord sought indemnity for landlord’s negligence from tenant under lease clause. **Held:** The indemnity provision did not support the indemnity claim. An indemnification clause must clearly and unequivocally cover the field of negligence and must cover an indemnitee for its own negligence. The clause required the tenant to indemnify the landlord for the tenant’s negligence but was silent as to the landlord’s negligence.

DAMAGES

CRIMINAL CONVICTION UNNECESSARY FOR RECOVERY UNDER CRIME VICTIM RELIEF ACT

Staggs v. Buxbaum, 2016 Ind. App. LEXIS 207 (Ind. App.)

Treble damages were awarded at trial for fraudulent misrepresentations made on a home sales disclosure report. **Held:** Under the Crime Victim Relief Act, an actual criminal conviction is unnecessary. Claimant merely needs to prove each element of an underlying crime by a preponderance of evidence. A trial court has discretion to decide whether conduct was so heinous as to permit an award of exemplary damages.

INSURANCE CLAIMS PRACTICES

INSURER’S FAILURE TO DEAL WITH IRRIGATION CLAIM COSTLY

McLaughlin v. Am. States Ins. Co., 92 Mass. App. Ct. 22 (Mass. App.)

Homeowners sued subcontractor’s insurer following installation of defective irrigation system. **Held:** Insurer failed to make a fair and reasonable offer once subcontractor’s liability became reasonably clear. Insurer had waited over four years after obtaining an independent assessment of liability before making an offer. The timing of an offer must be based on facts known or available at a given moment, not on when a fact-finder rules against the insured. An insured’s liability can be reasonably clear even though other potential tortfeasors are involved. Homeowners were entitled to attorney’s fees as damages arising out of their prosecution of the claim, interest for the lost use of money, and attorney’s fees on appeal.

INSURANCE LITIGATION

COURT OF APPEALS AGREES WITH APPELLATE DIVISION’S VIEW OF FACTS

Dryden Mutual Ins. Co. v. Goessl, 2016 N.Y. Slip Op. 04324 (N.Y. 2016)

Plaintiff insurer sought a declaratory judgment that it did not have a duty to defend and indemnify its insured in an underlying tort action and that another insurer had the duty to indemnify and

defend. The Supreme Court found in favor of the plaintiff but the Appellate Division reversed. **Held:** The Court of Appeals affirmed. The lower court made distinct factual findings after applying the principles of contract interpretation to the insurance policies. However, the Appellate Division’s new factual findings more nearly comport with the weight of the evidence. As such, plaintiff has a duty to defend and indemnify the defendant in the underlying tort action and the other insurance provider does not.

LIABILITY INSURANCE COVERAGE

NO DUTY TO DEFEND IN CONSTRUCTION DEFECT CASE

Evanston Ins. Co. v. DiMucci Development Corp., 2016 U.S. Dist. LEXIS 123678 (M.D. Fla.)

A condominium association sued its developer alleging various structural building defects. The developer’s insurer, Evanston, subsequently filed a declaratory judgment action contending it had no duty to indemnify the developer. **Held:** The district court granted summary judgment, ruling that Evanston does not have a duty to defend because the alleged property damage fell within the “Your Work” Exclusion as the developer’s work encompassed the overall construction of the condominiums, excluding the roof.

COVERAGE LIMIT PROVIDED IN ANSWERS TO INTERROGATORIES PRECLUDES LATER ATTEMPT TO ASSERT DIFFERENT COVERAGE LIMIT

Harwell v. Fireman’s Fund Ins. Co., 2016 IL App (1st) 152036

Plaintiff subcontractor was injured at a construction site. The general contractor’s insurer defended the general contractor in the initial suit and answered interrogatories stating that the applicable coverage limit was \$1 million. The insurer later advised the general contractor that a policy endorsement rendered the applicable limit \$50,000, but never amended the interrogatory answers. At trial, the plaintiff was awarded \$255,186. The insurer contended that the policy limits had been expended in providing the general contractor’s defense. **Held:** The plaintiff relied on the representations made by the attorneys retained by the insurer, to his detriment; hence, the doctrine of estoppel attaches and prevents the insurer from avoiding the stated limit.

