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MONOGRAPH

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Dede K. Zupanci — *HeplerBroom LLC, Edwardsville*

CONTRIBUTORS

Steven R. Arndt, Ph.D. — *Exponent Failure Analysis Associates, Chicago*

James Bertucci — *St. Louis University School of Law*

David M. Cades, Ph.D. — *Exponent Failure Analysis Associates, Chicago*

Matthew B. Champlin — *HeplerBroom LLC, Edwardsville*

Lindsay Drecoll Brown — *Cassiday Schade LLP, Chicago*

Mark D. Hansen — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

David A. Krauss, Ph.D. — *Exponent Failure Analysis Associates, Los Angeles*

Seth D. Lamden — *Neal, Gerber & Eisenberg LLP, Chicago*

Michelle M. Lore — *Minnesota Lawyers Mutual Insurance Company, Minneapolis*

William K. McVisk — *Johnson & Bell, Ltd., Chicago*

Brian A. Metcalf — *Cassidy & Mueller P.C., Peoria*

David B. Mueller — *Cassidy & Mueller P.C., Peoria*

Tyler Robinson — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

Joseph B. Sala, Ph.D. — *Exponent Failure Analysis Associates, Philadelphia*

Jessica R. Sarff — *Southern Illinois University School of Law*

J. Matthew Thompson — *Heyl, Royster, Voelker & Allen, P.C., Peoria*

John J. Vitanovec — *Cassiday Schade LLP, Chicago*

Mollie E. Nolan Werwas — *Kopon Airdo, LLC, Chicago*

Michael L. Young — *HeplerBroom LLC, St. Louis*

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Members and other readers are encouraged to submit manuscripts for possible publication in the *IDC Quarterly*, particularly articles of practical use to defense trial attorneys. Manuscripts must be in article form. A copy of the *IDC Quarterly* Stylistic Requirements is available upon request from ***The Illinois Association of Defense Trial Counsel*** office in Rochester, Illinois. No compensation is made for articles published, and no article will be considered that has been submitted simultaneously to another publication or published by any other publication. All articles submitted will be subjected to editing and become the property of the *IDC Quarterly*, unless special arrangements are made.

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THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL • P.O. Box 588 • Rochester, IL 62563-0588
800-232-0169 • 217-498-2649 • FAX 866-230-4415
idc@iadtc.org • www.iadtc.org

SANDRA J. WULF, CAE, IOM, *Executive Director*

IN THIS ISSUE

Monograph

Feature Articles

Columns

President's Message

Aleen R. Tiffany
Aleen R. Tiffany, P.C., Crystal Lake

"A pessimist sees the difficulty in every opportunity. An optimist sees the opportunity in every difficulty."

— Winston Churchill

I challenge all of you to join me in being optimists—eternal optimists, even —toward two primary goals: improving and streamlining civil discovery and advancing opportunities for young lawyers to learn our craft through trial experience.

No doubt, discovery is one of the most costly aspects of civil litigation in the modern justice system. Surely, if we put our heads together and gather the best and the brightest in the civil litigation community—including leaders of the various bar organizations—we can formulate and implement a more streamlined process.

It will take time—more than my year as IDC president. But, that need not, cannot, and will not deter us from achieving this goal. I am not the first to reach for it—I am at least the 49th. Under the leadership of each IDC president, we have worked toward improving civil justice. Since our earliest days, "the activities of IDC [have been] directed to champion trial by jury, to expedite fair disposition of legitimate claims, and to expose and defeat [those] who undermine our system of justice."[1] Surely, controlling and improving the too-lengthy and too-expensive discovery process is one important way to further those goals.

By the time you read this column, we will have hosted preliminary meetings of the joint bar leaders toward this goal of creating a more efficient process of civil discovery, thereby improving the civil justice system—for us, for our clients, and for future litigants and lawyers. We have the opportunity to reach out, to share with others, to teach, to learn, to work, to improve efficiency and fairness and, by extension, to make the system more accessible and affordable. The "right" result should not be dictated almost exclusively by its cost. And, because we have this opportunity, I believe that we have the obligation.

A pessimist might say that it cannot be done, or perhaps that it should not be done. A pessimist might say that any improvement or advancement will be too small to be noticed. But we optimists know the truth—that no advancement is too small, no improvement is too slow, and no knowledge is too limited. For we must always remember that **"[p]erfection is not attainable. But if we chase perfection, we can catch excellence."**[2]

Such excellence in civil justice has been "caught" in so many ways over the five decades that the IDC has worked toward it. Yet, we are not done; we must chase further perfection and excellence. As the civil litigation process has become more complex, expensive, and lengthy, we can, and must, work to improve it. Only by continuing to improve the civil justice system can we continue to "champion trial by jury" and "expedite fair disposition of legitimate claims," thereby ensuring opportunities and excellence for the next generation of civil defense lawyers and litigants.

Thinking of that next generation makes me think back to my own early years in practice and leaves me wondering where I would be without the mentoring, training, and encouragement I was so fortunate to receive. Sure, I would have found my way—we all do—but would I be where I am today? Writing this column? Thankful for the friends, colleagues, mentors, co-committee members, and competent adversaries from whom I have learned our craft? Leading our state defense organization and contemplating ways to streamline civil discovery? Spending time trying to better myself, our practice, and courtroom efficiency for our clients? Looking for ways to give back and gathering the profession's best and brightest in that goal?

I suspect not. I suspect none of us would. For no matter the choices we ultimately make, the practice areas we choose, the cities where we practice, or the partners and colleagues with whom we choose to practice, we can all look back and point to a person, a group of people, an organization of people, that helped us, mentored us, and assisted us in learning and making our way. And we must pay it forward.

So join us formally or informally, in large ways or small, on paper or orally, with brief ideas, or with concrete analysis and presentations. Reach out to newer lawyers within your firm. Donate your expertise to our Young Lawyers Training Series Task Force. Help plan and present one or more of our training sessions. Send us your ideas on how to coordinate training to give newer lawyers a version of the "trial experience" that we were all able to achieve, or your thoughts on the discovery process.

Make no mistake, new lawyers today do not have the same opportunities to gain experience. Indeed, fewer cases go to trial, trials are more costly, and

greater stakes make experienced trial lawyers preferred—often required—to lead those cases that are tried. Certainly, there are a variety of cases that justify an associate sitting second chair; but too few to provide all incoming defense lawyers the experience needed to advance their careers the way many of us have. Moreover, while sitting second chair certainly provides valuable trial experience, it is not the same as sitting first chair and making decisions—both tactical and substantive—oneself.

So, let us join together to provide our newest lawyers the opportunities that we have had—for only if we assist them in perfecting their craft, thereby becoming the next generation of defense trial lawyers and IDC leaders, can we guarantee continued civil justice. Let us work together to formulate and implement a plan for more efficient and cost effective discovery—for only if we find ways to more efficiently and effectively litigate can we guarantee the ongoing right to trial by jury. Only if we embrace these opportunities and reach for perfection can we catch further excellence.

The IDC takes this moment to remember the loss of one of its own, John "Jack" Reidy of *Ruff, Weidenaar & Reidy Ltd*. A longtime IDC member and a highly respected defense attorney, Jack died in November at his Orland Park home after fighting prostate cancer in recent years. Jack is remembered by many for combining a dedication to his clients and the issues they faced with a constant tone of professionalism and civility.

(Endnotes)

[1] *Thirty-Five Year History of the Illinois Association of Defense Trial Counsel*, by Willis R. Tribler, 1999, p. 2, *citing IDC Newsletter*, 1965.

[2] Vincent J. Lombardi, Head Coach, Green Bay Packers (1959-67) and Washington Redskins (1969-70).

Editor's Note

Geoffrey M. Waguespack
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

This issue of the *IDC Quarterly* features a Monograph from members of the Insurance Law Committee, exploring the jurisprudence of Illinois courts on the issue of coverage for construction defect claims. The authors discuss how courts have embraced other doctrines in construction defects claims, such as the "natural and ordinary consequences" test or the "economic loss" doctrine, but have applied them differently in the construction defect context than in non-construction defect claims in order to consistently find no coverage under CGL policies for construction defect claims, unless the claims sought recovery for damages other than the insured's own work.

In the inaugural Construction Law column, Lindsay Drecoll Brown and John Vitanovec explore the *Moorman* economic loss doctrine. The column highlights several instructive decisions that defense attorneys should consider when handling construction negligence cases. The tools discussed could serve to bar a claim or reduce damages.

In this issue, we are fortunate to have five feature articles covering an array of topics. In their article, Tyler Robinson and Roger Clayton explore the fascinating rise of "reverse" false claims that attorneys advising providers enrolled in federal government healthcare programs should appreciate and understand. The article also discusses proposed rules from the Centers for Medicare and Medicaid Services regarding government overpayments to healthcare providers.

David Mueller and Brian Metcalf provide us with the third article in a series that explores the evolution of Illinois case law concerning product liability design defect cases. This installment identifies how the court has imposed the multi-factorial risk-utility approach used in strict liability cases into the analysis of claims of negligent product design.

Several members of Exponent discuss the types and common effects of distracted driving. The article provides information necessary for a better understanding of the implications of distractions to drivers on businesses and litigation efforts.

Michelle Lore of Minnesota Lawyers Mutual Insurance Company provides perspective on dilemmas facing attorneys who agree to represent "accommodation clients." The article provides some guidance on the ethical considerations to keep in mind.

Matthew Champlin's article explains the conundrum that could be created by the use of a confidential good faith settlement. He provides interesting insight into whether employing such a mechanism is always a good idea.

Several columns address the changing landscape of the legal practice brought about by the increasing use of electronic databases and e-filing initiatives. John O'Malley's Insurance Law column provides advice on the use of Rule 23 orders in Illinois now widely available through online services. Scott Howie's Appellate Practice Corner highlights certain pitfalls that exist in the context of e-filing. With a perspective

— Continued on next page

from the other side of the technology divide, Bradford Peterson's Workers' Compensation column discusses potential problems with the mailbox rule in the context of circuit court review of decisions by the Workers Compensation Commission.

The Legislative Committee Report by William McVisk explains new legislation effective January 1, 2014, which dramatically changes the handling of settlements for many types of cases. The new law sets deadlines by which releases must be provided to plaintiffs and settlement payments must be made. Defense counsel need to understand these changes, and Bill's article provides a great starting point.

James Craney's Employment Law column discusses a significant development in U.S. Supreme Court jurisprudence on Title VII retaliation claims. His column explains the Supreme Court's decision that Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the adverse employment action, thereby rejecting the application of the "motivating-factor" standard.

Last, but certainly not least, after more than a decade of serving as a columnist for this publication, Tracy Stevenson is stepping down in order to take on more responsibility with the IDC Board of Directors. In her final Property Insurance column, she provides food for thought with respect to crop liens, whether crops are real property or personal property, and the effect of the Uniform Commercial Code on the priority of liens. All puns aside, we thank Tracy for her dedicated service to the *IDC Quarterly* and her excellent work over the years.

Feature Article

Tyler Robinson
Heyl, Royster, Voelker & Allen, P.C., Springfield

Roger R. Clayton
Heyl, Royster, Voelker & Allen, P.C., Peoria

The Rise of the "Reverse" False Claim and Proposed Rules from CMS on Reporting and Returning Overpayments

While providers enrolled in federal government healthcare programs have long reconciled and returned overpayments through various ongoing and post-payment audit and self-disclosure mechanisms, Congress has enacted laws and the Centers for Medicare and Medicaid Services (CMS) has proposed a set of rules that have *incredible* and *immediate* implications with respect to a provider's obligation to expeditiously identify and return government overpayments in order to avoid *significant* liability under the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733. This article details the evolution of the FCA to encompass a provider's retention of government overpayments, Congress's new 60-day deadline to report and return government overpayments, and proposed rules from CMS that could forever change the manner in which hospitals investigate and report government overpayments.

False Claims Act Background

The FCA has long been recognized by its supporters as the single most effective tool the United States has to combat fraud being perpetrated against the government. The United States Supreme Court has noted that the FCA is "the primary vehicle [used] by the Government for recouping losses suffered through fraud." *Vt. Agency of Natural Res. v. U.S.* ex rel. *Stevens*, 529 U.S. 765, 792 (2000) (quoting H.R. Rep. No. 99-660, at 18 (1986)). The FCA was enacted by Congress in 1863 at the behest of President Abraham Lincoln to redress fraud being perpetrated against the Union Army during the Civil War. S. Rep. No. 99-345, at 8-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5273-75. The FCA, sometimes referred to as "Lincoln's Law," was enacted so the government could "recover monies from unscrupulous contractors who sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations and provisions." Press Release, U.S. Dep't of Justice, Justice Department Celebrates 25th Anniversary of the False Claims Act Amendments of 1986 (Jan. 31, 2012), *available at* http://www.justice.gov/opa/pr/2012/January/12-ag-142.html (last visited October 21, 2013).

Between 1986 and 2012, civil lawsuits filed pursuant to the FCA have allowed the federal government to recoup more than $33 billion from fraud perpetrators. U.S. Dep't of Justice, Civil Div., Fraud Statistics – Overview, October 1, 1987 - September 30, 2012 (Oct. 24, 2012), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (last visited Oct. 21,

2013). Between 2008 and 2012 alone, the United States Department of Justice (DOJ) reported an increase of 268 FCA lawsuits and $2.3 billion in FCA recovery. *Id*. The influx of FCA lawsuits and recovery has come by way of recent congressional amendments that have strengthened FCA enforcement actions and by the formation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT). A combination of Medicare Fraud Strike Force teams spread throughout the United States, HEAT was created in 2009 by United States Attorney General Eric Holder and Health and Human Services Secretary Kathleen Sebelius for purposes of improving coordination of FCA enforcement. Since the formation of HEAT, DOJ has utilized the FCA to collect more than $9.5 billion in federal health care funds. Press Release, U.S. Dep't of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html (last visited Oct. 21, 2013).

The FCA provides for both civil and criminal penalties assessed against those who are found to have submitted a false claim to the government knowingly. The FCA, also referred to as a "whistleblower" statute, permits a private individual called a "Relator" to file a lawsuit in the name of and on behalf of the United States government against an entity or individual whom the Relator believes is perpetrating fraud against the United States government. If the Relator's lawsuit, characterized as a "*qui tam*"[1] lawsuit, is successful, the Relator is entitled to an award of up to 30 percent of the judgment or settlement,[2] plus costs and attorneys' fees. See 31 U.S.C. § 3730(d)(2).

Congress's 1986 Amendments

The FCA has been the subject of significant congressional amendments since its enactment in 1863, the most significant of which came by way of Congress's 1986 amendments. Among the significant changes the 1986 amendments made to the FCA were the increased financial incentive for whistleblowers to file *qui tam* lawsuits from 15 percent to 30 percent and the added whistleblower protections to prevent retaliation by the whistleblower's employer. The 1986 amendments also clarified that the FCA extends liability to false claims designed to decrease an obligation to pay or to transmit money or property to the government. H.R. Rep. 99-660, at 29 (1986). Classified as a "reverse" false claim theory of liability, the Senate Judiciary's Committee's Report on the 1986 Amendments stated the following:

> [T]he subcommittee added a clarification that an individual who makes a material misrepresentation to avoid paying money owed the Government should be equally liable under the Act as if he had submitted a false

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[1] The term "*qui tam*" is short for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own." *Vt. Agency of Natural Res. v. U.S.* ex rel. *Stevens*, 529 U.S. 765, 769 n.1 (2000).

[2] If the United States government intervenes and proceeds with the lawsuit brought by a Relator, the Relator is entitled to at least 15 percent but not more than 25 percent of the judgment or settlement. 31 U.S.C. § 3730(d)(1). If the United States government does *not* intervene, the Relator is entitled to at least 25 percent but not more than 30 percent. 31 U.S.C. § 3730(d)(2).

About the Authors

Tyler Robinson is an associate in the Springfield office of *Heyl, Royster, Voelker & Allen, P.C.*, where he is a member of the firm's healthcare practice group. His practice is focused on defending health care providers against *qui tam* lawsuits filed pursuant to the False Claims Act and similar state false claims laws. His experience includes working in tandem with the U.S. Department of Justice on *qui tam* litigation involving pharmaceutical and medical device companies, long term care providers, and a wide variety of government contractors and federal program participants, specifically regarding federal and state drug pricing methodologies and reporting requirements. He has also counseled and advised clients undergoing health care fraud and abuse investigations pursuant to the Anti-Kickback Statute and Stark Law. Mr. Robinson received his undergraduate degree from Southern Illinois University-Edwardsville in 2006 and a law degree from Southern Illinois University School of Law in 2010, where he was a member of the *Journal of Legal Medicine*. He is a member of the American Bar Association, Defense Research Institute, Illinois Association of Defense Trial Counsel, Illinois County Bar Association, and Sangamon County Bar Association.

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

> claim. The Justice Department testified that recent court rulings have produced an ambiguity as to whether such "reverse false claims" were covered by the False Claims Act, and the subcommittee agreed that such matters should be addressable under the Act.

Despite Congress's attempt to broaden the "reverse" false claims theory to encompass instances where an individual "makes a material misrepresentation to avoid paying money owed the Government," the theory was significantly weakened by courts instituting a narrow interpretation of "obligation."

S. Rep. No. 99-345, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

As a result of the 1986 amendments, the FCA extended liability to any person or entity that "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an *obligation* to pay or transmit money or property to the Government." Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986) (codified at 31 U.S.C. § 3729(a)(7)) (emphasis added). Since its inception, this theory of FCA liability has been characterized as a "reverse" false claim "because it is designed to [re]cover Government money or property that is knowingly retained by a person even though they have no right to it." S. Rep. No. 111-10, at 13-14 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 441.

After the 1986 amendments, plaintiffs relying on the "reverse" false claim theory of FCA liability were stifled with inconsistent and unpredictable rulings due, in large part, to the fact that the FCA did not define the term "obligation." In a commonly cited case addressing this issue, the United States Court of Appeals for the Sixth Circuit in *U.S.* ex rel. *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999), concluded that "a reverse false claim action cannot proceed without proof that the defendant made a false record or statement at the time the defendant owed to the Government an obligation sufficiently certain to give rise to an action of debt at common law." According to the *American Textile* court, FCA liability did not extend to "[c]ontingent obligations—those that will arise only after the exercise of discretion of government actors." *U.S.* ex rel. *Am. Textile Mfrs. Inst., Inc.*, 190 F.3d at 738. The Sixth Circuit's opinion in *American Textile* was consistent with similar holdings out of the United States Courts of Appeal for the Eighth, Tenth, and Eleventh Circuits that interpreted "obligation" to mean "a fixed sum" or "independent legal duty" to pay an amount that is "immediately due." See, *e.g., U.S.* ex rel. *Bahrani v. Conagra, Inc.*, 465 F.3d 1189 (10th Cir. 2006) (holding that, for there to be FCA liability, the defendant must have an *independent legal duty* to pay the government at the time the false statement is made); *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, (8th Cir. 1997) (holding that, for there to be FCA liability, the obligation "must be for a fixed sum that is immediately due"); *United States* ex rel. *Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (11th Cir. 1997) ("[T]he reverse false claims act does *not* extend to the potential or contingent obligations to pay the government fines or penalties which have not been levied or assessed . . . and which do not arise out of an economic relationship between the government and the defendant . . . under which the government provides some benefit to the defendant wholly or partially *in exchange* for an agreed or expected payment . . . to . . . the government." (emphasis in original)).

Despite Congress's attempt to broaden the "reverse" false claims theory to encompass instances where an individual "makes a material misrepresentation to avoid paying money owed the Government," S. Rep. No. 99-345, at 15, 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280, 5283, the theory was significantly weakened by courts instituting a narrow interpretation of "obligation." As a result, DOJ lobbied Congress for an amendment to define "obligation" in such a way "that would correct those cases that unduly narrowed the reverse false claim provision by holding or suggesting that the term "obligation" encompasses only a duty to pay that is fixed in all particulars, including the specific amount owed." Letter from M. Faith Burton, Acting Assistant Attorney General, U.S. Dep't of Justice, to Sen. Patrick Leahy, Chairman, Senate Comm. on the Judiciary, Appendix (April 1, 2009) (copy on file with author). DOJ further sought to clarify that reverse false claim liability exists "without any additional requirement of a false statement or record." *Id.* That is, an individual or entity can be held liable for the act of

knowingly retaining government funds to which the individual or entity is not entitled without having to actually present a claim for government reimbursement.

FERA: Congress Attempts to Resolve the "Obligation" Paradox

On May 20, 2009, Congress enacted the Fraud Enforcement Recovery Act of 2009 (FERA). Pub. L. No. 111-21, 123 Stat. 1617 (2009). Among other things, FERA significantly amended the FCA by defining "obligation" to mean "an established duty, *whether or not fixed*, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." Pub. L. No. 111-21, § 4, 123 Stat. 1617 (2009) (codified at 31 U.S.C. § 3729(b)(3)) (emphasis added). According to the Senate Judiciary Committee, the term "obligation" is meant to encompass "the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that 'results in a duty to pay the Government money, whether or not the amount owed is yet fixed.'" S. Rep. No. 111-10, at 14 (2009) (quoting Brief for United States at 24, *United States v. Bourseau*, No. 06–56741, 06–56743 (9th Cir. July 14, 2008)), *reprinted in* 2009 U.S.C.C.A.N. 430, 441. In plain terms, regardless of whether a government overpayment has been quantified, a provider's knowledge of the overpayment gives rise to FCA liability under a "reverse" false claims theory approach. That is, a provider knowingly retaining a government overpayment, by itself, gives rise to FCA liability.

According to the Senate Judiciary Committee's Report (the Report), the inclusion of "retention of an overpayment" into the definition of "obligation" was supported by DOJ. *Id.* at 15. In fact, DOJ took an active role during the drafting stages of FERA when it strongly encouraged Congress to include "overpayment" in the definition of "obligation." Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, to Sen. Patrick Leahy, Chairman, Senate Committee on the Judiciary, Appendix 3 (Feb. 21, 2008), cited in S. Rep. No. 111-10, at 15. According to the Report, a "reverse" false claim violation is committed "once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment." S. Rep. No. 111-10, at 15 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 442. The Report noted, however, that FCA liability is not designed to encompass cases where there exists statutory or regulatory processes for reconciliation, "provided the receipt of the overpayment is not based upon any willful act of a receipt to increase the payments from the Government" to which the recipient was not entitled. *Id.*

PPACA: Congress Injects a 60-Day Timeline to Report and Refund Overpayments

Not even a year after it passed FERA, Congress enacted the Patient Protection and Affordable Care Act of 2010 (PPACA), Pub. L. 111-148, 124 Stat. 119 (2010), and Health Care and Education Affordability Reconciliation Act, Pub. L. 111-152, 124 Stat. 1029 (2011) (collectively referred to as "PPACA"). Specifically, on March 23, 2010, Congress injected a 60-day timeline upon which providers and suppliers (hereinafter "providers") receiving government funds, such as Medicare and Medicaid reimbursements, must report and refund government "overpayments" they have received. According to Section 6402 of PPACA:

> An overpayment must be reported and returned . . . by the later of --
>
> (A) the date which is 60 days after the date on which the overpayment was identified; or
>
> (B) the date any corresponding cost report is due, if applicable.

42 U.S.C. § 1320a-7k(d)(2).

PPACA was clear that an overpayment retained after the deadline for reporting and returning an overpayment is considered an obligation, 31 U.S.C. § 3729(b)(3), for purposes of "reverse" false claims liability under the FCA. To avoid inconsistent, narrow interpretations of the term "overpayment," Congress broadly defined "overpayment" to mean "any funds that a person receives or retains under" Medicare or Medicaid to which the person, "after applicable reconciliation, is not entitled." 42 U.S.C. § 1320a-7k(d)(4)(B). Interestingly, Congress did not define or clarify the phrase, "after applicable reconciliation." Presumably, Congress was accounting for the sophisticated cost report and multifaceted reconciliation processes associated with Medicare that can take months, if not years, to elicit a fixed or final amount in what CMS owes to the provider or what the provider owes to CMS for a benefit year.

Nevertheless, after the enactment of PPACA, all health care providers receiving Medicare or Medicaid funds

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are required to "report" and "refund" any overpayments within 60-days from the date the overpayment is "identified" or within 60-days after the due date of any applicable cost report. Uncharacteristically, it took CMS almost two years to develop its much-anticipated proposed regulations interpreting PPACA. Having failed to finalize two previous sets of proposed rules relating to CMS's ability to recover overpayments in 1998, 63 Fed. Reg. 14506 (Mar. 25, 1998), and 2002, 67 Fed. Reg. 3662 (Jan. 25, 2002), PPACA reinvigorated CMS's strive to reduce fraud, waste, and abuse in the Medicare and Medicaid programs.

Proposed Regulations from CMS: More Questions than Answers

On February 16, 2012, CMS published in the Federal Register a set of proposed rules, establishing a new Subpart D in Part 401 of Title 42 of the regulations and interpreting PPACA's requirement that providers timely report and return Medicare and Medicaid overpayments. 77 Fed. Reg. 9179-02 (Feb. 16, 2012). Among other things, CMS sought to clarify and define PPACA's key terms, such as when an overpayment is "identified" and the 60-day "reporting and returning" timeline. Although CMS limited the scope of its proposed rules to those providers and suppliers that participate in Medicare Part A and Part B, CMS stated that it intended to address other stakeholders, such as Medicare Advantage organizations (MAO), Medicare prescription drug plans (PDP), and Medicaid managed care organizations (MCO), at a later date. 77 Fed. Reg. 9179-02, 9180 (Feb. 16, 2012). Notwithstanding the limited scope of it proposed rules, CMS cautioned that all providers are obliged to comply with the overpayment procedures set forth in PPACA. *Id.* at 9181.

"Identified"

With respect to when an overpayment is "identified," CMS proposed that "a person has identified an overpayment if the person has actual knowledge of the existence of the overpayment or acts in reckless disregard to deliberate ignorance of the overpayment." *Id*. at 9182. CMS sought to mirror the FCA's definition of the terms "knowing" and "knowingly," explaining that the term "identified" should be interpreted in such a way as to give providers "an incentive to exercise reasonable diligence to determine whether an overpayment exists." *Id.* Without such an incentive, the fear was that providers would "avoid performing activities to determine whether an overpayment exists, such as self-audits, compliance checks, and other additional research." *Id.*

Unfortunately, CMS was silent on the issue of whether there is a monetary threshold upon which an overpayment has been "identified" and, thus, must be reported and returned. CMS has focused on the *existence* of the overpayment, not on the *amount* of the overpayment. This point is key in that, presumably, the 60-day clock starts upon the awareness or deliberate indifference of the *existence* of an overpayment—even if the provider has not had the ability to quantify the *amount* of the overpayment. This glaring omission from CMS begs the question as to what providers are to do when they have identified the *existence*, but not the *amount*, of an overpayment. Until the provider can quantify the amount of the overpayment, providers should contact the entity to which they will inevitably submit their report and refund and describe their efforts to identify the amount of overpayment.

Reporting and Returning Deadlines

In cases where an overpayment is "identified," CMS proposed a regulation identical to that which was set forth in PPACA, wherein an overpayment must be reported and returned by the later of: "(A) the date which is 60 days after the date on which the overpayment was identified; or (B) the date any corresponding cost report is due, if applicable." 42 U.S.C. § 1320a-7k(d)(2)(A)-(B). CMS explained that if the overpayment is "claims-related," the provider is required to report and return the overpayment within 60 days of identification. If the claims-related overpayment is one that is typically reconciled on the provider's cost report, on the other hand, CMS stated that the provider is permitted to report and return the overpayment by the later of: (A) 60 days from the identification of the overpayment, or (B) 60 days from the date the cost report is due. 77 Fed. Reg. 9179-02, 9182 (Feb. 16, 2012). CMS cautioned that providers should not attempt to delay their reporting and returning claims-related overpayments by waiting until their cost reports are due.

In further explanation of a provider's obligations under PPACA, CMS theorized that there might be instances where a provider receives information that it has potentially received an overpayment. In such cases, CMS stated that providers have an obligation to undertake a "reasonable inquiry" with "deliberate speed" to determine whether the overpayment exists. *Id.* If, after receiving a notification of a potential overpayment, the provider fails to undertake a "reasonable inquiry," such a failure "could result in the provider knowingly

retaining an overpayment because it acted in reckless disregard or deliberate ignorance of whether it received such an overpayment." *Id.* CMS provided an example for further illustration, wherein a provider received an anonymous compliance hotline telephone complaint about a potential overpayment that the provider received. According to CMS, so long as the provider "diligently conducts the investigation" and "reports and returns any resulting overpayments" within 60 days, the provider would satisfy its obligations under the rules proposed by CMS. *Id.* If the provider failed to investigate the complaint, the provider "may be found to have acted in reckless disregard or deliberate indifference of any overpayment" in violation of the FCA. *Id.*

To further illustrate, CMS provided a series of examples of when a provider has an affirmative duty to investigate and return overpayments, including the following:

> • A provider . . . reviews billing or payment records and learns that it incorrectly coded certain services, resulting in increased reimbursement.
>
> . . . .
>
> • A provider of services . . . performs an internal audit and discovers that overpayments exist.
>
> • A provider . . . is informed by a government agency of an audit that discovered a potential overpayment, and the provider . . . fails to make a reasonable inquiry.

Id.

According to the rules proposed by CMS, once an overpayment is identified, the provider is expected to send a written report to the Department of Health and Human Services, or an intermediary, carrier, or contractor, and provide an explanation of why it has received an overpayment. 77 Fed. Reg. 9179-02, 9181 (Feb. 16, 2012). CMS proposed adopting the "self-reported overpayment refund process" currently in place for reporting Medicare overpayments. CMS instructed providers to obtain forms available on each Medicare Administrative Contractor's website and to provide sufficient information to allow the contractor to identify the affected claims. *Id.* Among other things a provider must report, the provider must summarize the following information: (1) the way in which the error was discovered; (2) a description of the corrective action plan that was implemented to ensure that the error does not occur again; (3) a refund in the same amount as the overpayment; and (4) if the overpayment amount was determined using a statistical sample, a description of the statistically valid methodology used in the determination of the overpayment. *Id.*

In connection with its proposed rules, CMS anticipated that there most certainly will be intersections between the 60-day deadline to report and return overpayments and the existing procedures for providers to self-disclose actual or potential violations to CMS through a Medicare Self-Referral Disclosure Protocol (SRDP) mechanism.[3] CMS proposes that a providers' obligation to *return* overpayments would be suspended when CMS acknowledges receipt of a disclosure made pursuant to a SRDP mechanism. *Id*. at 9182-83. To be clear, the proposed rule from CMS does not suspend a provider's obligation to *report* overpayments within the 60-day deadline. CMS proposed a similar suspension of a provider's obligation to *return* overpayments when the Office of Inspector General (OIG) acknowledges receipt of a submission pursuant to the OIG Self-Disclosure Protocol (SDP), which is a procedure that providers currently utilize to report self-discovered evidence of potential fraud. Unlike SRDP, however, CMS proposed that once the provider notifies OIG through the use of a SDP, such notice satisfies the "report" for purposes of the 60-day deadline. *Id*. at 9183.

10-Year Look-Back Period

As a final note, CMS proposed that overpayments must be reported and returned if a person identifies the overpayment within 10 years of the date the overpayment was received. *Id*. at 9184.

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[3] The Stark Law, codified at 42 U.S.C. § 1395nn, is a strict liability statute that prohibits a physician from referring Medicare patients to an entity for the furnishing of "designated health services" if the physician or an immediate family member of the physician has a "financial relationship" with the entity, unless an exception applies. If a claim in violation of the Stark Law is submitted to and paid by the government, the submitting provider could be subject to, among other sanctions, liability in the amount of any payment collected and civil penalties in the amount of $15,000 per service. 42 U.S.C. § 1395nn(g)(2). The Self-Referral Disclosure Protocol (SRDP) allows providers to self-disclose to CMS or the Office of the Inspector General actual or potential violations of the Stark Law in order to have any chance of seizing the possibility of reducing the amount of liability exposure. See 42 C.F.R. § 411.361. Once a provider makes a SRDP disclosure and CMS acknowledges receipt of the same, CMS suspends the provider's obligation, pursuant to 42 U.S.C. § 1320a-7k(d)(2)(A), to return the overpayment within 60 days until a settlement agreement is entered, the provider of services or supplier withdraws from the SRDP, or CMS removes the provider of services or supplier from the SRDP. CMS Voluntary Self-Disclosure Protocol, OMB Control Number: 0938-1106, *available at* http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Downloads/6409_SRDP_Protocol.pdf (last visited Oct. 29, 2013).

CMS chose 10 years "because this is the outer limit of the False Claims Act statute of limitations." 77 Fed. Reg. 9179-02, 9184 (Feb. 16, 2012); see also 31 U.S.C. § 3731(b) (providing that a civil action arising under the FCA may not be filed under Section 3730 more than six years after a Section 3729 violation occurred, or no more than three years after the responsible U.S. official knew or should have known of the facts material to the cause of action, but in any event may not be brought more than 10 years after the date of the violation giving rise to the claim, whichever is later). The rule proposed by CMS would amend 42 C.F.R. § 405.980(b), wherein there exists a one-year claims reopening period for "any reason" and a four-year reopening period for "good cause." Under the existing regulations, Medicare claims can be reopened only after four years "if there exists reliable evidence . . . that the initial determination was procured by fraud or similar fault." *Id.* § 405.980(b)(3). Under the rule proposed by CMS, overpayments may be reopened for a period of 10 years after their submission. 77 Fed. Reg. 9179-02, 9184 (Feb. 16, 2012).

A critical issue that remains unclear is whether rules proposed by CMS will encompass overpayments identified *before* March 23, 2010–PPACA's effective date. That is, CMS was silent as to whether providers are obligated to undertake reasonable inquiries to identify potential overpayments for the last 10 years of government reimbursement or whether the 10-year period began on March 23, 2010. If courts follow the holding set forth in *U.S.* ex rel. *Stone v. Omnicare, Inc.*, No. 09 C 4319, 2011 WL 2669659 (N.D. Ill. July 7, 2011), providers will *not* be held liable for overpayments identified before the enactment of FERA and PPACA. As of this writing, the *Stone* court is the *only* court to address whether providers have an ongoing obligation to report and return Government overpayments identified *before* the enactment of FERA and PPACA.

Significant Exposure: Penalties for Failure to Report and Return Overpayments

If a provider fails to report and return a government overpayment within the 60-day timeframe contemplated by PPACA, the provider could face liability under the FCA and under the Civil Monetary Penalties Law (CMPL) statute. With respect to the FCA, the theory of liability associated with the provider's knowing retention of a government overpayment resides in 31 U.S.C. § 3729(a)(1)(G). If a provider is found to have violated the FCA, the provider could face damages up to three times the amount of single damages (the *actual* amount of damages suffered by the government), between $5,500 and $11,000 for *each* false claim, and reasonable attorney's fees and costs associated with instituting and litigating the FCA enforcement action. *Id.* § 3729(a)(1).

PPACA also amended the CMPL to extend liability to instances where a provider "knows of an overpayment . . . and does not report and return the overpayment" as required by PPACA's 60-day rule. 42 U.S.C. § 1320a-7a(a)(10). If a provider is found to have violated the CMPL, the CMPL provides for a civil monetary penalty of three times the total amount of reimbursement the provider received without regard to whether the provider was lawfully entitled to a portion of the proceeds. *Id.* In addition, the CMPL provides for varying administrative civil penalties for *each* false claim and possible exclusion from Medicare. *Id.*

Conclusion

While the rules proposed by CMS are not yet final, PPACA's 60-day deadline for reporting and returning government overpayments has been the law since March 23, 2010. In light of the significant exposure providers will encounter if found liable under the FCA or CMPL, providers should *immediately* institute policies and procedures to field any potential complaints with respect to potential Medicare overpayments, including the manner in which the complaints are to be handled and who is responsible for conducting the investigation. To substantiate that the provider undertook a "reasonable inquiry" as contemplated by CMS, providers should record the identities of the employees undertaking the investigation and the information they gather.

Finally, as the number of healthcare *qui tam* lawsuits and whistleblower rewards rise with each passing year, providers should familiarize themselves with the latest Medicare statutes, regulations, and CMS publications and bulletins relating to billing requirements and consider integrating their legal team with their internal audit or accounting team to routinely perform statistically valid reviews to ensure compliance with these billing requirements. As a result of CMS indicating in its proposal that it expects 8.5% of the total number of Medicare providers to report three to five overpayments per year, providers should be wary of failing to report *any* overpayments in a benefit year.

Workers' Compensation Report

Bradford J. Peterson
Heyl, Royster, Voelker & Allen, P.C., Urbana

Illinois Supreme Court Applies the Mailbox Rule to Circuit Court Reviews

When commencing a judicial review in the circuit court from a decision of the Illinois Workers' Compensation Commission (the Commission), Section 19(f)(1) of the Workers' Compensation Act (the Act) provides that "a proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission." 820 ILCS 305/19(f)(1). In *Gruszeczka v. Illinois Workers' Compensation Commission*, 2013 IL 114212, the Illinois Supreme Court found that Section 19(f)(1) was ambiguous and, therefore, subject to interpretation as to whether the mailbox rule, 5 ILCS 70/1.25, applied to filings on a circuit court review.

In *Gruszeczka*, the Illinois Appellate Court, Workers' Compensation Commission Division, vacated the judgment entered in McHenry County that confirmed the Commission's decision to deny the claimant's claim. *Gruszeczka v. Ill. Workers' Compensation Comm'n*, 2012 IL App (2d) 101049WC. The appellate court interpreted Section 19(f)(1) as requiring the actual filing of a petition for review in the circuit court within the 20-day deadline prescribed under Section 19(f)(1), as opposed to deeming a document filed on the day it was mailed. *Gruszeczka*, 2012 IL App (2d) 101049WC, ¶¶ 13-16. The appellate court noted that Section 19(f) provided for the review as a "commencement" of the proceeding and, as such, it was akin to a new filing as opposed to the continuation of an existing proceeding or an appeal. *Id.* ¶¶ 14-15.

