CM REPORT

of Recent Decisions

2021 • Vol. 2

Insurer Wins First Appellate COVID-19 BI Coverage Decision

SCOTUS Explains Jurisdictional Rule Covering Corporate Defendants

Forum Non Conveniens— Persistence Conquers Plaintiff's Forum Shopping

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.

CM REPORT of Recent Decisions
2021 • Vol. 2

FEATURES

Report Staff

ARTICLES

More Tales From The Minefield—Or Why Appellate Counsel Is A Must During Litigation

by ***Melinda S. Kollross***

In this quarter's Sidebar, we report on two recent federal appellate decisions illustrating the wisdom of employing trained appellate practitioners.

Rexing Quality Eggs v. Rembrandt Enterprises, Inc., Nos. 20-1726 & 20-1727 (7th Cir. 4-22-21).

There are important lessons to be learned from the Seventh Circuit decision in ***Rexing Quality Eggs v. Rembrandt Enterprises, Inc.***, Nos. 20-1726 & 20-1727 (7th Cir. 4-22-21). First, as this author has counseled her clients may times, it is wise to utilize appellate counsel during trials to ensure all arguments are preserved for appellate review; secondly, *Rexing* teaches the importance of reviewing the pertinent rules each time legal work is performed.

Facts

Rexing involved the sale of eggs to a buyer (Rexing) from a supplier (Rembrandt). Rexing began refusing shipments of the eggs from Rembrandt because of alleged quality issues. Rexing sued contending it was excused from purchasing the eggs. Rembrandt counterclaimed seeking damages for Rexing's repudiation of the contract. The trial court ruled in Rembrandt's favor on liability, and a damages trial was held. The jury awarded Rembrandt $1,268,481 for losses on eggs it had resold, based on the difference between the contract price and the resale price, and another $193,752 for losses on eggs that it was not able to resell. Rexing appealed the damages to the Seventh Circuit.

Rexing's Appeal

Rexing appealed two aspects of the jury's resale award. First, it argued that there was no evidence that the eggs sold by Rembrandt met the case-weight requirement of the Purchase Agreement, and thus those eggs could not form the basis of a resale remedy, and Rembrandt should not have received any damages under the law. Second, Rexing argued there was no evidence of actual market transactions to support the calculation of damages for the eggs that Rembrandt could not resell and used for its own purposes. Consequently, according to Rexing, the jury lacked critical evidence to calculate Rembrandt's damages based on market price. Rexing sought judgment in its favor on these damages, and not merely a new trial.

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Rexing's Arguments Are Waived

The Seventh Circuit dispatched Rexing's damages arguments finding both arguments waived because of Rexing's failure to follow the dictates of the Federal Rules of Civil Procedure—specifically Rules 50(a) and 50(b).

As to Rexing's case-weight argument, the Court found that while Rexing raised this point in a Rule 50(a) motion prior to jury deliberations, it did not make the argument again in a Rule 50(b) motion following the jury's verdict. The federal rules require both a pre-verdict and post-verdict motion to be made. In the absence of a timely filed and made Rule 50(b) motion following the verdict, Rexing's case-weight arguments were not preserved for review. Rexing's arguments that it was not seeking a new trial and that its Rule 50(a) motion was sufficient were rejected. The 50(b) motion could have been utilized by Rexing to obtain the ruling it sought on appeal—judgment in its favor on the resale damages. And regardless of how sufficient Rexing's 50(a) motion was, it preserved nothing without a 50(b) motion made after verdict. These same reasons applied to Rexing's arguments regarding the award for the eggs Rembrandt could not resell—the absence of a Rule 50(b) post-verdict motion on the point was fatal to Rexing.

Additionally, the Court found that Rexing failed to make its pre-verdict Rule 50(a) motions on both damage points with the necessary specificity. According to the Court, Rule 50(a) required that a party challenging the sufficiency of the evidence specify "the law and facts" upon which the motion is based. Rexing only complained of the evidence regarding case-weight without discussing the erroneous market value calculations.

Learning Point: Appellate counsel would have known that to preserve Rexing's damage arguments for review to challenge the award of $1,462,233, both a Rule 50(a) and Rule 50(b) had to be made and made with specificity. In fact, Rexing's Rule 50(b) post-verdict motion should have been a part of a larger, global post-trial motion seeking not only judgment, but a new trial and remittitur, as is this author's post-trial practice. And appellate counsel would have known this because prudent attorneys read the rules before embarking on any motion preparation. Reading the rules governing various procedures is akin to a pilot's checklist before operating a plane. No matter how many times a pilot may have flown a plane, she reads the checklist before embarking to make sure everything is proper. The same is true with reading rules of procedure, such as Rules 50(a) and 50(b). Had Rexing retained experienced appellate counsel to work this case, it might not have had to pay this $1,462,233 award.

Newcomb v. Wyndham Vacation Ownership, Inc., Nos. 19-3109, 19-3111 (8th Cir. 6-8-11)

Newcomb demonstrates why **only** a trained appellate practitioner should prepare a notice of appeal.

The notice of appeal may only be one or two pages long—but it is the single most important document in any appeal because it is the one and only document that transfers subject matter jurisdiction from the trial court to the appellate tribunal. Unless all the rules are followed and all the "t's" are crossed and "i's" dotted, a notice of appeal may be found deficient, and it will not properly transfer jurisdiction to the appellate tribunal.

That is what happened in *Newcomb*. The Court found that the notice of appeal was so deficient that it failed to properly transfer jurisdiction, and the court dismissed the appeal.

The notice of appeal was apparently prepared by an attorney, albeit not a trained appellate practitioner. It was prepared supposedly by a real estate attorney, but perhaps he just "lujacked" it off to his paralegal or secretary, thinking it was "just a notice" and no big deal. As the Court described it, the notice of appeal had the incorrect date of the order appealed from, and misdescribed the names of both the lower court and Court of Appeals. The Eighth Circuit held:

> The complete failure by parties who are attorneys engaged in multi-state litigation to comply with multiple essential elements of Rule 3(c)(1) is not "imperfect but substantial compliance with a technical requirement" that we may excuse; it is an absolute bar to appeal.

Learning Point: A notice of appeal should not be left to trial counsel, or his/her secretary, paralegal, or law clerk. The notice of appeal is not "just a notice" and no "big deal". The notice of appeal is the "biggest deal" in any appeal. And regardless of the court, whether federal or state, a notice of appeal should only be prepared by an appellate practitioner. A word to the wise.

IN MY NEXT SIDEBAR

SCOTUS Issues Significant Jurisdictional Decision Concerning The Standing Necessary To Sue: *TransUnion LLC v. Ramirez*, No. 20-297 (U.S. 6-25-21)

We also wish to alert our friends in the insurance and defense industries of a recent development that may impact the rights of plaintiff class action lawyers to bring actions in federal court alleging mere technical violations of a statute as a basis for pursuing class action cases and huge recoveries for mostly attorney's fees. On June 25, 2121, the United States Supreme Court decided *TransUnion LLC v. Ramirez*, No. 20-297 (U.S. 6-25-21). *Ramirez* involved a class action brought for violating the Fair Credit Reporting Act, which regulates credit reporting and provides a private right of action for violations of the statute. For most of the class members, the Court held that inaccurate information in a credit file, while violating the credit act, did not by itself give a person standing to sue for damages. The Court did rule, however, that some class members could sue where the inaccurate information was turned over to third parties—those class members suffered a concrete injury that was enough to meet the federal standing requirements. We are currently analyzing the impact *Ramirez* may have on statutory claims being prosecuted in federal court and will report on same in the next Sidebar of the *CM Report*.

CM Welcomes New Attorneys Nationwide

A Dozen New Attorneys Join CM Offices in 2021

Veronica Abraham

Douglas M. Allen

Douglas M. Cohen

Jordan E. Gottheim

(pic not yet available)

Brad A. Leventhal

Tony Pagán, Jr.