SUBCONTRACTOR’S DEFECTIVE WORK IS NOT AN ACCIDENTAL EVENT

Westfield Ins. Co. v. W. Van Buren, LLC, 2016 IL App (1st) 140862

Complaint against defendant insured, a developer, alleged intentional bad acts/non-fortuitous events such as damage to a condo building due to shoddy workmanship of which the developer was allegedly aware. The policy required an accidental event to trigger coverage, yet nothing accidental was alleged in the complaint. **Held:**

The insurer had no duty to defend the developer when the complaint only alleged intentional acts. Under Illinois law, defective work of a subcontractor is not an accident or occurrence. The allegations in the complaint did not constitute an accident, and therefore did not potentially fall within the policy’s coverage.

INSURED TO BEAR PRO RATA SHARE FOR UNINSURED PERIODS

Arceneaux v. Amstar Corp., 2016 La. LEXIS 1675 (La.)

Policyholder and insurer were involved in a dispute regarding the duty to defend underlying long latency hearing loss claims by the insured’s workers. Louisiana follows the exposure theory in long latency disease cases which provides that liability is to be prorated among insurance carriers on the risk during periods of exposure to injurious conditions and, in those periods where the insured is self-insured, the insured must bear a *pro rata* share of the defense costs. **Held:** The policy language here supported *pro rata* allocation. Thus, the policyholder was required to pay for its defense “during years in which it did not acquire an insurance policy that would be triggered by the instant litigation.” The court also held that the time on the risk allocation formula was appropriate and applied that formula.



LIMITATIONS OF ACTIONS

MINORS’ DERIVATIVE CLAIMS TOLLED UNDER MALPRACTICE STATUTE

Anonymous M.D. v. Lockridge, 2016 Ind. App. LEXIS 211 (Ind. App.)

Decedent’s children filed medical malpractice action more than two years after date of malpractice. **Held in a case of first impression:** A claim must be filed within two years of malpractice, but minors under age six have until age eight to sue. The rule applies even though minor only has a derivative claim. **Also held:** The two-year rule applies despite the delayed discovery of malpractice, provided that a reasonable time remains to file suit. Four months may be sufficient. Because decedent’s estate had ten months to file suit, its action was barred.

NEGLIGENCE

AGREEMENT TO ARBITRATE NURSING HOME CLAIM UPHELD

Maynard v. Golden Living, 2016 Ind. App. LEXIS 244 (Ind. App.)

Decedent's administrator alleged nursing home negligence. **Held:** Decedent's arbitration agreement was binding. It was unambiguous and was separate from the home-admission agreement. The nursing home encouraged decedent to review the agreement before signing it. The agreement conspicuously stated that its execution was not a condition of admission. There was no evidence that decedent was incompetent and lacked capacity to sign it.

PHARMACY NOT ENTITLED TO SETTLEMENT CREDIT IN MEDICAL MALPRACTICE ACTION

Shelton v. Kroger Ltd. P'ship I, 2016 Ind. App. LEXIS 281 (Ind. App.)

In action for negligently filling customer's prescription, pharmacy sought credit for amount of physician's settlement with customer. **Held:** Under the Comparative Fault Act, a defendant's liability is several only. It may raise a non-party defense to reduce its liability but may not receive settlement credit. Although the Act is inapplicable to medical malpractice cases, a pharmacist is not a qualified healthcare provider under the Medical Malpractice Act.

MODE-OF-OPERATION ANALYSIS APPLICABLE TO INJURY AT GARDEN STORE

Bowers v. P. Wile's, Inc., 475 Mass. 34 (Mass.)