The Illinois Supreme Court disagreed and reversed the appellate court's ruling. In *Gruszeczka*, the judicial review documents were placed in the mail prior to their due date but were not filed by the McHenry County Circuit Court until 24 days after Gruszeczka's attorney received the Commission's decision. *Gruszeczka v. Ill. Workers' Compensation Comm'n.*, 2013 IL 114212, ¶¶ 3-4. The supreme court began its analysis by finding that Section 19(f)(1) was ambiguous and, therefore, subject to interpretation. *Gruszeczka*, 2013 IL 114212, ¶ 7. The court then noted that the mailbox rule applied to reviews to the Commission as well as appellate proceedings following the circuit court review. Applying the mailbox rule to judicial review proceedings "would bring harmony and consistency to the workers' compensation review process, with the same rules applying at every stage of review." *Id.* ¶ 28. The court noted that the legislature obviously was aware that courts had been construing the statute as containing the mailbox rule for decades and that a specific exception to the mailbox rule was not stated in Section 19(f).

In a dissent by Justices Clarence Freeman and Anne Burke, they argued that the mailbox rule should not apply to Section 19(f)(1) reviews, as the mailbox rule would effectively create an extension of the 20-day deadline. *Id.* ¶ 51 (Freeman, J., dissenting). They furthered argued that Section 19(f)(1) should be strictly construed as requiring actual filing within the 20-day filing deadline. *Id.*

The supreme court took exception to what has been a disturbing trend in appellate court decisions interpreting the Act—the appellate court's reliance on "dictionary definitions" to resolve legal questions under the Act. The supreme

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The supreme court took exception to what has been a disturbing trend in appellate court decisions interpreting the Act—the appellate court's reliance on "dictionary definitions" to resolve legal questions under the Act.

About the Author

Bradford J. Peterson is a partner in the Urbana office of *Heyl, Royster, Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability, and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims "Medicare, Workers' Compensation and Set Aside Trusts," *Southern Illinois Law Journal* (2002).

court noted that, "[u]nlike the appellate court, we do not believe that this question can be answered nearly by consulting a dictionary." *Id.* ¶ 15. Hopefully the supreme court's comments concerning dictionary references will have a chilling effect on the appellate court's repeated reliance on "dictionary definitions" to resolve issues arising under the Act.

The Illinois Supreme Court's decision in *Gruszeczka* is a victory for petitioners and respondents alike. Most workers' compensation practitioners handle cases arising from accidents throughout multiple counties in Illinois. The only way to ensure that the circuit court review was actually filed within the 20-day deadline was to personally appear and file the judicial review documents in the circuit court. Applying the mail box rule to judicial reviews to the circuit court will significantly reduce the time and expense previously experienced when personally filing circuit court reviews. Furthermore, the supreme court's ruling now creates a consistent standard throughout the workers' compensation review/appeal process.

As a word of caution, however, employers will want to continue to use extra care when filing their judicial reviews due to the need to file a surety bond in accordance with Section 19(f)(2). 820 ILCS 305/19(f)(2). Employers seeking to review a decision of the Commission, as the party against whom the award was rendered, must file a bond supported by a surety. The surety must be approved by the circuit court clerk. Several counties, including Cook, Lake, and DuPage, have unique local provisions governing the filing of an appeal bond, such as only accepting surety bonds from approved sureties or approved surety agents, or both. Moreover, it is also of paramount importance to include a proof of filing and a certificate of service when you place documents in the mail.

Construction Law

Lindsay Drecoll Brown and **John J. Vitanovec**
Cassiday Schade LLP, Chicago

Framing a Defense from *Moorman*'s Progeny

The concept of the economic loss doctrine, as set forth in the seminal Illinois Supreme Court decision of *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982), is deceptively simple: no plaintiff may recover in tort solely for economic losses arising out of disappointed commercial expectations. Nonetheless, as this doctrine gradually expanded from the products liability arena to professional services contracts and beyond, the confidence of many practitioners in its application to bar claims has diminished. This column highlights a few instructive decisions that could aid defense attorneys in construction negligence cases to effectively utilize the *Moorman* doctrine as a tool to bar claims or, at the very least, to limit damages that might be recovered by plaintiffs.

30 Years of Post-*Moorman* Case Law Formed the Current Battleground over Exceptions

In the product liability context, the *Moorman* court defined economic losses as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Moorman*, 91 Ill. 2d at 82. The court distinguished between tort law and contract law, finding that tort law was appropriately suited for personal injury and property damage resulting from a sudden or dangerous occurrence, whereas the remedy for a loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown, or nonaccidental cause lies in contract. *Id.* at 86. Since, the Illinois Supreme Court has continued to voice a strong interest in keeping the spheres of tort and contract law separate. *Trans States Airlines v. Pratt & Whitney Can., Inc.*, 177 Ill. 2d 21, 41 (1997).

The supreme court extended the *Moorman* doctrine into the construction context approximately 30 years ago, when it barred a negligence claim sounding in construction defect filed by a homeowner against the contractor

About the Authors

Lindsay Drecoll Brown is an associate at the law firm of *Cassiday Schade LLP*, where she concentrates her practice in civil litigation, with an emphasis on medical malpractice, professional liability, and product liability. Ms. Brown received her J.D., *cum laude*, from Loyola University Chicago School of Law, and her undergraduate degree from Michigan State University with high honors. She is a member of the IDC.

John J. Vitanovec is an associate at *Cassiday Schade LLP*'s Chicago office. He concentrates his practice in the defense of civil litigation matters concerning construction, medical malpractice, and insurance coverage. He received his undergraduate degree from Loyola University Maryland and his J.D. from DePaul University College of Law. He is a member of the IDC, serving its Construction Law Committee.

that built the home. In *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 174 (1982), the plaintiff sought recovery for the costs of repair and replacement of a defectively constructed chimney, wall, and patio. *Redarowicz*, 92 Ill. 2d at 176. The court dismissed the matter, finding tort law could provide no remedy for "a disgruntled purchaser" of a house if the allegedly defective construction did not result in injury to any residents or damage to the plaintiff's other property. *Id.* at 176-77. The decision in *Redarowicz* operated to bar the purchaser of a poorly or unsatisfactorily constructed home from filing a negligence claim against the builder unless bricks were to fall and strike a resident or damage furniture in the house. *Id.* at 178.

The *Moorman* doctrine is no complete bar to recovery, as exceptions have developed through Illinois case law. First, a plaintiff may seek solely economic loss if those injuries are the proximate result of a defendant's intentional and false representation—traditionally called deceit. *In re Chi. Flood Litig.*, 176 Ill. 2d 179, 199 (1997). Second, a plaintiff may seek solely economic loss where the damages are the proximate result of a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others. *Id.* Third, a plaintiff who sustains personal injury or property damage resulting from a sudden and dangerous occurrence may seek solely economic loss. *Id.*

Defeating Vague Allegations of Damages to Personal Injury and Other Property

Due to the inherent danger of many construction activities, the exception most often cited to by plaintiffs attempting to sue in tort to recover economic losses in the construction context is the "sudden and dangerous occurrence" exception. This exception applies only where a sudden occurrence is "highly dangerous and presents the likelihood of personal injury or injury to other property." *Mars, Inc. v. Heritage Builders of Effingham*, 327 Ill. App. 3d 346, 353 (4th Dist. 2002). The event, by itself, does not constitute an exception to the economic loss rule. Rather, both a sudden, dangerous event and a personal injury or property damage are required. *In re Chi. Flood Litig.*, 176 Ill. 2d at 200.

Due to the inherent danger of many construction activities, the exception most often cited to by plaintiffs attempting to sue in tort to recover economic losses in the construction context is the "sudden and dangerous occurrence" exception.

When a claim is filed *after* the complete construction of a house, building, or other facility, a plaintiff typically seeks recovery for issues that he or she believes were caused by inadequate or insufficient work performed by contractors during construction. To avoid defeat of the claim by application of the economic loss doctrine, plaintiffs may push to recover tort damages by incorporating allegations of a variety of minor and seemingly irrelevant losses—which plaintiffs characterize as personal injuries arising out of the same negligent conduct at issue in the construction negligence claim. Evaluating the legal impact of unique or unusual personal injury claims can be particularly challenging when attempting to assess whether a defendant has a viable defense under the *Moorman* doctrine. Fortunately, Illinois courts continue to provide guidance to help practitioners weed out illegitimate or insufficient personal injury claims.

Sudden and Dangerous Event Required for *De Minimis* Injury

The best defense against a plaintiff that alleges *de mimimis* personal injury might be denying that it was caused by an event that was sudden and dangerous. Recently, the Illinois Appellate Court Fourth District confirmed that allegations of a paper cut are not of sufficient caliber to escape application of the *Moorman* doctrine. In *Zaffiri v. Pontiac RV, Inc.*, 2012 IL App (4th) 120042-U, ¶ 5, an unpublished Rule 23 Order,[1] the defendant manufactured the walls of a motor home that the plaintiff purchased. The purchaser alleged that the outside panels of the motor home were defective, as the panels blistered, popped, and delaminated. *Zaffiri*, 2012 IL App (4th) 120042-U, ¶ 5. Replacement of the insulation of the motor home's walls was required due to water seeping in through those panels. *Id.* In an attempt to utilize the sudden and dangerous exception to the *Moorman* doctrine, the purchaser claimed that he suffered a finger cut while washing the motor home. *Id.* ¶ 85. The Fourth District upheld dismissal of the tort claims against the manufacturer after specifically finding that a *de minimis* injury was alleged and that no sudden

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and dangerous event could have caused that minor injury. *Id.* The purchaser's pulling a piece of fiberglass out from underneath his fingernail and placing a Band-Aid on his finger was not an event sudden and dangerous enough to allow the purchaser to sue in tort. *Id.*

Discomfort due to Alternative Residence not Sufficient

Plaintiffs also attempt to escape the *Moorman* doctrine by alleging personal injury in the form of discomfort and inconvenience when they are forced from their homes. Defense counsel may counteract those pleadings by analogizing a plaintiff's alleged trauma to the damages sought in *Mayer v. Chicago Mechanical Services, Inc.*, 398 Ill. App. 3d 1005 (2010).

In *Mayer*, occupiers of a condominium building sued the installer of the condominium unit's heating and air conditioning system after the system broke down. *Mayer*, 398 Ill. App. 3d at 1006. The occupiers alleged the malfunctioning heating and air systems caused mold and required the plaintiffs to obtain temporary, alternative housing. Plaintiffs subsequently sought compensation for their resulting "sense of homelessness" and inconvenience due to "living out of a suitcase." *Id.* at 1012.

The court found that plaintiffs' theory of damages was rooted more in the sentimental attachment to their homes, rather than in the tangible comforts and conveniences of living in those homes. *Id.* at 1013. The court denied recovery for those damages because they were vague and subjective. *Id.* at 102-13. Pursuant to *Mayer*, displacement from one's home, in and of itself, is not a sufficient basis for an award of damages. *Id.* at 1013.

"Other Property" Requires Property Outside the Contracted for Integrated System

In *Mars, Inc. v. Heritage Builder of Effingham, Inc.*, 327 Ill. App. 3d 346 (4th Dist. 2002), the court restricted the scope of "other property" to which damage was necessary for plaintiffs to satisfy the "sudden and dangerous" occurrence exception. In *Mars, Inc.*, the owner of a warehouse hired a general contractor to manage an expansion project of the warehouse. *Mars, Inc.*, 327 Ill. App. 3d at 347-48. After the steel frame collapsed during a violent thunderstorm, the owner filed suit against the steel erecting subcontractor, alleging that the erector negligently failed to erect and brace the frame properly. *Id.* at 348. After recognizing that the owner sought economic damages for the loss of use and the cost to replace the frame, the court analyzed the facts of the case to determine whether or not the owner's alleged tort met the "sudden or dangerous" exception to the *Moorman* doctrine. *Id.* at 352-58. Although the thunderstorm was a sudden and dangerous occurrence, the court found "other property" was not damaged despite the fact that the erector was only contracted to erect the steel manufactured by another subcontractor. *Id.* at 356-57.

The owner argued that the damage to the frame consisted of damage to "other property," because the erector's product was the mere assembly of the independent frame. *Id.* at 355. The critical fact of the court's inquiry was whether the damaged property was part of an integrated system, such that the damaged property could not be separated from the "product." *Id.* In this case, the owner had bargained for the contemplated warehouse expansion only, as its primary contract was with the general contractor to "provide materials, labor, equipment, engineering, and supervision to construct a warehouse." *Id.* There was no independent agreement for steel erection with the erector. *Mars, Inc.*, 327 Ill. App. 3d at 355. The frame was to become an integrated warehouse, as the steel had no intrinsic value unless the owner desired to erect the steel itself. *Id.* Furthermore, the court recognized that the owner sought to pursue a negligence action based on the failure of the erector to provide the owner with its benefit of the bargain, which can be defined only by reference to an agreement between the parties, which did not exist in this case. *Id.* at 357-58. Therefore, *Mars, Inc.* presents a defense for subcontractors based on *Moorman* that prevents owners of property from suing in tort if the only property damaged is part of the contracted for construction project.

Conclusion

A review of facts presented in Illinois case law reveals that favorable law and multiple defense strategies are available to attorneys in the construction arena when faced with claims of construction defect based in tort. The decisions discussed above provide guidance on how to sharpen and refine instruments already in the tool boxes of practitioners that regularly and effectively assert the *Moorman* doctrine to extricate their clients from construction negligence cases and to combat frivolous claims for big payouts for tort damages.

(Endnote)

[1] No motion to publish the order in *Zaffiri* was made, and it may not be cited as precedential, but it nevertheless provides helpful insight into this topic.

Feature Article

Michelle M. Lore
Minnesota Lawyers Mutual Insurance Company, Minneapolis, Minnesota

Representation as an Accommodation: Rules and Risks

All lawyers want their clients to be happy with their representation, particularly their large, regular, corporate clients. But how much accommodating should a lawyer do for these clients in order to keep them happy?

What if the accommodation the client requests is for the lawyer to defend the corporate client in a claim by a third party and also to defend the client's employees when they are called into depositions? What if the accommodation request goes even further and the lawyer is asked to defend both the corporate client and the client's chief executive officer in his individual capacity? Similarly, what if the lawyer is asked to represent two corporate defendants in a lawsuit, one of which is the lawyer's regular client and the main target who controls the litigation, while the other is sued only because it gives the plaintiff some strategic advantage?

Surely the lawyer would like to agree to the representation of the employee or the non-target corporate defendant as an "accommodation" to the regular client, particularly because it would please the regular client to avoid the expense involved in hiring two lawyers. But should the lawyer do it?

Before agreeing to the accommodation, lawyers should give careful consideration to how the "accommodation client" label might be viewed in the event a dispute or a conflict arises between the longtime client and the accommodation client. The risk that a court could disqualify the lawyer from continuing to represent the lawyer's longtime client might not be worth taking on the so-called "accommodation client."

> In a nutshell, an "accommodation client" is a client that a lawyer agrees to represent as an accommodation to the lawyer's regular client.

Conflicts Concerns

In a nutshell, an "accommodation client" is a client that a lawyer agrees to represent as an accommodation to the lawyer's regular client. In theory, the accommodation client understands and consents to the arrangement, the representation is expected to be of limited scope or duration, and the accommodation client has no reasonable expectation that the lawyer will keep his or her confidences from the regular client.

The "accommodation client" concept, which is controversial in part because it essentially strips a client of all conflicts of interest protection in some situations, was adopted in Comment *i* to Section 132 of the Restatement (Third) of the Law Governing Lawyers. The comment states that, with the informed consent of both clients, a lawyer may undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose and to avoid duplication of work and expense. The comment goes on to state:

> If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the "accommodation" client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular

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About the Author

Michelle M. Lore is claim attorney with *Minnesota Lawyers Mutual Insurance Company*. Prior to joining MLM, Ms. Lore worked as an associate editor for a publication that serves Minnesota's legal community. Before that, she was in private practice, primarily litigating employment discrimination claims on behalf of employees. She received her undergraduate degree from Mankato State University in 1991 and her law degree from William Mitchell College of Law in 1994. She is a member of the Minnesota State Bar Association and the Hennepin County Bar Association, and serves as a volunteer for the Minnesota Fourth District Ethics Committee.

> client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client.

Restatement (Third) of the Law Governing Lawyers § 132 cmt. *i*.

Thus, the "accommodation client" label could be a useful tool for a lawyer seeking to avoid disqualification from continuing to represent the regular client in the event a conflict arises between the regular client and the accommodation client during the representation. The label also might assist the lawyer in defeating a disqualification motion after the accommodation representation is concluded, such as when a new client seeks to hire the lawyer in litigation against the accommodation client. Will the accommodation client succeed on a motion to disqualify the lawyer? The answer is, "maybe, maybe not."

At the heart of most accommodation-client disputes are allegations involving conflicts of interest. The Illinois Rules of Professional Conduct do not distinguish between regular clients and accommodation clients, so lawyers are advised to be careful to comply with Illinois's ethics rules when agreeing to accommodate a client by also representing another party in the same matter.

Rule 1.7(a) of the Illinois Rules of Professional Conduct prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Ill. Sup. Ct. R. Prof'l Conduct 1.7(a). A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client, or if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or even by a personal interest of the lawyer. Ill. Sup. Ct. R. Prof'l Conduct 1.7(a)(1)-(2).

The rule derives from the fiduciary duties of loyalty, confidentiality, and competency that attorneys owe their clients. As noted in the first comment to Rule 1.7, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Ill. Sup. Ct. R. Prof'l Conduct 1.7 cmt. 1. Attorneys representing more than one client in a matter cannot fulfill their fiduciary duties of loyalty and competency if their representation promotes the interests of one client to the detriment of another client.

Thus, as in any joint representation situation, lawyers desiring to represent a third party as an accommodation to a regular client must analyze carefully whether any conflicts exist in representing both the regular client and the third party. Short of an actual conflict, attorneys may represent both parties, as long as each client consents after consultation.

Informed consent when representing multiple clients in a single matter requires disclosure of the facts and circumstances that might create a conflict, an explanation of how the representation could be adverse to the client's individual interests, and an explanation of the advantages and risks involved. In addition, as noted in Comments 30 and 31 to Rule 1.7, part of the process of obtaining informed consent involves advising both parties on the implications of the common representation, including the fact that information will be shared among all clients and that the attorney-client privilege generally does not attach as between jointly represented clients. Ill. Sup. Ct. R. Prof'l Conduct 1.7 cmts. 30-31. Lawyers also should inform the parties that they can and should consult with independent counsel before consenting to the representation.

If the lawyer determines at the outset that a conflict does, in fact, exist between the parties, the representation is not automatically prohibited, but the lawyer should proceed with caution. Rule 1.7(b) allows a lawyer to proceed with the representation if: 1) the lawyer has a reasonable belief that he or she will be able to provide competent and diligent representation to both parties, 2) the representation is legal, 3) the representation does not involve the assertion of a claim by one client against the other client in the same litigation, and 4) each client gives informed consent. Ill. Sup. Ct. R. Prof'l Conduct 1.7(b). Although the rule does not require written consent, obtaining each client's informed consent in writing is good practice nonetheless.

Lawyers also should be cognizant of the fact that, even if no conflicts exist at the time the representation begins, the potential for conflicts could arise at some point in the litigation. The lawyer's obligation to identify and disclose potential conflicts is ongoing, and a change in circumstances might require renewed consent from the clients.

Importantly, Comment 4 to Rule 1.7 states that, in a common representation situation, whether the lawyer may continue to represent the regular client after a conflict arises is determined by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to adequately represent the regular client, given the lawyer's duties to the former client. Ill. Sup. Ct. R. Prof'l Conduct 1.7 cmt. 4. Therefore,

also relevant to a lawyer's analysis of whether to take on an accommodation client is Rule 1.9 of the Illinois Supreme Court Rules of Professional Conduct, which deals with obligations attorneys have to former clients.

Rule 1.9(a) states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." Ill. Sup. Ct. R. Prof'l Conduct 1.9(a).

What constitutes a "matter," whether successive matters are "substantially related," and whether the current and former client's interests are "materially adverse" will depend on the facts of the particular case and the legal issues involved. Ill. Sup. Ct. R. Prof'l Conduct 1.9 cmts. 2-3. Notably, the crucial question behind the phrase "substantially related" is whether the lawyer learned confidential information from the former client that could be used in the representation of the new client. Ill. Sup. Ct. R. Prof'l Conduct 1.9 cmt. 3. Thus, the protection of client confidences is the primary basis for the prohibition identified in the rule and an issue that lawyers considering taking on an accommodation client must consider carefully.

Courts' Concerns

Commentators who have reviewed the sparse case law referring to accommodation-client situations have observed that, in those decisions that positively cite the accommodation client concept, the courts did not view seamless adherence to the substantial relationship test found in Rule 1.9 as appropriate under the facts before them. The nature of those cases was such that the accommodation client would have no expectation that anything the lawyer learned from the accommodation client would not be shared with the primary client.

> Lawyers may accommodate regular clients by taking on representation of third parties in order to save money and to avoid duplication of effort, but they should realize that courts might view the third party as a new client, fully entitled to the lawyer's loyalty, independent judgment, and confidentiality.

In other cases, however, courts have been critical of the concept, in part because it arguably gives short shrift to a lawyer's ethical duty of loyalty to clients. Accommodation-client status generally is conveyed only if the representation of the accommodation client is of limited scope or duration and the accommodation client has no reasonable expectation that the lawyer will keep his confidences from the regular client. Moreover, the label of accommodation client most likely is to be applied by courts only when the client has no financial stake in the outcome of the matter, no involvement in the representation, or has a primary lawyer of its own.

Thus, though the Restatement purports to create the "accommodation client" label to describe arrangements where lawyers may provide limited services to third parties as an accommodation to a current client, lawyers should be aware that a court might reject the concept, instead finding that an agreement to represent an accommodation client creates a real attorney-client relationship that entitles the client to the loyalty the rules provide for former clients. Accordingly, there is a risk that if a conflict arises between the parties and the accommodation client moves to disqualify the lawyer from continuing to represent the regular client, the motion might be successful.

Lawyers' Concerns

So, what should a lawyer do when a longtime client asks him or her to represent a third party (for example, the corporation's CEO) as an accommodation to the client?

As with any representation, first the lawyer must analyze conflicts carefully, including the potential for future conflicts to develop between the parties. He or she should address specifically with the clients the potential conflict issues and the risks inherent in common representation. Absent a current conflict and after full consultation, the lawyer should obtain both clients' informed consent in writing and detail the scope and nature of the lawyer's representation of each client in a clear and thorough engagement letter. It is recommended that the agreement specifically address the possibility that conflicts might arise between the parties and that the lawyer will continue to represent the regular client in that event. Finally, the lawyer should advise both clients to consult with independent

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counsel before consenting to the common representation. Notably, Comment *i* to Section 132 of the Restatement makes it clear that the lawyer bears the burden of showing that circumstances exist to warrant an inference of understanding and consent on the part of the accommodation client. Restatement (Third) of the Law Governing Lawyers § 132 cmt. *i*.

If a conflict does arise between the clients during the representation, the lawyer should consider carefully whether continued representation of the regular client is appropriate and whether the lawyer is likely to be disqualified from the matter if the accommodation client requests it.

Conclusion

Lawyers may accommodate regular clients by taking on representation of third parties in order to save money and to avoid duplication of effort, but they should realize that courts might view the third party as a new client, fully entitled to the lawyer's loyalty, independent judgment, and confidentiality. The best course might be to accept the accommodation to the regular client but to consider the accommodated party an "actual client," just as in any other joint representation. To that end, assuming all obligations to the accommodated client that the lawyer provides to all other clients and adding that person or entity to the firm's current client database are advisable.

Finally, if it seems likely that conflicts might arise at some point, or the accommodation could interfere with the lawyer's representation of the regular client in some way, the best course of action might be to advise the client to obtain separate counsel for the third party. Although likely to increase the cost of the litigation so that the client might not like the arrangement, in the end it might be the safest approach for the client, for the third party, and for the attorney.

Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Supreme Court Addresses Pitfalls of E-Filing in *VC&M, Ltd. v. Andrews*

The Illinois Supreme Court has made great strides towards modernizing various aspects of the legal practice in the state to take advantage of new technology. Its ambitious initiatives include the electronic reporting of appellate decisions and an ever-expanding effort to allow the use of electronic records on appeal. Among these initiatives, the one most likely to affect the everyday practice of law is the promotion of the electronic filing, or e-filing, of documents in the circuit courts. In a series of pilot programs, the supreme court has allowed circuit courts to implement local rules concerning e-filing rules and procedures.

One of those pilot programs, in the 18th Judicial Circuit, set the stage for the court's recent decision in *VC&M, Ltd. v. Andrews*, 2013 IL 114445. While the result of *VC&M* depends in part on features of the case that reflected the newness of the particular pilot program, the majority decision and the dissenting opinion examine a number of the issues that the e-filing initiative raises. And though the appeal survived the plaintiff's admitted violations of the local rules governing e-filing, the decision does not suggest that such rules may be taken lightly. To the contrary, the court's reasoning calls for appellate counsel to take great care in using these new procedural tools.

Procedural Posture of *VC&M*

VC&M concerned the rules implemented by the 18th Judicial Circuit to govern the pilot e-filing project in that circuit. Parties to a case could designate it for e-filing by filing the complaint or the answer electronically, or by stipulation. 18th Judicial Cir. Ct. R. 5.03(b) (eff. Jan. 2, 2007). Because the complaint in *VC&M* was filed before the pilot project commenced and the defendants apparently filed no answer at all, and the parties had not stipulated to allow e-filing, the case was not designated for e-filing.

The supreme court alluded only briefly to the substance of the dispute, which arose out of a contract by which the plaintiff was to list the defendants' residential home for sale. *VC&M, Ltd.*, 2013 IL 114445, ¶ 3. The plaintiff filed a two-count complaint containing claims for breach of contract and an account stated. The defendants filed motions to dismiss the complaint for failure to state a claim. The plaintiff e-filed its response to the motions, despite the fact that the case had not been designated for such filings, but the defendants did not object to

About the Author

Scott L. Howie is a partner at *Pretzel & Stouffer, Chartered*, in Chicago, specializing in posttrial and appellate practice in the state and federal courts. He received his undergraduate degree from Northwestern University in 1989 and his law degree from Chicago-Kent College of Law in 1994. Mr. Howie is a member and past director of the Illinois Appellate Lawyers Association, where he co-chairs the Moot Court Committee.

the method of filing. After a hearing, the circuit court granted both motions and dismissed the complaint. *Id.* ¶ 6.

Within 30 days of the dismissal, the plaintiff e-filed a motion to reconsider. Several weeks beyond the initial 30-day period, it filed a paper copy of the motion, on the same day a hearing was held in the case. At the hearing, the defendants objected to the filing, arguing that the e-filing was improper and the conventional filing untimely, depriving the circuit court of jurisdiction to hear the motion. The trial court denied the motion on the merits, without commenting on the method of filing. *Id.* ¶ 7. On the thirtieth day following that ruling, the plaintiff e-filed a notice of appeal in the circuit court, and never filed a hard copy. *Id.* ¶ 8.

On the defendants' motion, the appellate court dismissed the appeal. Because the plaintiff had improperly filed its motion to reconsider, the appellate court deemed the motion "a nullity and ineffective to toll the time for filing a notice of appeal." *Id.* ¶ 9 (citing *VC&M, Ltd. v. Andrews*, 2012 IL App (2d) 110523, ¶ 17). The filing of the paper copy was untimely, the court held, and therefore did not extend the deadline for a notice of appeal. The appellate court further held that the e-filing of the notice of appeal was in violation of a local rule expressly barring the e-filing of "appellate motions and documents," and that the acceptance of that document by the clerk of the circuit court did not confer jurisdiction on the appellate court. *Id.* (citing *VC&M, Ltd. v. Andrews*, 2012 IL App (2d) 110523, ¶ 21).

Though it dismissed the plaintiff's appeal, the appellate court issued a certificate of importance under Supreme Court Rule 316, effectively requiring the supreme court to review the issue. See Ill. S. Ct. R. 316 (eff. Dec. 6, 2006).

The supreme court reversed the dismissal of the appeal. It held that, even though the plaintiff had improperly e-filed the motion to reconsider the dismissal of its complaint and had untimely filed that motion by proper conventional means, the motion nonetheless tolled the time for filing a notice of appeal.

The supreme court reversed the dismissal of the appeal. It held that, even though the plaintiff had improperly e-filed the motion to reconsider the dismissal of its complaint and had untimely filed that motion by proper conventional means, the motion nonetheless tolled the time for filing a notice of appeal. *VC&M, Ltd.*, 2013 IL 114445, ¶ 25. The court further held that the notice of appeal was sufficient to vest the appellate court with appellate jurisdiction, even though the local rule prohibited the e-filing of such documents. *Id.* ¶ 33.

The Supreme Court's Analysis

With regard to the motion to reconsider, the supreme court regarded the validity of its e-filing as a question of law to be reviewed *de novo*. *Id.* ¶ 13. It observed that the defendants had not cited any authority "for the proposition that the failure to comply with a local court rule concerning the manner in which a motion is physically submitted to the trial court somehow constitutes a jurisdictional defect." *Id.* ¶ 20. Finding the unauthorized e-filing analogous to situations in other cases in which jurisdictionally significant pleadings were filed without leave of court, the supreme court concluded that the improper method of filing did not affect the circuit court's jurisdiction to hear the motion to reconsider. *Id.* ¶¶ 22-25. Since the improper e-filing did not affect the circuit court's jurisdiction, that court was within its discretion to consider the motion on its merits, effectively overlooking the violation of its own local rule. See *id.* ¶ 27.

As to the notice of appeal, the supreme court considered whether the e-filing of such a document violated the local rule that prohibited e-filing of "[a]ll appellate and postjudgment enforcement proceeding documents and notices." *Id.* ¶ 31 (quoting 18th Judicial Cir. Ct. R. 5.03(d) (eff. Jan. 2, 2007)). The plaintiff maintained that, because notices of appeal are filed with the clerk of the circuit court, its notice of appeal was not an "appellate document" within the meaning of the local rule. The supreme court disagreed, holding that the plain language of the rule barred the e-filing of notices of appeal. *Id.* ¶ 32.

The appeal survived, however, by virtue of the thinnest of administrative details: The e-filing rules required the clerk of the circuit court to create and maintain a backup paper copy of all e-filings. *Id.* ¶ 33. Noting that a defect in form and not in substance does not deprive a reviewing court of jurisdiction, the supreme court held that the e-filed notice of appeal was sufficient to confer jurisdiction on the appellate court—"particularly because a backup paper

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copy was required to be maintained in a parallel manual court file in the circuit court." *Id.* The supreme court's decision conspicuously does not say that that procedure actually was followed in that case. The court also found it significant that the defendants had known of the appeal and did not claim any prejudice from the e-filing. *Id.*

Dissenting from the majority's decision, Justice Robert Thomas—joined by two other justices—criticized the plaintiff's "complete disregard" for the local rules concerning e-filing. *Id.* ¶ 42 (Thomas, J., dissenting). Justice Thomas relied on Supreme Court Rule 303(a)(1), which requires the timely filing of all motions directed against the judgment and of all notices of appeal. *Id.* ¶¶ 43, 47 (Thomas, J., dissenting) (citing Ill. Sup. Ct. R. 303(a)(1) (eff. May 30, 2008)). He rejected the notion that e-filing the motion to reconsider was an adequate substitute—"at least not without some legal authority allowing the e-filing," and since there was no such authority, he concluded, "the conventional paper method of filing that document was required." *Id.* ¶ 47 (Thomas, J., dissenting).

Historical Understandings of "Filing"

The dissent evokes a question that is largely unspoken in *VC&M*: What does it means to "file" a document? Long before the notion of e-filing was even a pixel on the supreme court's screen, the court spoke to this issue in a more primitive context, with one justice observing that the use of the term "filed" seems to imply that a written document must be transferred to the custody of a court officer. *Swisher v. Duffy*, 117 Ill. 2d 376, 385 (1987) (Clark, C.J., dissenting) (citing *Sherman v. Bd. of Police & Fire Comm'rs*, 111 Ill. App. 3d 1001, 1007 (5th Dist. 1982) ("A document is filed when it is delivered to the proper officer with the intent of having such document kept on file by such officer in the proper place.")). At the same time, not all physical transfers were deemed equal. Until 2009, the "mailbox rule"—under which mailed documents received by the clerk of the reviewing court after their deadline are deemed filed on the day they were mailed—did not apply to documents sent via private courier services. See *Clark v. TAP Pharm. Prods., Inc.*, 331 Ill. App. 3d 628, 631 (5th Dist. 2002).

In 2002, the Illinois Supreme Court exercised its supervisory authority in *Clark v. TAP Pharmaceutical Products, Inc.*, 201 Ill. 2d 562 (2002) (table), and directed the appellate court to vacate its order dismissing an Illinois Supreme Court Rule 306(a)(2) petition for leave to appeal and to consider the petition on the merits, "given the unique facts and circumstances of this case and the equitable considerations inherent therein." The appellate court had dismissed the appeal, finding the Rule 306(a)(2) petition untimely because it had been sent via Federal Express rather than through the U.S. Postal Service, even though it would have been timely had it been sent via the U.S. mail. *Clark*, 331 Ill. App. 3d at 629-32. After *Clark*, the supreme court amended Illinois Supreme Court Rule 373 to allow the mailbox rule to apply when a filing is made by "delivery to a third-party commercial carrier for delivery to the clerk [of the reviewing court] within three business days." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009).

Clark alerted the supreme court to an aspect of modern practice—the routine use of courier services instead of the U.S. mail—that called for the rules to be updated to reflect a practice that was already underway. In the e-filing context, by contrast, the court is leading the modernization of legal practice in Illinois, using experimental pilot programs such as the one in the 18th Judicial Circuit. *VC&M* can be regarded as part of that experiment. Indeed, similar to the way the supreme court amended Rule 373 after *Clark*, the 18th Judicial Circuit has amended its local rules governing e-filing to permit the e-filing of notices of appeal and to allow for e-filing in a broader class of cases (though it did so before the supreme court's decision in this case, and there are no committee comments to suggest that the amendments were prompted by the appellate court's decision). See *VC&M, Ltd.*, 2013 IL 114445, ¶¶ 16, 32 n.2; see also 18th Judicial Cir. R. 5.03.

Be Forewarned

While the result in *VC&M* was favorable to the appellant—and no doubt a great relief to it as well—the supreme court's decision should not be considered a suggestion that technical violations of e-filing rules may be routinely overlooked or pardoned. For one thing, the decision is as close as they come: a 4–3 split, with three justices believing the appellant's procedural violations to be fatal to the appeal.

More importantly, the appellant in *VC&M* was fortunate in several respects that might not be true of every case. For one thing, the circuit court pardoned its violation of the local rule and denied the motion to reconsider on the merits, a treatment the supreme court found to be within its discretion. *VC&M, Ltd.*, 2013 IL 114445, ¶ 27. Had the circuit court strictly enforced the local rule and deemed the motion to reconsider untimely because the e-filing was a nullity, there is no reason to think that the supreme court would have found an abuse of discretion. Given the discretionary standard of review, the circuit

court's indulgence might have made the difference between whether the appeal was considered on its merits or thrown out on a procedural violation.

The majority in *VC&M* also was careful to observe that, although the appellees had objected to the e-filing of the motion to reconsider as invalid and to the conventional filing as untimely, they did not claim any prejudice. *Id.* It is difficult to imagine what prejudice an appellee might claim from such a filing, and as Justice Thomas remarked, "lack of prejudice has never been a valid reason for excusing an actual jurisdictional defect." *Id.* ¶ 48 (Thomas, J., dissenting) (citing *Browning-Ferris Indus. of Ill., Inc. v. Pollution Control Bd.*, 162 Ill. App. 3d 801, 804–05 (5th Dist. 1987)). Still, the majority alluded to the absence of prejudice as a factor that enabled the circuit court to excuse the violation of the local rule regarding the motion to reconsider and also observed that the defendants had claimed no prejudice from the improper e-filing of the notice of appeal. *VC&M, Ltd.*, 2013 IL 114445, ¶¶ 27, 33.

Moreover, the majority mentioned the fact that the clerk of the circuit court was required to make a hard copy of the notice of appeal and to keep it "in a parallel manual court file," as part of the pilot project—a fact that the majority took into account in finding the notice of appeal sufficient to confer appellate jurisdiction. *Id.* ¶ 33. Without this seemingly minor administrative detail, which might not be a part of other pilot projects or an eventual permanent e-filing system, the result might have been different. Likewise, an appellee who can show prejudice of some kind might persuade a circuit court not to overlook a violation of a local rule in the first place, resulting in a difficult-to-overturn discretionary ruling against the appellant. Similarly, a colorable claim of prejudice also might persuade a reviewing court to look less favorably on such a violation even if a circuit court has been willing to overlook it.

It seems certain that e-filing eventually will be widely available for all or most documents, with corresponding supreme court rules to make the process uniform across the state. But while the modernization of administrative procedures in the reviewing courts promises eventual ease and efficiency, it carries risks for those on the leading edge of those changes.