James G. Papadakis

(pic not yet available)

Brannon J. Simmons

Michael R. Tucker

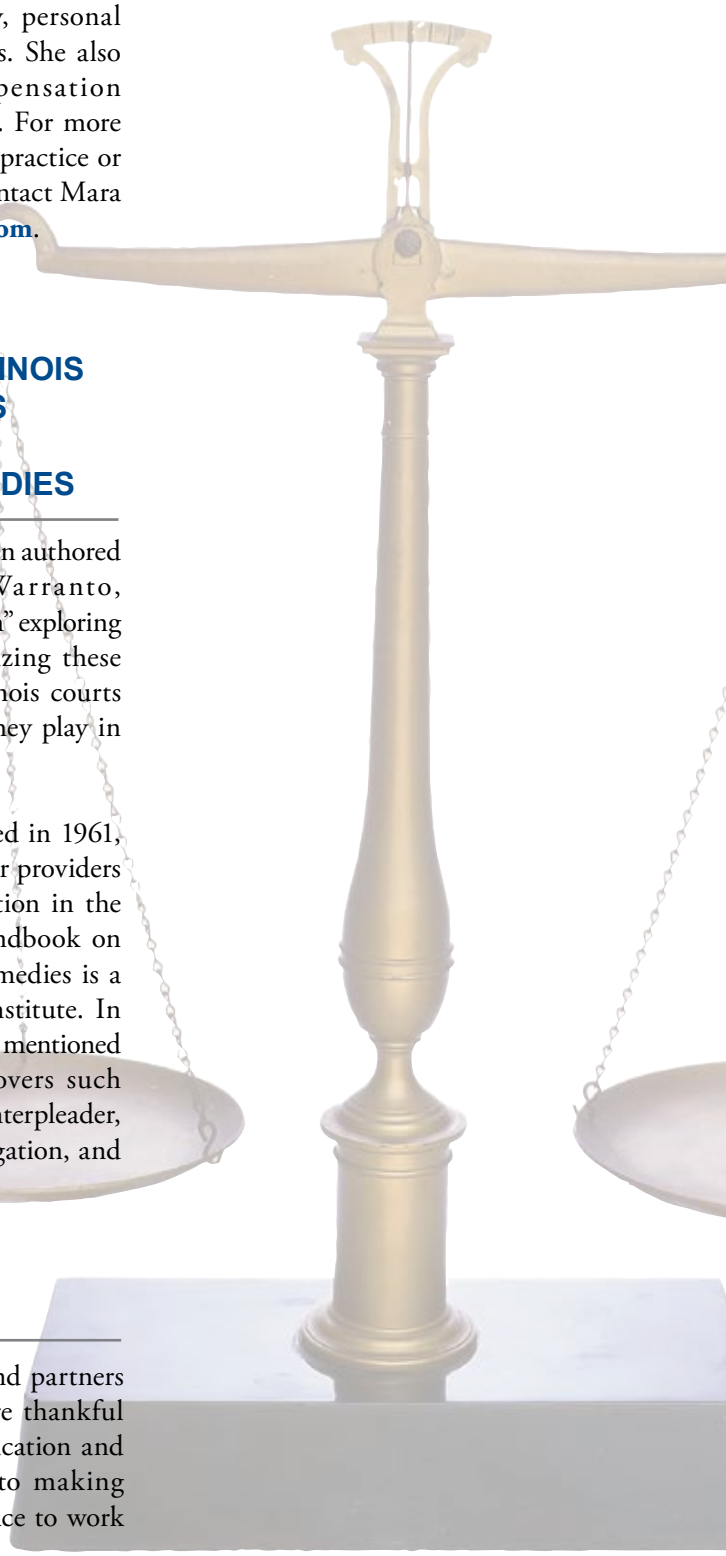
Brian A. Villar

Max Wessels

Cary C. Woods

GOLTSMAN SPEAKS AT WOMEN IN LAW SUMMIT

Mara Goltsman, a partner in CM's New York office, was a featured speaker at a recent Women in Law Summit. The topic was *Inclusion, Diversity & Change: Inspiring Growth*. The Summit was held virtually in accordance with COVID-19 protocols. Mara defends clients involved in litigation ranging from professional malpractice, including medical, dental and other health care provider malpractice, to various general liability claims which include premises liability, personal injury and labor law cases. She also handles worker's compensation claims for various carriers. For more information about Mara's practice or her presentation, please contact Mara at **mgoltsman@clausen.com**.



CLAUSEN MILLER PARTNERS EDUCATE THE ILLINOIS BAR BY AUTHORING CHAPTERS IN THE ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION HANDBOOK ON CHANCERY AND SPECIAL REMEDIES

Clausen Miller partners **Don Sampen**, **Joe Ferrini** and **Ed Kay** again have demonstrated their commitment to excellence in the legal profession by authoring two Chapters for the *Illinois Institute of Continuing Legal Education Handbook* entitled "Chancery and Special Remedies."

Ed Kay and Don Sampen authored a chapter on the "Principles of Contempt" fully examining all the substantive and procedural "ins and outs" of civil direct and indirect contempt and criminal direct and indirect contempt and appellate issues regarding these contempt proceedings.

Joe Ferrini and Don Sampen authored a chapter on "Quo Warranto, Mandamus, and Prohibition" exploring the requirements for utilizing these common law writs in Illinois courts and the important roles they play in litigation today.

IICLE, having been formed in 1961, serves as one of the premier providers of continuing legal education in the State of Illinois. The Handbook on Chancery and Special Remedies is a core publication of the Institute. In addition to the two chapters mentioned above, the Handbook covers such remedies as injunctions, interpleader, guardians/receivers, subrogation, and more. It's a great read!

YOLANDA WELLS PROMOTED TO MANAGER OF HUMAN RESOURCES

Clausen Miller P.C. and its Board of Directors are pleased to announce that **Yolanda Wells** has assumed new responsibilities as the Firm's Manager of Human Resources. Yolanda will plan, lead, and implement the Firm's HR policies and benefits programs for our staff, associates, and partners across the country. We are thankful for her demonstrated dedication and continued commitment to making Clausen Miller a great place to work and grow.

Clausen Miller PC

is proud to feature an additional office location

Tampa, Florida

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CARL PERRI AND GREG POPADIUK SCORE SUMMARY JUDGMENT WIN IN NY

Introduction

In this premises liability case involving a trip and fall on a sidewalk, we successfully moved for summary judgment on behalf of our clients, the Church of the Intercession and The Rector, Church Wardens and Vestrymembers of the Church of the Intercession ("Church Defendants" or "Church of the Intercession"). *Anthony Sanchez v. The Church of the Intercession and The Rector, Church Wardens and Vestrymembers of the Church of the Intercession and The City of New York* (Sup. Ct., New York County). We argued that despite being the adjacent property owner, the Church Defendants did not own, use, possess, maintain, manage, repair, inspect or control the portion of the sidewalk on which Plaintiff's accident occurred nor were responsible for doing so.

Plaintiff also sued the City of New York ("City"). Both the Church Defendants and the City denied ownership and control of that portion of the sidewalk where Plaintiff fell in their respective Answers. Discovery motion practice by our office resulted in the City being ordered to disclose post-accident repair records since subsequent remedial repair measures are admissible for the limited purpose of proving ownership or control. Rather than produce such records, during oral argument of our motion for summary judgment, the City conceded that it owned and controlled the area where Plaintiff fell. Notwithstanding that admission, Plaintiff still argued that there were material issues of fact as to whether the Church Defendants and the City shared responsibility for the sidewalk area where he fell. The Court disagreed.

Facts

Plaintiff alleged that on November 29, 2017, he fell on the sidewalk at or near the BX6 bus stop adjacent to the premises located at 550 W. 155th Street in New York, New York and sustained personal injuries. The Church Defendants owned the property abutting the sidewalk. Plaintiff's photographs depicted where his accident occurred, which was on the sidewalk adjacent to the Church of the Intercession in between a bus stop sign pole and a bus shelter. In one particular photograph, Plaintiff circled the sidewalk area where his accident occurred. This part of the sidewalk was made of ordinary concrete. The remaining part of the sidewalk was made of bluestone quarried in Ireland that was the same type of material that was used when the Church of the Intercession was originally built and completed. It was not ordinary concrete.

In or around October 2020, nearly three years post-accident, there was an unrelated car accident, which resulted in the bus route pole and the bus shelter being knocked down and destroyed. After that car accident, there was some repair work done to the sidewalk which included a new cement pad being poured in the exact area where Plaintiff fell. However, this work was not performed by on or behalf of the Church Defendants. Over the years, City contractors maintained the area where Plaintiff fell.

Analysis

In *Bednark v. City of New York*, 127 A.D.3d 403, 404 (1st Dept. 2015), the Appellate Division held that "[a] bus stop is not delimited to the roadway where buses operate but includes the sidewalk where passengers board and disembark from the bus". In *Shaller v. City of New York*, 41 A.D.3d 697,

839 N.Y.S.2d 766 (2d Dept. 2007), the Court held that the City of New York is responsible for the maintenance of bus stops within the City of New York, including the roads, curbs and sidewalks attendant thereto.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition". *Gronski v. County of Monroe*, 18 N.Y.3d 374, 379 (2011); *Basso v. Miller*, 40 N.Y.2d 233, 241 (1946). "That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of property is best able to identify and prevent any harm to others". *See Gronski, supra* quoting *Butler v. Rafferty*, 100 N.Y.2d 265, 270 (1976). "[C]ontrol is the test which measures generally the responsibility in tort of the owner of real property". *Ritto v. Goldberg*, 27 N.Y.2d 887, 889 (1970). A defendant did not breach a duty of care owed to plaintiff where it did not own, possess or exercise control over the day-to-day maintenance or operation of the store where the plaintiff's accident occurred. *Radosta v. Schechter et al.*, 2017 NY Slip Op 31965(U) (Sup. Ct. Suffolk County 2017).