Patron tripped on stone that migrated from gravel area to a walkway at garden store. **Held in a split decision:** Proprietor must take reasonable steps to protect patrons from foreseeable hazards created by third-parties as part of store's manner of operation. Patron must prove that hazard is a recurring feature of a mode of operation rather than just conceivable. If so, a patron need not also prove that proprietor created the condition or that it knew or should have known about it. Questions of fact existed as to whether proprietor created a foreseeable recurring risk and failed to adequately maintain area. The dissent contended that the mode analysis should be limited to spillage or breakage in self-service operations.

DIGNITY FOR ALL STUDENTS ACT DOES NOT PROVIDE PRIVATE RIGHT OF ACTION

Motta v. Eldred Cent. Sch. Dist., 2016 N.Y. Slip Op. 05424 (N.Y. App. Div. 3d Dep't)

A student and his parents sued the school district for alleged harassment and bullying by his classmates. The trial court granted summary judgment to the defendant school district holding there was no private right of action under the Dignity for All Students Act. **Held:** The Appellate Division reversed even though the trial court was correct in its interpretation of the Dignity for All Students Act. The school district was not entitled to summary judgment

on a negligent supervision of students claim because there was conflicting evidence as to whether the district adequately supervised the students and, if not, whether such negligent supervision caused the injuries.

FAA REGULATIONS DO NOT CREATE DUTY OF CARE

Pasternack v. Laboratory Corp. of Am. Holdings, 2016 N.Y. Slip Op. 05179 (N.Y.)

Airplane pilot, who was also a physician, sued drug testing companies for negligence and fraud for purportedly mishandling a random drug test which lead to the FAA's revocation of his airman certificates and termination of his aviation medical examiner designation. The United States Court of Appeals for the Second Circuit certified questions for the New York Court of Appeals. **Held:** The Court of Appeals determined that the regulations and guidelines of the FAA and Department of Transportation are ministerial and do not create a duty of care for drug testing laboratories under New York negligence law. The Court declined to extend case law relating to the negligent taking of drug tests to this case as it is unrelated to scientific integrity and instead a violation of federal regulations.

TRIP ON HANDICAP RAMP NOT ACTIONABLE

Lattimore v. K & A Market, Inc., 2016-Ohio-5295 (Ohio App.)

Patron tripped on the edge of a handicap ramp in a convenience store. **Held:** Owner had no duty to warn because ramp was open and obvious. Ramp was distinct from the floor and had a different floor covering. Orange

tape marked the edge, and a door sign alerted customers about the uneven rise. A patron's decision to look at a store display is not an attendant circumstance preventing a finding of an open and obvious condition. An owner must create an unusual circumstance causing a diversion of attention. **Further held:** There was no municipal code violation establishing negligence *per se*. The code required that railings be maintained in good condition but did not mandate the installation of a railing.

MEDICAL MALPRACTICE

MASSACHUSETTS ADOPTS "CONTINUING TREATMENT DOCTRINE"

Parr v. Rosenthal, 475 Mass. 368 (Mass.)

Minor's leg was amputated allegedly because of physician's negligence. **Held in a split decision:** Malpractice limitation statute does not run while physician continues to treat patient for the same or a related condition. It begins once patient learns physician's negligence caused injury or when physician stops treating patient. The doctrine is needed because a patient's continued confidence in physician makes difficult an informed judgment as to negligence. It also gives a physician adequate time to correct a poor result. The doctrine does not affect the seven-year statute of repose. The dissent contends the matter is for the executive and legislative branches.

EVIDENCE OF NEGLIGENT TREATMENT OF OTHER PATIENTS TAINTED JURY'S DELIBERATIVE PROCESS

Mazella v. Beals, 2016 N.Y. Slip Op. 05182 (N.Y.)