Conclusion

It seems certain that e-filing eventually will be widely available for all or most documents, with corresponding supreme court rules to make the process uniform across the state. But while the modernization of administrative procedures in the reviewing courts promises eventual ease and efficiency, it carries risks for those on the leading edge of those changes. *VC&M* illustrates some of the potential pitfalls that are specific to e-filing, but it is better understood as reflecting the general hazards of failing to follow local rules. Though it permitted the plaintiff's appeal to proceed on the merits, the supreme court criticized the plaintiff for failing to comply with the local rules concerning e-filing; that failure "was not an inconsequential matter," the court said, and "[w]e do not condone it." *Id.* ¶ 26. As the supreme court continues to authorize additional technological advances relevant to appellate practice, the courts will have to implement corresponding local rules. Appellate counsel must keep abreast of those rule changes and additions, and consult the rules frequently when technological issues arise. And *VC&M* itself stands as a warning to future litigants.

Presumably the plaintiff in *VC&M* did not test the limits of the local rules deliberately, but found itself forced to defend the adequacy of its e-filings in hindsight. The appellate decisions do not explain why the plaintiff took it upon itself to e-file the documents at issue in this case without simultaneously filing them by conventional means; in fairness, perhaps it did so in a spirit of support for the e-filing initiative.

But despite the eventually favorable result, the plaintiff likely would have preferred to avoid the entire exercise and probably wished it had complied with the rules in the first place. Indeed, prevailing in the supreme court proved to be a Pyrrhic victory. Since the court's decision had nothing to do with the dismissal of the complaint, it did not resolve the substance of the plaintiff's appeal—and on remand, the appellate court decided against the plaintiff, affirming the dismissal. *VC&M, Ltd. v. Andrews*, 2013 IL App (2d) 110523-U, ¶¶ 3, 23. Closer examination of the rules governing the 18th Judicial Circuit's pilot program would have saved the plaintiff and its attorneys significant time and effort, and spared them a good deal of anxiety as well.

Employment Law

James L. Craney
Lewis Brisbois Bisgaard & Smith, LLP, Edwardsville

U.S. Supreme Court Clarifies that Title VII Retaliation Claims Are Subject to "But-For" Rather than "Motivating-Factor" Standard

In *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the United States Supreme Court clarified the standard of causation required to prevail on a retaliation claim brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq*. The Court held that Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the challenged employment action. In reaching this conclusion, the Court rejected arguments that it should apply the "motivating-factor" standard set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and codified in Title VII.

In *Nassar*, the plaintiff Dr. Naiel Nassar was a physician of Middle Eastern descent on faculty with the University of Texas Medical Center. Dr. Nassar also held staff privileges at Parkland Memorial Hospital. He complained that he suffered harassment, including undeserved scrutiny of his billing practices and productivity. He alleged that this harassment stemmed from "religious, racial and cultural bias against Arabs and Muslims." *Nassar*, 133 S. Ct. at 2524. Dr. Nassar resigned his position with the university, though it appeared as if he would be able to retain his position with Parkland Hospital. The university protested to the hospital, asserting that the offer of employment to Dr. Nassar was inconsistent with the affiliation agreement between the university and the hospital. The hospital subsequently withdrew its offer of employment to Dr. Nassar. *Id.*

Dr. Nassar brought two claims against the university, both under Title VII. First, he alleged constructive discharge in violation of 42 U.S.C.§ 2000e-2(a), which prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, and national origin." Dr. Nassar also claimed employer retaliation in violation of Section 2000e-3(a), which prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge." *Id*. After a jury found for Dr. Nassar on both claims, the U.S. Court of Appeals, Fifth Circuit upheld the retaliation award. The Fifth Circuit upheld the retaliation award on the theory that the claim required only a showing that the retaliation was a motivating factor for the adverse employment action, rather than its but-for cause. *Id*.

The Supreme Court handed down a divided five-to-four opinion. Justice Anthony Kennedy delivered the opinion, in which Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito joined; Justice Ruth Bader Ginsburg filed a dissenting opinion, in which Justices Stephen Breyer, Sonia Sotamayor, and Elena Kagan joined. Justice Kennedy began by noting that causation in fact—that is, proof that the defendant's conduct did in fact cause a plaintiff's injury—is a standard requirement of any tort claim. This standard is included in federal statutory claims of workplace discrimination. *Id*. at 2525 (citing *Hazen Paper Co. v. Biggens*, 507 U.S. 604, 610 (1993)). In the usual course, this standard requires the plaintiff to show that the harm would not have occurred in the absence of the defendant's conduct. Because this is the background against which Congress legislated in enacting Title VII, these requirements "are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Nassar*, 133 S. Ct. at 2525.

The *Nassar* majority discussed two categories of employer conduct prohibited by Title VII. The Court referred to the first category as "status-based discrimination." This category is discrimination against an employee based upon the personal characteristics of race, color, religion, sex, and national origin. *Id*. The second category of proscribed employer action is not based upon an employee's

About the Author

James L. Craney is a partner in the Madison County office of *Lewis Brisbois Bisgaard & Smith LLP*, where his practice focuses upon general liability litigation. During his career, Mr. Craney has defended numerous employment discrimination, wrongful termination, and civil rights violation suits, both in federal and state court. He earned his B.S. from the University of Illinois in Champaign-Urbana, and his M.S. from Southern Illinois in Carbondale. He earned his J.D. from St. Louis University, where he also obtained the program's Health Law Certificate. Mr. Craney is a member of the IDC Employment Law Committee, and is a regular speaker before bar association and industry groups.

personal characteristics, but rather upon employee conduct. *Id*. The prohibition against discrimination based upon an employee's opposition to employment discrimination, or an employee's submission of, or support for, a complaint that alleges discrimination, are set out in a subsequent section of Title VII. *Id*.

Motivating Factor: The Causation Standard in Title VII Status-Based Claims

With respect to status-based discrimination, Title VII provides that it is unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." *Id*. at 2526 (citing *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 258-59 (1989), *superseded by statute on other grounds by* § 107 of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m)). In its 1989 *Price Waterhouse* opinion, the Court clarified what it meant for an action to be taken "because of" one of these personal characteristics. *Price-Waterhouse*, 490 U.S. at 240-42. In that opinion, six justices agreed that if a plaintiff could show that one of the prohibited traits was a "motivating" or a "substantial" factor in the employer's adverse employment action, the plaintiff had met his burden of proof. *Id*. at 241. At that point, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same action in the absence of all discriminatory motivation. *Id*. at 245-46.

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which to a degree codified the *Price Waterhouse* burden-shifting and causation framework. With respect to causation, Congress codified the *Price Waterhouse* standard by adding a new subsection to Section 2000e-2, Title VII's principal ban on status-based discrimination. 42 U.S.C. § 2000e-2. That section provides:

> [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.

Id. § 2000e-2(m) (emphasis added).

But-For: The Causation Standard in ADEA Age Discrimination Claims

In 2009, the Supreme Court addressed the causation standard found in a similar statute, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* See *Nassar*, 133 S. Ct. at 2527 (referencing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and citing § 623(a)(1) of the ADEA). The ADEA provides that it is unlawful for an employer to discriminate against an employee "because of such individual's age." *Id.* at 2527. In *Gross v. FBL Financial Services*, the Court was called upon to determine what standard of causation applied to ADEA claims alleging discrimination "because of" an individual's age. *Gross*, 557 U.S. at 176. The Court concluded that to prevail on an ADEA claim, a plaintiff must prove that "age was the 'but-for' cause of the employer's adverse decision." *Id*.

In *Gross*, the Court advanced two principal reasons for not applying the *Price Waterhouse* standard when interpreting the causation element under the ADEA. First, the Court noted that there were textual differences between Title VII and the ADEA that required different interpretations. Second, the Court noted that Congress had made several carefully-tailored structural changes to Title VII that were not made to the ADEA. *Id*. at 178-79. Notably, these changes included a modification to the causation element found at 42 U.S.C. § 2000e-2(m). The *Gross* Court's reasoning figured heavily in the majority's *Nassar* opinion. See *Nassar*, 133 S. Ct. at 2526-29.

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In summary, the majority concluded that if Congress had intended a lower causation standard to apply to Title VII retaliation claims, just as with status-based claims, then Congress could have made the modifications found at 42 U.S.C. § 2000e-2(m) applicable to the entire Title VII framework. Absent any statutory evidence that Congress intended such a sweeping change, the Court was left to apply a plain-meaning analysis to the word "because," and to conclude that it means "but-for" causation.

But-For: The Causation Standard in Title VII Retaliation Claims

Title VII's anti-retaliation provision is set forth in a separate provision from those addressing status-based discrimination. The anti-retaliation provision states, in relevant part, that "[i]t shall be . . . unlawful . . . for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a), quoted in *Nassar*, 133 S. Ct. at 2528.

Both Nassar and the United States—through their *amicus* brief—argued that the motivating-factor test of Section 2000e-2(m) should apply to Title VII retaliation claims, just as it does for Title VII status-based claims. *Nassar*, 133 S. Ct. at 2528. The Court rejected this argument, noting that such an approach is "inappropriate in the context of a statute as precise, complex, and exhaustive at Title VII." *Id*. at 2530. The majority noted that, had Congress desired to make the motivating factor standard applicable to all Title VII claims, it could have done so when it passed the 1991 Act. *Id*. at 2529.

Further, in the absence of a statutory clarification, the Court's analysis in *Gross* provided a framework for understanding the standard in retaliation claims. "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Id*. (citing *Gross*, 557 U.S. at 176). In summary, the majority concluded that if Congress had intended a lower causation standard to apply to Title VII retaliation claims, just as with status-based claims, then Congress could have made the modifications found at 42 U.S.C. § 2000e-2(m) applicable to the entire Title VII framework. *Id.* at 2530-31. Absent any statutory evidence that Congress intended such a sweeping change, the Court was left to apply a plain-meaning analysis to the word "because," and to conclude that it means "but-for" causation. *Id*. at 2534.

Significantly, the *Nassar* majority also noted that proper interpretation and implementation of Title VII's anti-retaliation provisions and its causation standard "have central importance to the fair and responsible allocation of resources in the judicial and litigation system." *Id*. at 2531. The majority observed:

> This [allocation of resources] is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the [EEOC] has nearly doubled in the past 15 years . . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

Nassar, 133 S. Ct. at 2531. The Court noted that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, [*sic*] administrative agencies, and courts to combat workplace harassment." *Id*. at 2531-32.

The Dissent

In a lengthy discussion, the *Nassar* dissent pointed to a line of Supreme Court case law. The dissent argued that these cases hold that a ban on discrimination encompasses any retaliation for that discrimination. *Nassar*, 133 S. Ct. at 2534-35 (Ginsburg, J., dissenting). Therefore, they reasoned, the causation standard should be the same whether the Title VII claim is for status-based discrimination or retaliation for opposing status-based discrimination. *Id*. The dissent also took issue with the majority's statutory construction analysis: the phrase "employment practices," they argue, "undeniably includes retaliation." *Id*. at 2541. The dissent argued that Section 2000e-2 does not deal exclusively with status-based claims; rather, that section deals with a variety of matters, some of them unquestionably covering retaliation. *Id*. at 2543.

Conclusion

Both risk managers and litigators should familiarize themselves with the *Nassar* opinion. Although the opinion is undoubtedly employer-friendly, it also draws the firing line for disputes over the burden of proof in retaliation claims. Now, those disputes will be presented more frequently to the court, whether by summary judgment or directed verdict. It remains critical for employers and risk managers to document meticulously employee performance and any issues surrounding an employee's involvement in a claim of workplace discrimination. Adequate record-keeping systems are also important to sidestep issues of foundation, and—particularly in Illinois—potential claims of spoliation.

Similarly, it is important for the litigator to be familiar with and conversant in a client's documentation from the outset, and to be able to present that evidence in a cogent and admissible way. At the trial stage, where cases involve both status-based and retaliation claims (such as the case in *Nassar*), it will be very important for the successful advocate to take the time to explain the differing burdens to the jury, and explain their application.

Tracy E. Stevenson
Robbins, Salomon & Patt, Ltd., Chicago

The Conundrum Surrounding Crops Liens

With the economy as it is, prices of farm products changing constantly, and farms being foreclosed upon, one would think that the farmers and the lawyers who represent them and their creditors would have plenty of work. It seems that an old issue is once again "cropping" up, however: the priority of crop liens. This article will address the issues with respect to liens on crops, whether crops are real property or personal property, and the effect the UCC has on interpretation of lien priority.

A Security Interest in Property Not Yet Grown

In light of the long growing season, it is commonplace for farmers to finance crops in advance of each planting season through the use of liens against the grown crop. In order to purchase seed, it is essential that farmers grant a security interest in the grown crops in exchange for funding. Banks and lenders are willing to advance funds to purchase seeds and immature crops in exchange for a valid security interest in future crops. Perhaps one reason is that Uniform Commercial Code Article 9, U.C.C. § 9-101, *et seq*., specifically addresses the issue of crops and lien priority.

Article 9 of the Uniform Commercial Code expressly defines farm products. The definition of farm products includes: "(A) crops grown, growing, or to be grown . . . and . . . (C) supplies used or produced in a farming operation." U.C.C. § 9-102(a)(34)(A), (C). Thus, the UCC actively considered the change in the "product" as it matures.

These various definitions must be considered in determining the priority of liens with respect to crops during any given point of the growing season. For example, one must consider a seed at time of purchase in a burlap sack; fertilizer at the time it is purchased in order to permit the seed to grow; the fertilizer once it is placed onto the soil and commingled therewith; and the seed placed into the fertilized soil to commence the growing process. At each stage, the priority of liens on the property, the seed, fertilizer, and soil or land may change in classification from real property to personal property and, potentially, back again. In the example above, crops' seeds certainly can be included within the definition of "crops to be grown." Likewise, fertilizer, even before it is placed on the ground, is a supply "used or produced in a farming operation." Thus, both elements fall within the Article 9 definition.

Further, the UCC defines "goods" as "crops grown, growing, or to be grown." U.C.C. § 9-102(a)(34)(A). Again, both definitions of "farm products" and "goods" apply to seeds that are or may be planted or the seedlings, or both, and ultimately the crops fully grown.

The Security Interest

Like other goods, a bank or financing institution generally requires a security interest prior to granting a loan for crops. The security interest might be tied to real property or personal property. Farmers and their crops, however, present unique lender issues. For example, a farmer could be a tenant on land owned by another. In that case, the security interest will be tied to personal property (the crop or feed), as the real property is owned by another.

In the event that the security interest in farm products is properly perfected under the UCC by the filing of a financing statement with the applicable secretary of state, the holder of the UCC interest has a valid priority interest. Here, the debate begins. At what point in time do seeds and fertilizer become part of real property and when do they retain their unique interest as goods or farm products pursuant to the definitions of the UCC Code? When exactly does fertilizer or seed become "commingled goods" as defined by the UCC? That is, when do crop items such as fertilizer or seeds become so interrelated with the real property—the soil—that the seed loses its categorization as personal property subject to a security lien?

It is undisputed that the Uniform Commercial Code applies to goods and not to real estate. U.C.C. § 2-102. The UCC also specifically provides that if a security interest in collateral is perfected

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About the Author

Tracy E. Stevenson is a partner in the Chicago firm of *Robbins, Salomon & Patt, Ltd.*, where she concentrates her practice in medical malpractice defense and insurance defense. She has defended cases on behalf of physicians and hospitals and represented various major insurance companies in claims involving fraud. Ms. Stevenson also represents corporations in litigation matters including TRO's and shareholder actions. She is licensed in Michigan as well as Illinois and speaks at various seminars around the country.

When exactly does fertilizer or seed become "commingled goods" as defined by the UCC? That is, when do crop items such as fertilizer or seeds become so interrelated with the real property—the soil—that the seed loses its categorization as personal property subject to a security lien?

before the collateral becomes commingled goods, the security interest in the product resulting from the commingling is perfected. U.C.C. § 9-315. The adage for priority liens has always been "first in time, first in right." See, *e.g., U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 720 n.7 (1979). But that might not apply to liens on crops.

The analysis with respect to crops as to the priority of the security interest in the UCC goods–the seeds–might be distinguishable from the priority interest in the goods–the fertilizer. As noted above, Article 9 defines goods as "crops grown, growing, or to be grown." U.C.C. § 9-102(a)(34)(A). Thus, as crops start from seed, there is a strong argument that, at all times, the seed, whether in its raw form, planted into the real property soil, or commingled with seed and soil, ultimately will grow and become a "grown crop." Considering the security interest with respect to "the seeds," a strong argument can be made that, per the UCC, the seed is never commingled with the real estate. Accordingly, it may always fall within the definition of goods that includes "crops grown, growing, or to be grown."

The analysis is distinct when one considers the fertilizer as the secured "goods." The fertilizer comes in bags or barrels such that it is a unique personal property subject to the UCC requirements related to security interests. But consider the lender who has secured and perfected a security interest in the fertilizer itself. The fertilizer is not a crop, but rather is a means in which to assist a crop in growing. By definition, fertilizer is a farm product within UCC Article 9: "supplies used or produced in a farming operation." U.C.C. § 9-102(a)(34)(A). But fertilizer is an item that can be commingled readily with real property, the soil, or the land on which it is placed prior to planting seeds, such that it cannot of its own right be distinguishable from the soil. It will not become "a crop grown, growing, or to be grown," due to its commingled status with the soil.

Under the UCC, a security interest does not exist in commingled goods. But, a security interest could attach to the crop that grows from the commingled fertilizer and soil. The UCC specifically provides that if security interest in collateral is perfected before the collateral becomes commingled goods, the security interest in the product resulting from the commingling is perfected. U.C.C. § 9-315. Arguably, one can distinguish between the commingling of the seed with the fertilizer versus the commingling of the fertilizer and the real property soil. Theoretically, this becomes a "chicken and egg" analysis with respect to the fertilizer. Does the security interest in the fertilizer continue to exist because it was perfected *before* the fertilizer becomes a "commingled good" or does its status change when it becomes a part of the real property to which no security interest can attach? Before placing a lien or using defined goods as security, one must contemplate whether: 1) the security interest attaching to the fertilizer is personal property (because the fertilizer is commingled with the seed), and thus the crops become the secured interest for the fertilizer; or 2) the commingling of the fertilizer with the soil, prior to the introduction of the seed, creates a commingling with the soil, thereby ultimately eliminating the security interest in personal property as it becomes part of the real property.

Illinois Case Law

These issues were addressed by the Illinois Appellate Court Second District in *First State Bank of Maple Park v. DeKalb Bank*, 175 Ill. App. 3d 812 (2d Dist. 1988). In that case, two banks filed liens against certain property, including the crops on that property, and both asserted a priority lien when the borrower defaulted on the notes. *First State Bank of Maple Park*, 175 Ill. App. 3d at 813. The Second District contemplated the UCC in conjunction with Illinois statute, throwing yet another analysis into the "field." In one instance, DeKalb Bank held a landlord's lien under a distressed warrant. The plaintiff, First State Bank of Maple Park, held a UCC Article 9 security interest in the same property. *Id.* at 813-14. At issue were two separate statutes. First, Section 9-301 of the Code of Civil Procedure states:

> In all cases of distress for rent, the landlord, by himself or herself . . . may seize for rent any personal property of his or her tenant

> that may be found in the county where such tenant resides, and in no case shall the property of any other person, although the same may be found on the premises, be liable for seizure for rent due from such tenant.

735 ILCS 5/9-301.

Next, Section 9-316 of the Code of Civil Procedure states: "Every landlord shall have a lien upon crops grown or growing upon the demised premises for the rent thereof . . . and also for the faithful performance of the lease." 735 ILCS 5/9-316. Early case law suggests that a landlord's lien on crops, due to its specificity, is separate from the landlord's lien on other personal property. A lien on crops pursuant to Section 9-316 does not extend to other personal property as set forth in Section 9-301. A crop lien, as explained above, is a paramount lien that arises by operation of statute and does not depend upon the judgment of any court or the employment of any means for its employment. See *Lillard v. Noble*, 159 Ill. 311, 317 (1896). A landlord's lien on crops attaches from the time of the commencement of their growth. *Watt v. Scofield*, 76 Ill. 261 (1875).

The *Bank of Maple Park* court then expressly addressed the priority of UCC crop liens and statutory crop liens, when it analyzed whether, in view of Section 9-104 of the UCC, U.C.C. § 9-104, conflicts between landlord's liens and Article 9 security interests are governed by the priority rules of Article 9. The court recognized a "split of authority in Illinois on this question." *First State Bank of Maple Park*, 175 Ill. App. 3d at 816. The court also cited to *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 385 (5th Dist. 1976), where the Illinois Appellate Court Fifth District stated:

> The purpose of section 9-104(b), however, is only to indicate that article nine does not govern the creation of a landlord's lien or the priorities between competing landlords' liens. In order for article nine to be the comprehensive statute that it was meant to be on the subject of consensual security interests, article ninie must always supply a rule for determining the priorities between a consensual security interest and any other kind of lien.

Peterson, 39 Ill. App. 3d at 385, quoted in *First State Bank of Maple Park*, 175 Ill. App. 3d at 816.

The Second District in *Bank of Maple Park* also recognized that the Illinois Appellate Court Fourth District in *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001 (1983), specifically rejected the holding in *Peterson*, stating that "[t]he language of 9-104(b) and 9-102(2) is crystal clear—no part of article 9, including the priority rules, apply to a landlord's statutory lien." *Dwyer*, 117 Ill. App. 3d at 1005, quoted in *First State Bank of Maple Park*, 175 Ill.App.3d at 816-17. The Second District further stated, "Applying non-UCC principles, generally a lien which is first in time has priority [citation omitted] and is entitled to prior satisfaction out of the property it binds." *First State Bank of Maple Park*, 175 Ill. App. 3d at 817 (citing *Home Fed. Savs. & Loan Ass'n v. Cook*, 170 Ill. App. 3d 720 (5th Dist. 1988), and 51 Am. Jur. 2d *Liens* § 52 (1970)).

The *Bank of Maple Park* court, in analyzing the distinction between Section 9-104(b) of the UCC and the statutory landlord's lien, recognized that the UCC merely governs the applicability of the UCC to landlord liens. It does not, by its language, suggest that, under whatever priority rule is applied in disputes between a landlord's lien and an Article 9 security interest, distinctions between types of landlord's liens are to be ignored. Thus, the *Bank of Maple Park* court held that the UCC does not eliminate distinctions between the landlord's crop lien and the lien under a distress warrant as to other personal property.

Conclusion

In a nutshell, liens on crops continue to create quite the conundrum when a priority dispute arises. To best protect oneself or one's client, one must not only use due diligence at the onset but also consider both the "first in time, first in rights" analysis and any statutes that affect crops whether grown, growing, or to be grown. Then, one should be sure to consider whether the subject of the lien is to be commingled with real property. If so, the final consideration is where the security interest in the collateral was perfected before the collateral becomes commingled goods and where there is a perfected security interest in the product resulting from the commingling.

From the Author

With some sadness, I offer my final Property Insurance column (hopefully) for your reading enjoyment. After well over 10 years of authoring this column, it is time to allow a new author the privilege of taking over this great endeavor. I will be moving on to other duties on the IDC Board of Directors and look forward to enjoying **Catherine Cooke**'s perspective as the new author of the Property Insurance column for years to come. Many thanks to all of the editors who over the years who have worked so diligently to ensure that the *IDC Quarterly* remains one of the best legal publications in Illinois.

—Tracy E. Stevenson

Feature Article

David B. Mueller and **Brian A. Metcalf**
Cassidy & Mueller P.C., Peoria

Adoption of the Risk-Utility Rule in Negligent Design Cases: *Jablonski v. Ford Motor Co.*, 2011 IL 110096

This article is the third in a series of articles that explores the evolution of Illinois law in product liability design defect cases. The first, *Developments in Product Liability Law: The Harm of Hindsight Analysis in Design Defect Cases*, 14 IDC Quarterly, no. 2, 2004, at 74, considered the theoretical and evidentiary distinctions between negligent design cases and defective design liability in strict liability cases. It did so while the Illinois Supreme Court was considering the question of whether the so-called "risk-utility test" was applicable to negligent-product-design claims. *Blue v. Envtl. Eng'g*, 215 Ill. 2d 78 (2005). The second article, Mikolajczyk v. Ford Motor Company*: A Synthesis of Approaches in Design Defect Cases*, 19 IDC Quarterly, no. 1, 2009, at 71, discussed the conflation of "consumer-expectation" and "risk-utility" theories in strict liability cases. This installment picks up where the second article left off and identifies how the court's decision in *Jablonski v. Ford Motor Co.*, 2011 IL 110096, imposed the multi-factorial risk-utility approach used in strict liability cases on negligent-product-design claims.

To appreciate the "how and why" of this evolutionary process, the following background is useful.

Development of Design-Defect Theories

Background

The evolution of Illinois product liability law in design-defect cases from the single consumer-expectation standard to a blended risk-utility or risk-benefit rule has been gradual and incremental. Strict liability had its genesis in *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965). *Suvada* relied upon Section 402A of the Restatement (Second) of Torts, which recognized a manufacturer's or supplier's liability for damages that were caused by the *unreasonably dangerous* condition of a product. "Unreasonably dangerous" generally has been defined as being unsafe when used in a reasonably foreseeable manner considering the nature and function of the product. *Winnett v. Winnett*, 57 Ill. 2d 7 (1974); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 342 (1969). A product is deemed to be "unreasonably dangerous" when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Lamkin v. Towner*, 138 Ill. 2d 510, 528 (1990); see also *Hunt v. Blasius*, 74 Ill. 2d 203, 211-12 (1978); Restatement (Second) of Torts § 402A cmt. *i*. The Illinois Pattern Jury Instruction–Civil 400.06 parallels Section 402A, stating: "When I use the expression 'unreasonably dangerous' in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product]" (*e.g.*, a hammer). Ill. Pattern Jury Instr. (Civ.) § 400.06. Indeed, it is well recognized that a plaintiff bringing a strict liability case must plead and prove that: (1) he was injured by a condition of the product; (2) the condition was unreasonably dangerous; and (3) the condition existed at the time the product left the manufacturer's or supplier's control. *Sollami v. Eaton*, 201 Ill. 2d 1 (2002).

About the Authors

David B. Mueller is a partner in the Peoria firm of *Cassidy & Mueller, P.C.* His practice is concentrated in the areas of products liability, construction injury litigation, and insurance coverage. He received his undergraduate degree from the University of Oklahoma and graduated from the University of Michigan Law School in 1966. He is a past co-chair of the Supreme Court Committee to revise the rules of discovery, 1983-1993, and presently serves as an advisory member of the Discovery Rules Committee of the Illinois Judicial Conference. He was member of the Illinois Supreme Court Committee on jury instructions in civil cases and participated in drafting the products liability portions of the 1995 Tort Reform Act. He is the author of a number of articles regarding procedural and substantive aspects of civil litigation and lectures frequently on those subjects.

Brian A. Metcalf is an associate with *Cassidy & Mueller, P.C.* He is a graduate of the U.S. Air Force Academy and the St. Louis University School of Law. His practice concentrates in the field of civil litigation in both state and federal courts focusing in the areas of products liability, construction injury, civil rights litigation, and municipal tort liability.

There are three types of strict liability cases: (1) those that result from the manufacturing process, known as manufacturing defects; (2) defects in the design of the product; and (3) dangers that arise from a lack of warnings or inadequate instructions. *Sollami*, 201 Ill. 2d at 7. Of these three, the most difficult to fit within the consumer-expectation test is the product-design-defect case. From the plaintiff's perspective, the consumer-expectation test circumscribes recovery in cases where the potential for injury is clear from the nature of the product. *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 3d 106 (1991). In those cases, the apparent hazard always would align with the consumer's reasonable expectations regarding its use. Simply stated, a plaintiff could not claim surprise when he is injured by an obvious hazard that is inherent in the nature and function of the product. The consumer-expectation test also created problems for manufacturers and vendors defending against concealed perils in complex products. In those cases, an injured plaintiff is able to easily demonstrate surprise that a seemingly innocuous product caused his injury. *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002).

These problems caused plaintiffs and defendants to seek an alternative standard to prove and to defend product-design-defect cases. The result was the risk-utility rule. The risk-utility rule evaluates a product's safety in the context of: (1) conformity with industry design standards; (2) compliance with governmental design criteria; and (3) the existence and feasibility of alternative designs that were available at the time it was manufactured. *Anderson v. Hyster Co.*, 74 Ill. 2d 364 (1979). Of these, the availability and feasibility of alternative designs is the most litigated component. It is also the source from which the definition of risk-utility is derived. Plaintiffs generally prefer alternative designs that avoid the risk in question. On the other hand, defendants generally argue that the suggested alternatives: (1) would not have prevented the injury; (2) would have created other hazards; or (3) would have eliminated the benefit or utility of the product by increasing its cost, compromising its practicability, or both. *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63 (1979). Conflicting evidence on both sides requires the trier of fact to balance and compare the risks and benefits of the existing design to those of the alternative design.

The risk-utility rule cuts both ways. It helps plaintiffs in cases where the hazard is obvious and favors defendants where a product's potential for injury is concealed. That is, plaintiffs want to apply the consumer-expectation test to complex products and the risk-utility rule to simple products. Defendants argue the opposite: that the risk-utility rule is required to test the safety of complex products but simple products should be judged by the consumer-expectation test.

Obvious problems arose when one side wanted to apply the consumer-expectation test and the other asserted the risk-utility rule. Thus, the question became whether the two tests were equally available alternatives, in which case the plaintiff had his choice. Historically, that choice appeared to be the case because the plaintiff generally had the right to choose, formulate, and prove his claim. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 59 (2007); *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 717-18 (4th Dist. 1998). On the other hand, a defendant also had the right to assert any theory that would defeat a claim. *Snelson v. Kamm*, 204 Ill. 2d 1, 27 (2003); *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 505 (2002). The conflict between those interests shaped the development of strict product liability law in design-defect cases from the time that the risk-utility rule was first recognized. The conflict was not resolved until the Illinois Supreme Court issued its opinion in *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516 (2008).

Identical considerations, with slightly different theoretical underpinnings, were raised in negligent design cases where the focus was whether the manufacturer exercised reasonable care in

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its design of the product that injured the plaintiff. In *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78 (2005), the question before the Illinois Supreme Court was whether risk-utility concepts applied to negligent design cases.

Precursors of *Jablonski v. Ford*

Blue v. Environmental Engineering, Inc. (Risk-Utility Is Introduced in Negligent Design Cases)

In *Blue v. Environmental Engineering, Inc.*, the plaintiff's leg was crushed when he stuck it into a moving compactor without stopping the machine. The plaintiff could not free his leg, and it was pulled into the compactor where it was "hit by the ram." *Blue*, 215 Ill. 2d at 83. As a result, the plaintiff suffered a broken pelvis, leg, and foot. *Id.* The plaintiff's strict liability claim was barred by the statute of repose, leaving only a negligence claim. *Id.* at 81.

Obviously, the plaintiff understood the potential for injury in sticking his leg into an operating compactor. *Id.* at 85. Thus, the peril was not only "open and obvious" but also understood by the claimant. Nonetheless, he received a verdict in excess of $1,000,000, which was reduced to $762,000 by his contributory negligence. *Id.* Judgment was entered for the defendant, however, based upon the jury's affirmative response to the following special interrogatory: "Was the risk of injury by sticking a foot over or through a gate into a moving compactor open and obvious?" *Id.*

In reversing, the appellate court found that "open and obvious" is not an absolute defense in a negligence case where the plaintiff claims a defective design. Instead, as with strict liability, the court held that a claimant is entitled to proceed on the basis of the risk-utility rule, which supersedes the open-and-obvious doctrine, and further requires proof by the defendant that the challenged design's benefits outweighed the design's inherent risk of danger. *Blue*, 215 Ill. 2d at 86-88 (citing *Blue v. Envtl. Eng'g, Inc.*, 345 Ill. App. 3d 455, 464-71 (1st Dist. 2003)).

The Illinois Supreme Court accepted the case and decided in a plurality opinion that the risk-utility test did not apply to the plaintiff's negligent design claim. In reaching that decision, the court considered the risk-utility rule as it is applied in strict liability cases, including a discussion of Section 2 of the Restatement (Third) of Torts. That analysis, without objection from the concurring justices, rejected the premise that the burden of going forward with the evidence shifts in a risk-utility case once the plaintiff proves that his injury was proximately caused by a condition of the product. The plurality stated that, in a design-defect case, a plaintiff must introduce evidence of a technologically feasible and practical alternative design that would have reduced or prevented the harm. Once that showing is made, the question of whether the product was unreasonably dangerous because of its design is a question for the trier of fact. *Blue*, 215 Ill. 2d at 100.

Further, the court in *Blue* did not reject the consumer-expectation test as an alternative means of proving a design defect. Therefore, although *Blue* gave intimations of the court's thinking about the use of consumer-expectation and risk-utility concepts in strict liability cases, the precedential effect of that reasoning awaited subsequent decisions.

Calles v. Scripto-Tokai (Risk-Utility Rule in "Simple Products" Cases)

In *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007), the court addressed the use of both the consumer-expectation test and the risk-utility rule in strict liability design-defect cases and negligent design cases. It did so in the context of the so-called "simple product" exception to risk-utility reasoning. That exception rejected the use of risk-utility considerations in cases where the potential for injury from a product (a Scripto lighter) was open, apparent, and readily avoidable by the user's exercise of common sense.

In *Scoby v. Vulcan-Heart Corp.*, 211 Ill. App. 3d 106, 107-08 (4th Dist. 1991), a restaurant kitchen employee slipped and fell, causing his arm to become submerged in the hot oil of a deep fat fryer. He sued the manufacturer of the fryer on a strict liability design-defect basis, relying upon the risk-utility test. *Scoby*, 211 Ill. App. Ct. at 109-10. The appellate court rejected application of the risk-utility test to the deep fat fryer because: (1) the risk of injury was open and obvious, and (2) the mechanism was simple: boiling oil in an open container. *Id.* at 112. Thereafter, a number of courts considered the simple product exception in the context of various products, with some applying the exception and others rejecting it. Compare *Bates v. Richland Sales Corp.*, 346 Ill. App. 3d 223 (4th Dist. 2004) (accepted), with *Miller v. Rinker Boat Co.*, 352 Ill. App. 3d 644 (4th Dist. 2004) (rejected), and *Wortel v. Somerset Indus., Inc.*, 331 Ill. App. 3d 895 (1st Dist. 2002) (same).

In considering the so-called simple product, which is fraught with patent peril, the court in *Calles* found that the open-and-obvious nature of any hazards

that are inherent in a product is a factor that has a bearing on *both* consumer expectations and the balancing that is required in assessing the risks inherent in a product versus its benefit or utility. *Calles*, 224 Ill. 2d at 262-64. On a sliding scale, the obviousness of a risk is given a higher priority in the context of consumer expectations than it is in weighing the risks of a product against its benefits. Thus, where a product is simple, like the deep fat fryer in *Scoby* and the lighter in *Calles*, the danger is within the consumer's contemplation, especially where the danger is inherent in the product's function (such as boiling oil and starting fires). That awareness, however, has less significance where the exposure to harm could be mitigated by a feasible alternative design.

Relying on public policy, the *Calles* court found that a *per se* bar of liability in products with open-and-obvious hazards would discourage manufacturers from making them safer. *Id.* at 262-63. Inherent in the court's reasoning is the assumption that potential exposure for damages drives a manufacturer's consideration of alternative designs. In that respect, the opinion states:

> Policy reasons also support rejection of a *per se* rule excepting simple products with open and obvious dangers from analysis under the risk-utility test. Adoption of such a rule would essentially absolve manufacturers from liability in certain situations even though there may be a reasonable and feasible alternative design available that would make a product safer, but which the manufacturer declines to incorporate because it knows it will not be held liable. *This would discourage product improvements that could easily and cost-effectively alleviate the dangers of a product.*

Id. (emphasis added).

Armed with the rationale that the goal of product liability law is the design of ever-safer products, the *Calles* court recognized that the risk-utility test applies to the simplest products that have self-evident hazards. In that regard, the court identified several factors that are relevant to the balance that must be struck between the benefits for which a product is purchased and the risks it poses to the purchaser and others. *Id.* at 263-64. These factors included the recognition of design criteria set by government regulation and industry standards, see, *e.g., Anderson v. Hyster Co.*, 74 Ill. 2d 364 (1979), and *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill. 2d 434, 436-39 (1979), and the feasibility of alternative designs, including the cost of those designs, see, *e.g., Kerns v. Engelke*, 76 Ill. 2d 154 (1979). Another factor considered was the obviousness of any risk that is inherent in the product. *E.g., Blue v. Envtl. Eng'g, Inc.*, 215 Ill. 2d 78, 103 (2005). The court then went on to add the following factors identified by Professor John W. Wade:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instruction.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973), quoted in *Calles*, 224 Ill. 2d at 264-65. The court also added as potentially relevant "(1) the appearance and aesthetic attractiveness of the product; (2) its utility for multiple uses; (3) the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and (4) the collateral safety of a feature other than the one that harmed the plaintiff." *Calles*, 224 Ill. 2d at 266.

Whether all or only some of these factors apply in a case is for the court to determine. It is up to the parties to put forth the factors that support their respective positions. The court will then select those that are admissible and, upon completion of the proof, will determine whether "the case is a proper one to submit to the jury." *Id.* Thereafter, it is up

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to the trier of fact to evaluate and weigh those factors in reaching a decision.

Applying this flexible risk-utility standard to the Scripto lighter, the court held that the plaintiff had presented proof of enough relevant factors to permit the case to go to the jury on both the strict liability and negligence claims. The court noted that the crucial consideration "is whether the manufacturer exercised reasonable care in the design of the product." *Id.* at 270. From the *Calles* opinion, it is evident that the court believed that the same factors apply to what a manufacturer should reasonably foresee as bearing upon the utility of a product versus its benefits. Among these is the open-and-obvious nature of any danger that is inherent in the product. As the court held, "[t]he open and obvious nature of a danger is just one factor in evaluating whether a manufacturer acted reasonably in designing its product. It is not dispositive." *Id.* at 271.