The evidence and testimony here established not only that Plaintiff's accident occurred at or appurtenant to the BX6 bus stop, but that only the City owned, used, possessed, maintained, managed, repaired, inspected and controlled that area. Not only was that particular part of the sidewalk made of a different material—ordinary concrete as opposed to bluestone but only the City and/or its private contractors repaired the bus shelter and bus stop sign in that area after both were knocked down and destroyed and shoveled snow and scraped ice from that portion of the sidewalk. The Church Defendants did not own, occupy, control, or make special use of that portion of the sidewalk where Plaintiff's accident occurred and, therefore, did not cause or create any allegedly defective or dangerous condition or have actual or constructive notice of any such condition.

Learning Point: It is important to examine and consider other parties' pleadings. Here, a careful review of the City's Answer paved the way for our office to pursue subsequent remedial repair records. Although the City challenged the Order that it provide such records, it did ultimately lead to an admission that it owned and controlled the area in question. Often times, what pleadings do not say is equally as important, if not more important, than what they do say.

7TH CIRCUIT WIN FEATURED IN *LAW 360*

CM partners **Paige Neel** and **Kim Kearney** obtained judgment on the pleadings in a legal malpractice case brought by a widow who claimed that a financial adviser and an Illinois attorney worked behind her back to transfer away assets left to her by her late husband. CM partners **Paige Neel**, **Kim Kearney** and **Joe Ferrini** successfully defended the case on appeal before the United States Court of Appeal for the Seventh Circuit. The Seventh Circuit held that the widow's claims are barred by a jury's findings in a parallel Indiana state court case that she illegally acquired estate interests by exerting undue influence over him. *Linda Bergal v. Ben Roth et al.*, No. 20-2887 (7th Cir. July 2, 2021). The case is featured in *Law360*. **https://www.law360.com/appellate/articles/1399708/7th-circ-won-t-revive-widow-s-legal-malpractice-suit**

United States Supreme Court Holds That Prevailing Defendants On Appeal Are Entitled To The Full Amount Of Premium *Supersedeas* Bond Costs From A Losing Plaintiff

by ***Melinda S. Kollross***

In *City of San Antonio, Texas v. Hotels.com, L.P.*, No. 20-334 (U.S. 5-27-21), the Supreme Court issued a unanimous ruling crucial and beneficial to defendants seeking to stay a money judgment in federal court pending appeal. The Court ruled that a district court had no discretion to reduce the amount of surety bond premiums assessed as costs against the plaintiff-appellee who lost on appeal.

Facts

The City of San Antonio acting on behalf of a class of 173 Texas municipalities sued several popular online travel companies (OTCs) claiming that the OTCs were systematically underpaying hotel occupancy taxes. The City prevailed at trial and a $55 million judgment was entered against the OTCs.

The Federal Rules of Civil Procedure only provide an automatic stay of execution for 30 days. After that period, the defendant must either work out an agreement with the plaintiff to stay execution of judgment without a bond during the post-trial and appellate phases or secure a surety/supersedeas bond in a sufficient amount to cover the judgment and interest, have it approved by the district court and plaintiff, and have an order entered staying execution.

In *City of San Antonio*, the OTCs had to purchase a *supersedeas* bond to obtain the entry of a stay order enjoining the City from executing on the judgment. The parties initially agreed to a bond of $69 million to cover the judgment, interest, and accrual of further taxes, but at the City's urging, the bond amount grew to $84 million after years of post-trial proceedings.

The OTCs prevailed on appeal against the City, wiping out the entire $55 million judgment. The appellate mandate directed that judgment be entered for the OTCs. The OTCs thereafter filed a bill of costs in the district court pursuant to Federal Rule of Appellate Procedure 39(e) which provides for the taxation of the premiums paid for a bond to stay execution. The district court taxed these costs over the City's objection in the approximate amount of $2.2 million. The Court of Appeals affirmed, and the Supreme Court granted the City's certiorari petition.

Analysis

The United States Supreme Court ruled that Federal Rule of Appellate Procedure 39 governs the taxation of appellate costs, and a district court had no discretion to deny or reduce those costs to a party entitled to taxation of those costs. Rule 39 allows an appellate

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tribunal to allocate costs as it sees fit, and a district court is powerless to disturb that appellate determination on costs.

In this case, when the OTCs prevailed on appeal, they were entitled to their costs under Federal Rule of Appellate Procedure 39(a)(3), which taxes costs against the appellee when the judgment is reversed. The Court of Appeals in reversing the City's judgment did not order that the OTCs would be entitled to anything less than what the costs provision of Rule 39 allows. Accordingly, the OTCs were entitled to recover their full premium bond costs from the City as costs, and the district court could not deny or reduce those costs.

Learning Point: There is no reason to force a defendant to post a *supersedeas* bond to stay execution of judgment pending appeal where the defendant has sufficient assets or is adequately insured. But some litigants use the bond issue to discourage defendants from pursuing appellate remedies… demanding exorbitant bond amounts and the use of surety companies with expensive premiums unrelated to a defendant's liability carrier—all the while dangling a threatened garnishment against the defendant. *City of San Antonio* now gives the defense the ammunition to fight these tactics, as a plaintiff might have to think twice about forcing an insured defendant or a defendant with adequate assets to purchase an additional bond when the plaintiff will be personally responsible for the bond premiums if unsuccessful on appeal. *City of San Antonio* should be used by the defense to persuade plaintiffs to forego a *supersedeas* bond under these circumstances, and have the court stay execution upon the stipulation of the parties. ♦

Illinois Supreme Court Decides "Unanswered Question" Under The Illinois Contribution Act

by ***Melinda S. Kollross***

In Volume 3 of our 2020 CM Report, we reported on an order issued by the United States Court of Appeals for the Seventh Circuit in *Roberts v. Alexandria Transp. Inc.*, 968 F.3d 794 (7th Cir. 2020), certifying to the Illinois Supreme Court an unanswered question arising under Section 3 the Illinois Contribution Act. Section 3 provides that each tortfeasor owes no more than his/her/its *pro rata* share of the common liability, except where the obligation of a tortfeasor is "uncollectable". In that event, the remaining tortfeasors must share in the uncollectable obligation on a *pro rata* basis. The Seventh Circuit asked the Illinois Supreme Court to decide "whether the obligation of a settling party is uncollectable" under Section 3 of the Illinois Contribution Act.

The Supreme Court in a split 5-2 decision answered that question on June 17, 2021, holding that the obligation of a tortfeasor who settles is not "uncollectable" under the Contribution Act. *Roberts v. Alexandria Transp. Inc.*, 2021 IL 126249.

Facts

Plaintiff Roberts was driving a truck through a construction zone. A flagger abruptly turned a flag from slow to stop. Roberts slammed on his brakes and was hit from behind by a driver working for the Alex Parties. Roberts sued the Alex Parties, and the Alex Parties sued EK (the general contractor) and Safety (a sub EK retained to manage the site worker safety program) for contribution.

Roberts settled with EK for $50K, and EK was dismissed from the suit. Roberts also settled with the Alex Parties for $1.85 million, and that settlement released claims against Safety as well. The settlement amounts established a total common liability of $1.9 million.

The Alex Parties continued their contribution claim against Safety. The trial court determined that the Alex parties, EK and Safety all had to be on the verdict form so that the jury could properly apportion fault. The trial court also determined, however, that any fault of EK would not be redistributed between the Alex Parties and Safety. Rather, Safety would just owe Alex its own share of fault and the Alex Parties would have to be liable for EK's share along with its own.

At the end of the trial, the jury determined fault as follows: 10% Safety; 15% The Alex Parties; 75% EK.

On appeal in the Supreme Court, the Alex Parties argued that since a tortfeasor's settlement with a plaintiff discharged the tortfeasor for all liability for any contribution to any other tortfeasor, it rendered the settling defendant's obligation, such as EK's, "uncollectable" in any future

contribution action. Because EK's 75% obligation of the total common liability was "uncollectable", EK's 75% obligation had to be reallocated between the Alex parties and Safety on a *pro rata* basis. In opposition, Safety contended that a good-faith settlement with a plaintiff did not render the settling party's obligation "uncollectable" within the meaning of the Contribution Act. Therefore, the Contribution Act protected Safety from contributing more than its *pro rata* share of the common liability, and EK's 75% share could not be reallocated between the Alex Parties and Safety.

Analysis/Holding

The Supreme Court ruled that Safety had the better argument that EK's settlement with plaintiff and discharge from further liability did not render EK's obligation "uncollectable" as the word "uncollectable" was commonly viewed by the Court. "Uncollectable" meant "insolvency" or Immunity", not a discharge from further liability because of a good faith settlement with the plaintiff. The Court approvingly cited the Seventh Circuit's observation that discharged did not mean uncollectable.