Decedent's wife brought a medical malpractice and wrongful death claim against her husband's former psychiatrist alleging that the defendant's negligent treatment resulted in her husband's suicide. Plaintiff won a jury verdict against defendant, which the Appellate Division affirmed. **Held:** The Court of Appeals reversed. The trial court abused its discretion by admitting evidence that was irrelevant to the defendant's liability and unduly prejudicial, such as his negligent treatment of twelve other patients. The admission of this evidence, along with its repeated use throughout trial, entitled defendant to a new trial.

PRODUCTS LIABILITY

MANUFACTURER LIABLE FOR FAILURE TO WARN OF DANGER FROM ASBESTOS DUST FROM THIRD PARTY PRODUCTS

In the Matter of New York City Asbestos Litigation, 2016 N.Y. Slip Op. 05063 (N.Y.)

Two lawsuits arising out of decedents' exposure to asbestos while working on valves used in a steam-pipe system, were brought against the valve manufacturer for failure to warn of the dangers of asbestos dust as to products manufactured by third parties. The jury rendered a verdict for plaintiffs. **Held:** The Court of Appeals affirmed. The manufacturer took affirmative steps to integrate its

valves with the third-party products by endorsing their use and packaging the valves with such components when it sold them. Also, the design and mechanics of the valves prevented them from operating properly without asbestos-bearing components and the asbestos-containing components were economically necessary to allow the valves to work as designed. Thus, the manufacturer had a duty to warn end-users of the danger in using its product with a product produced by another company.

TORTS

NO INVASION OF PRIVACY FOR RELEASE OF MEDICAL RECORDS WITHIN ORGANIZATION

Wall v. Pahl, 2016 Wisc. App. LEXIS 567 (Wis. App.)

Patient brought invasion of privacy claim against health organization after unauthorized employees saw his medical records. **Held:** To be actionable, medical records must be released to persons outside the organization. Any other result would subject healthcare employees to liability merely for accidentally seeing records. Over time, problems would arise with proving the reason for access. Attempting to create barriers to access would unreasonably burden organizations and their employees. Congress' failure to create a right of action under HIPAA for improper use of information suggests a concern over possible ramifications. **Further held:** No claim exists for the failure to explain why an unauthorized access occurred.

UM/UIM

OWNED VEHICLE EXCLUSION IS ENFORCEABLE; RIDING LAWNMOWER QUALIFIES AS A MOTOR VEHICLE

Goldstein v. Grinnell Select Ins. Co., 2016 IL App (1st) 140317

Plaintiff sued insurer for denying coverage for deceased who was struck and killed by a pickup truck while driving a riding lawnmower on a street. The subject underinsured motorist (UIM) exclusion stated that there was no coverage for bodily injury sustained by an insured while occupying a vehicle owned by the insured but not insured under the policy. The court held that a 1995 amendment to Section 143a of the Insurance Code allowing insurers to exclude unnamed owned vehicles from uninsured motorist (UM) coverage applies equally to UIM coverage as there is no rational basis to distinguish between UM and UIM coverage for purposes of the exclusion. The court also found that a riding lawnmower constitutes a motor vehicle as defined in the Vehicle Code.



US GOVERNMENT PAYMENT CANNOT BE SET OFF BY UIM INSURER

DeStefano v. Farmers Auto. Ins. Ass'n, 2016 IL App (5th) 150325

A postal worker negligently drove his own car into a driveway, striking a minor riding a motorcycle in her family's driveway. The postal worker had \$25,000 in insurance coverage. The minor's father's UIM coverage had a \$100,000 limit. The United States paid \$49,900 to the family to release claims against the United States and its agents and employees. The father's insurer then attempted to set off both the \$25,000 and the \$49,900 claiming it was only responsible for \$25,100. **Held:** The United States' payment was not on behalf of the underinsured motorist, but was to extinguish its own liabilities. Additionally, requiring the father's insurer to pay out \$75,000 was not against public policy, as the purpose of UIM coverage is to place the insured in substantially the same position as if the tortfeasor carried adequate insurance.

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