The *Calles* decision resolved the question of whether the risk-utility analysis applies to simple products, particularly those that have a self-evident potential for injury. In strict liability design cases the risk-utility test clearly applies, but a variety of potentially relevant factors must be evaluated. Nonetheless, there still might be some products that by their very nature cannot be considered "unreasonably dangerous," like rubber-soled shoes, *Fanning v. LeMay*, 38 Ill. 2d 209 (1967), the overhang of commercial trailers, *Mieher v. Brown*, 54 Ill. 2d 539 (1973), and trampolines, *Sollami v. Eaton*, 201 Ill. 2d 1 (2002). *Calles* also rejected the plurality opinion in *Blue* as it related to the application of risk-utility principles in negligent-product-design cases. Instead, the court held that the same evidentiary criteria may be considered in the context of what a reasonably careful manufacturer would consider in designing a product.

Mikolajczyk v. Ford Motor Co. (Synthesis of Consumer-Expectation and Risk-Utility Approaches in Strict Liability Cases)

Mikolajczyk v. Ford Motor Co., 231 Ill. 2d 516 (2008), is a strict liability case involving the other side of the risk-utility coin. There, the court was called upon to determine whether the consumer-expectation test applies to the design of complex products and, if so, whether the plaintiff can choose the standard upon which the case is to be tried. *Mikolajczyk*, 231 Ill. 2d at 521. In *Mikolajczyk*, the driver of a Ford Escort was killed when he was struck from behind with such force that his seat back collapsed, propelling him rearward so that he struck his head on the back seat of the car. *Id.* at 521-22. His widow sued Ford Motor Co. on the theory that the design of the seat was unreasonably dangerous. *Id.* at 520. At trial, the plaintiff relied on *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002), and elected to try the case on the consumer-expectation standard. Ford Motor Co. argued that, after the decision in *Calles*, risk-utility is the sole and exclusive test to determine whether a product's design is unreasonably dangerous. *Id.* at 522-23, 528-29.

During the trial, proof was offered and received on both theories. At the conclusion of the evidence, the jury was given the standard pattern instructions in Illinois Pattern Jury Instructions–Civil 400.01.01, 400.02 and 400.06 that apply to defective manufacture, defective warning, and defective design cases. *Id.* at 522. In so doing, the trial court rejected Ford Motor Co.'s non-pattern instruction that was directed at "whether the foreseeable risks of harm of the design outweighed its benefits, and whether the adoption of a feasible alternative design would have avoided or reduced the risks." *Id.* at 522. The appellate court rejected the defendant's arguments and affirmed, after remitting a portion of the damages. *Mikolajczyk*, 231 Ill. 2d at 523. That result set the stage for the Illinois Supreme Court to decide whether the defendant in a design defect case can offer risk-utility evidence when the plaintiff has elected to proceed under the consumer-expectation test, and, if so, how the jury should be instructed.

Responding to those questions, the supreme court first rejected the manufacturer's contention that the risk-utility standard must be applied exclusively in complex product cases. *Id.* at 541. The court also refused to apply the restrictive approach, which is required by subsection 2(b) of the Restatement (Third) of Torts. *Id.* at 543-46. Instead, it reaffirmed the alternative approach articulated in *Hansen*. *Id.* at 546. The court also approved the continuing use of Illinois Pattern Jury Instruction–Civil 400.06 and its reliance upon the term "unreasonably dangerous" to describe a defective product. *Id.* at 558, 565-68. On the latter point, the choice was between "unreasonably dangerous," meaning that the product is "too dangerous," as opposed to the term "not reasonably safe," which means that it is "not safe enough." *Id.* at 545.

Rejecting the either/or approach that limited the trial court to choosing between "consumer-expectation" and risk-utility theories, the supreme court held that the issue was one of "methods of proof," rather than "theories of liability," as the consumer-expectation test and the risk-utility test are simply alternative methods of proof. Each party is entitled

to use the method of proof—either the consumer-expectation test or risk-utility test—that it believes will demonstrate that the design of a product is or is not "unreasonably dangerous." Thus, a plaintiff may limit its proof in a complex product design case to what a consumer would expect. At the same time, the manufacturer is entitled to weigh the risks inherent in a product against its utility or benefit, using the various factors that were approved in *Calles*.

The obvious question is how those divergent "methods of proof" can be reconciled where the plaintiff is going in one direction and the defendant is proceeding in another. Can the plaintiff win on his method of proof and the defendant prevail on its method of proof? What would happen if the jury was instructed on both standards and inconsistent answers resulted? Responding to those questions, the court posited four possible outcomes: (1) the product could be found unreasonably dangerous under both tests, resulting in judgment for the plaintiff (see *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002)); (2) the product could be exonerated under both standards and judgment would be for the manufacturer (see *Lamkin v. Towner*, 138 Ill. 2d 510 (1990)); (3) the product could be found unreasonably dangerous under the risk-utility test but not under the consumer-expectation test (see *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007)); or (4) the product could be found unreasonably dangerous under the consumer-expectation test but not under the risk-utility test. *Mikolajczyk*, 231 Ill. 2d at 550-51.

In discussing the last alternative, the court considered *Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1 (1st Dist. 2004) (finding that the level of a complex product's danger should be evaluated with a test incorporating both the expectations of an ordinary consumer and the risks and benefits of the product), and *Besse v. Deere & Co.*, 237 Ill. App. 3d 497 (3d Dist. 1992) (finding a broad definition of "unreasonably dangerous" that embraces both the consumer-expectation test and the risk-utility test), and held that the best approach is to integrate the consumer-expectation test with the risk-benefit analysis. In that respect, the *Mikolajczyk* court found that the two tests are "not mutually exclusive and may be applied together if the evidence supports it." *Mikolajczyk*, 231 Ill. 2d at 552. Thus, it further held that "even when a plaintiff chooses to proceed under the consumer-expectation test, she cannot dictate the defendant's method of proving its case by preventing the admission of evidence relevant to the risk-utility analysis." *Id.* at 554.

Where there is evidence to support both approaches "consumer expectation" becomes "but one of the factors to be considered in applying an expanded risk-utility standard." Thus, the court held:

> In sum, we hold that both the consumer-expectation test and the risk-utility test continue to have their place in our law of strict product liability based on design defect. Each party is entitled to choose its own method of proof, to present relevant evidence, and to request a corresponding jury instruction. If the evidence is sufficient to implicate the risk-utility test, the broader test, which incorporates the factor of consumer expectations, is to be applied by the finder of fact.

Id. at 556.

After finding that each party had the right to have the jury clearly and fully instructed on its theory of the case, the supreme court concluded that, where both the consumer-expectation and the risk-utility tests are utilized in a strict liability design defect case, "consumer expectation is to be treated as one factor in the multifactor risk-utility analysis." *Id.* at 569. Therefore, the *Mikolajczyk* court left off with the recognition, at least in strict liability cases, that, if either side relies upon a risk-utility theory as a basis for liability or as a defense, the trial court is to consider the various factors that bear upon that approach and determine which factors are relevant to the circumstances of the case. In that analysis, "consumer expectation," while relevant, is but one of several evidentiary factors.

Following *Mikolajczyk*, the Illinois Supreme Court approved the Illinois Pattern Jury Instruction–Civil 400.06A that defines the term "unreasonably dangerous," stating:

> When I use the expression "unreasonably dangerous," I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product.

Ill. Pattern Jury Instr. (Civ.) § 400.06A. It is significant that, in submitting the instruction for approval, the drafters specifically chose not to include any of the factors that were found by the court in *Calles* and *Mikolajczyk* to be significant in balancing the risks of the challenged design to its benefits or utility. See Ill. Pattern Jury Instr. (Civ.) § 400.06A cmt.

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Jablonski v. Ford Motor Co. (Applying the *Mikolajczyk* Rule to Negligent Design Cases)

Despite the decision in *Calles*, the question was open as to whether risk-utility theories and factors also applied to negligent design claims. In *Jablonski v. Ford Motor Co.*, 2011 IL 110096, the court responded affirmatively and, in doing so, engaged in an analysis that might also apply to strict liability cases.

Jablonski involved the location of the fuel tank in a 1993 Lincoln Town Car. There, the Town Car sustained a violent high-speed rear impact, which caused a large pipe wrench in the trunk to puncture the back of the vehicle's fuel tank, causing a fire that resulted in the death of one occupant and severe burns to the other. *Jablonski*, 2011 IL 110096, ¶ 3. The fuel tank was of the so-called "Panther platform" or "vertical-behind-the-axle" design. *Id.* ¶¶ 8-9.

For an unspecified reason, the plaintiffs abandoned their strict liability claims, and the case was presented to the jury on claims that the design was negligent and Ford Motor Co. was guilty of willful and wanton misconduct by: "(1) failing to locate the fuel tank over the axle or forward of the rear axle; (2) failing to shield the fuel tank to prevent punctures by contents in the trunk; and (3) failing to warn of the risk of trunk contents puncturing the fuel tank." *Id.* ¶ 6. Also involved was a fourth theory that Ford Motor was negligent in failing to inform the decedent and injured plaintiff "of certain remedial measures taken by Ford [Motor] *after* the manufacture of the vehicle but prior to the . . . accident." *Id.* (emphasis added). The jury returned verdicts in favor of the plaintiff and awarded significant compensatory damages and punitive damages.

The appellate court affirmed, and the Illinois Supreme Court accepted the appeal. In doing so, the court prefaced its opinion by stating: it was "asked to clarify the duty analysis in a negligent-product-design case." *Id.* ¶ 1. That analysis includes a thorough discussion and evaluation of: (1) the comparative elements of design cases under a strict liability theory and those that involve negligence principles; (2) consideration of consumer-expectation and risk-utility concepts in the context of both theories; (3) the various evidentiary factors that bear upon whether the product itself is "reasonably safe" in strict liability cases and whether the manufacturer has exercised ordinary care in negligence cases; and (4) the application and balancing of the relevant factors *vis-à-vis* the applicable directed verdict standard as set forth in *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967) ("[V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.").

Applying the *Pedrick* standard, the court reversed, finding that the plaintiffs had presented insufficient evidence from which a jury could conclude that Ford Motor Co. breached its duty to exercise reasonable care in the design of the gas tank.[1] The analytical steps taken by the court in considering the duty of a manufacturer in a negligent-product-design case are instructive and merit in-depth consideration.

[1] The court also found that the plaintiffs' theory that Ford Motor Co. owed a "post-sale duty to warn" was not recognized by Illinois law, either directly or under the guise of a "voluntary undertaking."

Synthesis of Strict Liability and Negligence Concepts

In strict liability cases, the focus is on the product itself and not the manufacturer's conduct in producing it. Thus, the defendant's fault, or lack fault, is immaterial. *Calles*, 224 Ill. 2d at 264-65. On the other hand, in a negligence case, both the defendant's fault and the condition of the product are at issue. *Coney v. JLG Indus., Inc.*, 97 Ill. 2d 104, 112-18 (1983). Both theories start with the premise that a manufacturer has a non-delegable duty to design a reasonably safe product. *Calles*, 224 Ill. 2d at 270. Assuming that the product is not reasonably safe, basic negligence rules are applied in evaluating the defendant's conduct. Specifically, the plaintiff must establish the existence of a duty, a breach of that duty, and damages that were proximately caused by the breach. *Heastie v. Roberts*, 226 Ill. 2d 515, 556 (2007).

In determining whether the manufacturer acted reasonably in designing the product, the initial question is whether, in the exercise of ordinary care, the manufacturer should have foreseen that the design "would be hazardous to someone." *Calles*, 224 Ill. 2d at 270. In that regard, the pertinent "risks" are those that a manufacturer should have known were posed by the product's design at the time it was manufactured. *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 923 (2007). As discussed above, the Illinois Supreme Court in *Mikolajczyk*, considered the alternative "consumer-expectation" and "risk-utility" approaches to the prosecution and defense of strict liability claims. In recognizing that the parties had a right to pursue both from an evidentiary perspective, the court held that "consumer expectation" is one of the factors to be considered where a risk-

utility theory is pursued by either party. *Mikolajczyk*, 231 Ill. 2d at 569.

In *Jablonski*, the supreme court reached the same result with respect to negligence cases by adopting its reasoning in *Calles* with additional reliance upon Section 291 of the Restatement (Second) of Torts, regarding which it found:

> It has long been held that whether the manufacturer exercised reasonable care in designing its product also encompasses a balancing of the risks inherent in the product design with the utility or benefit derived from the product. Restatement (Second) of Torts § 291, at 54 (1965) ("[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."). When the risk of harm outweighs the utility of a particular design, there is a determination that the manufacturer exposed the consumer to a greater risk of danger than is acceptable to society. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence,* 33 Vand. L.Rev. 593, 610 (1980) ("[c]onceptually and analytically, this approach bespeaks negligence").

Jablonski, 2011 IL 110096, ¶ 84.

Although *Calles* pointed to the court's adoption of the risk-utility approach in negligent design cases, *Jablonski* leaves no doubt that is the case. The court in *Jablonski* also considered and evaluated the most significant factors that are to be balanced by the trier of fact in determining the respective risks and benefits of a product's design. The decision, therefore, provides guidance in both negligence and strict liability design cases.

Factors that Are Weighed and Balanced

As discussed in the second article in this series, Mikolajczyk v. Ford Motor Company*: A Synthesis of Approaches in Design Defect Cases*,19 IDC Quarterly, no. 1, 2009, at 71, the *Mikolajczyk* and *Calles* courts considered many factors as probative of whether the risks inherent in the design of a product outweighed its benefits. In *Jablonski*, the court agreed that it is up to the trial court to determine which of the evidentiary factors are relevant, but it also gave insight into the factors that are most pertinent.

Recognizing that a manufacturer is not required to guard against every conceivable risk, the court imposed a twofold burden upon the plaintiff. First, the plaintiff must prove that the risk was foreseeable. Second, he must show that the hazards that the design imposes outweigh the benefits of that design. *Cunis v. Brennan*, 56 Ill. 2d 372, 376 (1974). In each case, the risk is defined by the accident that caused the injuries for which recovery is sought. For example, in *Jablonski* the risk was the risk of contents in the trunk puncturing the gas tank because of a 55-66 miles-per-hour rear-impact crash. The second burden focuses upon the merits of the design that is criticized versus its failure to prevent accidents of the type that took place.

Industry Standards

Compliance with industry design standards, design guidelines provided by voluntary organizations, or design criteria set by legislation or governmental regulation have long been considered probative in product liability cases. *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill. 2d 434, 436-39 (1979). In *Blue*, the plurality suggested that compliance with an industry standard was dispositive as to the manufacturer's exercise of ordinary care in designing the product. The *Jablonski* court expressly rejected that suggestion. Instead, compliance with industry standards is considered to be a relevant and significant, but not a dispositive, factor. Likewise, a violation of industry standards is probative of, but not conclusive on, the question of negligent design. Either way, the overarching issue is whether the manufacturer's conduct was reasonable under the circumstances. It is significant to note, however, that satisfaction of all applicable standards, coupled with the absence of any opposing standards that were violated, was one of the chief factors relied upon by the *Jablonski* court in reversing the verdicts that had been entered in favor of the plaintiffs under the rule in *Pedrick*. In that regard, the following language from the opinion is informative because it sets forth the plaintiff's burden when the manufacturer shows that the product met or exceeded any standards that were in existence at the time the product was produced:

> Given that Ford [Motor] complied with, and even exceeded, the industry standard set forth for fuel system integrity, plaintiffs were required to come

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> forward with evidence that despite Ford[Motor]'s compliance, its conduct was otherwise unreasonable because the foreseeable risk posed by the vertical-behind-the-axle design of the fuel tank at the time of manufacture outweighed its utility.

Jablonski, 2011 IL 110096, ¶ 98. One way of satisfying that burden would be to show the existence of a safer feasible alternative.

The Availability and Feasibility of Alternative Designs

Commencing with *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368 (1979), the Illinois Supreme Court recognized that a defective design can be established either by evidence that the product's design did not conform with industry standards *or* by evidence that available and feasible alternative designs existed at the time the product was manufactured. In *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63 (1979), the court affirmed a verdict against the manufacturer of a forage blower based upon evidence that an alternative design, which would have prevented the accident, was both available and feasible.

Although recognizing that a manufacturer is not required to produce a product "which represents the ultimate in safety," the court held a manufacturer is obligated to provide an alternative design that is safer, economical, and feasible, where such a design exists. In that respect, it quoted with approval the following instruction given to the jury:

> "There is no duty upon the manufacturer of the forage blower to manufacture the product with a different design, if the different design is not feasible. Feasibility includes not only elements of economy, effectiveness and practicality, but also technological possibilities under the state of the manufacturing art at the time the product was produced."

Kerns, 76 Ill. 2d at 164. The same instruction was referred to in *Mikolajczyk*. *Kerns* and *Mikolajczyk* were both strict liability cases. In *Jablonski*, the court makes it clear that the same reasoning applies to the manufacturer's exercise of ordinary care in negligent design cases.

In *Jablonski*, the plaintiff's expert witness posited that Ford Motor Co. failed to act reasonably in using the "Panther platform" design instead of "a safer alternative feasible tank design either over the axle or forward of the axle." *Jablonski*, 2011 IL 110096, ¶ 99. In discrediting that evidence, the court held that the plaintiff was required to show more than the "technical possibility of an alternative design." *Id.* ¶ 103. Instead, for the design to be "feasible," it had to take into account: (1) the type of vehicle involved; (2) the potential for side as well as rear impacts; (3) whether there had been accidents of the same type; and (4) whether the alternative design would have prevented the type of rupture that occurred. *Id.* ¶ 98-106. In each of the preceding respects, the plaintiff's evidence fell short. *Id.* ¶ 107. Consequently, the plaintiff's inability to prove either: (1) the breach of applicable industry standards, rules, and regulations; or (2) the existence of a feasible alternative design, condemned the plaintiff's negligent design claim and resulted in reversal of the judgments that were entered against Ford Motor Co. by the trial court and affirmed by the appellate court.

Conclusion

Jablonski v. Ford Motor Co. confirms the risk-utility analysis that was adopted in negligent design cases by the court in *Calles v. Scripto-Tokai Corp.* No attempt was made to pursue a "consumer-expectation" test in *Jablonski*. It is logical to assume, however, that where either party elects to proceed on a risk-utility basis, consumer expectation, if it is relevant at all, will be relegated to the status of one of several factors to be considered by the jury.

Jablonski also makes it clear that the same factors apply to the determination of whether a manufacturer acted reasonably in designing a product as pertinent to whether the product *per se* is "unreasonably dangerous" in a strict liability case. Chief among the factors are the following: (1) compliance with or breach of applicable state and federal regulations and industry standards; and (2) the availability of a safe and feasible alternative design. Whether an alternative design is safe turns on its ability to prevent the accident that took place, while at the same time not introducing other risks of equal or greater magnitude. Feasibility focuses upon the frequency of the harm to be avoided versus the technological possibilities and state of the manufacturing art at the time the product was produced. In these respects, it is significant that the court appears to require something more than conceptual possibilities.

Commercial Law

James K. Borcia
Tressler LLP, Chicago

Seventh Circuit Affirms Dismissal of Accountant Malpractice Suit Brought By Lender

In *Bank of America, N.A. v. Knight*, 725 F.3d 815 (7th Cir. 2013), the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of a lawsuit filed by a bank against its borrower's accountant for malpractice.

Bank of America ("the Bank") lost about $34 million when its borrowers, Knight Industries, Knight Quartz Flooring, and Knight-Celotex (collectively "Knight"), went bankrupt. The Bank contended that Knight's directors and managers looted the firm and that its accountants failed to detect the wrongdoing. The district court dismissed all of the Bank's claims on the pleadings. The accountants invoked the protection of 225 ILCS 450/30.1, which provides that an accountant is liable only to its clients unless the accountant itself committed fraud (which was not alleged) or "was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action" (Section 450/30.1(2)). The district court concluded that the Bank's complaint did not allege plausibly—see *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)—that the accountants knew that Knight's "primary intent" was to benefit the Bank. *Knight*, 725 F.3d at 816.

The complaint alleged that the accountants knew that Knight furnished copies of the financial statements to lenders, including the Bank, but the district court observed that auditors always know that clients send statements to lenders (existing or prospective). In affirming the district court's decision, the Seventh Circuit held that the statute would be ineffectual if knowledge that clients show financial statements to third parties were enough to demonstrate that the client's "primary intent" was to benefit a particular lender. *Id.* at 815.

The court found that the contention that "the defendants looted the corporation"—without any details about who did what—was inadequate. The court specifically noted that "allegation that *someone* looted a corporation does not establish a plausible contention that *a particular person* did anything wrong."

According to the Bank, its claims did not depend on proof of fraud, so Federal Rule of Civil Procedure 9(b) was irrelevant. Fed. R. Civ. P. 9 (b). The Seventh Circuit held that it did not need to decide that issue because the problem the district court identified defeated the complaint based upon normal pleading standards. The court found that the contention that "the defendants looted the corporation"—without any details about who did what—was inadequate. *Knight*, 725 F.3d at 815. The court specifically noted that "allegation that *someone* looted a corporation does not establish a plausible contention that *a particular person* did anything wrong." *Id.* at 818 (emphasis in original). Indeed, the court recognized that "liability is personal." *Id.* As such, the court stated that a complaint or claim based on a theory of collective responsibility must be dismissed. Even for conspiracy claims based on a theory of collective responsibility must be dismissed because, although a conspirator is responsible for the acts of his co-conspirators that are within the scope of the conspiracy, a plaintiff still must show that a particular defendant joined the conspiracy and knew of its scope. The court found that the Bank's complaint did not get even that far. *Id.*

The Bank insisted that the district judge abused his discretion by dismissing

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About the Author

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

the Bank's second-amended complaint with prejudice rather than allowing it to re-plead. The Seventh Circuit held that, as in baseball, "three strikes and you're out." *Id.* at 819. The Bank was allowed to amend its complaint twice, and its lack of success in giving notice and framing a manageable suit allowed the district judge to conclude, without abusing his discretion, that the suit was properly dismissed with prejudice. *Id.*

Knight highlights the importance of pre-suit investigation, particularly when alleging claims such as those raised by the Bank. The Bank's claims ultimately failed because it failed to put forward any detail to support its allegations of supposed wrongdoing. Presumably, a thorough pre-suit investigation would have revealed some of the specific facts supporting the Bank's claims. Had the Bank uncovered and pled such facts regarding Knight's downfall and how the accountants might have been complicit in that downfall, the result in this case likely would have been different. Conversely, if no such facts are uncovered, then claims such as the ones in *Knight* should not be filed. Along these same lines, *Knight* is also illustrative of the need, particularly in cases asserting a novel theory, to spend time developing a coherent theory and considering how it should be presented. Although this case dealt with the plaintiff's side, this principle applies with equal force to defense counsel.

Supreme Court Watch

Beth A. Bauer*
HeplerBroom LLC, Edwardsville

Does the Illinois Insurance Code Allow Judicial Review of Arbitrators' Interlocutory Discovery Orders Prior to a Final Adjudication?

***Klehr v. Ill. Farmers Ins. Co.*, No. 121843, 1st Dist. No. 1-12-1843**

The plaintiff was a passenger in a car hit by an uninsured driver. She suffered substantial injuries, and the driver of the car in which the plaintiff rode was underinsured. Thus, her medical costs were not fully covered by insurance from either of the drivers of the vehicles in the collision.

In 2007, the plaintiff ("the insured") filed a claim for the remainder of the costs under her personal insurance policy issued by the defendant insurer. She also invoked the policy's arbitration clause to adjudicate the amount of her claim. At the outset of arbitration, the insurer served formal discovery on the insured pursuant to Illinois Supreme Court Rules 213, 214, and 237. In 2011, however, the insured objected to the discovery requests, claiming that they were time-barred by the Illinois Insurance Code, 215 ILCS 5/143a ("Section 143a"), and Rule 6 of the Illinois Uninsured/Underinsured Motorist Arbitration and Mediations Rules ("AAA Rule 6").

Section 143a of the Illinois Insurance Code requires that policies include a provision that mandates arbitration, subject to the AAA Rules. 215 ILCS 5/143a. AAA Rule 6 provides that "[u]nless otherwise limited by order of the court, parties shall complete all discovery no later than 180 days from the [notification of an arbitration claim.]" Relying on this language, the insured moved to close discovery. The arbitrator denied her motion and ordered her to answer the insurer's discovery requests.

The insured then filed an action in circuit court and sought a declaratory judgment that the insurer's discovery requests were time-barred by AAA Rule 6. The circuit court *sua sponte* raised the issue of subject-matter jurisdiction and found that it had no jurisdiction to review an arbitrator's interlocutory order before the arbitration process is complete.

The Illinois Appellate Court First District affirmed the circuit court on dif-

About the Author

Beth A. Bauer is a partner of *HeplerBroom LLC*. Ms. Bauer is a litigation attorney with a primary emphasis in the defense of complex, multi-party civil cases and class actions, involving all aspects of consumer fraud, product liability, particularly pharmaceuticals, construction, and insurance litigation. Ms. Bauer also regularly handles appeals and consults with others in the firm on appellate issues. Ms. Bauer is a member of IDC, Illinois Appellate Lawyers Association, DRI, and Christian Legal Society. She has authored the Supreme Court Watch column for *IDC Quarterly* since 2001 and has served on the Editorial Board of that publication since 2009. Ms. Bauer earned her B.A. in Secondary Education and English Literature from Washington University in St. Louis in 1997 and her J.D., *cum laude*, from Saint Louis University School of Law in 2000.

* Ms. Bauer recognizes and appreciates the work of **James Bertucci**, a *HeplerBroom* summer associate from *St. Louis University School of Law*, for his contribution to this column.

[T]he appellate court found that subject-matter jurisdiction was proper because it was a "justiciable matter," and declaratory judgments are remedies that circuit courts are generally empowered to give. But, the court dismissed the insured's complaint as unripe for adjudication, holding that the discovery dispute would "remain unripe until the arbitrators issue their final award."

ferent grounds. First, the appellate court found that subject-matter jurisdiction was proper because it was a "justiciable matter," and declaratory judgments are remedies that circuit courts are generally empowered to give. *Klehr v. Ill. Farmers Ins. Co.*, 2013 IL App (1st) 12843, ¶¶ 6-7 (citing *In re Luis R.*, 239 Ill. 2d 295, 301 (2010)). But, the court dismissed the insured's complaint as unripe for adjudication, holding that the discovery dispute would "remain unripe until the arbitrators issue their final award." *Klehr*, 2013 IL App (1st) 12843, ¶ 21. The appellate court found that the Illinois Uniform Arbitration Act (UAA), 710 ILCS 5/10–13, dictates that "courts cannot review [an] arbitrator's ruling . . . until after the arbitration process is complete." *Id*. ¶ 16. The First District further stated that any prejudice suffered by the insured was outweighed by UAA's underlying policy goals of "promot[ing] the economical and efficient resolution of disputes," which would be defeated by "inject[ing] the courts into the arbitration process." *Id*. ¶ 20.

On appeal, the insured argues that the First District failed to distinguish between the typical arbitration agreements governed by the UAA and the particular class of arbitration agreements governed by Section 143a of the Illinois Insurance Code. Accordingly, the insured avers that the UAA is not the controlling statute for the insured's underlying claim, and Section 143a and AAA Rule 6 should be read together to create a right of judicial review of arbitrators' interlocutory discovery orders in these types of arbitrations.

Further, the insured contends that the First District contravened Illinois law by declining to construe or otherwise discuss the "unless otherwise limited by order of the court" phrase contained in AAA Rule 6. See *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990) ("A statute should be construed so that no word or phrase is rendered superfluous or meaningless."). According to the insured, the First District's failure to give effect to this phrase effectively rendered it meaningless.

Finally, the insured maintains that she suffered sufficient hardship and prejudice to make her declaratory judgment action ripe for adjudication. She further objects to the First District's finding that actions such as hers "would reduce the efficient and cost effectiveness of arbitration as a dispute-resolution mechanism." See *Klehr*, 2013 IL App (1st) 12843, ¶ 20. Conversely, the insured argues that the statutory right to a speedy conclusion of arbitration discovery was intended to *increase* the efficiency of the arbitration process, and that the First District's refusal to close discovery has caused her to suffer the exact type of hardship and prejudice Section 143a and AAA Rule 6 were designed to prevent.

[T]he insured argues that the statutory right to a speedy conclusion of arbitration discovery was intended to *increase* the efficiency of the arbitration process, and that the First District's refusal to close discovery has caused her to suffer the exact type of hardship and prejudice Section 143a and AAA Rule 6 were designed to prevent.

Health Law Update

Roger R. Clayton, Mark D. Hansen, and **J. Matthew Thompson**
Heyl, Royster, Voelker & Allen, P.C., Peoria

First District Appellate Court Addresses Proximate Cause Defense in Case of Third-Party Intervening Physician in *Buck v. Charletta*

In *Buck v. Charletta*, 2013 IL App (1st) 122144, the Illinois Appellate Court First District addressed the line of cases where proximate cause is contingent on the actions of an intervening third party. Previously in Illinois, a plaintiff's medical malpractice claim would fail if there was no evidence that the third party would have done anything differently if provided additional or different information. In other words, if a plaintiff alleges that a physician or nurse was negligent for failing to provide additional or different information to another treating physician, but there is no evidence that the treating physician would have acted any differently given the additional information, then a causal connection is absent.

In *Buck*, however, the appellate court determined that a question of material fact might exist as to proximate cause if a plaintiff's expert witnesses testify that the third-party intervening physician would have acted differently, even if the third-party physician himself testifies that he would not have. Defense attorneys should carefully consider *Buck* in defending similar cases so that facts can be developed throughout discovery to distinguish *Buck*.

Background

In *Buck*, the plaintiff was seen for neck pain by her orthopedic surgeon ("surgeon") who ordered x-rays and an MRI. *Buck*, 2013 IL App (1st) 122144, ¶ 3. The test results were read by the defendant radiologist ("radiologist"), who contracted with Midwest Orthopaedics. *Id.* The radiology image showed a density in the plaintiff's lung, which the radiologist detailed in his MRI report, recommending that follow-up chest x-rays be taken. *Id.* ¶ 10. The report clearly stated that a malignant tumor could not be ruled out. *Id.* The radiologist's practice was to read the images remotely and then upload his final report to a server owned by Midwest Orthopaedics for use by the ordering physician. *Id.* ¶ 9. The radiologist uploaded the plaintiff's MRI report in this manner and admittedly had no personal communication with the surgeon regarding his findings. *Id.* ¶ 11.

At his discovery deposition, the surgeon testified that he saw and reviewed the radiologist's MRI report and that he considered the reference to the lung mass clinically significant. *Id.* ¶ 15. The surgeon testified that he reviewed the report with the plaintiff and advised her to see her primary-care physician, which she said she would do. *Buck*, 2013 IL App (1st) 122144, ¶ 15. Most importantly, the surgeon testified that his understanding of the MRI report would not have been any different if the radiologist would have called or otherwise contacted him personally to discuss the report. *Id.* ¶ 21.

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

Mark D. Hansen is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mark has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mark is a member of the Illinois Association of Defense Trial Counsel and is a former co-chair of the Young Lawyers Committee, former ex officio member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

J. Matthew Thompson is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He practices primarily in the area of general tort defense. He received his B.S. in Accounting from Culver-Stockton College in 2005 and his J.D. *cum laude* from Southern Illinois University School of Law in 2008.

THE IDC MONOGRAPH:

Exclusion of the Occurrence? Examining Illinois Courts' Interpretation of "Coverage" in Construction Defect Cases

Seth D. Lamden
Neal, Gerber & Eisenberg LLP, Chicago

Michael L. Young
HeplerBroom LLC, St. Louis

Mollie E. Nolan Werwas
Kopon Airdo, LLC, Chicago

Exclusion of the Occurrence? Examining Illinois Courts' Interpretation of "Coverage" in Construction Defect Cases

I. Introduction

Construction, whether of a home, a building, or a relatively small renovation project, can be fraught with delays, setbacks, complications, and problems. The last thing anyone involved in the project wants to learn is that the end result is defective in some way—the foundation is unstable, the windows are not straight, the floor finishes are peeling. The question becomes who will be responsible for fixing this defect? Can the owner of the project look to its contractors' insurance carriers, or is the only recourse to hold the contractor personally responsible? Contractors, in turn, also look to their own carriers and also to carriers for their subcontractors, which might be the parties ultimately responsible for creating the defective condition. Given the approach taken by Illinois courts, the answer to these questions is likely that no coverage applies. The reasoning used by the courts in reaching that result, however, raises a new set of questions concerning interpretation of the standard commercial general liability (CGL) policy.

This article addresses how Illinois courts consider coverage for construction defect claims. For more than two decades, Illinois has developed a body of law in which construction defect claims typically are not covered as part of the standard CGL policy's coverage grant, based on the reasoning that such defects are not the result of an "occurrence," as opposed to relying on construction defect exclusions. When the analysis of a construction defect claim is compared to Illinois's approach to coverage in other contexts, however, it appears that construction defect claims are treated differently. This article examines this different approach and the implications of which attorneys representing clients in construction defect cases should be aware with respect to coverage.

II. Illinois Courts Hold that Construction Defects That Damage Only the Insured's Work Are Not "Property Damage" Caused by an "Occurrence"

A. *Western Casualty & Surety Co. v. Brochu*

One of earliest Illinois decisions to address whether a construction defect claim is covered under a CGL policy is the 1985 decision in *Western Casualty & Surety Co. v. Brochu*.[1] In the underlying litigation, Richard and Marita Brochu (collectively, the Brochus) filed suit against Mark III Development Co. (Mark III), which built their home, alleging that that the home began to settle at an unnatural rate, leading to cracks in the foundation, sagging support beams, and other damages and defects.[2] The Brochus' complaint against Mark III included claims for breach of warranty and fraud, as the house failed to comply with warranties contained in the construction contract providing that the house would be built in a good and workmanlike manner, as well as a specific provision concerning soil preparation.[3] Mark III tendered the claim to its CGL insurer, which denied coverage.

Although the Illinois Supreme Court ultimately held that Mark III's CGL policy

About the Authors

Seth D. Lamden is a litigation partner at *Neal, Gerber & Eisenberg LLP* in Chicago. He concentrates his practice on representing corporate and individual policyholders in coverage disputes with their insurers. In addition to dispute resolution, Mr. Lamden counsels clients on matters relating to insurance and risk management, including maximizing insurance recovery for lawsuits and property damage, policy audits and procurement, and drafting contractual insurance specifications and indemnity agreements. He obtained his B.A. from Brandeis University and his J.D., *magna cum laude*, from The John Marshall Law School.

Michael L. Young is a partner with the St. Louis office of *HeplerBroom LLC*, with a primary emphasis in the practice of insurance law. He represents both insureds and insurers in complex insurance coverage matters at all stages of the claims process. Mr. Young's litigation practice also includes the defense of personal injury, products liability, and white collar criminal defense matters. Mr. Young obtained his law degree from Saint Louis University, *summa cum laude*, in 2002, where he was the Valedictorian of his class. While in law school, Mr. Young served as a Staff Member for the *Saint Louis University Law Journal* in 2000-2001. He received his Bachelor of Arts degree in 1999 from Washington University in St. Louis, Missouri, *summa cum laude*, majoring in History.

Mollie E. Nolan Werwas is a partner at *Kopon Airdo, LLC*, where she focuses her practice on insurance coverage and related issues. She has represented clients at the state and national level in matters involving complex insurance coverage issues, including personal injury claims, uninsured motorist claims, business interruption claims, catastrophic property losses, and natural disaster losses. She has counseled with clients in drafting coverage agreements, tendering matters for defense and indemnification by third-parties, and preparing reservation of rights and denial of coverage letters. Ms. Werwas has worked with clients in both prosecuting and defending declaratory judgment actions relating to insurance coverage. She received her undergraduate degree from Southern Illinois University in 2003 and her Juris Doctorate degree from Southern Illinois University School of Law in 2006.

did not cover the Brochus' construction defect claim, the court apparently accepted (without discussion) that the claim fell within the insuring agreement of a CGL policy, which typically encompasses damages for "property damage" caused by an "occurrence."[4] It is unknown whether the insurer in *Brochu* argued that defective construction does not constitute an "occurrence," as the portion of the policy quoted by the *Brochu* court makes no reference to an "occurrence."[5]

Instead, it appears that the insurer in *Brochu* focused its arguments on two exclusions in the CGL policy that it found to be relevant to the Brochus' claims.[6] The first exclusion precluded coverage for claims involving property damage to the named insured's products.[7] The second exclusion barred coverage for property damage to work performed by or on behalf of the named insured "arising out of the work . . . in connection therewith."[8] Based on these exclusions, the court held that the damage to the Brochus' home, which was the "product" or "work" of the insured, Mark III, was excluded from the scope of the policy's coverage.[9] As stated by the court, as a result of these two exclusions, "the policy in question does not cover an accident of faulty workmanship, but rather faulty workmanship which causes an accident" to some property other than the insured's product or work.[10]

If the *Brochu* court accepted that the underlying claim involved an "occurrence," then that court very well might have found that the Brochus' claim would have been covered under the post-1985 version of the standard form CGL policy. First, the definition of "your product" in the post-1985 form policy expressly excludes "real property," so the policy exclusion for damage to "your product" would not have eliminated coverage in the *Brochu* case.[11] Since the post-1985 modification of the CGL coverage form, most courts have held that construction projects involving the erection of a building or other improvements to real property do not constitute the "product" of the insured.[12] Second, although the *Brochu* decision does not state whether the defective work was performed by the insured or by a subcontractor, the insured was the builder of the Brochus' home, and it is likely that the work was not performed by the builder. If the work had been performed for the insured by a subcontractor, then the "your work" exclusion in the post-1985 standard form CGL policy would not have eliminated coverage because the form was modified with an exception for claims arising out of work performed by the insured for a subcontractor.[13]

B. *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*

From 1991 to 1996, Illinois appellate courts issued a series of decisions holding that a claim against a general contractor or developer alleging defective construction and seeking to recover only for damages to the building itself did not allege an "occurrence" under the contractor's or developer's CGL policy.[14] The courts in these decisions found there to be no "occurrence" because, according to the courts, construction defects are a natural and probable consequence of construction activities. In *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*,[15] for example, the plaintiff in the underlying action sought damages from a general contractor for construction defects. The *Wil-Freds Construction* court ruled that the underlying complaint failed to allege an occurrence because a defective structure is the natural and ordinary consequence of faulty workmanship.[16] The court did note, however, that if the underlying complaint had included a claim for damage to other property (for example, if the claimant "had sued Wil-Freds for the water damage suffered by cars in the parking garage, or a pedestrian sued Wil-Freds for an injury caused by falling concrete"), there would have been coverage for the third-party injury or damage because "there would have been 'negligent manufacture that results in 'an occurrence.'"[17] In other words, while the construction activities themselves were not an "occurrence," there might be coverage if the construction activities cause third-party property damage.