Further, the Court found the plain language of Section 3 showed that the obligation of a settling defendant could not be considered unpaid because it was in fact paid to the plaintiff as part of the common liability:

> The plain language of section 3 provides that, where 'the obligation of one or more of the joint tortfeasors is uncollectable,' 'the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their *pro rata* liability.' (Emphasis in original.). 740 ILCS 100/3 (West 2018). The legislature could not have intended to include a settlement as an "uncollectable" obligation because there is no 'unpaid portion' of a settlement. Section 2(c) provides that, where a joint tortfeasor settles with a plaintiff, it reduces the recovery on any claim against the other joint tortfeasors to the extent of the amount stated in the settlement agreement or in the amount of the consideration actually paid for the settlement, whichever is greater. Id. § 2(c). In this case, for example, EK's settlement payment of $50,000 contributed to the total common liability owed to plaintiffs. Safety accurately argues that EK's obligation was not uncollectable—it was collected.

The Court also held that its decision was consistent with the public policy goal of equitably apportioning damages. According to the Court, the Alex Parties' settlement established the common liability to the plaintiff knowing full well that the $50K EK paid was all it would ever pay towards the common liability. Further the Alex Parties knew that Safety would owe only its *pro rata* share, and Safety might be adjudged only a small percentage of the total common liability. The Court thus found it would be inequitable to require Safety to pay more than its *pro rata* share of the total common liability.

Dissent

Justices Carter and Burke dissented contending that since a settling defendant was forever discharged for any further liability, the settling defendant's share of the common liability should be deemed uncollectable under the Contribution Act. According to the dissent, establishing the settling defendant's share of the common liability as "uncollectable" would foster the goal of achieving more settlements from all defendants in cases such as this one involving multiple defendants. The dissent stated that Safety could have protected itself from having to pay its share of EK's adjudicated and "uncollectable" portion of the common liability by itself settling with plaintiffs, like everyone else.

Learning Point: We believe this was the right decision by the Illinois Supreme Court on the issue presented. The Court protected the non-settling defendant's right to pay no more than its *pro rata* share of the common liability. We respectfully disagree with the dissent's view that Safety should have settled with plaintiffs like everyone else to protect itself from future contribution liability over and above it own *pro rata* share. Safety's adjudicated fault of only 10% showed that it had little to do with the accident and a strong case on liability. The dissent nonetheless would have counseled Safety to "throw substantial money" to the plaintiffs to avoid the risk of paying more than the adjudicated share of common liability. Although promoting settlement is a goal of the Contribution Act, the Supreme Court's decision shows that the equitable apportionment of fault outweighs the goal of just settling cases. ♦

Insurer Wins First Appellate Decision Addressing COVID-19 Business Interruption Coverage

by ***Melinda S. Kollross***

In the first appellate decision nationwide addressing business interruption coverage for COVID-19 pandemic related losses, the Eighth Circuit ruled for the insurer, holding that Cincinnati Insurance Company does not have to pay an Iowa dental clinic for losses due to government-imposed COVID-19 restrictions. *Oral Surgeons PC v. The Cincinnati Insurance Co.*, No. 20-3211 (8th Cir. July 2, 2021).

Facts

Oral Surgeons provides oral and maxillofacial surgery services at its four offices in the Des Moines, Iowa, area. It stopped performing non-emergency procedures in late March 2020, after the governor of Iowa declared a state of emergency and imposed restrictions on dental practices because of the COVID-19 pandemic. Oral Surgeons resumed procedures in May 2020 as the restrictions were lifted, adhering to guidance from the Iowa Dental Board.

Oral Surgeons submitted a claim to Cincinnati for losses it suffered as a result of the suspension of non-emergency procedures. The policy insured against lost business income and certain extra expense sustained due to the suspension of operations "caused by direct 'loss' to property." The policy defines "loss" as "accidental physical loss or accidental physical damage." Cincinnati responded that the policy did not afford coverage because there was no direct physical loss or physical damage to Oral Surgeons' property. This lawsuit followed. The district court granted Cincinnati's motion to dismiss, concluding that Oral Surgeons was not entitled to declaratory judgment and that it had failed to state claims for breach of contract and bad faith. Oral Surgeons appealed.

Analysis

Reviewing *de novo* and applying Iowa law in this diversity action, the Eighth Circuit unanimously affirmed. The Eighth Circuit rejected Oral Surgeons' contention that the policy's disjunctive definition of "loss" as "physical loss" or "physical damage" creates an ambiguity that must be construed against Cincinnati. To give the terms separate meanings, Oral Surgeons suggested defining physical loss to include "lost operations or inability to use the business" and defining physical damage as a physical alteration to property. Amicus Restaurant Law Center contended that "physical loss" occurs whenever the insured is physically deprived of the insured property.

As the Eighth Circuit explained:

> The policy here clearly requires direct "physical loss" or "physical damage" to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property—*e.g.*, a physical

> alteration, physical contamination, or physical destruction.
>
> ***
>
> The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage.

The Eighth Circuit further noted that the unambiguous requirement that the loss or damage be physical in nature accords with the policy's coverage of lost business income during the "period of restoration." The Court cited its precedent interpreting "direct physical loss" under Minnesota law as instructive. Prior precedent rejected the argument that loss of use or function necessarily constitutes "direct physical loss or damage" as such an interpretation would allow coverage whenever property cannot be used for its intended purpose.

Learning Points: We expect *Oral Surgeons* to be widely cited in subsequent COVID-19 BI claim cases addressing the physical loss or damage requirement for business interruption coverage to exist. Because a virus exclusion was not at issue, the Eighth Circuit's ruling shows that the insured must first establish a covered cause of loss—which must be physical—prior to the analysis of any exclusionary language. However, we also note that the *Oral Surgeons* complaint did not allege the presence of COVID-19 virus on the property, and thus policyholders will attempt to distinguish it in subsequent cases alleging that the presence of virus on premises constitutes physical loss or damage to covered property. ♦

Home Is Where You Make It: SCOTUS Explains The Jurisdictional Rule Covering Corporate Defendants

by ***Paul V. Esposito***

We all have a place we call home. Over a lifetime, the average person will own three houses. Some people may simultaneously own more than one. But that's nothing compared to corporations, some of which operate in all 50 states.

A corporation may have two home states where it may be sued: the state of its incorporation and of its principal place of business. But what about the other 48 states where it actively does business. May it be sued there? The U.S. Supreme Court has unanimously answered "yes." Its message to the corporate world: home is not just where you'd like it; home is where you make it. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 2021 U.S. LEXIS 1610 (2021).

Facts

Ford designed its 1996 Explorer in Michigan and manufactured it in Kentucky. It sold a new Explorer in Washington. The owner resold it to Markkaya Gullett, who moved to Montana. While she drove it there, the tread on a rear tire separated. The car spun, then flipped. Markkaya died at the scene. Her estate sued Ford in Montana.

Ford designed its 1994 Crown Victoria in Michigan and manufactured it in Canada. It sold one in North Dakota. The car's owner resold it, and the new buyer moved to Minnesota. Adam Bandemer was a passenger in the car heading to a Minnesota ice-fishing hole when his driver rear-ended a snow plow. The airbag did not deploy; the car landed in a ditch. Bandemer sustained serious brain injuries. He sued Ford in Minnesota.

Ford is incorporated in Delaware, headquartered in Michigan. It moved to dismiss each suit, arguing that personal jurisdiction over Ford existed only if Ford's conduct in the state gave rise to the claim. In Ford's mind, a vehicle needed to be designed, manufactured, or originally sold in a state asserting personal jurisdiction over Ford. The state courts in Montana and Minnesota found the ties between Ford's marketing and the victims' injuries sufficient to make Ford defend itself in those states.

Analysis

SCOTUS unanimously sided with the state courts. Personal jurisdiction exists where a defendant's contacts with a forum state are enough to make a suit there reasonable under "traditional notions of fair play and substantial justice." There are two forms of personal jurisdiction: general and specific. General jurisdiction exists where a defendant is incorporated or has its principal place of business. Where general jurisdiction exists, a lawsuit need not be factually related to the forum state.

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By contrast, specific jurisdiction is narrowly focused. It looks for evidence that a defendant has purposely availed itself of the privilege of conducting activities in a forum state. The claim against it must arise out of or relate to defendant's contacts within the state. The specific-jurisdiction rule gives a defendant fair warning that the extent of its conduct within a state may impact future litigation.

The Supreme Court rejected as too narrow Ford's argument that to invoke specific jurisdiction, an injury needed to be caused by Ford's conduct in a forum state. So long as a claim "relates" to a defendant's activity there, it is enough. And Ford's activities in Montana and Minnesota were enough to relate the claims to the forum states. In each state Ford mounted a large advertising campaign about its vehicles, including the models involved in the accidents. Ford had 36 dealerships in Montana and 84 in Minnesota where it sold new and used cars, again including the involved models. The dealers performed repair work and Ford sold replacement parts in the states. In short, Ford systematically served the states where the allegedly defective vehicles caused injuries. In doing so, Ford benefitted from the states' laws covering the enforcement of contracts, defense of property, and creation of markets.