C. *Pekin Insurance Co. v. Richard Marker Associates, Inc.*

Such was the situation in *Pekin Insurance Co. v. Richard Marker Associates, Inc.*,[18] in which the court held that an insurer was obligated to defend a construction defect suit because the complaint alleged that the insured not only failed to properly design and construct a building for them, but also that the insured's negligence led to burst water pipes that damaged their carpeting, furniture, and clothing. In so holding, the *Richard Marker Associates* court relied on the following statement in *Brochu* to support its holding that defective construction that damages third-party property may constitute an "occurrence": "A CGL policy 'does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.'"[19] Notably, the *Brochu* court made that statement in the context of interpreting whether the "your work" and "your product" exclusions in the CGL policy at issue were ambiguous to the extent that they conflicted with another exclusion in the policy that applied to "liability assumed by the insured under any contract," and not in connection with whether the claim involved an "occurrence."[20]

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D. *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*

Since *Richard Marker Associates*, Illinois courts have continued to hold that defective construction is not an "occurrence" when the only alleged damage is the work of the insured—regardless of whether the insured actually performed the work or the work was performed by another party. The decision in *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*[21] provides a thorough overview of Illinois law on this issue. As the court noted, at the time of the decision, the question of coverage for construction defects was "in great dispute," with at least one commentator stating that the issue "lies in chaos."[22] Citing a collection of secondary sources, the *Viking* court concluded that, as a general rule, faulty workmanship, standing alone, is not covered under a CGL policy because construction defects do not constitute an accident or occurrence that triggers coverage under CGL policies in Illinois.[23]

At issue in *Viking Construction Management* was whether a CGL policy provided coverage to Viking Construction Management, Inc. (Viking), the insured general contractor, for damage to a building that Viking contracted to build for Woodland Community School District (Woodland).[24] During construction of the building, a masonry wall collapsed due to inadequate temporary bracing installed by Viking's subcontractor, Crouch-Walker.[25] Woodland filed a breach of contract suit against Viking for repair and replacement of the damaged property. Viking, which had been added as an additional insured to Crouch-Walker's CGL policy with Liberty Mutual Insurance Company, tendered the Woodland suit to Liberty Mutual.[26] Liberty denied the tender, and Viking filed a declaratory judgment action.[27] Although the trial court ruled in favor of Viking, the appellate court reversed, finding that Liberty had no duty to defend or indemnify Viking against the Woodland suit.[28]

The court noted that to find coverage for damages that required only the replacement of Viking's defective work product would transform the policy into a performance bond.

Discussing whether the claim involved an "occurrence" under Viking's CGL policy, the *Viking Construction Management* court discussed three approaches that courts outside of Illinois have applied, either individually or in combination, in determining that construction defects are not covered under the standard CGL policy: (1) examination of the policy language, including the existence of an "occurrence," "property damage," or whether an exclusion applies; (2) application of the "business risk," "ordinary and natural consequences," or breach of contract doctrine; or (3) application of the "economic loss" (no "property damage") doctrine.[29]

The *Viking Construction Management* court held that the claim was not for "property damage" caused by an "occurrence," as required by Viking's CGL policy, because the core of the underlying allegations was a breach of contract action wherein all allegations against Viking were premised on its failure to satisfy various terms of its contract.[30] In looking at whether the damages claimed in the underlying suit in *Viking Construction Management* were for property damage caused by an "occurrence," the court noted that, although the policy did not define the term "accident," which is part of the definition of "occurrence," an "accident" previously has been viewed in Illinois jurisprudence as involving "an unforeseen occurrence" or "an undesigned sudden or unexpected event."[31] Without discussing the actual cause of the particular faulty workmanship allegedly performed by Viking, the court noted that, generally, courts have held that no "occurrence" exists when removal or repair work is necessitated by a subcontractor's defective workmanship.[32] The court further found that the damages sustained by Woodland were the natural and ordinary consequences of Viking's defective workmanship.[33] In so holding, the *Viking Construction Management* court relied on *Indiana Insurance Co. v. Hydra Corp.*,[34] noting that Woodland's underlying breach of contract claim was simply outside the scope of the CGL policy because, as in *Hydra*, the alleged defects to the insured's work were the natural results of negligent and unworkmanlike construction, which is not an "occurrence."[35]

The court also found that no "property damage" had occurred, as the only damages sustained by Woodland were economic losses associated with Woodland's nonconforming work.[36] The court noted that to find coverage for damages that required only the replacement of Viking's defective work product would transform the policy into a performance bond.[37]

Because the court found that the construction defect was not "property damage" caused by an "occurrence," it held that the damage claimed was outside the scope of the insuring agreement in Viking's CGL policy.[38] Consequently, there was no need to discuss whether any policy exclusion applied.[39] As noted above, the only applicable exclusion contained in the policy

precluded coverage for damage that was "expected or intended *from the standpoint of the insured*."[40] Given Viking's role in the underlying litigation as a construction manager overseeing the work of a subcontractor, it is possible that the court might have reached a different outcome if it had considered the application of the exclusion. At the very least, Viking might have been able to make a compelling argument as to the duty to defend by asserting that, from its perspective, the damage to Woodland's property was neither expected nor intended.

E. *Stoneridge Development Co, Inc. v. Essex Insurance Co.*

Following *Viking*, many Illinois courts have continued to hold that construction defects that only damage the insured's work are not "occurrences" under CGL policy language. For example, the court in *Stoneridge Development Co, Inc. v. Essex Ins. Co.*,[41] ruled in favor of the insurer, finding no coverage for construction defects, including cracks in a home and foundation, resulting from the insured-contractor's faulty soil compaction.[42] In support of its holding, the court explained that such damage was the "natural and ordinary consequence" of the defective workmanship, and was not "property damage" resulting from an "occurrence."[43] In so ruling, the court did not consider whether the insured subjectively expected or intended the property damage at issue. Instead, the court applied an objective standard, stating: "[W]e believe that, even if the person performing the act did not intend or expect the result, if the result is the 'rational and probable' consequence of the act [citation omitted] or, stated differently, the 'natural and ordinary' consequence of the act [citation omitted], it is not an 'accident.'"[44]

In addition, the court found that the damages claimed by the underlying plaintiffs were damages for breach of contract and economic loss, involving no damage to any property other than that which was the subject of the contract with the insured-contractor.[45] In reaching its decision, the *Stoneridge Development* court expressly distinguished its reasoning from the reasoning of *Brochu*, noting that *Brochu* did not analyze the terms "occurrence" or "property damage" and instead focused only on the policy exclusion.[46] The *Stoneridge Development* court, however, found its analysis to be consistent with *Brochu*'s proclamation that a CGL policy does not cover the """"accident of faulty workmanship but rather faulty workmanship which causes an accident."""[47] The *Stoneridge Development* court did not address the fact that the *Brochu* court might have held implicitly that faulty workmanship was an "occurrence"; nor did it discuss the fact that the *Brochu* court based its holding on exclusions in the policy at issue.

F. *CMK Development Corp. v. West Bend Mutual Insurance Co*.

Similarly, in *CMK Development Corp. v. West Bend Mutual Insurance Co.*,[48] the court held that various construction defects alleged against the insured builder were outside the scope of the policy's coverage grant.[49] The plaintiffs in the underlying action alleged numerous defects in the construction of their home, for which the insured, CMK Development Corp. (CMK), served as the developer.[50] In its claim for coverage, CMK asserted that only three of the alleged defects would give rise to coverage and conceded that other defects were not covered: (1) defective outdoor concrete work; (2) water damage to a lower-level cork floor; and (3) scratches on a bathtub and toilet bowl.[51] As to the defective outdoor concrete work, CMK argued that the damage could have been caused by its work on an adjacent property and, as such, was damage to "other property" during work on the adjacent area and not a construction defect.[52] Similarly, CMK argued that the cork flooring was installed by the home purchaser and that damage to that property caused by its construction work was damage to "other property."[53] Finally, CMK argued that the scratches could have occurred after the closing and were not construction defects.[54]

The court rejected CMK's arguments, noting that coverage for damage to "other property" comes not from the language of the CGL policy, but rather from Illinois law, as articulated in cases like *Viking Construction Management* and *Stonebridge Development*.[55] The court viewed the underlying complaint as one for breach of contract, as the home purchasers did not receive the item they had bargained for–namely, a home free from defects.[56] In finding that the entire home constituted the subject of the contract and the developer's work, the court was not swayed by CMK's argument that the three specific defects were damage to "other property."[57] Like the courts in *Viking Construction Management* and *Stonebridge Development*, the *CMK Development* court also relied on public policy considerations, noting that a developer's CGL policy cannot be applied in such a way that it becomes a performance bond.[58]

G. *Country Mutual Insurance Co. v. Carr*

Against this backdrop, the case of *Country Mutual Insurance Co. v. Carr*[59] stands as an anomaly in which coverage did apply to damages that could be considered construction defects. In the underlying action, the plaintiffs sued Carr, a general contractor, claiming that its subcontractor had used inappropriate

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In some respects, *Carr* and the *CMK Development* court's comments regarding *Carr* suggest that the "natural and ordinary consequences" approach is really a proxy for denying coverage for claims arising under breach of contract theories.

backfill around the plaintiffs' basement walls, which caused the basement walls to sustain "sudden movement and damage."[60] The CGL insurer denied coverage, claiming that the homeowner's claim was one for mere economic loss and thus not "property damage."[61]

The court, however, found that the underlying plaintiffs alleged more than "intangible property losses," and that their claims were for damage within the scope of the definition of "property damage."[62] As the court explained, the homeowners "alleged physical injury to tangible property, their basement walls."[63] As a result, the court concluded that the "property damage" requirement of the CGL policy had been met.[64]

Moreover, the court found that the underlying complaint alleged an "occurrence," as the underlying claim was for negligence, without any allegation that Carr or his employees or subcontractors expected or intended that their work would result in damage.[65] The court found significant that the homeowners alleged that the "negligent actions of defendant [general contractor] resulted in damage to their basement walls and other parts of the residence."[66] Ultimately, the case was remanded to the trial court, with the indication that the burden would shift to the insurer to establish that one of its policy exclusions applied to bar coverage.[67]

At least two subsequent Illinois decisions, without much discussion, have criticized *Carr*, which has been described as an "outlier."[68] As one court noted, in "*Carr*, the 'occurrence' was not the result of faulty workmanship related to the project, but rather the negligent operation of machinery at the worksite that caused damage to the project."[69] This purported distinction is subtle, and the factual similarities between *Carr* and *Viking Construction Management* make any meaningful attempt to distinguish those cases difficult, as both cases involved claims against general contractors for damage to the wall of a structure built by the insured caused by the faulty work of a subcontractor.

III. The "Natural and Ordinary Consequence" Test Does Not Always Support a Finding of No Coverage

As alluded to above, in addition to relying on its interpretation of the standard CGL policy language, the *Viking Construction Management* court also based its analysis on the notion that resulting damage to a contractor's work is the "ordinary and natural consequence" of performing inadequate work, and is not an accident.[70] Yet, like the analysis of CGL policy language that seems in conflict with the plain and ordinary meaning of those terms, the "ordinary and natural consequences" approach does not, on its face, necessarily support a finding of no coverage for construction defects claims with the uniformity seen in Illinois defective construction insurance cases.

In explaining this approach in finding no coverage for construction defect claims, the *Viking Construction Management* court noted that the rationale for the approach is specifically that coverage is provided only for fortuitous losses—the requirement implicit in every liability policy.[71] According to the *Viking* court, this approach looks to how the underlying claim is plead, and whether it is asserted as a breach of contract claim or a tort claim.[72] As the *Viking* court explained:

> "if a contractor uses inadequate building materials, or performs shoddy workmanship, he takes a calculated business risk that no damage will take place. If damage does take place, it flows as an ordinary and natural consequence of the contractor's failure to perform the construction properly or as contracted [and] [t]here can be no coverage for such damage."[73]

This view seems to presume, however, that the contractor has either knowingly or intentionally performed shoddy work, or allowed his employees or sub-contractors to do the same, based solely on the allegations of the underlying plaintiff, without a factual finding to that effect. In *Viking Construction Management*, *Stonebridge Development*, and *CMK Development*, there is no discussion of any factual allegations that the defendants knew their work to be shoddy at the time it was performed or intended damage to result from their work. Similarly, in each of these cases, it appears that the defective work at issue might have been performed by a subcontractor of the insured and not by the insured itself.[74]

The "ordinary and natural consequences" approach also does not explain an outlying case like *Carr*; nor does it

support the distinction that Illinois courts make in precluding coverage for damage to the insured's own work while allowing coverage for damage to other property, as it relates to the CGL coverage grant. In *Carr*, as discussed above, the insured contractor allegedly used improper backfill and negligently used heavy equipment in such a way as to cause damage to the underlying plaintiff's residence.[75] Presumably, using the standard set forth in *Viking Construction Management*, the damage to the plaintiff's residence should be viewed as the natural and ordinary consequence of Carr's faulty work. In rejecting this type of argument, though, the *Carr* court noted that there was no specific allegation that Carr knowingly or intentionally caused this damage, and the underlying plaintiff's claim was asserted as a tort and not a breach of contract claim.[76] The *CMK Development* court similarly distinguished *Carr* as a claim brought in negligence and not breach of contract.[77]

In some respects, *Carr* and the *CMK Development* court's comments regarding *Carr* suggest that the "natural and ordinary consequences" approach is really a proxy for denying coverage for claims arising under breach of contract theories. Certainly, a contractor, like any insured, should not be permitted to rely on CGL coverage to protect him from his failure to perform work in accordance with his contract. That basis, alone, should be sufficient to support rulings that claims arising from faulty workmanship cannot be covered when asserted under breach of contract and similar theories.[78] By introducing the notion that resulting damage is the "natural and ordinary consequence" of faulty workmanship, without requiring the related factual analysis, Illinois courts confuse the issues and leave their rulings open for attack.

Courts in other jurisdictions have questioned the "natural and ordinary consequences" approach as a basis for denying coverage under the typical CGL coverage grant. In the 2013 North Dakota case of *K&L Homes, Inc. v. American Family Mutual Insurance Co.*,[79] for example, the court found that faulty workmanship could be considered an "occurrence" if the faulty work was "unexpected" and not intended by the insured.[80] In taking this position, the North Dakota court specifically criticized the idea of distinguishing between damage to the contractor's own work and damage to other property, stating that "[b]oth types of property damage are caused by the same thing—negligent or defective work. One type of damage is no more accidental than the other."[81] Notably, the North Dakota court did not rule out the possibility that an exclusion could apply to bar coverage.[82] Instead, the case was remanded for a determination of the facts relevant to whether coverage exists under the CGL coverage grant, and for the insurer to argue whether coverage was precluded by any policy exclusions.[83]

IV. Illinois Courts Often Apply Different Standards when Interpreting "Occurrence" and "Property Damage" in Non-Construction Defect Insurance Cases

One would presume that Illinois courts would interpret and apply the terms "occurrence" and "property damage" in a CGL policy consistently across a broad variety of cases. They do not. Instead, Illinois courts appear to interpret these terms differently depending upon the factual context in which a claim arises. Specifically, the courts have applied different tests to determine if the "occurrence" and "property damage" requirements have been met in construction defect claims than in claims for trespass or improper home sale disclosure, for example. The line the courts apparently have drawn between construction and non-construction claims is an interesting one, particularly given the fact that the standard Illinois rules for policy interpretation do not necessarily seem to call for it.

Illinois case law routinely provides that an insurance policy is a contract subject to the same general rules governing contract interpretation.[84] The "primary objective" is to "ascertain and give effect to the intentions of the parties as expressed by the language of the policy."[85] The policy must be construed "as a whole" with "effect" given to every provision.[86] The court normally will assume that the parties intended every provision to serve a purpose.[87] Words used in the policy are to be given their "plain and ordinary meaning."[88] If the policy language is unambiguous, the courts will apply them as written so long as they do not violate public policy.[89] If the language is ambiguous, the language is strictly construed against the drafter.[90]

In interpreting words in an insurance policy, Illinois courts do not adopt "creative possibilities" or "search for ambiguity where there is none."[91] They disfavor "strict technical" or "legalistic" interpretations of policy terms, particularly when the insurer has the ability to "specify some meaning other than that understood by the average individual."[92] The courts attempt to interpret the language to avoid "illogical results."[93] A "consistent" interpretation is valued.[94]

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A. In Non-Construction Insurance Cases, Illinois Courts Typically Focus on Whether the Insured Expected or Intended the Injury when Determining Whether It Was Caused by an "Occurrence"

As mentioned earlier, Illinois courts purport to follow the "natural and ordinary consequences" doctrine when evaluating whether a defective construction claim involves an "occurrence" under a CGL policy.[95] The doctrine simply states that the "natural and ordinary consequences of an act do not constitute an accident."[96] Where a construction defect is "no more than the natural and ordinary consequences of faulty workmanship it is not caused by an accident."[97] Although an insured's failure to construct a home or building properly might be unintentional, *Viking Construction Management* made clear that the "natural and ordinary consequences" doctrine would prevent the court from finding that the costs to repair or replace that bad work result from an "occurrence." According to *Viking Construction Management*, CGL policies do not cover an occurrence of negligent manufacture, but rather negligent manufacture that results in an occurrence.[98] In other words, the claimant must seek recovery for damage to property *other* than the building or property that the insured constructed. Because construction defect claims pursue damages for the "natural and ordinary consequences" of the insured's "improper construction techniques," such claims do not present an "occurrence" under Illinois law.[99]

Interestingly, Illinois courts have declined to apply the "natural and ordinary consequences" doctrine in many non-construction defect contexts. For example, the Illinois Appellate Court Fifth District in *Lyons v. State Farm Fire and Casualty Company*[100] reviewed insurance coverage for a claim where the insured allegedly built levees that improperly extended onto his neighbors' property.[101] State Farm argued that the resulting trespass lawsuit filed against its insured was not covered by his homeowner's policy because there was no "occurrence."[102] Like a typical CGL policy, the homeowner's policy in *Lyons* defined "occurrence" to mean "accident."[103] State Farm argued that the levees were the "natural and ordinary consequences" of the insured's act of construction and, therefore, did not constitute an accident or "occurrence."[104]

The Fifth District rejected this argument. It held that, in determining what constitutes an "accident," Illinois "adheres to the rule of law promulgated by the United States Supreme Court more than a century ago in *United States Mutual Accident Ass'n v. Barry*."[105] The *Barry* interpretation of "accident," according to *Lyons*, focuses on whether the resulting *injury* was expected or intended by the insured:

> "[I]f an act is performed with the intention of accomplishing a certain result, and if, in the attempt to accomplish that result, another result, unintended and unexpected, and not the rational and probable consequence of the intended act, in fact, occurs, such unintended result is deemed to be by accidental means."[106]

The Fifth District held that the question is "not whether the *acts* were performed intentionally," but "whether the *injury* is expected or intended by the insured."[107] Although the insured did intend to build levees, the court held that the threshold question was whether he intended to build those levees over his neighbors' property lines.[108] Because the evidence indicated that he did not, the appellate court held that the "occurrence" requirement was met.[109]

After *Lyons*, other Illinois courts have applied the *Barry* interpretation and similarly found an "occurrence" in claims involving intentional conduct on the part of the insured. For example, in *Insurance Corporation of Hanover v. Shelborne Associates*,[110] the Illinois Appellate Court First District held that a lawsuit that alleged that the insured intentionally sent faxes in violation of the Telephone Consumer Protection Act (TCPA) met the "occurrence" requirement.[111] Because the insured argued that it believed that its faxes were authorized, it did not intend or expect the injury alleged.[112] Similarly, in *Pekin Insurance Co. v. Miller*,[113] the First District held than an insured's intentional removal of trees from the plaintiff's property met the "occurrence" requirement because he believed that he was removing trees from the correct property.[114]

The courts in *Lyons, Shelborne Associates*, and *Miller* all held that the intentional nature of the insured's conduct was not determinative of coverage. Instead, the focus was on whether the insured intended or expected the actual injury at issue. The courts in all three of those cases rejected the insurers' arguments that the claims each failed to present an "occurrence" because they sought recovery for the "natural and ordinary consequences" of their insured's acts. Indeed, *Lyons, Shelborne Associates*, and *Miller* implicitly suggest that the "natural and ordinary consequences" doctrine may be limited to the construction defect context. As a result, it seems evident that Illinois interprets and applies the "occurrence" requirement for construction defect claims differently that it does for many non-construction claims.

B. In Non-Construction Insurance Cases, Illinois Courts Focus Solely on Whether Tangible Property Was Physically Altered when Determining Whether There Was "Property Damage"

The paths of insurance policy interpretation that Illinois courts take also diverge with respect to the meaning of "property damage." As mentioned earlier, CGL policies define "property damage" to include "physical injury to tangible property." In *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*,[115] the Illinois Supreme Court held that tangible property suffers a physical injury when the property is "altered in appearance, shape, color or in other material dimension."[116] But the holding in *Viking Construction Management* bears little resemblance to this interpretation of "property damage."[117] Notwithstanding the fact that the underlying suit in *Viking Construction Management* arose from faulty construction that caused a masonry wall to collapse, the appellate court held that the costs to repair that wall were mere economic losses and thus not "property damage" within the meaning of a CGL policy.[118] To hold that such losses were covered "property damage," the court in *Viking Construction Management* contended, "would transform the policy into something akin to a performance bond."[119] It is difficult to reconcile this holding with the "plain and ordinary" meaning of the term "property damage," which is defined in the CGL policy as simply "physical injury to tangible property."

Notably, the court in *Viking Construction Management* made little attempt to apply the plain meaning of "property damage," instead acknowledging that Illinois's jurisprudence on insurance coverage for construction defect claims was based in part on the economic loss doctrine.[120]

> The bare explanation given by Illinois courts for not holding that these construction claims seek "property damage," even where a masonry wall collapses, is that to do so would transform the policy into a performance bond. Such an explanation might be a valid public policy consideration, but it is not necessarily grounded in the "plain and ordinary meaning" of the policy language.

Adopted by the Illinois Supreme Court in *Moorman Manufacturing Co. v. National Tank Co.*,[121] the economic loss doctrine provides that a plaintiff cannot recover for solely economic loss under the tort theories of strict liability or negligence.[122] Under this doctrine, economic loss would include damages for inadequate value, diminution in value, repair or replacement costs, and lost profits.[123] A plaintiff seeking recovery for such damages would need to do so by way of a contract action.[124]

Originally adopted in the context of a case involving a failure of a product to perform as contracted or warranted,[125] Illinois courts have expanded the doctrine to apply to various construction defect claims. For example, courts here have used the economic loss doctrine to defeat negligence claims in the construction defect context where the defect was the result of a contractor's poor workmanship,[126] an engineer's faulty specifications,[127] or an architect's bad design.[128] So long as the plaintiff seeks damages against a contractor for his "inferior workmanship," or the costs to repair or replace that inferior work, Illinois courts generally have not allowed those claims to proceed in negligence.[129] To recover in tort, the plaintiff must allege "personal injury or damage to *other* property" as a result of the contractor's bad work.[130]

The admission in *Viking Construction Management* that the economic loss doctrine may factor into how Illinois views insurance coverage for construction defect claims is remarkable because it is one of the few instances where an Illinois court has acknowledged openly that it is applying a tort law principle to limit coverage under a CGL policy. Under the economic loss doctrine, a negligence claim typically cannot lie against a contractor for the cost to repair or replace bad work, because such damages are economic loss. It does not necessarily follow, however, that an underlying claim alleging that tangible property was physically altered—regardless of whether the property is the insured's work—does not involve "physical injury to tangible property" simply because the insured may be able to assert the economic loss doctrine as a defense in the underlying action. As courts in other jurisdictions have commented, the economic loss doctrine is not a principle of insurance coverage law: "'The economic loss doctrine is a remedies principle. It determines how a loss can be recovered—in tort or contract/warranty law. It does not determine whether an insurance policy covers a claim, which depends instead upon the policy language.'"[131]

Unlike in *Viking Construction Management*, Illinois courts in non-construction insurance cases have held that a claim

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alleges "property damage" even if the economic loss doctrine might apply in the underlying action. For example, the Illinois Appellate Court Second District in *USAA Casualty Insurance Co. v. McInerney*[132] examined the economic loss argument with respect to a lawsuit where the insureds allegedly failed to disclose water leakage at their home during the sale of that property.[133] The buyers alleged that the insureds failed to disclose that the home had experienced backyard flooding, water intrusion, mold growth, and deterioration of building components.[134] They alleged that these conditions continued and worsened after their purchase of the home.[135]

The insureds' homeowner's carrier argued that the buyers' lawsuit did not seek "property damage." Similar to a CGL policy, the policy in *McInerney* defined "property damage" as "physical damage to, or destruction of tangible property."[136] The insurer argued that the buyers sustained only intangible economic loss and thus no "property damage."[137] The Second District disagreed. Although the "preexisting damage" to the home may not be covered, the appellate court held that the buyers "clearly alleged postsale damage and injury."[138] The court pointed to the buyers' allegations that they experienced water infiltration, basement flooding, and airborne mold after the sale.[139]

In *Posing v. Merit Insurance Co.*,[140] the Illinois Appellate Court Third District similarly rejected the insurer's economic loss argument while reviewing insurance coverage for a series of negligent termite inspection cases. The claimants all alleged that the insured failed to properly inspect or treat their various premises for termites.[141] The CGL carrier argued that the claimants had not sustained physical injury to tangible property, but only economic loss in terms of diminution in value of the buildings.[142] Like the Second District in *McInerney*, the Third District rejected the economic loss argument. The appellate court held that each of the underlying complaints alleged "property damage" in that the properties were "partially destroyed by pest infestation allegedly resulting from [the insured's] faulty inspection or treatment."[143]

In both *McInerney* and *Posing*, the claimants sought recovery from the insureds for conditions on real property that, to a certain extent, already existed before the insureds' allegedly tortious conduct. In *McInerney*, it was backyard flooding, water intrusion, and mold growth; in *Posing*, it was termites. The insureds in those cases failed to disclose or notify the claimants of these conditions, and the conditions worsened over time. One could characterize many construction defect claims in the same way. Indeed, the appeal of declaring the claims in *McInerney* and *Posing* as those seeking recovery of economic loss would seem just as strong (or weak) as it would for many construction defect claims, such as in *Viking Construction Management*, where the insured's defective construction actually caused a masonry wall to collapse. Nevertheless, the appellate courts in *McInerney* and *Posing* held that the claimants in those cases *did* seek recovery for physical injury or damage to tangible property. In construction defect cases like *Viking Construction Management*, Illinois courts routinely do not. This distinction does not appear to be based on the "plain and ordinary meaning" of "property damage." The bare explanation given by Illinois courts for not holding that these construction claims seek "property damage," even where a masonry wall collapses, is that to do so would transform the policy into a performance bond. Such an explanation might be a valid public policy consideration, but it is not necessarily grounded in the "plain and ordinary meaning" of the policy language.

The complaint in *Carr*, however, alleged negligence against the contractor. By alleging that the "negligent actions of defendant [general contractor] resulted in damage to their basement walls and other parts of the residence,"[144] the homeowners did attempt to allege that the contractor physically injured their property. Those allegations might not survive a substantive law challenge under the economic loss doctrine,[145] but the allegations were made. When confronted with whether to follow the purpose of the economic loss doctrine and to find no "property damage," or to give effect to the allegations as framed by the plaintiff and find "property damage," the Illinois Appellate Court Fourth District apparently chose the latter.

The more radical view, and perhaps the more consequential one, would be that *Carr* simply did not follow the expansive view of economic loss espoused by *Viking Construction Management* and its predecessors. Those cases held that claims to recover the costs to repair or replace a contractor's inferior work sought mere economic loss and thus did not meet the "property damage" requirement. The decision in *Carr* to characterize the contractor's inferior work in that case as physical injury to tangible property seems much closer to the holdings in *McInerney* and *Posing*. In terms of insurance coverage, those cases appeared to embrace a narrower view of economic loss—a view that did not necessarily track the substantive law-based economic loss doctrine. If other Illinois courts begin to interpret "property damage" in construction defect claims in accordance with this narrower view of economic loss, as *Carr* apparently did, the insurance coverage landscape for these claims could change dramatically.[146]

V. Conclusion

With the exception of *Carr*, Illinois courts for over 20 years have not found insurance coverage under CGL policies for construction defect claims unless the claims sought recovery for damage to property other than the insured's own work. In so doing, the courts have not applied rigidly the "plain and ordinary meaning" of key policy terms, like "occurrence" and "property damage." Instead, the courts have embraced other doctrines in these construction defects claims, such as the "natural and ordinary consequences" test or the "economic loss" doctrine, that they have not necessarily employed in the same way in other non-construction defect claims. There might or might not be justification for treating insurance coverage for construction defect claims differently, but the fact that they are treated differently in Illinois is a point that should be recognized.

(Endnotes)

1 *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 498 (1985).

2 *Brochu*, 105 Ill. 2d at 492.

3 *Id.*

4 *Id.* at 494.

5 *Id.* at 495.

6 *Id.* at 498.

7 *Id.* at 494.

8 *Brochu*, 105 Ill. 2d at 494.

9 *Id.* at 495.

10 *Id.* at 496 (citing *Weedo v. Stone-E-Brick, Inc*., 81 N.J. 233, 249 (1979)).

11 See ISO CGL Form CG 00 01 11 85.

12 See, *e.g., Am. States Ins. Co. v. Powers*, 262 F. Supp. 2d 1245, 1252 (D. Kan. 2003) (finding house or structure was not insured's "product").

13 See ISO CGL Form CG 00 01 11 85.

14 *Monticello Ins. Co. v. Wil-Freds Constr., Inc*., 277 Ill. App. 3d 697 (1996); *Bituminous Cas. Corp. v. Gust K. Newberg Constr. Co*., 218 Ill. App. 3d 956 (1st Dist. 1991); *Diamond State Ins. Co. v. Chester-Jensen Co. Inc*., 243 Ill. App. 3d 471 (1st Dist. 1993); *Ind. Ins. Co. v. Hydra Corp*., 245 Ill. App. 3d 926 (2d Dist. 1993).

15 *Monticello Ins. Co. v. Wil-Freds Constr., Inc.*, 277 Ill. App. 3d 697 (2d Dist. 1996).

16 *Wil-Freds Constr. Co.*, 277 Ill. App. 3d at 703-04.

17 *Id.* at 705 (quoting *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir.1975)).

18 *Pekin Ins. Co. v. Richard Marker Assocs., Inc.*, 289 Ill. App. 3d 819 (1st Dist. 1997).

19 *Richard Marker Assocs., Inc.*, 289 Ill. App. 3d at 823 (quoting *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 498 (1985)).

20 *Brochu*, 105 Ill. 2d at 497-98.

21 *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34 (1st Dist. 2005).

22 *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 42 (quoting William D. Lyman, *Is Defective Construction Covered under Contractors' and Subcontractors' Commercial General Liability Insurance Policies?*, 491 Real Est. L. & Prac. Course Handbook Series: Handling Constr. Risks 505, 513 (Practising L. Inst. Apr. 2003)).

23 *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 42-43.

24 *Id.* at 38.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 56.

29 *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 43.

30 *Id.* at 45.

31 *Id.* at 42.

32 *Id.* at 54.

33 *Id.*

34 *Ind. Ins. Co. v. Hydra Corp*., 245 Ill. App. 3d 926 (2d Dist. 1993).

35 *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 45 (citing *Hydra Corp.*, 245 Ill. App. 3d at 927).

36 *Id.* at 56.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 56 n.2 (emphasis added).

41 *Stoneridge Dev. Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731 (2d Dist. 2008).

42 *Stoneridge Dev. Co., Inc.*, 382 Ill. App. 3d at 753.

43 *Id.* at 751.

44 *Id.*

45 *Id.* at 752-53.

46 *Id.* at 754.

47 *Id.* (quoting *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 498 (1985) (quoting *Weedo v. Stone–E–Brick, Inc.*, 81 N.J. 233, 249 (1979))).

48 *CMK Dev. Corp. v. West Bend Mut. Ins. Co.*, 395 Ill. App. 3d 830 (1st Dist. 2009).

49 *CMK Dev. Corp.*, 395 Ill. App. 3d at 842-43.

50 *Id.* at 831-32.

51 *Id.* at 835.

52 *Id.* at 839.

53 *Id.*

54 *Id.*

55 *CMK Dev. Corp.*, 395 Ill. App. 3d at 840.

56 *Id.* at 842.

57 *Id.* at 843.

58 *Id.* at 844-45.

59 *Country Mut. Ins. Co. v. Carr*, 372 Ill. App. 3d 335 (4th Dist. 2007).

60 *Carr*, 372 Ill. App. 3d at 337.

61 *Id.* at 338.

62 *Id.* at 341.

63 *Id.*

64 *Id.*

65 *Id.* at 341-42.

66 *Carr*, 372 Ill. App. 3d at 341.

67 *Id.* at 342.

68 *Nautilus Ins. Co. v. 1735 W. Diversey, LLC*, No. 10C-425, 2011 U.S. Dist. Lexis 82246 (N.D. Ill. July 21, 2011); see also *Stoneridge Dev. Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 733 (2d Dist. 2008).

69 *Nautilus Ins. Co.*, 2011 U.S. Dist. Lexis 82246, at *14-*15.

70 *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 43 (1st Dist. 2005).

71 *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 43 (quoting John C. Yang, *No Accident: The Scope of Coverage for Construction Defect*

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Claims, 690 Litig. & Admin. Course Handbook Series 8, 36 (Practising L. Inst. Apr. 2003)).

[72] *Id*. (citing Yang, *supra*, note 71, at 27-28).

[73] *Id*. (quoting Yang, *supra*, note 71, at 36-37).

[74] *Id*. at 38; *Stoneridge Dev. Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 733 (2d Dist. 2008); *CMK Dev. Corp. v. West Bend Mut. Ins. Co.*, 395 Ill. App. 3d 830 (1st Dist. 2009).

[75] *Country Mut. Ins. Co. v. Carr*, 372 Ill. App. 3d 335, 337 (4th Dist. 2007).

[76] *Carr*, 372 Ill. App. 3d at 341-42.

[77] *CMK Dev. Corp.*, 395 Ill. App. 3d at 841 n.2.

[78] *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 46 (1st Dist. 2005).

[79] *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 829 N.W.2d 724 (N.D. 2013).

[80] *K&L Homes, Inc.*, 829 N.W.2d at 736.

[81] *Id*.

[82] *Id*. at 737.

[83] *Id*.

[84] *Progressive Premier Ins. Co. v. Cannon*, 382 Ill. App. 3d 526, 528 (3d Dist. 2008).

[85] *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 362 (2006)

[86] *Swiderski Elecs., Inc.*, 223 Ill. 2d at 362.

[87] *Id*.

[88] *Id*. at 363.

[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *Bishop v. Crowther*, 101 Ill. App. 3d 933, 940 (1st Dist. 1981).

[93] *James McHugh Constr. Co. v. Zurich Am. Ins. Co*., 401 Ill. App. 3d 127, 132-33 (1st Dist. 2010).

[94] *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 527 (1995).

[95] *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 48-53 (1st Dist. 2005).

[96] *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 48.

[97] *Id*. (quoting *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App. 3d 409 (5th Dist. 2002)).

[98] *Id*.

[99] *Id*. at 49.

[100] *Lyons v. State Farm Fire & Cas. Co.*, 349 Ill. App. 3d 404 (5th Dist. 2004).

[101] *Lyons*, 349 Ill. App. 3d at 405-06.

[102] *Id.* at 408.

[103] *Id.*

[104] *Id*.

[105] *Id.* (citing *U.S. Mut. Accident Ass'n v. Barry*, 131 U.S. 100 (1889)).

[106] *Id.* (quoting *Yates v. Bankers Life & Cas. Co.*, 415 Ill. 16 (1953)).

[107] *Lyons*, 349 Ill. App. 3d at 409 (emphasis in original).

[108] *Id*.

[109] *Id*. at 409-10.

[110] *Ins. Corp. of Hanover v. Shelborne Assocs.*, 389 Ill. App. 3d 795 (1st Dist. 2009).

[111] *Ins. Corp. of Hanover*, 389 Ill. App. 3d at 803 (discussing the Telephone Consumer Protection Act, 47 U.S.C. § 227).

[112] *Id.* at 802.

[113] *Pekin Ins. Co. v. Miller*, 367 Ill. App. 3d 263 (1st Dist. 2006).

[114] *Miller*, 367 Ill. App. 3d at 269, 271-72.

[115] *Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278 (2001).

[116] *Eljer Mfg., Inc*., 197 Ill. 2d at 301-02.