The considerations of interstate federalism also supported jurisdiction in Montana and Minnesota. Those states had an interest in providing residents with a convenient forum and in enforcing their own safety rules. Ford's choice of forums—the states of original sale—means that states would preside over suits by non-residents involving out-of-state accidents and injuries. The inconvenience resulting from Ford's approach would undermine the law's purpose of properly allocating jurisdiction.

Learning Point: The *Ford Motor* decision should go far in resolving jurisdiction disputes involving multi-state businesses involved in traditional sales-and-service operations. If a corporation *systematically*—as opposed to *sporadically*—transacts business within a state, it should expect that it will need to defend suits there.

But *Ford Motor* does not cover what SCOTUS must eventually address: whether a mere "virtual" presence in a state translates into a specific-jurisdictional contact with it. With internet transactions having become a fact of business life (think Amazon), that question needs an answer. The "when" an answer will come is anyone's guess. ♦

Extrinsic Evidence Properly Considered In Coverage Denial For Sexual Molestation

by ***Don R. Sampen***

The evidence on which an insurer may rely in making a decision whether to defend an insured constitutes a frequent issue in liability coverage matters. Some jurisdictions subscribe to the "eight corners" rule, meaning that the insurer must confine its attention to the "four corners" of the underlying complaint and the "four corners" of the policy. Other jurisdictions require and/or allow an insurer to look to "extrinsic" evidence, for purposes of finding, or negating, or both, a defense obligation. Illinois follows the latter approach, at least under certain circumstances, as evidenced by *Freeburg Community Consolidated School District No. 70 v. Country Mutual Insurance Co.*, 2021 IL App (5th) 190098.

In that case, the Fifth District Appellate Court, reversing the trial court, held that a liability insurer had no duty to defend or indemnify an insured school district with respect to a claim for sexual abuse of a student by a school administrator.

Facts

A former teacher, coach and superintendent for the Freeburg Community Consolidated School District, Robin Hawkins, was sued by a former student, "John Doe 4," in 2014. The former student claimed he had been sexually molested by Hawkins while in sixth, seventh and eighth grades during the period 2007 to the spring of 2009.

Hawkins had been the target of three prior lawsuits by students. These prior claims were brought to the attention of an insurance broker in 2010 when the school district sought to join a state insurance cooperative comprised of 134 public schools. Hence, when the cooperative acquired claims-made coverage for the school district in 2013 through RSUI, various provisions, limitations and exclusions on coverage were added to the policy.

Among them was a retroactive date of July 1, 2009. Another was a "single claim" provision stating that all claims based on the "same or related series of facts, circumstances [*etc.*] . . . shall be deemed to be a single claim . . . and shall be deemed first made when the earliest of such claims is first made."

Following the filing of the John Doe 4 claim, the school district tendered to RSUI, which denied or reserved coverage on a variety of policy provisions. The school district then filed the current declaratory action against RSUI and others seeking a determination of coverage. In late 2014, RSUI filed a section 2-619 motion to dismiss, asking the court to find a duty neither to defend nor indemnify. The motion relied in part on extrinsic evidence outside the underlying complaint's allegations.

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The trial court denied that motion about a year later. In August of 2017 the trial court entered partial summary judgment in favor of the school district, finding that RSUI had a duty to defend. After denying RSUI the opportunity for an interlocutory appeal, the court further held in October of 2018 that RSUI also had a duty to indemnify. RSUI took this appeal.

Analysis

Extrinsic Evidence

In an opinion by Justice John B. Barberis, the Fifth District reversed. The Court initially considered whether RSUI could rely on extrinsic evidence in denying coverage and, correspondingly, whether the trial court could properly consider such evidence in support of RSUI's motion to dismiss.

Generally, the duty to defend should be decided based on the "eight corners" rule, *i.e.*, a comparison of the four corners of the underlying tort complaint to the four corners of the insurance policy. That rule, however, under *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446 (2010), does not bar an insurer from making use of extrinsic evidence unless the evidence tends to determine an issue crucial to the determination of the underlying lawsuit.

In this case, the Appellate Court said there was no concern that RSUI's extrinsic evidence, in the form of the complaints in the three prior lawsuits against Hawkins, would interfere with any factual determinations in the action brought by John Doe 4. The fact that a monetary judgment had been entered against the school district prior to this appeal was all the more reason why consideration of the extrinsic evidence was permissible.

Hence, the Court wrote, nothing was inappropriate in RSUI's consideration of the extrinsic evidence in denying coverage. Nor would it have been inappropriate for the trial court to have considered such evidence in connection with RSUI's motion to dismiss, nor for the appellate court to consider such evidence in connection with the instant appeal.

Single Claims Provision

Although several provisions in the RSUI policy appear from the Court's opinion to provide justification for RSUI to have denied coverage, the Fifth District focused on just the single claim provision.

As earlier noted, that provision deemed claims arising from the same or related series of facts as a single claim first made when the earliest of such claims was made. RSUI thus took the position that the John Doe 4 claim should be deemed as one and the same as the three earlier claims involving Hawkins' alleged sexual molestation, and being part of the same claim, it should be deemed to have been asserted prior to the inception of the RSUI policy issued in 2013.

The school district and the trial court, however, attacked the provision as being ambiguous and overly broad with respect to the degree of connection required to trigger its application to a particular set of claims.

The Court disagreed that the provision was ambiguous. It found that a plain and ordinary reading of the provision would lead a reasonable person to conclude that the John Doe 4 action resulted from the same or related facts, in that it involved the same continuing course of misconduct, by the same school official, resulting in the same type of harm, and neglect by the same school district officials.

Based on that determination, the Appellate Court concluded that the trial court erred in finding that the single claim provision was ambiguous, and further erred in denying RSUI's motion to dismiss.

The Court therefore reversed in favor of RSUI.

Learning Points:

(a) An insurer may reasonably rely on evidence extrinsic to the "eight corners" of the underlying complaint and policy in denying coverage, so long as the evidence does not determine an issue crucial to the determination of the underlying lawsuit.

(b) In determining whether a policy provision is ambiguous, the court will consider only reasonable interpretations of the policy language and will not strain to find an ambiguity where none exists. ♦

Forum Non Conveniens—Persistence Conquers Plaintiff's Forum Shopping

by **Scott R. Shinkan** *and* **Alexander J. Brinson**

Introduction

A motion based on *forum non conveniens* is a great tool that allows a court to dismiss or transfer a case to a forum better suited to hear the case. The court's power to transfer the case to a more appropriate forum is discretionary, unlike the mandatory transfer of a lawsuit based on theories such as improper venue.

Forum has a significant impact on every aspect of a case, including time to resolution, likelihood of success, potential jury make-up, and therefore, the value of a case. The doctrine of *forum non conveniens* discourages forum shopping by plaintiffs eager to file suit in plaintiff-friendly jurisdictions. In turn, by transferring the case to a more appropriate forum, the doctrine can assist in keeping the price of a claim down for defendants and insurers. The Illinois First District Appellate Court issued a recent unpublished opinion that is highly persuasive, albeit not binding, that provides a roadmap for a successful *forum non conveniens* ("*FNC*") motion.

Facts

In *Matthiessen*, a motor vehicle accident occurred in Kane County, Illinois, but the plaintiff filed suit in Cook County, Illinois, based on the residence of a defendant. *Matthiessen v. Greenwood Motor Lines, Inc., et al.*, 2021 IL App (1st) 200405-U (May 28, 2021). The defendant-driver and the defendant-entity that owned the semi-truck operated by defendant-driver filed an *FNC* motion to transfer venue to Kane County. The trial court denied the defendants' *FNC* motion. The appellate court initially dismissed the defendants' petition for leave for appeal, but the Illinois Supreme Court vacated and ordered the appellate court to address the petition.

Analysis

The appellate court found that the trial court abused its discretion in denying the defendants' motion to transfer, and remanded with directions to transfer the matter from Cook County to Kane County. The appellate court weighed the private and public interest factors and held that the defendants established that the factors strongly favored transfer.

When analyzing an *FNC* motion, Illinois courts consider the "totality of the circumstances" and weigh certain private and public interest factors. There are very similar tests in nearly every jurisdiction. The *Matthiessen* court addressed the following private interest factors: (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises; and (6) all other practical considerations that make trial easy, expeditious, and inexpensive.

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The public interest factors included: (1) the administrative difficulties flowing from court congestion; (2) the unfairness of burdening citizens in an unrelated forum with jury duty; and (3) the interest in having local controversies decided locally.

In holding that Kane County would be substantially more convenient, the First District reasoned that the convenience of the parties, the possibility of viewing the premises, the administrative difficulties flowing from court congestion, the unfairness of burdening citizens in an unrelated forum with jury duty, and the interest in having local controversies decided locally all favored transfer.