[117] *Eljer Manufacturing, Inc.* itself seemed to back away from its own bright line interpretation of "property damage" in part by later explaining that the costs to repair or replace a defective product were mere economic loss. See *id.* at 312-13.

[118] *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 54-56 (1st Dist. 2005).

[119] *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 55 (quoting *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App. 3d 410 (5th Dist. 2002)).

[120] *Viking Constr. Mgmt., Inc.*, 358 Ill. App. 3d at 43.

[121] *Moorman Mfg. Co. v. Nat'l Tank Co*., 91 Ill. 2d 69 (1982).

[122] *Moorman Mfg. Co.*, 91 Ill. 2d at 91-92.

[123] *Id.* at 81.

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

[125] *Id*.

[126] *Anderson Electric, Inc. v. Ledbetter Erection Corp*., 133 Ill. App. 3d 844 (4th Dist. 1985).

[127] *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 281 Ill. App. 3d 789 (1st Dist. 1996).

[128] *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill. App. 3d 18 (1st Dist. 1999).

[129] *2314 Lincoln Park West Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd*., 136 Ill. 2d 302, 310-12 (1990).

[130] *2314 Lincoln Park West Condo. Ass'n*, 136 Ill. 2d at 312 (emphasis added).

[131] See *Durbrow v. Mike Check Builders, Inc*., 442 F. Supp. 2d 676, 685 (E.D. Wis. 2006) (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc*., 673 N.W.2d 65, 75 (Wis. 2004)).

[132] *USAA Cas. Ins. Co. v. McInerney*, 2011 IL App (2d) 100970.

[133] *McInerney*, 2011 IL App (2d) 100970, ¶ 4.

[134] *Id.*

[135] *Id*.

[136] *Id*. ¶ 14.

[137] *Id*. ¶ 20.

[138] *Id*. ¶ 24.

[139] *McInerney*, 2011 IL App (2d) 100970, ¶ 24. The opinion in *McInerney* does not specify whether the buyers sustained damage to property other than the real property sold to them by the insureds, such as any of the buyers' personal property.

[140] *Posing v. Merit Ins. Co.*, 258 Ill. App. 3d 827 (3d Dist. 1994).

[141] *Posing*, 258 Ill. App. 3d at 829-31.

[142] *Id*. at 833.

[143] *Id*. at 834.

[144] *Country Mut. Ins. Co. v. Carr*, 372 Ill. App. 3d 335, 341 (4th Dist. 2007).

[145] The opinion in *Carr* does not indicate if the insured's defense counsel attempted to dismiss or obtain summary judgment against the underlying negligence claims on the grounds of the economic loss doctrine.

[146] *Carr* also applied the court's interpretation of "accident" as set forth in *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889), and held that the "occurrence" requirement had been met. *Carr*, 372 Ill. App. 3d at 341.

> Previously in Illinois, a plaintiff's medical malpractice claim would fail if there was no evidence that the third party would have done anything differently if provided additional or different information. In other words, if a plaintiff alleges that a physician or nurse was negligent for failing to provide additional or different information to another treating physician, but there is no evidence that the treating physician would have acted any differently given the additional information, then a causal connection is absent.

The surgeon testified that, even if the radiologist had contacted him personally, his management of the plaintiff would have been the same. *Id.*

The plaintiff, on the other hand, testified that the surgeon never discussed the MRI report with her, that she was never provided a copy of the report, and that she was never referred for further follow-up. *Id.* ¶ 35. She testified that, as a former oncology nurse, she was familiar with the meaning of a "lung mass" and "malignant lung tumor," which she associated with death. *Id.* She stated that if the surgeon had recommended she follow up with additional chest x-rays, she definitely would have. *Id.*

The plaintiff retained three expert witnesses to testify: two radiologists and a health-care consultant specializing in medical record-keeping. *Buck*, 2013 IL App (1st) 122144, ¶ 44. The record-keeping expert testified that, because the surgeon's records did not mention that the plaintiff was told about the MRI report, it showed that the findings and recommendations were not effectively communicated by the radiologist to the surgeon or to the plaintiff's primary-care physician. *Id.* ¶ 45. The expert radiologists both testified that the radiologist breached the standard of care by failing to personally communicate his findings to the surgeon and that this failure resulted in a one-year delay in diagnosis and treatment. *Id.* ¶ 47-50.

In light of these facts, the radiologist moved for summary judgment, arguing that any alleged breach of the standard of care was not a proximate cause of the plaintiff's injury because nothing that he did or failed to do impacted the surgeon's treatment. *Id.* ¶ 52. The surgeon testified that he received the MRI report, noted the abnormal findings, appreciated the clinical significance, and would not have done anything differently if the radiologist communicated personally with him. *Id.* ¶¶ 52, 61. The trial court initially denied the motion for summary judgment, but upon a motion to reconsider, entered summary judgment in the radiologist's favor for lack of proximate cause. *Id.* ¶ 54.

Even if a Third-Party Intervening Provider Testifies that He Would Not Have Treated the Plaintiff Any Differently Given Additional Information, a Question of Fact Might Still Exist Based upon Expert Testimony

The appellate court, citing *Gill v. Foster*, 157 Ill. 2d 304 (1993), and *Snelson v. Kamm*, 204 Ill. 2d 1 (2003), first examined cases holding that where proximate cause is contingent on the actions of an intervening third party, as a matter of law, a plaintiff cannot prevail on his medical malpractice claim if there is no evidence that the third party would have done anything differently. *Buck*, 2013 IL App (1st) 122144, ¶¶ 62-69. The court, however, distinguished *Gill* and *Snelson*, finding that, in each of those cases, there was no factual dispute regarding what a medical professional might have done if provided certain information by the allegedly negligent medical provider. *Id.* ¶ 69.

In *Gill*, the plaintiff alleged that a nurse was negligent in failing to communicate the plaintiff's complaint of chest pain to the treating physician, resulting in the treating physician's failure to diagnose her condition. *Id.* ¶ 63 (citing *Gill*, 157 Ill. 2d at 309-10). The Illinois Supreme Court held that, because the physician was aware of the chest pains and still failed to diagnose the plaintiff's condition, the nurse's failure to communicate the complaint could not have been a proximate cause of the failure to diagnose. *Id.* ¶ 65 (citing *Gill*, 157 Ill. 2d at 311).

In *Snelson*, the plaintiff alleged that nurses were negligent in failing to disclose pain complaints and the placement of a catheter to the treating

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physician, which resulted in a delayed diagnosis and significant tissue death. *Id.* ¶ 66 (citing *Snelson*, 204 Ill. 2d at 11-16). But, the treating physician testified that he was in possession of the nurses' notes indicating that a catheter had been placed and that the nurses had provided him with all necessary information. *Id.* ¶ 67 (citing *Snelson*, 204 Ill. 2d at 15). Therefore, the trial court entered judgment notwithstanding the verdict in favor of the nurses. *Buck*, 2013 IL App (1st) 122144, ¶ 68 (citing *Snelson*, 204 Ill. 2d at 23). The Illinois Supreme Court upheld the trial court's decision, finding that, because the treating physician knew of the pain complaints and the catheter, there was no causal connection between the nurses' alleged negligence and the physician's delayed diagnosis. *Id.* ¶ 68 (citing *Snelson*, 204 Ill. 2d at 44).

Nevertheless, the *Buck* court determined that a question of fact might still exist, even when the intervening third party testifies that he would not have acted differently given additional information. *Id.* ¶ 69. In determining that a fact question might be created by a plaintiff's expert testimony, the *Buck* court relied on a passage from *Snelson*, stating:

> Our supreme court disagreed and called this argument a "red herring" because it assumes that doctors would not be willing to tell the truth about whether the conduct of others affected their decision making ability and because "a plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a doctor's assertion that the nurses' omission did not affect his decisionmaking."

Id. (quoting *Snelson*, 204 Ill. 2d at 45-46). The appellate court commented that the plaintiff took the "litigation advice offered by our supreme court" in presenting her experts' testimony. *Id.* ¶ 70.

Even though the surgeon testified that his management of the patient would not have changed if he had been contacted personally by the radiologist, the First District found this issue to be one of fact in light of the plaintiff's expert anesthesiologists' opinions that the failure to personally communicate was a breach of the standard of care and resulted in a one-year delay in diagnosis and treatment. *Id.* In particular, the court was convinced that this question was one of fact because, contrary to the surgeon's testimony, the plaintiff testified that he never discussed the MRI report with her or provided her a copy. *Buck*, 2013 IL App (1st) 122144, ¶ 71. The court found this testimony consistent with the fact that the plaintiff was an oncological nurse familiar with the term mass and with her testimony that if she would have been informed of the contents of the report she would have followed up with another physician. *Id.* Therefore, the First District held that a jury should have been allowed to determine whether or not the surgeon should have acted differently in treating the plaintiff if the radiologist communicated the findings to him personally. *Id.* ¶¶ 71, 73.

The decision in *Buck* will provide a plaintiff a stronger argument against summary judgment in similar cases if the plaintiff's expert witnesses testify that the intervening third party physician would have acted differently if provided additional or different information.

Conclusion

The decision in *Buck* will provide a plaintiff a stronger argument against summary judgment in similar cases if the plaintiff's expert witnesses testify that the intervening third party physician would have acted differently if provided additional or different information. The *Buck* court, however, seemed particularly convinced that a question of fact existed because the testimony of the third-party intervening physician, the surgeon, and the plaintiff differed dramatically as to how the surgeon in fact treated the plaintiff. This circumstance, in turn, seemed to persuade the court that a jury could believe logically the plaintiff's expert testimony that the surgeon's treatment would have been different, despite his testimony to the contrary. When confronted with *Buck*, practitioners could readily distinguish the decision if there is no question of fact regarding the treatment rendered by the intervening third-party provider. In other words, if the treatment rendered is not disputed and the intervening provider testifies that he would not have acted differently given additional information, *Buck* could be limited in its application.

Feature Article

Matthew B. Champlin
HeplerBroom LLC, Edwardsville

The Confidential Good-Faith Settlement Conundrum: The Case for Full Disclosure of Settlement Terms to Non-Settling Tortfeasors

The Joint Tortfeasor Contribution Act (the Act), 740 ILCS 100/0.01, *et seq.*, codified the Illinois Supreme Court's opinion in *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1 (1977), and created a right of contribution among joint tortfeasors. *BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill. 2d 356, 363 (2005). Since its inception, the Act's application has been the subject of hundreds of Illinois appellate court and supreme court opinions. Despite this abundance of jurisprudence, many questions remain unanswered when addressing the competing interests covered by the Act.

One question that has not been addressed concerns the interplay between the good faith requirement of the Act and confidential settlements. Specifically, a conflict often arises between settling parties and a non-settling defendant when the settling parties refuse to disclose the terms and amounts of the settlement but nevertheless seek a good faith finding under the Act. This scenario places the trial court in the position of deciding whether to order settlement terms disclosed to the remaining defendants or to simply find the settlement in good faith based on the court's *in camera* review of the settlement terms.

Despite the dearth of law on the issue, many Illinois trial courts choose the latter approach, perhaps believing that confidential settlement terms need not be revealed unless and until the time for judgment set-off calculations. Although the reasoning behind this approach is unclear, the approach is inconsistent with the policy considerations underlying the Act. Rather, a non-settling tortfeasor is entitled as a matter of law to know the terms and amounts of any settlement for which a settling defendant seeks a good faith finding.

The "Good Faith" Requirement

Pursuant to the Act:

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

740 ILCS 100/2(c). A tortfeasor that settles with the plaintiff under this provision is "discharged from all liability for any contribution to any other tortfeasor." *Id.* § 100/2(d).

"The only limitation that the Contribution Act places upon the parties' right to settle and thereby extinguish contribution liability is that the settlement must be accomplished in good faith." *In re Guardianship of Babb*, 162 Ill. 2d 153, 161 (1994). The Act does not define "good faith," however; nor does it provide any procedural guidance as to when or how to make a good-faith determination. *Johnson v. United Airlines*, 203 Ill. 2d 121, 128 (2003). It is recognized that there cannot be a "single, precise formula for determining what constitutes 'good faith' within the meaning of the Contribution Act that would be applicable in every case." *Johnson*, 203 Ill. 2d at 134. Ultimately, whether a settlement is in good faith is left to the discretion of the trial court and is based upon the totality of the circumstances. *Id.* at 135.

The settling parties bear the initial burden of making a preliminary showing of good faith, which entails, at a minimum, showing the existence of a legally valid settlement agreement. *Id.*

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About the Author

Matthew B. Champlin is an associate at *HeplerBroom LLC*, in Edwardsville. He focuses his practice on personal injury defense. Mr. Champlin received his J.D. from the University of Missouri-Columbia School of Law, where he was inducted in the *Order of the Coif*. He is admitted to practice in Illinois, Missouri, the Southern District of Illinois, and the Eighth Circuit Court of Appeals. Prior to joining *HeplerBroom LLC*, Mr. Champlin clerked for the Honorable Duane Benton on the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

at 132. Once the settling parties make such preliminary showing, the party challenging the good faith of the settlement must prove the absence of good faith by a preponderance of the evidence. *Id.*

The Argument for Full Disclosure

But how can a non-settling defendant challenge a settlement—and meet the "preponderance of the evidence" standard—when the settlement terms have not been disclosed? For a trial court to make a finding of good faith based upon the "totality of the circumstances," doesn't that require hearing an informed argument from the parties potentially adversely affected by the finding? This cannot be accomplished when a court fails to order the settlement terms disclosed to non-settling defendants. Withholding settlement terms from non-settling defendants is not contemplated by the Act, and sound reasons exist to require settling parties to fully disclose the terms of settlement prior to a good faith finding.

The Burden of Proof Requires Disclosure

First, and most importantly, a non-settling defendant must be given an opportunity to examine the settlement terms in order to determine whether to challenge the settlement or investigate the settlement further. The burden of challenging a good faith settlement rests with the non-settling defendant once the existence of a legally valid settlement agreement has been shown. It is illogical to require a non-settling defendant to prove—by a preponderance of the evidence—that the agreement is not in good faith when that defendant is not even given an opportunity to review the agreement or its terms.

No Illinois court has fully addressed the issue of compelling disclosure of confidential settlement terms in conjunction with a motion for good faith finding. In one case, *Zielke v. Wagner*, 291 Ill. App. 3d 1037, 1039 (2d Dist. 1997), the settling parties sought a good faith finding and moved for a protective order, contending that the settlement contained sensitive and confidential information. The trial court ordered the settling parties to provide a copy of the settlement agreement to the non-settling defendants, but the court entered a protective order restricting the non-settling defendants from communicating the terms of the settlement to anyone but their counsel and insurer. *Zielke*, 291 Ill. App. 3d at 1039. The trial court allowed the agreement to be filed under seal and subsequently found the settlement between the plaintiff and the settling defendants to be in good faith. *Id.* at 1039-40.

On appeal, the non-settling defendants argued that the trial court improperly issued a protective order concerning the terms of the settlement. *Id.* at 1040. Specifically, they contended that such action was an unconstitutional prior restraint on speech and unfairly precluded the non-settling defendants from using jury instructions pertaining to comparative negligence. *Id*. The appellate court found that the non-settling defendants waived their constitutional argument and failed to articulate any prejudice they suffered from the protective order. *Id.* at 1040-41. Notably, however, the non-settling defendants were given a copy of the settlement agreement, and the propriety of the trial court ordering the disclosure of the agreement to non-settling defendants was not an issue on appeal.

California employs a statutory scheme similar to Illinois's in extinguishing contribution liability by good faith settlement. See Cal. Civ. Proc. Code § 877.6 (2002). California courts have thoroughly addressed the issue of confidentiality of settlements in conjunction with good faith findings and have recognized the problems associated with requiring a party to challenge a settlement agreement without knowing the terms of that agreement.

In *Mediplex of California, Inc. v. Superior Court*, 40 Cal. Rptr. 2d 397, 398-99 (Ct. App. 1995), a settling defendant disclosed the settlement amount to non-settling parties in conjunction with its motion for good faith finding, but argued that the remaining "terms and contingencies" of the settlement agreement did not "have the effect of reducing the offset." *Mediplex*, 40 Cal. Rptr. at 398. The settling defendant, therefore, refused to disclose the additional terms. *Id*. The trial court held that the settling defendant had divulged the terms of the settlement that were necessary for a determination of whether the settlement was in good faith and entered a good faith finding. *Id.*

Mediplex of California, Inc. (Mediplex), a non-settling defendant, sought a writ of mandate challenging the trial court's ruling because Mediplex was not allowed to see the confidential settlement agreement. *Id.* at 398-99. The court of appeal granted the writ, holding that Mediplex was entitled to review the written settlement agreement for purposes of contesting the good faith finding. *Id.* at 401. In so holding, the court reviewed several prior cases from the court of appeal concerning disclosure of settlement terms in conjunction with motions for good faith finding. Specifically, the court reiterated that, although parties are free to maintain the confidentiality of their settlement agreement, "they may not claim a privilege of nondisclosure when

they move to confirm the good faith of their settlement." *Id.* at 399. According to the court, a party simply "may not both seek confirmation of a settlement agreement and withhold it from nonsettling defendants on the grounds of confidentiality." *Mediplex*, 40 Cal. Rptr. at 400. The court of appeal held that the trial court improperly required Mediplex to "take on faith" that its adversaries properly decided what terms were important and fairly represented those terms. *Id.* at 400.

The *Mediplex* court expressly noted that the party asserting lack of good faith bears the burden of proof on that issue, and therefore "the nonsettling party must be allowed to review the agreement if [it] is to meet [its] burden of proof." *Id.* at 399 (citing *J. Allen Radford Co. v. Superior Court*, 265 Cal. Rptr. 535, 539 (App. Ct. 1989)). The court of appeal disapproved of the approach taken by the trial court and noted that "[a] client would be incredulous to hear his lawyer say he was relying on opposing counsel and would not be reading the agreement." *Id.* at 401. Simply put, "if the onus [is on a non-settling defendant] to come forward with evidence, its counsel must be allowed to do the job; counsel cannot be expected to do it without reviewing the settlement agreement." *Id.*

The rationale and analysis in *Mediplex* is sound and easily transferable to Illinois. Without having an opportunity to review the settlement agreement, a non-settling defendant simply cannot meet what Illinois courts have determined is a non-settling defendant's burden—to prove the settlement is not in good faith. Disclosure of settlement terms is necessary for counsel to adequately assess the settlement and assert informed objections to the settlement.

Likewise, on appeal, the burden is upon the non-settling defendant to show that the trial court abused its discretion in determining whether the settlement was in good faith. Without a record of the settlement terms, this burden cannot be met.

In *Davis v. American Optical Corp.*, 386 Ill. App. 3d 866 (5th Dist. 2008), the Illinois Appellate Court Fifth District presumed the circuit court's good faith finding was proper, even though the amounts of the challenged settlements were not included in the record. The court pointed out that the burden of presenting the court with a record that is adequate with respect to the claimed error lies with the appellant, and any doubts that might arise from an incomplete record are resolved against the appellant. *Davis*, 386 Ill. App. 3d at 873 (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47 (1996)). The non-settling defendant in *Davis* did not insist on the settlement amounts being made a part of the record, and, to the contrary, consented to the confidentiality of the settlements. *Id.* In short, to adequately challenge the good faith nature of a settlement on appeal, the terms of the settlement must be disclosed and made a part of the record. Disclosure of the settlement terms is necessary for preservation purposes.

Confidential Settlements Conflict with Policy Considerations Behind the Act

Second, keeping settlement terms confidential from non-settling defendants is inconsistent with the policy considerations underlying the Act. "[T]he Act furthers two policies: promoting settlement and ensuring equitable apportionment of damages." *BHI Corp.*, 214 Ill. 2d at 365. On a motion for good faith finding, a court must strike a balance between these two policy considerations. *Johnson*, 203 Ill. 2d at 134. The good-faith requirement is not satisfied by an agreement that conflicts with the underlying terms or policies (or both) of the Act and thus cannot discharge a settling tortfeasor from contribution liability. *In re Guardianship of Babb*, 162 Ill. 2d at 170.

The goal of equitable apportionment is not accomplished by preventing co-defendants from knowing how much the plaintiff receives through other settlements. As reflected in Section 2(c) of the Act, the long-recognized principle in Illinois is that a plaintiff shall only have one recovery for an injury." *Pasquale v. Speed Products Eng'g*, 166 Ill. 2d 337, 368 (1995). Double recovery is condemned and its prevention is precisely the intention of Section 2(c). *Id.* That section "ensures that a nonsettling party will not be required to pay more than its *pro rata* share of the shared liability." *Thornton v. Garcini*, 237 Ill. 2d 100, 116 (2009). Keeping settlement terms confidential from non-settling defendants frustrates this policy, creating the possibility of a later windfall for the plaintiff in the form of subsequent settlements from the uninformed defendants.

A common response to this argument is that a windfall to the plaintiff is prevented because non-settling defendants are entitled to a set-off from any judgment. Of course, there is a set-off only if the case actually reaches judgment. If, on the other hand, like the vast majority of civil suits, a case is settled by all parties prior to judgment, the potential for a windfall to the plaintiff is very real. In the interest of preventing possible windfalls for plaintiffs, settlement terms should be disclosed.

Plaintiffs might argue further that keeping the terms of a settlement confidential encourages non-settling defendants to evaluate the case based upon

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their individual culpability and to not rely upon knowledge about what other defendants have paid. In this way, some argue, keeping the terms of settlements confidential encourages settlement (the second policy consideration underlying the Act). Of course, from a plaintiff's perspective, the purpose behind keeping the non-settling defendants in the dark is clear—to pressure those non-settling defendants into settlement and to negotiate a potentially higher settlement from each. This rationale is not compelling. Indeed, the failure to disclose the terms of settlement suggests the parties are not acting in good faith, as non-settling defendants are not given an adequate opportunity to object to the settlement. See *In re Guardianship of Babb*, 162 Ill. 2d at 166 (finding that a failure to notify non-settling defendants, in attempt to prevent their objections to petition for good-faith finding, suggested settling parties were not acting in good faith).

Moreover, the opposite is equally true—full disclosure of settlement terms actually promotes later settlement between the plaintiff and the non-settling defendants. When both the plaintiff and the non-settling defendants are equally aware of the set-off amounts, it is more likely that the non-settling defendants are able to negotiate fair and reasonable settlements with the plaintiff's counsel. Therefore, the second policy consideration behind the Act—promotion of settlements—is not hindered and actually might be advanced by disclosure of settlement terms.

Disclosure Advances Judicial Efficiency and Economy

Third, in the interest of judicial efficiency and economy, settlement terms should be disclosed upon request of any non-settling defendant. The entry of a good faith finding necessarily means that the settling defendant will not be included on the jury verdict form. *Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 385 (2008) ("We hold that section 2–1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit"). In other words, jurors will be unable to apportion any degree of fault to the previously-settled defendant (absent sole proximate cause). This result, of course, is problematic if the court failed to require disclosure of settlement terms at the good faith hearing.

If it becomes clear to the non-settling defendants that the settlement terms, revealed for the first time at judgment for set-off purposes, were not in good faith, a new trial might be warranted. Specifically, if the court improperly granted the motion for good faith finding, the non-settling defendants were very likely prejudiced by the settling co-defendant's absence from the verdict form. Of course, if the settlement terms had been disclosed at the time of the good faith finding, all parties would have been able to challenge the settlement properly at that time and the added expense of additional litigation would have been averted.

Due Process Might Require Disclosure

Finally, granting a motion for good faith finding without advising the non-settling defendants of the amounts and terms of the settlement could violate procedural due process. Entry of a good faith finding extinguishes a non-settling defendant's cause of action for contribution against the settling defendant. *Johnson*, 203 Ill. 2d at 128. A statutory cause of action is considered property under the Fourteenth Amendment, and therefore due process requirements are implicated. See *Bradford v. Soto*, 159 Ill. App. 3d 668, 672-73 (4th Dist. 1987) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982)). "At a minimum, procedural due process requires notice, *an opportunity to respond, and a meaningful opportunity to be heard*." *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675, 681 (1st Dist. 2005) (emphasis added).

At least one Illinois court has held, however, that a party *does not* have a due process property interest in a contribution claim unless and until the tortfeasor bringing the claim has paid more than his or her pro rata share. In *Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966 (1st Dist. 1990), the Illinois Appellate Court First District held that non-settling defendants did not have a protected property interest in a contribution cause of action because the Fourteenth Amendment does not apply to "unaccrued causes of action." *Snoddy*, 198 Ill. App. 3d at 970. The Court noted that, although "contribution among tortfeasors is an *inchoate* right at the time of the injury, [citation omitted] the cause of action does not *accrue* until a tortfeasor pays more than his pro rata share." *Id.* at 971 (emphasis in original). Because the plaintiff and the settling defendant had settled already, the non-settling defendants' inchoate property interests were abolished prior to any cause of action accruing. *Id.* The *Snoddy* court, therefore, found that the non-settling defendants had no due process rights in their contribution claims. *Id.*

The *Snoddy* court, however, failed to harmonize its holding with the fact that a defendant is required to assert a contribution claim in the underlying case and is not allowed to wait until such action accrues. See *Laue v. Leifheit*, 105 Ill. 2d 191, 196 (1984). If a defendant is *required by law* to assert a contribu-

tion action, that defendant should be entitled to due process with respect to that action. Under the *Snoddy* holding, it is difficult to imagine a scenario in which a defendant would be entitled to any due process with respect to its contribution claims. Because a non-settling defendant will lose its right to seek contribution from a settling defendant *if* the settlement is found in good faith, a property right (and therefore procedural due process concerns) is implicated. See *In re Guardianship of Babb*, 162 Ill. 2d at 166 (recognizing that non-settling defendants had "a legitimate interest" in receiving notice and in having an opportunity to challenge a petition for good faith finding). Notwithstanding the holding in *Snoddy*, therefore, any due process argument concerning the failure to disclose settlement terms should be explored fully and preserved.

Mechanism for Disclosure of Settlement Terms

From the perspective of a settling defendant, there is one option that protects confidentiality, at least until the time to determine set-off. That is, a settling defendant might choose not to seek a good faith finding at all. Of course, this approach lacks finality and the settling defendant still risks being pursued for contribution. As such, a settling defendant must weigh the interests of finality and protection from contribution claims against the interest in maintaining confidentiality of the settlement.

Assuming a motion for good faith finding is sought, however, there does not appear to be any current mechanisms or procedures in place that address the concerns of both the settling parties and non-settling defendants in disclosing settlements. One alternative is requesting that the court conduct an *in camera* inspection of the settlement documents, without filing the documents with the court. Another is filing the settlement documents under seal, without revealing the settlement terms to the other parties. These approaches, however, neither preserve the record on appeal nor afford the non-settling defendants the opportunity to uncover evidence in opposition to the motion for good faith finding.

Another common approach is that the parties request that the court disclose the terms to all parties on the record and then seal the record. This accomplishes the disclosure of the terms, allows all parties to be heard, and preserves the issues and arguments for appeal. Of course, the law favors public access to court records, and "[t]he judge, as a primary representative of the public interest in the judicial process, should not rubber stamp a stipulation to seal a record." *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 995 (1st Dist. 2004). As such, a trial court might be unwilling to allow the documents to be filed under seal, and, even if the court did permit such, the documents potentially could be unsealed later.

Given the narrowly-tailored rules concerning sealed documents, a more sensible approach would be to allow all non-settling defendants to review the signed release/settlement agreement outside of the record. If settling defendants are concerned about secondary disclosure of terms, they can request a protective order, similar to that in *Zielke*. Given that settlements are almost always found to have been made in good faith, this informal disclosure of settlement terms likely will reveal that the settlement is in good faith. There would then be no need to place the terms of the settlement in the record, as the non-settling defendants are not likely to object to the finding. The non-settling defendants are adequately informed and the terms of the settlement remain confidential except with respect to the parties to the case. If there is a basis to oppose the good faith finding after this initial informal review and a record needs to be preserved, then either (1) the court can seal the record (with the potential for the record to be later unsealed) or (2) the record is made and the settlement is publicly available.

There is no statutory or common law right or privilege to confidential settlements. Indeed, as outlined above, the interests of non-settling defendants outweigh the settling parties' interest in confidentiality.

Practical Considerations

Despite the legal arguments, there are practical reasons why a non-settling defendant might not wish to force disclosure of settlement terms. The most compelling reason for allowing another defendant's settlement terms to remain confidential is to prevent being asked to disclose the terms of your client's confidential settlement later in the same or a similar cause of action. Potentially, being the only defendant to force disclosure of settlement terms could isolate your client and make your client more of a target to a plaintiff's counsel who feels strongly about maintaining confidentiality of settlements.

The decision to challenge the confidential settlement should take these strategic considerations into account and balance them with the potential benefits to be gleaned from learning the details of the settlement. Such a decision is necessarily a case-by-case determination and certainly depends on the relative liabilities of the parties and the plaintiff's damages.

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Conclusion

A non-settling defendant is entitled to know the terms of any settlement for which a settling co-defendant and the plaintiff seek a good faith finding. There is no statutory or common law authority supporting an argument that a confidential settlement is privileged from disclosure to the other parties. Indeed, knowledge of a co-defendant's settlement terms is critical to a non-settling defendant's arguments against a good faith finding and is necessary to meet their burden. It is also helpful for a non-settling defendant's subsequent exposure analysis and settlement approach. As a non-settling defendant, knowing the terms and amounts of prior settlements helps prevent your client from overpaying and diminishes the likelihood of a windfall for the plaintiff. In addition, knowing prior settlement terms could assist a non-settling defendant in showing bias or prejudice in trial testimony. Moreover, requiring disclosure of settlement terms helps to prevent and deter bad faith or collusive settlement arrangements.

Absent special strategy considerations, when settling parties seek a good faith finding and refuse to disclose the settlement terms, counsel for non-settling defendants should request disclosure of the terms and object to any good faith finding absent such disclosure. Given the potential judicial efficiency and economy implications, a good faith finding without disclosure of settlement terms should not go unchallenged. Under the right circumstances, counsel for non-settling defendants should consider a request to certify the question for appeal under Illinois Supreme Court Rule 308 or seek a motion for supervisory order under Supreme Court Rule 383.

Insurance Law Update

John P. O'Malley
Schuyler, Roche & Crisham, P.C., Chicago

An Expanded Tool Kit for Illinois Insurance Lawyers

I recently inherited my father's tool chest. In that chest are standard screwdrivers and hammers, plus a few other tools (the uses for which I still have not determined). Included in those tools, however, is an odd little screwdriver that works, not by twisting the handle, but rather by pushing the handle down towards the screw. Although that screwdriver does not work in all situations, in a tight situation, I have often found that it is the perfect tool.

In my insurance practice, I have come to rely on a very helpful research tool: namely Rule 23 Orders from the Illinois Appellate Court, which have helped me in a few tight spots. In 2011, the Illinois Supreme Court amended Rule 23 to permit the electronic publication of all Rule 23 Orders on the courts' website. Ill. S. Ct. R. 23(g). In addition, Rule 23 Orders are easily accessible on computer-based research services such as Lexis and Westlaw.

Under Rule 23, the decisions of the appellate court may be issued in one of three forms: a full opinion, a concise written order, or a summary order. Ill. S. Ct. R. 23(a)-(c). (Effective January 1, 2011, Rule 23 was amended to delete the provision that "only opinions of the court will be published.") The amended rule now requires that clerks of the appellate court transmit an electronic copy of each opinion or order "to the webmaster of the Illinois Supreme and Appellate Court's Web site on the day of filing." Ill. S. Ct. R. 23(g).

Taking advantage of the ease of access to these electronically published Rule 23 Orders might be the difference between winning and losing your case. This proposition is true particularly for the Insurance Law practitioner dealing with largely standardized insurance policy language. Rule 23 Orders can provide a wealth of information regarding insurance policy language and disputes and are an invaluable tool for researching insurance policy disputes.

About the Author

John P. O'Malley, a shareholder in the Chicago firm *Schuyler, Roche & Crisham, P.C.*, has significant experience in federal and state courts in Illinois and across the nation, representing policyholders, insurers, and reinsurers on a full range of insurance coverage issues, including coverage disputes, defense of claims, indemnification, liability limits, policy exclusions, and targeted tenders. His practice also includes commercial litigation, ERISA and employment matters, and intellectual property disputes. His impressive body of work includes serving as lead attorney in numerous actions concerning insurance coverage for environmental liabilities, intellectual property disputes, professional liability, directors' and officers' coverage, and insurance company errors and omissions. In addition to his many trial successes, Mr. O'Malley lectures on insurance coverage issues and has created and presented several seminars to insurance companies and their policyholders with respect to claims handling practices, risk management, and risk transfer devices. He received his J.D. with honors from DePaul University College of Law in 1991, and his B.S. in Business Administration from Marquette University, Milwaukee, Wisconsin, in 1987.

If I Can't Cite a Rule 23 Order, What's the Point?

Rule 23 makes it clear that an order entered under that rule "is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1). The rule requires that every order entered pursuant to Rule 23 must contain the following notice:

> **NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Ill. S. Ct. R. 23(e)(2). Even though Rule 23 limits the utility of orders, they can be invaluable sources of information essential to the insurance law practitioner in numerous areas. I have used them most frequently in two areas: first, conducting research of previous rulings a specific judge has made on similar issues; and second, citing the orders in cases pending in federal court.

Know Your Judge and Her Rulings

Rule 23 Orders provide invaluable insight into previous rulings that a judge or the appellate court panel has made on similar issues. Rule 23 Orders, therefore, can provide crucial information to assist a lawyer in framing arguments in briefs, anticipating concerns that the judge might have, and forming an oral presentation to persuasively argue in the strongest possible manner. Knowing how a judge (on an appellate court panel) has ruled in a similar case can give you a tremendous advantage in briefing or in settlement discussions.

Rule 23 Orders provide invaluable insight into previous rulings that a judge or the appellate court panel has made on similar issues. Rule 23 Orders, therefore, can provide crucial information to assist a lawyer in framing arguments in briefs, anticipating concerns that the judge might have, and forming an oral presentation to persuasively argue in the strongest possible manner.

Many circuit court judges also take the time to draft detailed orders explaining their reasoning. Although the prohibition on citing Rule 23 Orders applies to decisions of the appellate court, it does not extend to orders/opinions of circuit court judges. In fact, while browsing the Rule 23 Orders online, I found a previous ruling by a circuit court judge concerning a declaratory judgment action like an action I filed, involving a similar issue under identical policy language. I was able to obtain a copy of the circuit judge's written opinion and to include it in support of the motion for summary judgment. The information obtained from Rule 23 Orders regarding a judge's previous rulings in the circuit court can be invaluable in presenting a persuasive argument to that same judge in a subsequent case.

Further, knowledge of a judge's previous history from both officially published and electronically published sources can be a critical tool in advising your clients of the likelihood of success or failure in litigation, particularly in insurance litigation where circuit judges frequently rule on issues involving similar insurance policy language. Rule 23 orders can provide that additional insight to previous rulings in the judicial circuit in which the insurance dispute is pending, therefore providing additional sources of persuasive authority and arguments. Knowledge of those previous rulings can enable an insurance lawyer to fully and zealously represent a client's interests.

Electronically Published Orders May (Under Certain Circumstances) Be Cited in Federal Court

Although there is no question that a lawyer cannot cite a Rule 23 Order in state court, that prohibition does not necessarily extend to cases pending in federal court. Federal Rule of Appellate Procedure 32.1 provides, in relevant part, that:

> A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued or after January 1, 2007.

Fed. R. App. Pro. 32.1. Illinois attorney Helen W. Gunnarsson had the opportu-

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nity to speak to (then) Chief Judge James Holderman of the United States District Court for the Northern District of Illinois who agreed "that the district courts do not prohibit the citation of nonprecedential orders." Helen W. Gunnarson, *Can You Cite to Unpublished Opinions?*, 98 Ill. B.J. 286 (2010). Ms. Gunnarsson wrote that Judge Holderman agreed "that an argument can be made that the duty of zealous representation would require lawyers to bring unpublished, nonprecedential orders that support their clients' cases to a court's attention where the court's rules do not prohibit their citation." *Id.*

The fact that there is no express prohibition in federal court regarding the use of Rule 23 orders can provide a decisive advantage to a litigant in the absence of directly controlling authority, or where the facts presented closely mirror the claim pending in federal court.

Conclusion

Although Rule 23 Orders may not be cited as precedent in Illinois state courts, they nevertheless can provide an invaluable resource to Illinois insurance law practitioners. A key practice tip for all practitioners in Illinois is to add regular review of Rule 23 Orders that are available on the Illinois Supreme Court's website to your "research" tool kit. Regular review of such orders could provide invaluable insight into the rulings of the judges hearing your cases, could provide an excellent source of fresh research material, and might be helpful in litigating matters in the federal court in Illinois.

Civil Rights Update

David A. Perkins and **Jessica R. Sarff**
Heyl, Royster, Voelker & Allen, P.C., Peoria

U.S. Supreme Court Upholds Application of Strict Scrutiny of Racial Classifications in Higher Education Admissions Decisions

In *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), the United States Supreme Court addressed whether "race-conscious" admissions plans are a legitimate constitutional means of securing student-body diversity in higher education. Eight months after oral arguments, the court published its opinion and remanded the case to the U.S. Court of Appeals for the Fifth Circuit on the basis that it had improperly applied strict scrutiny; that is, it had failed to determine whether "race-neutral alternatives" had been considered that would have achieved diversity sufficient to meet the goals of the defendant University of Texas (the University).