There were three keys to this case. First, plaintiffs virtually always make the argument that their choice of forum should be given deference, and the defendants have to meet a heavy burden to show that the case should proceed elsewhere. However, *Matthiessen* clarified that a plaintiff's choice of forum is given minimal deference where the plaintiff is not a resident of the forum where suit was filed. Second, *Matthiessen* reiterated that the location of injury giving rise to the case is the most significant factor in giving any county a local interest in the lawsuit. Third, judges who deny defendants' *FNC* motions often state that the location of an accident site does not matter because it is doubtful anyone would take the jury there. However, *Matthiessen* reiterated that the possibility of viewing the premises should be the factor, not the likelihood of actually doing it.

Learning Points: A *forum non conveniens* motion should be considered and discussed with trial and appellate counsel in the early stages of pending litigation. If unsuccessful, do not give up. If denied by the trial court, an appeal should be pursued immediately by petition and/or pursuant to the rules of the venue. It is highly unlikely that an *FNC* appeal will be successful post-verdict. *Matthiessen* was a great example of resiliency on appeal. The defendants' motion was denied by the trial court, and the petition for leave to appeal was initially denied by the appellate court. It was not until the Illinois Supreme Court intervened and ordered the appellate court to address the motion that defendants' relief was granted. With persistence, the defendants successfully transferred the case to the more appropriate forum, potentially saving significantly on indemnity and defense costs. ♦

TMI!: HIPAA Informs State Law Negligence Claims

by ***Paul V. Esposito***

Americans value their privacy. They particularly value it regarding medical matters. The reasons are many. A disclosure of private medical information can adversely impact a person's employment. It can call unwanted attention to a person's condition. It can impact personal relationships. It can even be downright embarrassing, requiring explanations that some would rather not make.

For Greg Shepherd, it was the latter. He was so embarrassed that he sued his pharmacist for negligent disclosure of information. The Arizona Supreme Court now says that the federal Health Insurance Portability and Accountability Act (HIPAA) may inform his state law claim. *Shepherd v. Costco Whsle. Corp.*, 482 P.3d 390 (Ariz. 2021).

Facts

As Shepherd tells the story, he went to his doctor's office for a check-up and a prescription refill. While there, his doctor gave him a sample of an erectile dysfunction medication. When Shepherd went to Costco to pick up the refill, a full prescription of the E.D. med was also there. Shepherd rejected the E.D. med and told the Costco employee to cancel the prescription. The employee said he would. But the following month, the same thing happened.

The next day, Shepherd called Costco asking if his ex-wife, with whom he was trying to reconcile, could pick up his regular prescription. A Costco employee approved but did not tell Shepherd that the E.D. med was also awaiting pick-up. When the ex-wife went to the store, a Costco employee offered her both meds. She refused the E.D. med; she and the employee laughed about it.

Apparently, she wasn't laughing when she next saw Shepherd. She told him that she knew about the E.D. med and no longer wanted to be with him, ending Shepherd's hope of reconciliation. And she blabbed to Shepherd's children and friends about the medication.

Shepherd wasn't laughing either. He complained to Costco, which acknowledged its violations of HIPAA and Costco privacy policy. Shepherd sued Costco for negligence, breach of fiduciary duty, fraud, negligent misrepresentation, intentional infliction of emotional distress, intrusion upon seclusion, and public disclosure of private facts. The trial court dismissed the complaint on grounds of state law immunity and preemption under HIPAA. The court of appeals affirmed the dismissal of everything but the negligence claim.

Analysis

Under Arizona statute, a health care provider acting in good faith is not liable for the unauthorized disclosure of medical records information. Supplying a definition missing from the statute, the Supreme Court defined

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"good faith" as an honest belief and the lack of malice or an intent to defraud or take unconscionable advantage. Whether Costco met the standard remained to be determined.

Costco argued that HIPAA neither created a private right of action for negligence *per se* nor established a standard of care for negligence. The Court agreed with courts nationwide that HIPAA did not create a private right of action. But it disagreed with Costco that HIPAA precluded state law negligence claims, citing state cases recognizing claims for privacy violations.

The Court also rejected Costco's argument that by relying exclusively on HIPAA, Shepherd brought an impermissible negligence *per se* claim. After finding that Costco too restrictively read the complaint, it ruled that the weight of authority recognizes HIPAA's relevance to state law negligence claims. Without itself defining the standard of care, HIPAA may at least inform the relevant state law standard of duty.

Learning Point: The amount and availability of electronic medical information out there makes the unauthorized release of it predictable—even inevitable. Given the lack of a federal HIPAA cause of action, more and more states will find ways to incorporate HIPAA into state law negligence claims. Arizona is not the first state to do so. It won't be the last. ♦

Alert On Illinois Personal Injury And Wrongful Death Actions: Prejudgment Interest On Those Judgments Is Effective On July 1, 2021

*by **Melinda S. Kollross** and **Amy R. Paulus***

We had earlier reported on efforts by the Illinois legislature to assess prejudgment interest on personal injury and wrongful death judgments. That legislation stalled, but a compromise bill was passed and signed into law on May 28, 2021, with an effective date of July 1, 2021.

This new law places additional burdens on defendants and their insurers defending personal injury and wrongful death actions in Illinois.

General Provisions:

The prejudgment interest rate is 6% per annum.

The prejudgment interest applies to all damages except punitive damages, sanctions, statutory attorney's fees, and statutory costs.

Prejudgment interest runs from the date the action is filed.

If a plaintiff voluntary dismisses an action, prejudgment interest is tolled from the date the action is dismissed to it being refiled.

Prejudgment interest cannot accrue longer than 5 years.

Prejudgment interest cannot be assessed against the State, a local government unit, school district, community college district when sued directly or in a vicarious capacity.

If the personal injury or wrongful death suit was filed before 7-1-21, prejudgment interest begins to accrue on 7-1-21. If the personal injury or wrongful death occurred before 7-1-21, but suit was filed after 7-1-21, then interest runs from the date of the action.

Settlement Provisions—The "Guts" Of The Compromise Enactment

If any eventual judgment is greater than the amount of the highest written settlement offer made within 12 months from the effective date of the Act or the filing of an action, and not accepted by plaintiff within 90 days of the offer or rejected by the plaintiff, 6% interest is computed on the difference between amount of the judgment and the highest written settlement offer.

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If any eventual judgment is equal to or less than the amount of the highest written settlement offer made within 12 months from the effective date of the Act or the filing of an action, and not accepted by plaintiff within 90 days of the offer or rejected by the plaintiff, no prejudgment interest shall be added to the amount of the judgment.

The withdrawal of a settlement offer by the defendant shall not be considered the rejection of an offer by the plaintiff.

The 12-Month Settlement Window Means Immediate Action Is Necessary

The 12-month period specified in this law should be treated by defendants and their insurers as a "statute of limitation". That means immediate action is required to review pending claims, confirm coverage, evaluate liability, and determine judgment/settlement values, if any. Then, written settlement offers should be issued prior to the deadline for each case in order to maximize the benefits of the settlement contingencies in the statute. ♦

Skin In The Game: Insurers' Standing To Seek Subrogation For Attorneys' Malpractice In Defending Insureds

*by **Anne E. Kevlin** and **Paul V. Esposito***

It's stating the obvious, but we live in a litigious society. Truth be told, there is probably a lawsuit or two we'd all like to file. Fortunately, cooler heads prevail more often than not.

But when they don't, there are rules that wisely control access to the courts. One of them is the doctrine of standing. The doctrine limits the people and entities who may bring a lawsuit to those actually involved in a controversy. Suit may not be brought by someone wanting to get an issue resolved, yet lacking a real interest in a case. A party bringing suit must have skin in the game.

Very recently, a question of standing arose in a Florida case. It questioned an insurer's standing to bring a malpractice claim against an attorney who didn't do such a hot job representing an insured. *Arch Ins. Co. v. Kubicki Draper, LLP*, 2021 Fla. LEXIS 898.

Facts

Arch's insured, accounting firm Spear Safer, performed financial audits for firm client MBC. Apparently, the federal Securities and Exchange Commission had problems with how MBC was reporting its operations. Proceedings followed. After settling with the SEC, MBC's receiver sued Spear Safer for accounting malpractice.

Arch had a duty to defend Spear Safer pursuant to a professional liability policy. Arch retained Kubicki Draper LLP to defend Spear Safer in the litigation. Shortly before trial, the receiver's claim settled within policy limits for $3.5 million.

Arch was upset that Kubicki missed a statute-of-limitations defense that would have greatly reduced the settlement value. The policy contained a subrogation provision letting Arch recover from third persons all amounts paid under the policy. Arch sued Kubicki for legal malpractice, breach of fiduciary duty, subrogation, assignment, third-party beneficiary, and breach of contract. Kubicki responded that Arch lacked standing to sue and also lacked privity supporting Kubicki's duty of care. Agreeing on both grounds, the trial court ruled that Arch had no standing to sue Kubicki for legal malpractice.

The Fourth District Court of Appeal affirmed. It agreed with the trial court's reasoning and found that Arch was not an intended third-party beneficiary of the Kubicki/Spear Safer relationship.