Following the Supreme Court decision in *Grutter v. Bollinger*, 539 U.S. 982, 124 S. Ct. 35 (2003), which upheld the constitutionality of an admissions program that considers race as one of many "plus factors," the University adopted an admissions program whereby applicants were asked to classify themselves from among five predefined racial categories. *Fisher*, 133 S. Ct. at 2417. Under the program, race was not given an explicit numerical value, yet it was undisputed that race was considered as a "meaningful factor." *Id.*

In 2008, Abigail Fisher, a Caucasian female, applied for admission to the University under the race-conscious program and was rejected. *Id.* As a result, Ms. Fisher sued the University in federal court, alleging that the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

The United States District Court for the Western District of Texas granted summary judgment, upholding the legality of the University's admission program. *Id.* On appeal, the Fifth Circuit affirmed, holding that, under *Grutter*, courts are required to give substantial deference to

About the Authors

David A. Perkins is a partner at *Heyl, Royster, Voelker & Allen, P.C.* Mr. Perkins concentrates his practice in the areas of civil rights, municipal liability, first party property claims, and general tort litigation. He has spoken on a wide variety of subjects, including: civil rights liability, municipal liability, the investigation of fire losses, and first-party property claims. He is a member of the Peoria County, Illinois State, and American Bar Associations, as well as the Abraham Lincoln American Inns of Court, and the Illinois Association of Defense Trial Counsel.

Jessica R. Sarff is a law student of Southern Illinois University School of Law Class of 2014, and a summer law clerk with the law firm of *Heyl, Royster, Voelker & Allen, P.C.*, in Peoria. While at law school, she serves as the Lead Articles Editor of the *Southern Illinois University Law Journal* and as the Brief Writing Justice of the Moot Court Board, Appellate Division.

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a university's determination that a compelling interest exists in the educational benefit of diversity and that its specific plan is narrowly tailored to achieve the goal of educational diversity. *Id.*

In a 7-1 opinion, with Justice Elena Kagan recusing herself, the Supreme Court vacated the Fifth Circuit's decision and remanded the case for further consideration. *Fisher*, 133 S. Ct. at 2414. Writing for the majority, Justice Anthony Kennedy began the opinion by reiterating that racial classifications must withstand strict scrutiny, "when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" *Id.* at 2417 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

Looking to the first prong of the strict scrutiny analysis, the Court noted that the attainment of a diverse student body is a constitutionally permissible goal under *Grutter*. *Id.* at 2413. The type of diversity that can withstand strict scrutiny, however, is that which "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id*. (citing *Bakke*, 438 U.S. at 315). On this point, the Court held that, under *Grutter*, both the district court and the court of appeals were correct in affording deference to the University's "educational judgment" that such diversity is "essential to its educational mission." *Id.* at 2419.

Looking to the second prong, however, the Court noted that it remains the University's obligation to establish that its race-conscious admissions plan is narrowly tailored to achieve the goal of educational diversity. *Id.* at 2419-20. There are two requirements that must be met for the University to show that its plan was narrowly tailored. First, the University must prove that its admissions process "ensure[s] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Fisher*, 133 S. Ct. at 2418. The second requirement is that the University must show that its use of race to obtain the benefits of educational diversity is "necessary" (that is, that the University could not achieve the diversity it seeks without the use of racial classifications). *Id.* at 2420.

It is under this prong of strict scrutiny that the Court found error in the Fifth Circuit's decision. Rather than analyzing the validity of the University's admissions plan under a strict scrutiny analysis—requiring the University to prove that its plan was narrowly tailored—the court of appeals instead gave deference to the University's determination that its decision to include "race as a factor in admissions was made in good faith." *Id.*

The Court noted that "strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 2421. As a result, the Court vacated summary judgment and remanded to the Fifth Circuit for a determination of "whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* at 2434.

Justice Antonin Scalia filed a one-paragraph concurring opinion stating that he adheres to the view he expressed in *Grutter*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)). Because Ms. Fisher, however, was not asking the Court to overrule the holding of *Grutter* —that a compelling interest in the educational benefits of diversity can justify racial preferences in university admissions—Justice Scalia joined the Court's opinion in full. *Id.* at 2422 (Scalia, J., concurring).

Justice Clarence Thomas filed a much lengthier concurring opinion. Although he agreed with the majority that the court of appeals did not correctly apply strict scrutiny, he wrote separately to explain that he would overrule *Grutter v. Bollinger* on the ground that the use of race in higher education admissions

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decisions is "categorically prohibited" by the Equal Protection Clause. *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

Justice Thomas began his concurrence by reminding the Court that strict scrutiny "has proven automatically fatal" in almost every case involving racial classifications. *Id.* (Thomas, J., concurring) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995)). The only two instances in which the Court has recognized a compelling government interest (which Justice Thomas refers to as a "pressing public necessity") sufficient to justify racial discrimination are (1) protecting national security, and (2) remedying past discrimination for which it is responsible. *Id.* at 2433 (Thomas, J., concurring); *Korematsu v. United States*, 323 U.S. 214 (1996); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Justice Thomas believed that *Grutter* should be overruled because "there is nothing 'pressing' or 'necessary' about obtaining whatever educational benefits may flow from racial diversity." *Fisher*, 133 S. Ct. at 2424 (Thomas, J., concurring). He declared that this same argument was advanced in support of racial segregation in the 1950s, and "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, . . . the alleged educational benefits of diversity cannot justify racial discrimination today." *Id.* at 2424-25 (Thomas, J., concurring) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

In support of his position, Justice Thomas cited *Davis v. School Board of Prince Edward County* (decided with *Brown v. Board of Education*) for the proposition that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. *Id.* at 2424-25 (Thomas, J., concurring). He explained that, in *Davis*, the school board had argued that if the Court were to find segregation unconstitutional, white students would stray toward private schools, thereby causing the eventual extinction of public schools. *Id.* at 2425 (Thomas, J., concurring). The Court rejected the argument and found the segregation plan unconstitutional. *Id.* (Thomas, J., concurring). Relying on *Davis*, Justice Thomas opined that if the Court actually were to apply strict scrutiny to the University's admissions policy, it would require Texas either to close the University or to completely remove race from the list of factors it may consider. *Id.* (Thomas, J., concurring).

Describing the University's arguments as "virtually identical" to arguments the Court rejected in the desegregation cases, Justice Thomas stated: "There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits." *Fisher*, 133 S. Ct. at 2428 (Thomas, J., concurring).

The final point Justice Thomas made in his concurrence was that the University's admissions plan actually hurts minorities by creating a "pervasive shifting effect." *Id.* at 2430 (Thomas, J., concurring). He explained that, under the admissions plan, the University admitted minorities who otherwise would have attended less selective colleges. *Id.* at 2431 (Thomas, J., concurring). As a result, those students were far less prepared than their non-minority classmates, and their underperformance was "all but inevitable." *Id.* (Thomas, J., concurring). According to Justice Thomas, even if minority students did excel at the University, they remained stamped with the "badge of inferiority" for having been admitted under a racially discriminatory admissions scheme. *Id.* at 2432 (Thomas, J., concurring).

Writing as the sole dissenter, Justice Ruth Bader Ginsburg stated that she would have affirmed the lower court's decision on the ground that the University's admissions plan was constitutional under *Grutter*. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). She explained that race was only flexibly considered as a "factor of a factor of a factor of a factor" in the admissions calculus. *Id.* at 2434 (Ginsburg, J., dissenting).

Ms. Fisher urged that Texas's Top Ten Percent Law—which grants automatic admission to any public state school (including the University) to all students within the top ten percent of their class at any Texas high school—and race-blind holistic review of each application would achieve significant diversity, such that the University must not be allowed to consider race as a factor in admissions. *Id.* at 2433 (Ginsburg, J., dissenting). Justice Ginsburg criticized these suggested "race-neutral alternatives," stating that "only an ostrich could regard [them] as race unconscious." *Id.* (Ginsburg, J., dissenting). She explained that Texas's Top Ten Percent Law was enacted as a result of "race consciousness," not blindness to race, because many school districts in Texas still are

comprised of a single racial or ethnic group. *Id.* (Ginsburg, J., dissenting). Additionally, she felt that, if universities cannot consider race explicitly, "many may 'resort to camouflage' to 'maintain their minority enrollment.'" *Id.* at 2433-34 (Ginsburg, J., dissenting) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting)).

Regardless of her views on the purported race-neutral alternatives, Justice Ginsburg noted that the University conducted a yearlong review, through which it made the reasonable determination that these alternative options were insufficient to achieve the educational benefits of student-body diversity. *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting). Relying on the holding of *Grutter*, Justice Ginsburg opined that no further determinations were required. *Id.* (Ginsburg, J., dissenting).

She finished her opinion by reiterating her longstanding view that government actors "need not be blind to the lingering effects of 'an overtly discriminatory past'" and that, among constitutionally permissible options, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Id.* at 2433-34 (Ginsburg, J., dissenting) (quoting *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting)).

Despite the split of opinion on the bigger "affirmative action" picture, the fact remains that, on remand, the University not only will have to show that its particular plan considers all applicants as individuals, but also it must present evidence that no race-neutral alternatives are sufficient to achieve its desired student-body diversity. In the future, the "narrowly tailored" prong of strict scrutiny looks to be an imposing obstacle for those colleges and universities that seek to accomplish diversity through the use of race-conscious admissions plans.

Recent Decisions

Stacy Dolan Fulco
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago

Summary Judgment for the Defendants Was Upheld where Plaintiff Relied on the "Eggshell Plaintiff Doctrine"

In *Lough v. BNSF Railway Co.*, 2013 IL App (3d) 120305, the Illinois Appellate Court Third District upheld summary judgment in favor of the defendants in a wrongful death action arising from the death of the plaintiff's father 22 months after he was involved in an automobile accident. The decision was based on the fact that there was no evidence to support the plaintiff's reliance on the "eggshell plaintiff doctrine" that the accident caused or aggravated the decedent's congestive heart failure from chronic obstructive pulmonary disease (COPD) and emphysema. *Lough*, 2013 IL App (3d) 120305, ¶¶ 30-37.

The automobile accident involved vehicles driven by the plaintiff's decedent, Kenneth Lough, and the defendant, Leo Joerger. Joerger's vehicle was driven in the course of employment with defendant BNSF Railway Co. *Id.* ¶¶ 1, 3.

The Third District first evaluated the medical background of Lough. In December of 1978, Lough was injured in a snowplow accident that caused him significant neck problems. During Lough's first visit to his primary care physician in 1979, Dr. Martin Faber, he already was suffering from COPD likely caused by smoking, hereditary deficiencies, or chemical exposure. *Id.* ¶ 4.

Lough's COPD progressed until his death. A physical examination in 1979 demonstrated neuroforaminal changes at C5-C6. X-rays disclosed moderate to marked degenerative changes at multiple levels in his spine. After the death of his wife in 1993, Lough's depression became "unrelenting." His condition was further complicated by memory changes, difficulty driving, getting lost when leaving the house, and forgetting the names of his children and friends. *Id.* ¶¶ 5-6.

In 1997, Lough continued to have severe arthritis that did not resolve prior to his death and chronic pain that was unresponsive to surgical or medical remedies. Lough's health problems prior to the accident were related to his smoking, occupational circumstances, lifestyle, injury, and hereditary changes. *Id.* ¶ 7.

Lough was susceptible to many issues not occasioned by healthy individuals because of his pre-occurrence conditions. Any trauma likely would have resulted in greater pain, immobility, or inactivity. Any patient similar to Lough who becomes immobilized would have problems fighting off pneumonia. *Id.* ¶ 8.

MRIs taken immediately after the 2007 accident showed no acute traumatic abnormality in Lough's neck or back. Dr.

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About the Author

Stacy Dolan Fulco is a partner at the Chicago law firm of *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*. She practices primarily in the areas of premises liability, products liability, and wrongful death defense. She received her undergraduate degree at Illinois State University and her J.D./M.B.A. degree from DePaul University. She is a member of the IDC.

Faber testified he would have a difficult time connecting the motor vehicle accident, after 22 months, to Lough's death. Dr. Faber concurred that it was more probably true than not true that there was no connection between the car accident and Lough's death. *Lough*, 2013 IL App (3d) 120305, ¶¶ 9-10.

The appellate court found that if a plaintiff attempts to defeat a motion for summary judgment by relying upon circumstantial evidence to establish proximate cause, then that evidence must be of such a kind—and so related—as to make the conclusion probable as opposed to merely possible.

Dr. Faber referred Lough to a pain management doctor, Dr. Robert Kloc. Dr. Kloc found no acute traumatic abnormality. Dr. Kloc obtained a history that, prior to the accident, Lough rode motorcycles or snowmobiles and was unable to do so afterwards. His pain was much worse after the accident. Dr. Kloc diagnosed degenerative disc disease, facet joint arthritis, and sacroilitis. Dr. Kloc noted that a patient who suffers from COPD experiences inadequate oxygen exchange, which eventually leads to heart failure. *Id*. ¶ 13.

Dr. Kloc testified that he had no quarrel with the cause of death of COPD/emphysema as stated on Lough's death certificate and that he held no other opinion as to any other causes of death. Dr. Kloc testified that it was "anybody's guess" as to the extent to which the 2007 accident injured Lough. *Id*. ¶ 14.

On April 14, 2008, Lough presented to Dr. Rick Cernovich at an emergency room. Dr. Cernovich held no opinion connecting Lough's complaints to the car accident. Lough died on August 11, 2009. No autopsy was performed. *Id*. ¶¶ 15-16.

The complaint alleged two counts under the Wrongful Death Act, 740 ILCS 180/0.01, *et seq.*, and two counts under the Survival Act, 755 ILCS 5/27-6. The defendants moved for summary judgment on the wrongful death counts, arguing insufficient evidence to establish proximate cause of Lough's death. The trial court granted the defendants' motion for summary judgment and an appeal followed. *Lough*, 2013 IL App (3d) 120305, ¶ 17.

To state a cause of action under the Wrongful Death Act, the plaintiff must plead and prove four elements: (1) the defendant owed a duty; (2) the defendant breached the duty; (3) the breach proximately caused the decedent's death; and (4) monetary damages recoverable under the Act. *Id*. ¶ 20 (citing 740 ILCS 180/1 and *Bovan v. Am. Family Life Ins. Co*., 386 Ill. App. 3d 933 (1st Dist. 2008)). Proximate cause is comprised of two distinct requirements: cause in fact and legal cause. *Id.* ¶ 21 (citing *Lee v. Chi. Transit Auth.*, 152 Ill. 2d 432, 455 (1992)).

The plaintiff argued that this scenario was a classic "eggshell plaintiff" case by activating a dormant disease process. In response, the defendants pointed to Lough's own physician who testified that the accident did not cause or contribute to Lough's death. *Id.* ¶ 22. The court agreed, finding that the plaintiff offered no evidence to support a theory on causation. *Id*. ¶ 30. There was no evidence suggesting the automobile accident aggravated Lough's congestive heart failure or COPD. The court distinguished plaintiff's citations to authority and pointed specifically to the testimony of Dr. Faber that he agreed that there was no connection between the car accident and Lough's death. *Id*. ¶ 33.

Finally, the plaintiff argued that the trial court improperly required direct testimony of causation where there existed sufficient circumstantial evidence to create a genuine issue of material fact. *Lough*, 2013 IL App (3d) 120305, ¶ 33 (citing *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941 (1st Dist. 1993) (proximate cause can be established by circumstantial evidence). The appellate court found that if a plaintiff attempts to defeat a motion for summary judgment by relying upon circumstantial evidence to establish proximate cause, then that evidence must be of such a kind—and so related—as to make the conclusion probable as opposed to merely possible. *Id.* ¶ 34 (citing *Majetich v. P.T. Ferro Constr. Co.*, 389 Ill. App. 3d 220, 225 (3d Dist. 2009)).

In *Lough*, no evidence existed to show that the accident "more probably than not" caused Lough's death. The plaintiff presented no testimony that the occurrence could cause congestive heart failure, COPD, or emphysema, which were the causes of death listed on Lough's death certificate, and affirmed summary judgment in favor of the defendants. *Id*. ¶ 35.

The First District Provides a Lesson on the Admission of Out-of-Court Statements of a Party

In *Jones v. Bojorge*, 2013 IL App (1st) 123209, the Illinois Appellate Court First District affirmed a jury verdict in favor of the defendant after determining that the trial court properly allowed the admission of a prior consistent statement. The plaintiff was employed by a food services company that provided supplies to a Pizza Hut restaurant. The defendant was employed as a Pizza Hut delivery driver. The defendant was familiar with the plaintiff, having seen him there on prior occasions. The plaintiff testified that he was moving boxes of pizza dough when he was struck by the defendant's vehicle. Plaintiff's next memory was of the defendant standing over him and apologizing for hitting him. *Jones*, 2013 IL App (1st) 123209, ¶ 3.

The defendant's version of the incident was that plaintiff routinely hurried about, overloading his dolly to the point of obscuring his vision. Plaintiff crashed his dolly into her car, causing a number of boxes to fall onto her vehicle. After the accident, the plaintiff showed her a scratch on his leg caused by the collision. Thirty minutes later, the plaintiff was still delivering pizza dough to the restaurant. *Id*. ¶ 4.

The defense focused on the plaintiff's credibility, pointing to several inconsistent statements made to two medical doctors that treated the plaintiff for orthopedic problems, some related and some unrelated to the incident. *Id*. ¶ 5.

The plaintiff's wife, Stephanie, testified over objection that her husband called her on the telephone and said that the "delivery lady hit him." Stephanie also testified that the plaintiff told her that she needed to meet him at work because he was not able to drive. After she met him, they went directly to the hospital. *Id*. ¶ 7. The only issue on appeal was the admissibility of the plaintiff's out-of-court prior consistent statement. *Id*. ¶¶ 20, 22.

Generally, prior consistent statements are not admissible. *Id*. ¶ 23 (citing *Moore v. Anchor Org. for Health Maint.*, 284 Ill. App. 3d 874, 883 (1st Dist. 1996)). A prior consistent statement, however, is admissible to rebut an inference of fabrication if the prior consistent statement was made before the alleged fabrication. *Jones*, 2013 IL App. (1st) 123209, ¶ 23 (citing Robert J. Steigmann & Lori A. Nicholson, Illinois Evidence Manual § 10:38, at 257 (4th ed. 2006)). But such evidence may not be admitted to prove that its contents are true. *Id.* ¶ 23 (citing *People v. Walker*, 211 Ill. 2d 317, 343-44 (2004) (finding prior consistent statements permitted solely for rehabilitative purposes and not as substantive evidence)).

In *Jones*, the defendant did not claim that the contested statement was admitted substantively, so the appellate court looked to determine whether it was properly admitted to rebut a charge of subsequent fabrication. *Id.* ¶ 23. Further, the defendant argued that the admission of the prior consistent statement was highly prejudicial. *Id.* ¶ 24 (citing *Moore v. Anchor Org. for Health Maint.*, 284 Ill. App. 3d 874 (1st Dist. 1996)).

After announcing the general rule that such statements amount to improper bolstering of a witness's testimony, the First District, citing *People v. Harris*, 123 Ill. 2d 113, 139-40 (1988), recognized the recent fabrication exception. *Jones*, 2013 IL App (1st) 123209, ¶ 25 (citing *Walker v. Midwest Emery Freight Sys., Inc.*, 200 Ill. App. 3d 790, 800 (1st Dist. 1990) (finding that a prior consistent statement could be admissible if it was made before the witness's motive to fabricate arose, where it is alleged that the witness's trial testimony was fabricated recently or that the witness had some motive for testifying falsely)).

The court in *Moore v. Anchor Organization for Health Maintenance*, 284 Ill. App. 3d 874 (1st Dist. 1996), disagreed with the plaintiff on the main point upon which the recent fabrication exception exists. Specifically, the court did not find any proof that the defendants were saying, suggesting, or implying that plaintiff was lying. *Jones*, 2013 IL App (1st) 123209, ¶ 26 (citing *Moore*, 284 Ill. App. 3d at 884). In fact, the court pointed out that there were no remarks of counsel even consistent with the suggestion that the plaintiff had not reported accurately his symptoms to his doctors. *Id*. (citing *Moore*, 284 Ill. App. 3d at 884-85). In the *Moore* court's view, the plaintiff, at best, could point to contradictory evidence only in medical records as a basis to imply that the defendants were accusing him of fabrication. *Id*. (citing *Moore*, 284 Ill. App. 3d at 885). The court in *Jones* commented that the court in *Moore* "quite properly held" that the plaintiff's position in *Moore* was not an accurate statement of the law. *Id*. (citing *Moore*, 284 Ill. App. 3d at 885-86).

After fully explaining *Moore*, the First District in *Jones* advised that to say that *Moore* is factually distinguishable from the facts in *Jones* was an understatement. In *Jones*, the defense counsel's opening statement was focused almost exclusively on establishing that

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the plaintiff was a liar who had made up a lawsuit against the defendant. Although this argument was focused mostly on the suit's damages aspect, the defendant also alleged that she wrote the equivalent of an admission of liability only because the plaintiff begged her to do so.

As opposed to the factual scenario in *Moore*, the facts in *Jones* presented no difficulty for the court to identify many direct defense accusations that branded the plaintiff as an outright liar. On appeal, the defendant could point out only one innocuous statement relating to the accident. Nevertheless, the defendant requested that she be granted a new trial because of the prejudice from the admission of the conversation between the plaintiff and his wife where she testified that her husband stated that he was hit in the parking lot by the "delivery lady." The court noted that this statement was consistent with the plaintiff's trial testimony, but even more so was entirely consistent with the defendant's own statement. Simply put, the defendant claimed prejudice because the plaintiff's wife testified that the plaintiff said exactly what the defendant had said in her own statement. The court found this position to be legally untenable. *Id.* ¶ 27.

The appellate court determined that the trial judge was well within his discretion in allowing the prior consistent statement because recent fabrication was the gravamen of the defense. The court concluded: "When one party relentlessly calls the other a liar, it should not come as a surprise when the aggrieved party is allowed to introduce a single instance where he was, remarkably enough, consistent with both his *and* his opponent's original version of events." *Id.* ¶ 32 (emphasis in original). For these reasons, the trial court was affirmed. *Id*. ¶¶ 32-33.

Feature Article

David M. Cades, Ph.D. and **Steven R. Arndt, Ph.D.**
Exponent Failure Analysis Associates, Chicago

Joseph B. Sala, Ph.D.
Exponent Failure Analysis Associates, Philadelphia, PA

David A. Krauss, Ph.D.
Exponent Failure Analysis Associates, Los Angeles, CA

What You Need to Know About the Distracted Driver

Distracted driving is a term being cited with increasing frequency in the news and in government organizations as a growing epidemic causing vehicle accidents. See Bianca Bosker, *To Fix Distracted Driving, Experts Say Target the People, Not the Tech*, The Huffington Post (Aug. 27, 2013), http://www.huffingtonpost.com/2013/08/27/distracted-driving-tech-experts_n_3823322.html (last visited Oct. 30, 2013).[1] In 2011, crashes involving distracted driving led to the death of over 3,000 people. U.S. Dep't of Transp., *What Is Distracted Driving?*, D!STRACTION.GOV: Official US Government Website for Distracted Driving, http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.

Decades of scientific research has been dedicated to the study of driver distraction. Ivan D. Brown et al., *Interference between Concurrent Tasks of Driving and Telephoning*, 53 J. of Applied Psychol. 419-24 (1969); A.J. McKnight & A.S. McKnight, *The Effect of Cellular Phone Use upon Driver Attention*, 25 Accident Analysis & Prevention 259-65 (1993); Vicki L. Neale et al., Va. Tech Transp. Inst., *An Overview of the 100-Car Naturalistic Study and Findings (Paper No. 05-0400)*, (U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin. 2005), *available at* http://www.nhtsa.gov/Research/Human+Factors/ci.Naturalistic+driving+studies: (last visited Oct. 30, 2103); and David L Strayer et al., AAA Foundation for Traffic Safety, *Measuring Cognitive Distraction in Automobiles* (June 2013), https://www.aaafoundation.org/sites/default/files/MeasuringCognitiveDistractions.pdf. Many state legislatures have appealed to such research to ban handheld cell phone use and texting, and, in some states, to ban all cell phone use for younger drivers.

Though much work has been done, the need for research and understanding of the effects of distraction on driving has never been greater. With a population ever hungry for connectivity and with more technology being integrated into vehicles, the potential for drivers to become distracted is rising quickly. Despite the current legislation and potentially deadly consequences, certain drivers routinely drive distracted—with a phone

[1] See also Roy Furchgott, *Keeping a Connection, Even on the Open Road*, N.Y. Times, Aug. 30, 2013, http://www.nytimes.com/2013/09/01/automobiles/keeping-a-connection-even-on-the-open-road.html?_r=0; and D!STRACTION.GOV: Official US Government Website for Distracted Driving, http://www.distraction.gov (last visited Oct. 30, 2013).

With a population ever hungry for connectivity and with more technology being integrated into vehicles, the potential for drivers to become distracted is rising quickly.

in hand, with eyes off the road, or while engrossed in other activities—exposing themselves and other motorists around them to greater accident risks.

This article is aimed at helping to explain the types and common effects of driver distraction. The information presented here will equip readers with the information necessary to aid clients in achieving a better understanding of the implications of driver distraction on their businesses and litigation efforts.

Distraction Comes in All Shapes and Sizes

Generally, there are three different modalities from which distraction can arise: visual, manual, and cognitive. Visual distraction occurs when activities unrelated to the primary task of driving result in a driver's gaze shifting away from the roadway. The effects of visual distractions can range from simply missing landmarks or signs, to drivers not seeing a vehicle stopped directly in front of them. David Strayer et al., *Cell Phone-Induced Failures of Visual Attention During Simulated Driving*, 9 J. of Experimental Psychol.: Applied 23-32 (2003). Something as routine as changing the temperature in a car can be a visual distraction if a driver glances down at the dial or display. Most visual distractions in a vehicle are short-lived. Previous research has shown that the average glance duration off the roadway to most in-vehicle comfort and infotainment systems is less than a second or two. Paul L. Olson et al., Forensic Aspects of Driver Perception and Response (Lawyers & Judges Publ'g Co., Inc., 3d ed. 2010). Other routine activities, such as monitoring children in the back seat of a vehicle, can lead to highly variable and sometimes lengthy visual distractions. Jane D. Stutts, Ph.D. et al., AAA Foundation for Traffic Safety, *The Role of Driver Distraction in Traffic Crashes* (May 2001), http://www.safedriver.gr/data/84/distraction_aaa.pdf (last visited Oct. 30, 2013).

More recently, activities requiring longer and more frequent glances off the roadway, such as text messaging, have become more prevalent in the vehicle. For example, when changing the temperature in a vehicle, a driver can usually perform this action in about three short glances away from the roadway. Thomas Dingus, Va. Polytechnic Inst. & St. Univ., *Human Factors Tests and Evaluation of an Automobile Moving-Map Navigation System. Part I. Attentional Demand Requirements* (1986). Using display oriented technologies such as GPS navigation systems or smartphones for tasks such as emailing, web-browsing, and text messaging might require many more glances away from the roadway than a typical in-vehicle task (for example, changing the radio, adjusting the temperature, etc.). Even though each single glance while composing a text message may be on the order of a second or less, the cumulative

— Continued on next page

About the Authors

Dr. David M. Cades is a Scientist in *Exponent, Inc.*'s Human Factors practice. He has expertise in the testing and analysis of how interruptions and distractions affect human performance, including driving, commercial aviation, healthcare, offices and classrooms. He also has experience in investigating aspects of human behavior and performance and the role they play in accident analysis.

Dr. Steven R. Arndt is a Principal with *Exponent, Inc.* He holds a doctorate degree and a masters degree in Industrial Engineering with a specialization in Human Factors from the University of Wisconsin – Madison. He has expertise in the areas of operator behavior with regard to perception response time, and consumer and occupational safety. Dr. Arndt provides consultation in the investigation and prevention of accidents and injuries in the home and industrial products in occupational environments.

Dr. Joseph B. Sala is a Principal Scientist with *Exponent, Inc.* He holds a doctorate degree in experimental psychology from Johns Hopkins University and conducted post-doctoral research at Stanford University, with a focus in cognitive neuroscience. He has expertise relating to the analysis and evaluation of human behavior and performance, including issues as to visibility, perception-reaction, attention and control, and accident avoidance. He has investigated safety issues related to the interaction between human perception, cognition, and behavior. He is also the Philadelphia Office Director.

Dr. David A. Krauss is a Principal Scientist in *Exponent, Inc.*'s Human Factors practice. He has specialized knowledge in human perception and cognition, reaction time, attention, the effects of lighting conditions on vision, and how stress affects behavior. He has investigated accidents associated with industrial safety, motor vehicles, and consumer products, among others.

effects of many glances means that the driver's eyes are off the roadway for a longer total time as compared to the more mundane tasks requiring only a glance or two. Robert E. Dewar & Paul L. Olson, *Human Factors in Traffic Safety* (Lawyers & Judges Publ'g Co., Inc. 2002), http://www.lawyersandjudges.com/client/client_docs/5473_traffic_errata.pdf.

Manual distraction results from completing any in-vehicle action that requires removing one's hand or hands from the steering wheel in support of a non-driving related task. As with visual distractions, manual distractions include tasks that drivers might view as commonplace or even as part of their normal driving experience. Manually distracting tasks may include changing the radio or climate control, eating and drinking, smoking, or operating an infotainment device, such as a cell phone or GPS. Often, manual distractions are in concert with visual distractions. For example, when changing the radio station, drivers tend to look at the radio while moving their hands there as well. As with visual distractions, the greater the frequency and the greater the duration of the distraction, the more likely it will be deleterious to the task of driving.

Understanding how visual and manual interactions with non-driving-related in-vehicle tasks can be distracting is often relatively straightforward—eyes off the road and hands off the controls, respectively. Although research on the third mode, cognitive distraction, has been increasing recently, this form of distraction is sometimes overlooked or misunderstood during incident investigation. McKnight & McKnight, *supra*; Strayer et al., *Measuring Cognitive Distraction, supra*; David Cades et al., *Driver Distraction Is More than Just Taking Eyes Off the Road*, 81 ITE J. 26-33 (2011); and Miguel Recarte & Luis Nunes, *Effects of Verbal and Spatial-Imagery Tasks on Eye Fixations while Driving*, 6 Journal of Experimental Psychology: Applied 31-43 (2000). Unlike visual and manual modes of distraction, which are objectively observable, cognitive distractions can affect driving performance while the driver's hands are on the wheel and eyes are on the road.

Unlike visual and manual modes of distraction, which are objectively observable, cognitive distractions can affect driving performance while the driver's hands are on the wheel and eyes are on the road. Any time that even a portion of a driver's cognitive resources are focused on something other than the driving task, that driver is experiencing some level of cognitive distraction.

Any time that even a portion of a driver's cognitive resources are focused on something other than the driving task, that driver is experiencing some level of cognitive distraction. Cognitive distraction captures anything from thinking about what you need to do when you get home to having an emotionally charged conversation on a cell phone. As with visual and manual modes of distraction, both the frequency and duration of cognitive distraction affect the likelihood of it having negative effects on the driving task. For instance, a drawn out, attentionally demanding phone conversation can result in distraction-related driving impairments for a longer period of time than leaving a simple voicemail.

Cognitive distraction is not only due to cellphone conversations. Research has shown that in-vehicle conversations, day dreaming, and simply talking or singing alone in a car may increase the risk of an incident while driving. Neale et al., *supra*. In this sense, attention to and distraction from the driving task exists along a continuum. Understanding the types and magnitude of distraction is required in order to assess the presence of distraction, its relevance to the immediate driving performance, and its contribution to an accident.

What Are the Effects of Distraction on the Typical Driver?

When approaching any case in which driver behavior may be called into question, exploring and understanding the potential sources of driver distraction may be critical. As with describing the modes of distraction, some of the effects of driver distraction are more straightforward than others. For example, if a driver is looking at the radio when a bicyclist crosses in front of his vehicle, that driver is unlikely to see the bicyclist. In such a case, the distraction of looking at the radio led to the driver's eyes being off the road and to the driver not see-

ing a potential hazard. Similarly, with a manual distraction, if an unexpected hazard requires the driver to enter a steering input, shift the gear, or pull the emergency brake and his hands are off the wheel adjusting the climate control or reaching for a drink in the cup holder, then the required physical response will be delayed or might not occur at all. Dingus, *supra*. These types of distractions can have a clear deleterious effect on driving performance if a driver's eyes are off the road, or hands are off the wheel at a time when that driver would need eyes on the road and hands on the wheel.

Assessing the effects of cognitive distraction, and possible case-relevant arguments that can be made as a result thereof, is a slightly more nuanced and intricate endeavor. Simply because a driver has his hands on the wheel and eyes on the road does not mean that he is not susceptible to driving impairments due to distraction. Research has shown that cognitively distracted drivers might not be able to perceive information presented to them visually even if they are looking right at it. Strayer et al., *Cell Phone-Induced Failures, supra*. These types of distraction can also lead to slower responses to hazards in the roadway, higher non-response rates to critical events or hazards in the roadway, decreased ability to safely negotiate gaps in traffic to drive through, and decreased scanning behavior, just to name a few. Strayer et al., *Measuring Cognitive Distraction, supra*; McKnight & McKnight, *supra*; Brown et al., *supra*; Peter J. Cooper & Yvonne Zheng, *Turning Gap Acceptance Decision-Making: The Impact of Driver Distraction*, 33 J. of Safety Res. 321, 321-35 (Oct. 2002); and Recarte & Nunes, *supra*.

As the proliferation of in-vehicle devices and tasks continue to inundate drivers with potential sources of distraction—visual, manual, and cognitive—investigators and litigators alike must be sure to assess the human factors associated with these sources of distraction in order to get a complete picture of what might have occurred.

What Can We Do?

Sights, sounds, tasks, and goals compete for our attention and cognitive resources on a regular basis. When this occurs during a complex, dynamic, and demanding task such as driving, momentary lapses and distractions can have profound effects on safety. Not all shifts of attention are the same, however, nor would one expect them to have similar consequences. Decades of research in human factors and cognitive engineering have helped categorize the types and frequency of such distraction. More recently, scientific investigations have begun to quantify the variety of effects these distractions may have on driver behavior.

A technical understanding of distraction, rooted in scientific investigations of human perception, cognition, and behavior, allows one to make sound assessments of the role a driver's actions may have played in the causation of an accident and strategic decisions as to handling one's case. Additionally, such an understanding can aid companies in training their drivers on both the hazards and safe uses of the rapidly proliferating technology. While no employer can ever ensure a driver will not violate company policy while unsupervised on the job, providing the proper training and guidelines for use of in-vehicle technology can reduce risks and thereby increase driver, and company, safety overall.

Finally, the choices of organizations to adopt new administrative policies for in-vehicle devices, hardware, or software that locks out cellphones while moving, or employee training with a goal of educating employees on the risks of distracted driving should be studied thoroughly by experienced and qualified human factors specialists and assessed on a case by case basis before assuming they will have an overall reduction of risk on the road. Policies and practices that are perceived as too restrictive may entice some employees to search for ways to work around the restrictions. Implementation of hardware, training, and enforcement of policies may have unintended secondary consequences.

A technical understanding of distraction, rooted in scientific investigations of human perception, cognition, and behavior, allows one to make sound assessments of the role a driver's actions may have played in the causation of an accident and strategic decisions as to handling one's case.

Medical Malpractice Update

Dede K. Zupanci
HeplerBroom LLC, Edwardsville

Perkey v. Portes-Jarol Clarifies Whether a Right of Recoupment Bars a Reduction in Judgment

There exists an effective, yet often-overlooked, provision for defendants in medical malpractice cases. Section 2-1205 of the Code of Civil Procedure allows for a reduction of damages awarded for medical bills and lost wages in cases alleging negligence or other wrongful acts, not including intentional torts, on the part of a hospital or physician. 735 ILCS 5/2-1205. The statute states that the reduction does not apply "to the extent that there is a right of recoupment through subrogation, trust agreement, lien, or otherwise." 735 ILCS 5/2-1205(2). Medical bills are often covered by the plaintiff's health care insurance, and many policies carry a right of recoupment. The question then arises as to how a right of recoupment affects a defendant's reduction in judgment.

The Illinois Appellate Court Second District addressed this issue in its recent decision of *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470. The court confirmed that a post-trial reduction is limited by the amount of the right of recoupment by the insurance provider.

In *Perkey*, the plaintiff was the surviving husband of the decedent. *Perkey*, 2013 IL App (2d) 120470, ¶ 1. The decedent visited the defendant–her primary-care physician–with complaints of back pain in 2001. *Id.* ¶ 4. The physician ordered an abdominal CT. The CT report indicated that the pancreatic duct was dilated, and the physician recommended additional evaluation to assess for a tumor or stricture. *Id*. The decedent returned to the physician's office two days after her last visit and was told that there were no significant findings on the CT. *Id.* ¶ 6. Eventually, the decedent was diagnosed with pancreatic cancer and died. *Id.* ¶ 12. The plaintiff filed suit against the primary care physician and his medical group.

At trial, the jury returned a verdict in favor of the plaintiff and awarded $600,000. *Id.* ¶ 46. Of that amount, $310,000 was for medical expenses. *Perkey*, 2013 IL App (2d) 120470, ¶ 46. The defendants filed a post-trial motion for reduction of damages awarded for medical expenses, pursuant to Section 2-1205. *Id.* ¶ 80.

Section 2-1205 states that, in medical malpractice cases, 100% of the medical benefits

> which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury . . . shall be deducted from any judgment in an action to recover for that injury based on an allegation of negligence or other wrongful act, not including intentional torts, on the part of a licensed hospital or physician . . . .

735 ILCS 5/2-1205. Because the statute does not allow the total judgment to be decreased by more than 50%, the defendants requested a reduction of $300,000. *Perkey*, 2013 IL App (2d) 120470, ¶ 80. If granted, the total damage award would have decreased from $600,000 to $300,000.