Analysis

The Florida Supreme Court reversed. The Supreme Court agreed with the lower courts that Kubicki was in privity with Spear Shafer, not with Arch. But the Court also ruled that Arch had standing to sue Kubicki pursuant to the policy's subrogation provision. The Court defined subrogation as "the substitution of one person in the place of another with reference to a lawful

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claim or right." Florida recognizes both equitable and contractual subrogation, the latter flowing from an agreement allowing recovery for a debt owed by a third party. The subrogation language in the Arch policy was plain, and so is the law: "Where an insurer has a duty to defend and counsel breaches the duty owed to the client insured, contractual subrogation permits the insurer, who—on behalf of the insured—pays the damage, to step into the shoes of its insured and pursue the same claim the insured could have pursued." Because Arch's subrogation right was unmistakable, the Court found no need to consider Arch's third-party beneficiary argument.

The Supreme Court ruled that the Fourth District erred in focusing on the lack of privity between Arch and Kubicki. It was sufficient that privity existed between Kubicki and Spear Safer. This allowed Arch to step into Spear Safer's shoes pursuant to the insurance contract.

The Supreme Court rejected the notion that the general bar against the assignment of legal malpractice claims blocked Arch's claim. The bar prevents a marketplace for malpractice claims from developing in which parties lacking a legal relationship to a tortfeasor may sue. But here a relationship existed between Arch and Kubicki—the firm Arch hired. Public policy does not shield a law firm from liability for its malpractice. Instead, subrogation advances public policy by keeping insurance premiums down and by forcing tortfeasors to pay for losses they caused.

Learning Point: The *Arch* decision is very helpful for insurers—who definitely have skin in a lot of games. The decision makes perfect sense, consistent with contract language and equitable to all concerned. It will be interesting to watch its play nationwide. ♦

CONTRIBUTION AND INDEMNITY

HOSPITAL'S CONTRACTUAL INDEMNITY CLAIM SUBJECT TO MEDICAL MALPRACTICE STATUTE

Lake Imaging, LLC v. Franciscan Alliance, Inc., 2021 Ind. App. LEXIS 144 (Ind. App.)

Following malpractice settlement, hospital sought contractual indemnity from radiologists. ***Held:*** Claim is subject to Medical Malpractice Act's medical review panel requirement and two-year limitation provision. The Act applies to claimants, not just patients. The review panel and limitation provisions were part of the legislature's strategy to control medical costs. Though medical providers might now need to file suit for indemnity before suffering an underlying loss, the Act's purpose justifies it.

CYBER LIABILITY

RANSOMWARE ATTACK ELIGIBLE FOR COVERAGE

G&G Oil Co. v. Cont'l W. Ins. Co., 165 N.E.3d 82 (Ind.)

Computer fraud provision of commercial crime policy covered loss "resulting directly from the use of any computer to fraudulently cause a transfer of money." ***Held:*** Insured's being locked out of computer until ransom paid was covered loss. Insured needed to pay hackers to avoid further loss of business and profitability—losses directly resulting from use of computer.

DEFAULT JUDGMENT

REASONABLE CAUSE MUST BE SHOWN FOR FAILURE TO APPEAR

Jean M. Disturco v. Gates in New Canaan, LLC, AC 44115 (Conn. App.)

Plaintiff became trapped in restaurant restroom and was struck by defendant employee trying to force door open with piece of wood. Defendant's registered agent was served but defendant did not file appearance until nine months later, after entry of default judgment due to failure to appear. Defendant claimed broker did not notify insurer until after judgment but motion to open judgment was denied. ***Held:*** Affirmed. There was no reasonable cause for defendant's failure to appear. Defendant's sending of summons and complaint to its broker under assumption broker would inform insurer constituted negligence rather than a mistake or other reasonable cause.

FIRST-PARTY PROPERTY

INSURER'S INVESTIGATOR NOT IMMUNE FROM SUIT FOR DEFICIENT POST-LOSS INVESTIGATION

Cincinnati Ins. Co. v. Ropicky, 2021 Wisc. App. LEXIS 135 (Wis. App.)

Insured sued insurer's post-loss investigator for negligent failure to discover extent of damages. ***Held:*** Statute only immunized investigators providing advisory services seeking to prevent or minimize future losses. It did not immunize post-loss investigations. There was no evidence that investigator provided information to prevent future losses.

AGENT'S STATEMENT DID NOT EXTEND DEADLINE TO OBTAIN REPLACEMENT COST COVERAGE

Baber v. Ohio Mut. Ins. Co., 2021 Ohio App. LEXIS 1581 (Ohio App.)

Insured sued agency for promissory estoppel after insurer refused further deadline extension for barn reconstruction needed to qualify for full replacement cost coverage. ***Held:*** Agency's statement that insurer would be "fair" with further extensions was too ambiguous to be actionable promise. Insured could not explain its meaning under the circumstances. Absent explanation, "fair" could not induce reliance.

ATTORNEY FEES INAPPROPRIATE WHEN LAWSUIT DID NOT SERVE LEGITIMATE PURPOSE

People's Trust Ins. Co. v. Farinato, 2021 Fla. App. LEXIS 4949 (Fla. App.)

Insurer appealed final judgment on attorney's fees and costs entered in favor of insureds, arguing insureds did not have to file suit to force insurer to satisfy its obligations under policy because insurer did not refuse coverage. ***Held:*** Reversed. Insurer's coverage position prior to lawsuit was not anticipatory breach of contract because insurer requested appraisal, which would address insureds' claim.

BUILDING UNIT MISREPRESENTATION ON INSURANCE APPLICATION FATAL

Konstantakopoulos v. Union Mut. Fire Ins. Co., 2021 NY Slip Op 03256, (N.Y. App. Div. 1st Dep't)

Insurer sought ruling that insurance policy was void *ab initio* where the insured misrepresented on its insurance application that an apartment building had three units as opposed to four and further failed to list an ongoing eviction proceeding. ***Held:*** The policy was void. Insurer showed a material misrepresentation such that it would not have issued the policy if it had known the true nature of the risk. ***Further held:*** Even if plaintiff thought his eviction proceeding did not qualify as an eviction proceeding for purposes of the question asked on the insurance application, a misrepresentation need not be fraudulent to be material.

DISHONEST ENTRUSTMENT EXCLUSION APPLIES TO JEWELRY LOSS

Crown Jewels Estate Jewelry v. Underwrs. at Interest at Lloyd's London, 2021 NY Slip Op 03110 (N.Y. App. Div. 1st Dep't)

Plaintiff, a high-end jeweler, was contacted by a person claiming to work for Sony Pictures who was shooting a video with Jennifer Lopez and wanted to borrow pieces of plaintiff's jewelry for the shoot. In reality, the man was a member of the Gambino Organized Crime Family of La Cosa Nostra and made off with over $2 million dollars in jewelry. Plaintiff sought coverage. ***Held:*** Summary judgment for the insurer was proper because the loss of the insured's jewelry resulted from theft or an act of dishonest character on the part of the persons to whom the jewelry was entrusted. Plain language of the dishonest entrustment exclusion applied.

JURISDICTION

PRIVATE DETECTIVE MUST BE SPECIALLY APPOINTED TO SERVE PROCESS IN COOK COUNTY

Municipal Trust and Savings Bank v. Moriarty, 2021 IL 126290

Defendant filed a section 2-1401 petition arguing that the Circuit Court of Kankakee County was without personal jurisdiction to enter a default judgment against him in a foreclosure proceeding due to improper service of process in Cook County by a private detective who had not been specially appointed by the court. The appellate court affirmed the denial of petition, holding that service was proper. The Illinois Supreme Court reversed, holding that under Section 2-202 of the Illinois Code of Civil Procedure, for a licensed private detective to serve process on a defendant in Cook County, the private detective must be specially appointed by the court. This rule applies even if the lawsuit is filed outside of Cook County, as it was in this case.

LIABILITY INSURANCE COVERAGE

NO COVERAGE FOR ACCIDENT OR INJURY OUTSIDE LIABILITY POLICY'S COVERAGE PERIOD

Certain Underwriters at Lloyd's v. Pierson, 2021 Fla. App. LEXIS 7940 (Fla. App.)

Police officers found liable in civil rights suit brought over twenty years earlier sued insurer for failing to indemnify. Trial court ruled in officers' favor, concluding policies were triggered because damages alleged extended into policy periods. Insurer argued that "occurrence" giving rise to liability under CGL policies must have happened during period of insurance, and officers' misconduct occurred twenty years before policies were executed. ***Held:*** Reversed. An occurrence insurance policy offers coverage where the negligent act or omission occurs within policy period, regardless of date claim is asserted.

FAILURE TO NOTIFY CITY'S INSURER OF CLAIMS DEEMED FATAL

Ohio Cas. Ins. Co. v. State, 2021 Ind. App. LEXIS 110 (Ind. App.)

State waited over three years after learning about city's loss before notifying insurer under city's employee-crime policy. ***Held:*** Policy controlled notice period. Policy required sworn proof of loss to insurer within 120 days of discovering insurable claim

and suit within two years of discovery. Lengthier time allowed for State to sue wrongdoer had no impact on policy.

LACK OF INSURANCE CERTIFICATE CLARITY PRECLUDES SUMMARY JUDGMENT

County of Erie v. Gateway-Longview, Inc., 2021 NY Slip Op 02631 (N.Y. App. Div. 4th Dep't)

Defendant insurer sought summary judgment against plaintiff who claimed to be additional insured under policy. In response, insured submitted certificate of insurance listing it as additional insured. ***Held:*** An insurer that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment. Here, since the insurer presented no evidence establishing that neither it nor an authorized agent issued the certificate, summary judgment was properly denied.

LEGAL MALPRACTICE

UNDATED, UNSIGNED RETAINER DOES NOT WARRANT SUMMARY JUDGMENT

Fricano v. Law Offices of Tisha Adams, 2021 NY Slip Op 03306 (N.Y. App. Div. 2d Dep't)

Plaintiff sued her attorneys claiming they committed malpractice in failing to sue an insurer within the two-year period required by the insurance policy. Defendants disputed the contention that the attorney-client relationship included litigation of her insurance claim. ***Held:*** The retainer agreement submitted by defendants in support of a limited scope of retention was unsigned and undated. Thus, defendants failed to eliminate triable issues of fact as to whether their attorney-client relationship included litigation of the insurance claim.

LIMITATIONS OF ACTIONS

LIMITATIONS PERIOD FOR MALPRACTICE PURPOSES DID NOT BEGIN UNTIL SUPREME COURT RESOLVED TIMELY FILED APPEAL

Vega v. Rier, 2021 Fla. App. LEXIS 7499 (Fla. App.)

Plaintiff brought legal malpractice action against his attorney, who represented him in both his criminal trial and appeal. Trial court ruled that the action was untimely. ***Held:*** Reversed. Statute of limitations for legal malpractice action began to run from rendition of final order on appeal.

NEGLIGENCE

MUNICIPALITY PRIMARILY RESPONSIBLE FOR PUBLIC SIDEWALKS

Lajeune Pollard v. City of Bridgeport, AC 43260 (Conn. App.)

Plaintiff was injured by defective, raised, uneven, and deteriorated public sidewalk located adjacent to defendant housing cooperative association. Defense expert determined sidewalk's condition was result of large tree root growing directly beneath it, which emanated from tree growing on defendant's property. The trial court awarded defendant summary judgment. ***Held:*** Affirmed. Primary responsibility for maintaining public sidewalks in reasonably safe condition falls to municipalities, not abutting landowners. There was no statute or ordinance that shifted liability to landowner. Injury did not result from affirmative act of landowner.

STORE MANAGER NOT LIABLE FOR CUSTOMER'S TRIP OVER PALLET

Branscomb v. Wal-Mart Stores East, L.P., 165 N.E.3d 982 (Ind.)

Customer tripped on pallet left in store while manager was neither working nor physically present. ***Held:*** Claims of negligent hiring, training, and supervision were only available against employer, not store manager. No evidence existed that employee placing pallet acted outside scope of employment. Manager did not determine safety policies and procedures. He was not possessor of land for purposes of imposing duty under premises liability law. Manager did not control store, and customer did not rely on manager.

BYSTANDER RULE LIMITS AVAILABILITY OF RELIEF

K. G. v. Smith, 164 N.E.3d 829 (Ind. App.)

School employee abused disabled child outside mother's presence. ***Held:*** To recover for emotional distress, bystander must witness or come on scene soon after death or injury to loved one having relationship analogous to close family. Mother did not witness abuse or arrive at school soon after it.

STORE OWNER NOT LIABLE FOR DRUNK DRIVING ACCIDENT IN PARKING LOT

Poppe v. Angell Enters., Inc., 2021 Ind. App. LEXIS 127 (Ind. App.)

Patrons were injured in store parking lot when intoxicated driver pinned them against minivan. ***Held:*** Store owner not subject to premises liability for failing to place barriers near crosswalk. Whether driver's criminal conduct was foreseeable turns on broad types of plaintiff and harm involved, regardless of actual occurrence. Owner could not have reasonably foreseen drunk driving accident in parking lot.

NEW TENANT NOT BENEFICIARY OF LEAD PAINT INSPECTION YEARS AGO

Navarro v. Burgess, 2021 Mass. App. LEXIS 45 (Mass. App.)

Child contracted lead poisoning two years after family moved into apartment. ***Held:*** Contractor inspecting unit for prior owner 20 years earlier did not owe duty to injured child. Contractor's duty ran to building owner hiring him, not to future building owners. He did not know that injured child would become tenant. Contractor did not certify that apartment was free of lead paint or that paint would never peel, chip, or flake.

STANDING

DAMAGES CONTINGENT ON CONTINUED OWNERSHIP INTEREST

Daryl L. Starke v. The Goodwin Estate Assoc., Inc., AC 42736 (Conn. App.)

Plaintiff sued defendant for alleged failure to repair water damage to his condominium unit. Trial court granted defendant's motion to dismiss because plaintiff no longer owned condominium. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff's complaint was based on his rights as a unit owner.

SUBJECT MATTER JURISDICTION

NOTICE TO MUNICIPALITY CONDITION PRECEDENT TO SUIT BASED ON DEFECTIVE HIGHWAY STATUTE

William Dobie v. City of New Haven et al., AC 42877 (Conn. App.)

Plaintiff was injured when vehicle struck open manhole on roadway maintained by defendant municipality. One of defendant's snowplows had knocked off manhole cover and its operator failed to stop and secure roadway. Defendant sought dismissal, arguing no subject matter jurisdiction because plaintiff failed to give notice required by defective highway statute. Plaintiff successfully responded that he was asserting negligence claims rather than a defective highway claim and obtained verdict. ***Held:*** Reversed. Plaintiff's injuries were caused by a highway defect, an object in the traveled path that obstructed or hindered use of road. Plaintiff failed to provide timely notice.

TORTS

ADMINISTRATOR'S REPORT TO POLICE ABOUT THREATENING COMMENT COVERED BY QUALIFIED PRIVILEGE

Carter v. Pristine Sen. Living & Post-Acute Care, 2021 Ohio App. LEXIS 1206 (Ohio App.)

Administrator reported to police a threat by patient's family member to hit nurse. ***Held:*** Reports to law enforcement for prevention or detection of crime enjoy qualified privilege from defamation actions. Administrator acted in good faith and in properly limited manner.

TRIAL PRACTICE

RECORD OF ALLEGED DELIBERATIONS ERROR MUST BE MADE PRIOR TO READING OF VERDICT

Ryan K. Brown, Jr. v. David Cartwright et al., AC 43415 (Conn. App.)

Jury returned verdict in favor of defendants in personal injury action stemming from single car accident.

Plaintiff subsequently argued only defendants' exhibits and not plaintiff's were timely delivered to the jury room during deliberations. ***Held:*** Plaintiff presented no evidence the jury began deliberations prior to delivery of the exhibits. Plaintiff did not bring the late delivery of the exhibits to the attention of the trial court on the record prior to the reading of the verdict.

PLAINTIFF IMPROPERLY DENIED PROPOSED JURY CHARGE

Ussbasy Garcia v. Robert Cohen et al., AC 41079 (Conn. App.)

Plaintiff slipped on exterior apartment building staircase. Defendants removed snow and spread salt and sand on the staircase but no one returned to clear the staircase after spreading salt and sand. The trial court rejected plaintiff's request to charge and instruct the jury that the possessor of real property has a non-delegable duty to maintain premises in a reasonably safe condition and plaintiff appealed. ***Held:*** Reversed. Defendants' testimony that it employed contractors to remove snow and maintain the staircase implicated the non-delegable duty doctrine since it raised the issue of who was responsible for the staircase.

UM/UIM

PIP INSURER CANNOT REDUCE CHIROPRACTIC CLAIM PAYMENTS

Sunrise Chiropractic & Rehab. Ctr. v. Sec. Nat'l Ins. Co., 2021 Fla. App. LEXIS 7174

Facility sought reimbursement for chiropractic care from patient's insurer, through assignment of benefits. Insurer reduced its Personal Injury Protection ("PIP") payment per the Medicare/ Worker's Compensation fee schedule. Insurer obtained summary disposition as to application of the reduction. ***Held:*** Reversed. Payment reduction was contradicted by plain language of Florida's No-Fault Statute, which allows an insurer to limit reimbursement of medical care to the treating chiropractor to "200 percent of the allowable amount under" the "participating physicians fee schedule of Medicare Part B." The Medicare Physician Fee Schedule ("PFS") does not include the two percent (2%) reduction for CPT codes 98940, 98941 or 98942 shown in the CMS Payment Files which the defendant had relied upon to underpay chiropractic claims by 2%.

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