In their motion for reduction of damages, the defendants asserted that the plaintiff's answers to interrogatories stated that all of the decedent's medical bills were covered by insurance, but there was never a disclosure of any right of recoupment of those payments. *Id.* The plaintiff argued that no reduction should be allowed because there was, in fact, a right of recoupment by the insurance company. *Id*. ¶ 81. As proof of such right, the plaintiff attached a section from his health insurance policy entitled "Reimbursement Provision." *Id*. That section stated that the carrier "has the right to reimbursement for all benefits . . . provided from any and all damages collected from the third party for those same expenses whether by action at law, settlement, or compromise, by you or your legal representative . . . ." *Id*. The plaintiff also included a letter from the carrier that confirmed the existence of the subrogation provision in the policy and that the total amount of relevant benefits paid was $134,934. *Id*. In response, the defendants asserted that this lien had not been previously disclosed and that, even if the right to subrogation was confirmed, the judgment still should be reduced by

About the Author

Dede K. Zupanci is a partner in the Edwardsville office of *HeplerBroom LLC*. Her practice focuses on the defense of medical malpractice actions, as well as other healthcare litigation. She is a 2002 graduate of Saint Louis University School of Law.

$175,066, which represented $300,000 minus the amount paid by the carrier. *Perkey*, 2013 IL App (2d) 120470, ¶ 82. In his surresponse, the plaintiff argued that the reduction was barred by the right of recoupment, and not by perfection of the right. *Id.* ¶ 83.

The trial court asked if the parties would like to submit any further evidence before it ruled upon the defendants' motion, but neither party did. *Id.* ¶ 85. The trial court then denied the defendants' motion for a reduction of damages, finding that, *inter alia*, Section 2-1205 does not allow for any reduction of judgment when there is a right of recoupment. *Id.* The defendants then filed a motion to reconsider, arguing that they had learned just recently that the insurance carrier had agreed to accept two-thirds of the total amounts it paid for medical expenses as settlement of its lien. *Id.* ¶ 88. The trial court struck this information because the defendants did not show that it was unavailable at the time of the original hearing. *Id.* ¶ 90. The defendants' motion to reconsider was denied, and the defendants appealed. *Perkey*, 2013 IL App (2d) 120470, ¶ 90.

On appeal, the defendants asserted that the judgment should be reduced by $300,000, minus the amount of the lien, while the plaintiffs argued that the right of recoupment by the carrier completely barred any reduction. *Id.* ¶ 94. The appellate court explained that the purpose of the enactment of Section 2-1205, which creates an exception to the collateral source rule, was to reduce the costs associated with medical malpractice claims. *Id.* ¶ 93. It then looked to the plain language of the statute to determine the effect of a right of recoupment on a reduction of judgment. *Id.* ¶ 110. Paragraph (2) of the statute states: "Such reduction shall not apply ***to the extent that*** there is a right of recoupment through subrogation, trust agreement, lien, or otherwise." 735 ILCS 5/2-1205(2) (emphasis added*)*.

Medical malpractice defendants have a right to file a post-trial motion for the reduction of damages pursuant to 735 ILCS 5/2-1205. If an application is successfully filed with the court within 30 days after judgment is entered, a defendant may receive a reduction in the amount of 50% of the award for lost wages and 100% of the award for medical bills, except for those medical costs directly associated with the specific care and treatment at issue in the case.

The appellate court reversed the trial court's denial of defendants' motion for reduction of judgment. It held that the statute decreases an award by the amount of the right of recoupment and does not bar reduction in its entirety. *Perkey*, 2013 IL App (2d) 120470, ¶ 118. It found the phrase "to the extent that" to be significant, and that the plaintiff's interpretation of the statute would make that language unnecessary. *Id*. Specifically, the appellate court stated that a complete bar to recovery for a plaintiff when a right of recoupment exists would contradict the purpose of the statute, which is to reduce the cost of medical malpractice actions by eliminating duplicative awards. *Id.* ¶ 112. Regarding the amount of the reduction, the appellate court found that the jury awarded the plaintiff $310,000 for medical expenses, and that the health insurance carrier held a right of recoupment of the amount paid, which was $134,934. *Id.* ¶ 120. Using a formula of $310,000 minus $134,934, the court found that the defendants were entitled to a reduction of the judgment in the amount of $175,066. *Id*. The court did not consider the evidence of a further reduction based upon a lien settlement by the carrier, as the lien document was appropriately stricken by the trial court. *Id.* ¶ 108.

Medical malpractice defendants have a right to file a post-trial motion for the reduction of damages pursuant to 735 ILCS 5/2-1205. If an application is successfully filed with the court within 30 days after judgment is entered, a defendant may receive a reduction in the amount of 50% of the award for lost wages and 100% of the award for medical bills, except for those medical costs directly associated with the specific care and treatment at issue in the case. The total reduction of damages, however, is decreased by the amount of a third party's right of recoupment, which in many cases involves the plaintiff's health insurance carrier. For defense counsel, it is important to serve specific interrogatories on the plaintiff to determine whether any entity has a right of recoupment of a judgment in the case, and also whether the plaintiff has entered into an agreement to settle a lien for an amount other than what was paid. This information will be significant to a successful post-trial motion to reduce the judgment.

Christopher M. Garcia
Hinshaw & Culbertson LLP, St. Louis

The CD Case Might Not be the Only Thing Missing from a Purchase on iTunes

Less than a decade ago, a person could go to Best Buy or a record store and buy a CD with that year's hit summer song. Today, that same purchase will likely occur online at Apple's iTunes Store, Amazon's MP3 Store, or the Google Play Store. Ten years ago, if the purchaser tired of listening to the single, she could take it to the used record store and get a small bit of money or store credit for it. The store could then profit by selling the used CD to a new owner for more than it paid the original owner. The new owner would own the same CD, albeit previously used, having paid significantly less for his copy than he would have had he bought it new. Can the digital music consumer do the same today? The district court in *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013), determined the legal owner of a digital copy of a copyrighted work has fewer rights than she would if she had owned a physical copy of the same work.

ReDigi, Inc.'s Business Model

ReDigi, Inc. (ReDigi) markets itself as the "world's first and only online marketplace for digital music." *Capitol Records, LLC*, 934 F. Supp. 2d at 645. To sell music on ReDigi, the user must download a program and install it on his or her computer. This program only permits the user to sell music files previously purchased either from Apple's iTunes Store or from a ReDigi user. ReDigi's software cannot detect the presence of music files stored on devices other than the user's computer and those attached to that computer. *Id.*

If a user decides to sell a legally purchased digital music file, she can upload the file to her account on ReDigi's server, called her "Cloud Locker." *Id.* (Capitol Records, LLC (Capitol) and ReDigi disagreed about how this process should be described: ReDigi insisted the user "migrat[es]" the file from the user's computer to the Cloud Locker; Capitol asserted that ReDigi's upload process "necessarily involves copying." *Id.* at 645-46.) At the end of the process, the music file is located in the user's Cloud Locker, and no copy remains on the user's computer. *Id*. at 646.

After a file is uploaded, the user can stream, store, or offer the music for sale. *Id.* When the user offers the song for sale, that user's access rights to the file terminate at the time of purchase. The new owner can store the file in his Cloud Locker, stream it, download it, or try to sell it again. ReDigi uses a credit system in order to keep track of these transactions. *Capitol Records, LLC*, 934 F. Supp. 2d at 646. ReDigi sells every file for either 59 or 79 cents. The seller receives 20 percent of the sale price, 20 percent is directed to an escrow account for the artist, and 60 percent is retained by ReDigi. *Id*. Capitol owned the copyright for some of the works available for sale on ReDigi and moved for judgment against ReDigi for violation of Capitol's exclusive right to reproduce and distribute copies of the works. ReDigi asserted fair use and first sale affirmative defenses and moved for judgment in its favor on all allegations of liability. *Id.* at 647.

The *ReDigi* Court's Decision

The court concluded that ReDigi violated Capitol's reproduction and distribution rights. It also held ReDigi's fair use and first sale affirmative defenses were not applicable. The court determined that ReDigi directly, contributorily, and vicariously infringed Capitol's copyrights. This article focuses on the problems in the court's analysis of ReDigi's affirmative defenses and therefore will concentrate on those issues, with a brief review of how the court determined a reproduction of a copyrighted work had occurred.

About the Author

Christopher M. Garcia is an associate at *Hinshaw & Culbertson LLP* in St. Louis, Missouri. He earned a Bachelor of Science in Mathematics from the Ohio State University, and a J.D. from Tulane University's School of Law. In law school, he received the CALI award in copyright, was a student attorney in the Environmental Law Clinic, and earned an Environmental Law Certificate for advanced work in environmental law. Mr. Garcia is licensed to practice in the States of Missouri and Illinois, and is a licensed patent attorney with the United States Patent and Trademark Office. He concentrates his practice on commercial contract and transactional issues, insurance coverage issues, policy and contract analysis, interpretation and statutory conformity.

Reproduction and Distribution

"The novel question presented [was] whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine." *Capitol Records, LLC*, 934 F. Supp. 2d at 648. The Copyright Act grants "the owner of copyright under this title" certain "exclusive rights," including the right "to reproduce the copyrighted work in copies or phonorecords," and "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership." 17 U.S.C. §§ 106(1), (3). ReDigi did not dispute that it distributed copies of copyrighted works. It only asserted that the distribution was protected by fair use and the first sale doctrine. *Capitol Records, LLC*, 934 F. Supp. 2d at 648, 651.

The court analyzed whether a "reproduction" occurred. *Id*. at 648-51. The "reproduction right is the exclusive right to embody, and to prevent others from embodying, the copyrighted work (or sound recording) in a new material object (or phonorecord)." *Id.* at 649 (citing Nimmer on Copyright § 8.02). The "material object" a digital file is embodied upon is the "appropriate segment of the [user's] hard disk." *Id*. (quoting *London-Sire Records, Inc. v. John Doe 1*, 542 F. Supp. 2d 153, 171 (D. Mass. 2008)). Because "the laws of physics" render it impossible to transfer "material objects" over the Internet, the file on the Cloud Locker after the process must be a new embodiment of the work on a different "material object"—specifically, ReDigi's server's hard drive. *Id.* at 649.

Significantly, ReDigi countered that the court's interpretation "would lead to 'irrational' outcomes, as it would render illegal any movement of copyrighted files on a hard drive, including relocating files between directories and defragmenting." *Id*. at 651. The court, however, found this the argument was "nothing more than a red herring," because Capitol conceded "such reproduction is almost certainly protected under other doctrines or defenses." *Capitol Records, LLC*, 924 F. Supp. 2d at 651. As explained below, even though the court ignored this argument, it (and Capitol's concession to it) decimates the court's reasoning.

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. . .

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Fair Use

The court first analyzed whether the copying to and from the Cloud Locker is protected by fair use. "The ultimate test of fair use . . . is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it." *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc*., 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. Const., art. I, § 8, cl. 8), quoted in *Capitol Records, LLC*, 934 F. Supp. 2d at 652-53. A person can reproduce a copyrighted work without the copyright owner's consent "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107; however, this "list is not exhaustive but merely illustrates the types of copying typically embraced by fair use." *Capitol Records, LLC*, 934 F. Supp. 2d at 653. Fair use is an "equitable rule of reason," and courts are "free to adapt the doctrine to particular situations on a case-by-case basis." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984), quoted in *Capitol Records, LLC*, 934 F. Supp. 2d at 653. The courts look to four statutory factors in applying the doctrine:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107, quoted in *Capitol Records, LLC*, 934 F. Supp. 2d at 653.

The court had "little difficulty concluding that ReDigi's reproduction and distribution of Capitol's copyrighted works [fell] well outside the fair use

— Continued on next page

defense." *Capitol Records, LLC*, 934 F. Supp. 2d at 653 (emphasis added). According to the court, ReDigi weakly "argue[d] that uploading to and downloading from the Cloud Locker for storage and personal use are protected fair use," while noting "Capitol does not contest that claim." *Id.* Instead, the court agreed with Capitol that "uploading to and downloading from the Cloud Locker *incident to sale* fall outside the ambit of fair use." *Id.* (emphasis in original).

To support its conclusion, the court found each of the statutory factors weighed against a finding of fair use. The first factor favored Capitol because "ReDigi's use" did nothing to "transform" the work, and "ReDigi's use is also undoubtedly commercial." *Id.* (emphasis added). The court noted that the downloading user pays significantly less for the song than he would in a primary market, quoting *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985): "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Capitol Records, LLC*, 934 F. Supp. 2d at 653. The court accused ReDigi of twisting "the law to fit its facts" when it claimed "downloads for personal, and not public or commercial, use 'must be characterized as . . . noncommercial, nonprofit activity.'" *Id.* at 654 (quoting ReDigi's Brief, in turn quoting *Sony Corp. of Am.*, 464 U.S. at 449). According to the court, the reproduction of the digital music file is "an essential component of ReDigi's commercial enterprise." *Id.*

The court briefly noted that the second and third factors also cut against ReDigi, because the work is a sound recording "'close to the core of the intended copyright protection'" and because the song is copied in its entirety. *Id.* at 654 (quoting *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)). Lastly, the effect on the "market for or value of the copyrighted work" did not favor ReDigi. *Id.* According to the court, "ReDigi's sales are likely to undercut" that market, because "[t]he product sold in ReDigi's secondary market is indistinguishable from that sold in the legitimate primary market save for its lower price." *Id.* The court concluded, "ReDigi facilitates and profits from the sale of copyrighted commercial recordings, transferred in their entirety, with a likely detrimental impact on the primary market . . . . [and] the fair use defense does not permit ReDigi's *users* to upload and download files to and from the Cloud Locker incident to sale." *Id.* (emphasis added).

The glaring flaw in the court's analysis is that its conclusion does not flow from its premise. The court concluded that ReDigi's users' acts of uploading and downloading music files do not constitute fair use, based on an examination of how ReDigi uses files. In the most obvious example, when the court scrutinized the first factor—the purpose of the use—it found that ReDigi's use is commercial and non-transformative. It is not ReDigi, however, that is "using" the file—it is the user, a lawful owner of that particular copy of the song, who is moving the file to his or her Cloud Locker.

The correct inquiry is whether that user's reproduction of the file is a fair use. To construe "the purpose of the use" as an "undoubtedly commercial" purpose, the court substituted ReDigi in place of the actual person causing the reproduction of the file—the file's owner.

The court's citation to *Harper & Rowe Publishers* creates a similar problem. As the "profit/non-profit" distinction is determined by "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price," the factor favors a finding of fair use because the user has paid the customary price for her copy of the work. *Capitol Records, LLC*, 934 F. Supp. 2d at 653-54 (quoting *Harper & Rowe Publishers, Inc.*, 471 U.S. at 562).

In fact, the applicability of fair use from the user's perspective already had been determined by the court—Capitol conceded, in ReDigi's "red herring" argument and in the court's fair use analysis, that a user has the right to move his or her digital file from place to place. If a user has the right to reproduce a digital file for the purposes of transfer from place to place on a single hard drive, why would that fair use not extend to "migrating" that file to different storage devices? Recognizing the incredulous nature of the claim that a person should not be permitted to defragment a hard drive, for fear that it might change the physical location of a song on the drive, Capitol manufactured a self-serving exception to fair use movement of digital files—only those reproductions "incident to sale" "fall outside the ambit of fair use." *Capitol Records, LLC*, 934 F. Supp. 2d at 653. But, when viewed from the proper perspective—that of the user—even this qualification fails. The user, after all, is not moving the digital file "incident to sale," but rather incident to exercising her statutory rights under the first sale doctrine pursuant to Section 109 of the Copyright Act, 17 U.S.C. § 109(a).

First Sale

The first sale doctrine, a 100-year-old common law principle from the U.S.

Supreme Court case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908), is codified at Section 109 of the Copyright Act, and provides:

> Notwithstanding the provisions of section 106(3) [the copyright owner's distribution right], the owner of a *particular copy or phonorecord lawfully made under this title*, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 109(a) (emphasis added). "The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution." *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc*., 523 U.S. 135, 152 (1998).

The first sale doctrine, by its terms, is only a defense to a copyright owner's distribution rights, not the right of reproduction. Therefore, the first sale doctrine is not a defense to the user's act of uploading her copy from her PC to the Cloud Locker. The first sale doctrine, however, could apply to the subsequent distribution of the transferred copy, that is, the sale on ReDigi's secondary market.

The court held that the first sale doctrine does not apply to a sale between two ReDigi users, because the uploaded file was an unlawful reproduction and not "lawfully made under this title." *Capitol Records, LLC*, 934 F. Supp. 2d at 655 (quoting 17 U.S.C. § 109(a)). The court also concluded that the doctrine cannot protect digital copies, because a new copy must be made on ReDigi's server before a sale can be consummated, and it is therefore impossible for a user to sell her "particular" copy on her hard drive. *Id.* "Put another way, the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce." *Id.*

> The correct inquiry is whether that user's reproduction of the file is a fair use. To construe "the purpose of the use" as an "undoubtedly commercial" purpose, the court substituted ReDigi in place of the actual person causing the reproduction of the file—the file's owner.

The court's conclusion is based upon its erroneous determination that a user's act of uploading a file to the Cloud Locker is not a fair use. Section 109(a) explicitly provides the "owner of a particular copy or phonorecord lawfully made under this title . . ., is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a). If the migration of the user's copy of the music file from her PC to the Cloud Locker is a fair use, then the migrated copy on ReDigi's server is a "copy . . . lawfully made under this title." The owner of that copy—the user—has the right under Section 109 to sell "that particular" copy.

ReDigi asserted that the failure to apply the first sale doctrine to its service would give Capitol "'a Court sanctioned extension of rights under the [C]opyright [A]ct . . . which is against policy, and should not be endorsed by this Court.'" *Capitol Records, LLC*, 934 F. Supp. 2d at 655 (quoting ReDigi's Brief). Disagreeing with ReDigi's policy argument, the court cited a United States Copyright Office report on the first sale doctrine and the Digital Millenium Copyright Act, 17 U.S.C. § 512. Library of Cong., DMCA Section 104 Report (2001) ("DMCA Report"). The Copyright Office contended that "the impact of the [first sale] doctrine on copyright owners [is] limited in the off-line world by a number of factors, including geography and the gradual degradation of books and analog works." DMCA Report, at xi. Specifically,

> [p]hysical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright

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> owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world.

Id. at 82-83 (footnotes omitted).

These policy arguments, however, are unavailing. The court's analysis first conflates "physical objects" with "analog objects." Musical works have been legally available in digital form since the advent of the compact disc. Similarly, motion pictures have been digitized in DVD format. Although analog media—cassette tapes and VHS recordings—will degrade with use, CDs and DVDs, barring physical injury to the medium itself, do not. A used CD will produce the same digital quality sound as a new one, so long as the physical medium has not been damaged. Both the songs downloaded from iTunes and the songs on a CD are digital. Further, hard drives are mechanical devices that degrade and breakdown, and studies show most hard drives experience significant increases in failure rates after 5-7 years of use. Bianca Schroeder & Garth A. Gibson, *Disk Failures in the Real World: What Does an MTTF of 1,000,000 Hours Mean to You?* 5th USENIX Conference on File and Storage Technologies—Paper (Feb. 14, 2007), *available at* https://www.usenix.org/legacy/events/fast07/tech/schroeder/schroeder_html/index.html (last visited Nov. 6, 2013). On the other hand, pressed CDs, like those purchased at used record stores, have an estimated lifespan of 20-100 years. Fred Byers, Council on Library and Information Resources, *Care and Handling of CDs and DVDs: A Guide for Librarians and Archivists, § 4: How Long Can You Store CDs and DVDs and Use Them Again?* (Oct. 2003), http://www.clir.org/pubs/reports/pub121/sec4.html.

In addition, although the court expressed great concern for the negative impact competition would have on the primary market, the court did not discuss the benefits to the public of having a vibrant secondary market. After all, for each of the files at issue in the case, the copyright holder had received payment once already.

Apparently, because technology has increased efficiency of the secondary market, the court reasoned that the first sale doctrine should be limited. It is that same technology, however, that drives the primary market, and the court did not explain why, in addition to the grant of the limited monopoly provided by copyright, the copyright holder also should be permitted to dictate the form of the secondary market. Under this reasoning, the first sale doctrine would not apply to sales of used books on eBay, because that technology improves the efficiency of the secondary market beyond physically hunting through local used book shops. Or should Amazon be barred from selling used textbooks because it improves students' ability to find cheaper used textbooks? The court did not justify its preference for a protected primary market over a competitive secondary market.

[A]lthough the court expressed great concern for the negative impact competition would have on the primary market, the court did not discuss the benefits to the public of having a vibrant secondary market. After all, for each of the files at issue in the case, the copyright holder had received payment once already. Apparently, because technology has increased efficiency of the secondary market, the court reasoned that the first sale doctrine should be limited.

Conclusion

The *Capitol Records, LLC* decision continues the imbalance of digital copyright law in favor of the copyright owner at the expense of users. The conclusion in *Capitol Records, LLC* is not actually based on a distinction between digital and non-digital media, but is instead based upon how media is acquired—whether physically or through the Internet. As society moves towards the increased convenience and efficiency of purchasing copyrighted material through digital transmissions over the Internet, consumers might find that they are missing more than just the physical packaging for the product. If *Capitol Records*-type reasoning wins the day, they also will be deprived of their fair use and first sale rights, and secondary markets for used intellectual property will wither and die.

Legislative Committee Report

William K. McVisk
Johnson & Bell, Ltd., Chicago

Dealing with New Legislation: Timing of Settlement Agreements

The new Illinois statute concerning the timing of settlements, 735 ILCS 5/2-2301 (the "Act"), effective January 1, 2014, should give defense counsel pause. As the failure to comply with the terms of the Act can result in substantial financial penalties, defense counsel needs to be familiar with the Act and address the issues presented before reaching an agreement with the plaintiff to settle the case.

Requirements of the Act

The sections below discuss the requirements of the Act. In particular, they discuss under what circumstances the Act applies, the documentation required by the Act in order to preserve a defendant's rights and to protect its interests, how the Act affects when payments are due, and the ramifications for a defendant for failure to comply with the Act.

(1) Application

The Act applies to the following types of cases filed in Illinois state court: (1) personal injury claims, including wrongful death claims; (2) property damage claims; and (3) any other tort action for money damages. 735 ILCS 5/2-2301(g). The parties, however, can agree to opt out of the Act. *Id.* The Act does not apply to settlements involving the state of Illinois, any state agency or state officer sued in an official capacity, any person being represented by the Illinois Attorney General and being indemnified by the state pursuant to the Illinois Employee Indemnification Act, municipalities, and class action suits. *Id.* § 2-2301(g)(1)-(6).

(2) Settlement Documentation

Under the Act, settling defendants are required to tender a release to the plaintiff's counsel within 14 days after written confirmation of the settlement. Written confirmation includes "all communication by written means," *id.* § 2-2301(a), so confirmation received via e-mail is sufficient to start the clock running.

The plaintiff is responsible for providing certain documentation before the defendant's payment obligation is triggered under various circumstances. Where court approval is required (such as in a wrongful death case or a case involving a minor's estate), the plaintiff's counsel must tender to the defendant a copy of the court order approving the settlement. *Id.* § 2-2301(b).

Where there are known third-party rights of recovery, including attorney's liens and healthcare provider liens, the plaintiff's counsel must provide documentation to assure the defendant that the liens will be satisfied from the settlement. For an attorney's lien, a signed release of the lien is required. *Id.* § 2-2301(c)(1).

For healthcare provider liens, the plaintiff has the choice of providing any one of the following: a signed release of the healthcare provider lien; a letter from the plaintiff's attorney agreeing to hold the full amount of the claimed lien in the plaintiff's attorney's client trust account pending final resolution of the lien amount; an offer that the defendant hold the full amount of the claimed lien pending final resolution of the lien amount; or any other documentation agreed to by the parties. *Id.* § 2-2301(c)(2)(i)-(iv).

Where there are liens asserted by Medicare, the Centers for Medicare and Medicaid Services, the Illinois Department of Healthcare and Family Services, or private health insurance companies (hereinafter referred to as "the medical payment lienholder" to mean one or more of those entities listed here), the plaintiff has the choice of submitting any one of the following: (1) documentation of an agreement between the medical payment lienholder and the plaintiff as to the amount of the settlement that will be accepted in satisfaction of the right of recovery; (2) a letter from the plaintiff's attorney agreeing to hold the full amount of the medical payment lienholder's claimed right of recovery in the plaintiff's attorney's client trust account pending final resolution of the amount to be recovered; (3) an offer allowing the defendant to retain the full amount of the medical payment lienholder's right

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About the Author

William K. McVisk is a shareholder of *Johnson & Bell, Ltd.* in Chicago, with thirty years of litigation and trial experience. He focuses on complex insurance coverage and bad faith litigation and medical malpractice defense. He represents both policyholders and insurers in coverage litigation, and has had experience in all areas of coverage. He has written numerous articles and has given numerous presentations on insurance coverage litigation. Bill has served as a past editor-in-chief of the *IDC Quarterly*, and is a member of the IDC Board of Directors.

of recovery pending resolution of the amount to be recovered; or (4) documentation of any other method of resolution of the liens as agreed by the parties. *Id.* § 2-2301(c)(3)(i)-(iv).

(3) Payment and Penalties

The defendant must pay all sums due to the plaintiff within 30 days after the plaintiff has tendered the settlement documentation specified in the Act. 735 ILCS 5/2-2301(d). If a court finds that a settling defendant fails to make timely payment, the court is required to enter judgment against that defendant for the amount set forth in the executed release, plus costs incurred in obtaining the judgment, plus post-judgment interest (currently 9%) calculated from the date of the tender by plaintiff of the required settlement documentation. *Id.* § 2-2301(e).

Strategies for Dealing with the Act

In most cases involving simple settlements between one plaintiff and one defendant, with no insurance disputes or cross claims, there should be little difficulty in meeting the time frames set forth in the Act. In simple claims, releases generally can be prepared and approved in 14 days from written confirmation of the agreement to settle, and the defendant or its insurer should be able to tender payment of the settlement within 30 days of receipt of the release.

The problems will arise in more complex cases. For example, in many construction accident cases there are several defendants, and many of those defendants have claims against each other for indemnity and contribution. Adding to the complexity is that insurance coverage disputes often accompany the underlying litigation. Similarly, if the plaintiff has had substantial medical treatment as the result of the defendants' allegedly tortious conduct, Medicare and other liens likely are involved. If those liens are not properly satisfied, defendants can face liability even though they have paid the full amount of the settlement. See, *e.g.*, Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2)(B)(ii)-(iii).

Given the likelihood of delays in more complex cases, defense counsel must recognize this problem before reaching a settlement with the plaintiff so that the parties can negotiate for reasonable time frames and reach agreement concerning the types of assurances the defendants will need to ensure that liens are satisfied. Significantly, the Act specifies that it applies to all types of actions set forth in the Act "except as otherwise agreed by the parties." 735 ILCS 5/2-2301(g). Additionally, if the issue is raised at the time of settlement or before, a plaintiff's attorney is likely to agree to modify the time limits and other requirements to meet the legitimate needs of the defendants. Presumably, the plaintiff will be more willing to accommodate the defendants if the subject is brought up before the parties reach final agreement on the amount of the settlement.

Therefore, before making the final settlement offer, a defendant should consider how much time will be required reasonably to finalize the terms of settlement agreements with all of the necessary parties. Will approval be required from the insured as well as the insurer? Are there claims for contribution and indemnity that need to be finalized before the parties can tender the final release to the plaintiff? Have any of the defendants or their insurers agreed to postpone resolution of their disputes until after the case is resolve by the plaintiff, using a "fund and fight" agreement? If so, it will likely take additional time to finalize the settlement documentation, and 14 days will not be sufficient.

Additionally, defense counsel should determine whether there are healthcare liens and, if so, whether those liens are liquidated or disputed. Generally, this information can be gathered during discovery through interrogatories. If the amount of the liens is not yet final, defense counsel should discuss with the client the risks of allowing the plaintiff's attorney to hold the funds needed to satisfy the lien in the plaintiff's attorney's client trust account. Although most plaintiffs' attorneys are scrupulous concerning their client trust accounts, if the plaintiff's attorney is not well known to the defendants and their attorneys, a defendant might not want to accept the risk that the plaintiff's attorney will satisfy the lien.

For example, if a plaintiff's attorney does not satisfy a Medicare lien from the proceeds of the settlement, the fact that the plaintiff's attorney agreed in a letter to hold the funds in a client trust account probably will not be a defense when the federal government comes in search of its money. Thus, the defendant's attorney should condition a settlement offer on the agreement that the full amount of any claimed liens will be held by the defendant pending receipt of satisfactory documentation of resolution of the lien amount.

Conclusion

Although the Act creates presumptive standards for the timing of settlements and how liens should be handled, its terms are all subject to negotiation. Therefore, the key for defense counsel will be to recognize the problems that could be created before the final terms of the settlement are reached and to address them with plaintiff's counsel, with the resulting agreement memorialized in writing.

Young Lawyer Division

Michelle M. Wahl
Swanson, Martin & Bell, LLP, Chicago

Uniting and Empowering Future Leaders of Lawyering

Introductions!

Fellow members of the IDC,

It is with great pride and honor that I serve as the Chair of the Young Lawyers Division during the 2013-2014 term. I cannot express how enthusiastic (and eager) I am to be working with all of you and particularly my young lawyer colleagues. Together, the young lawyers and I hope to further the goals and aspirations of the IDC and to inspire and encourage even more involvement in the organization by not only our current members, but also by young lawyers who have yet to take advantage of all the IDC has to offer them. In a short time, we already have seen IDC young lawyers take the initiative to get involved in various facets of our division, and I know that our dedication and innovative ideas will continue to develop as we grow as a division. I am thrilled to be working with Starr Rayford of *Hinshaw & Culberston LLP*, our division vice-chair, and hope that our division will be as successful as it was while under the leadership of Mandi Ferguson of *HeplerBroom LLC*. Stay tuned for details on several YLD events that are currently in the planning stages, including mock trials, CLEs, the holiday party fundraiser, and more! For now, please calendar the events as the dates are circulated and join us for some comradery and community service.

We look forward to seeing you!

YLD Past Events

On August 23, 2013, the Young Lawyers Division, in association with the American Red Cross, hosted a very successful blood drive at *HeplerBroom*'s Edwardsville office. Under the leadership of YLD member Matthew Champlin, Red Cross and HeplerBroom were able to collect 22 units of blood, exceeding the goal they gave to Red Cross! Great work Matthew, HeplerBroom, and Red Cross on the planning and execution of this event.

On September 20, the Young Lawyers Division hosted its "End of Summer Soiree" at Public House in Chicago. Thank you to all who attended and contributed to making the evening an exciting and memorable one!

On September 30, the Young Lawyers Division, again in association with the American Red Cross, hosted a second blood drive at *Swanson, Martin & Bell*'s Chicago office. This blood drive was also a great success, and we are thankful for all those who helped plan the event, as well as for everyone who came forward to help others in need by donating blood. Our sincere appreciation to all involved!

During the month of September, and in conjunction with the Chicago Public School system, the Young Lawyers Division collected school supplies at a handful of firms to benefit two elementary schools: Henderson and Randolph. Several boxes of supplies and a wonderful monetary donation were collected and provided to aid these schools. I am so thankful to everyone who encouraged their respective firms to participate and who committed to making this drive a success.

On October 14, Greg Odom of *HeplerBroom LLC* and other YLD members went to Southern Illinois University to speak to students about "The Life of a First Year Associate." Similarly, at The John Marshall Law School, Greg Odom, Starr Rayford, and I spoke to first year students on October 29. Both events were well-received, and we were successful in encouraging law students to get involved in the IDC and to actively participate in the many opportunities the organization affords them. A special thank you to Southern Illinois University and The John Marshall Law School staff members, as well as to Greg Odom and Starr Rayford, for their tremendous efforts in putting on these events.

About the Author

Michelle M. Wahl is an associate with the Chicago office of *Swanson, Martin & Bell, LLP*, where she focuses her practice in asbestos litigation and toxic tort defense litigation, which includes the preparation of pleadings and discovery requests, voluminous document reviews, deposing of witnesses, keeping abreast of legal developments, and the preparation of discovery responses for matters in multiple jurisdictions. Ms. Wahl also has experience in intellectual property litigation and transactional services, including work with clients in various aspects of the entertainment industry. She also has assisted in the registration and policing of trademarks and copyrights. In addition to her current involvement with the Illinois Association of Defense Trial Counsel, she is also a member of the American Bar Association, Women's Bar Association of Illinois, Chicago Bar Association, and Indiana State Bar Association.

Association News

Changes Are Coming to the Illinois Code of Civil Procedure

On May 30, 2013, changes to the Illinois Code of Civil Procedure were adopted by the General Assembly (see Legislative Committee Report, page 67). To prepare our members for these changes, the IDC partnered with the **Illinois Insurance Association** and **Property Casualty Insurers Association of America** to present a topical seminar.

We would like to thank **Hinshaw & Culbertson LLP** for hosting the seminar and our speakers, **David H. Levitt**, *Hinshaw & Culbertson LLP*, **Stephen G. Loverde**, *Law Office of Steven A. Lihosit/Allstate Insurance Company Staff Counsel*, **R. Mark Mifflin**, *Giffin, Winning, Cohen & Bodewes, P.C.*, and **Frank Stevens**, *Taylor Miller LLC*, for their participation in the program.

If you were unable to attend the seminar, but are interested in viewing the recording, please contact the IDC office at idc@iadtc.org or 800-232-0169.

Notice of Election

In accordance with the Bylaws of the Illinois Association of Defense Trial Counsel, an election must be held to fill the vacancies of the following six (6) directors, whose terms will expire at the Annual Meeting, May 30, 2014:

C. William Busse, Jr.,
Busse, Busse & Grassé, P.C.
Joseph G. Feehan,
Heyl, Royster, Voelker & Allen, P.C.
William K. McVisk,
Johnson & Bell, Ltd.
Nicole D. Milos,
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC
Bradley C. Nahrstadt,
Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.
Patrick W. Stufflebeam,
HeplerBroom LLC

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

All individual members of the Association are eligible for election to the Board of Directors, unless otherwise excluded by the Bylaws. Corporate, Educator, and Law Student members are not eligible to serve on the Board of Directors.

The Board of Directors shall be representative of all areas of the State of Illinois, and to this end, two Districts are declared: "Cook County" and for all remaining counties, "Statewide." No more than four of the six directors elected each year shall office within the same District, and regardless of votes cast, only the four persons receiving the most votes may be elected from within the District. If all individual members filing Nominating Petitions are from the same District, only four shall be elected and the board shall seek out and appoint two directors from the other District.

No more than two voting members of the combined Executive Committee and Board of Directors shall be partners or associates or otherwise practice together in the same law firm.

The filing of a Nominating Petition for election as a director shall consist of:

- The Nominating Petition. Each individual nominated must be supported by the signatures of three (3) members in good standing.
- A statement by that member of his ***availability and commitment to serve actively*** on the board.
- A head and shoulders photo (1 MB or higher, jpg format preferred).
- A short biography (1-2 paragraphs maximum).
- A statement of no more than 200 words on why you should be elected to the Board of Directors.

A sample copy of the Nominating Petition and Commitment to Serve Statement are included below for your reference.

Nominations must be sent electronically to IDC Secretary/Treasurer Michael L. Resis of SmithAmundsen LLC, at mresis@salawus.com, and IDC Executive Director Sandra J. Wulf, CAE, IOM, at idc@iadtc.org. **Nominations must be accompanied with the five items listed above.** All candidates will be featured with their biography, statement of candidacy and picture in the ***IDC Quarterly***, and this same feature will be sent to the membership if more than six petitions are received.

All nominating petitions must arrive at the IDC office no later than **Friday, March 7, 2014.**

All candidates who have filed a complete nominating petition are eligible to receive an electronic copy of the IDC membership listing, upon request.

Statement of Availability and Commitment Sample

I, _____,
hereby declare that I am a member in good standing of the Illinois Association of Defense Trial Counsel and I do hereby warrant and affirm my ability and commitment to serve actively on the Board of Directors of the Illinois Association of Defense Trial Counsel.

Dated this _____ day of _____, 20__.

_____
Signature

Nominating Petition Sample

We, the undersigned, hereby declare that we are members in good standing of the Illinois Association of Defense Trial Counsel.

We, the undersigned, further nominate (name of person) of (firm name, address, city, state, zip code) for the position of Director of the Illinois Association of Defense Trial Counsel.

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

Dated this _____ day of _____, 20__.

IDC Visits Rochester Junior High

Special thanks to **R. Mark Mifflin** and **Mollie M. Townsend** of *Giffin, Winning, Cohen & Bodewes, P.C.*, in Springfield, for visiting the Rochester Junior High School (RJHS) on our behalf. Mark and Mollie took part in the school's 7th grade mock trial lesson. The students learned about all aspects of the civil justice system and what it is like being an attorney. We would also like to thank the teachers and students of RJHS for the invitation to speak.

IDC Winter Seminar (Ski & CLE)

A Destination CLE Program Presented in Conjunction with the Texas Association of Defense Counsel

Elevation Resort and Spa

Crested Butte, Colorado | February 5-8, 2014

The IDC Winter Seminar will feature CLE presentations (including professionalism/ethics topics) and a joint Networking Reception with the TADC in beautiful Crested Butte, Colorado. Registration is now open for this event - reserve your spot today!

— Continued on next page

2014 IDC Winter Seminar Agenda

Wednesday, February 5, 2014

6:00-8:00 p.m. Welcome Reception

Thursday, February 6, 2014

6:45–9:00 a.m. Buffet Breakfast

7:15–7:30 a.m. Welcome & Announcements

7:30–8:30 a.m. *The Searchers: What Lawyers Can and Cannot Say in the Digital Age*
Presented by: **Bradley C. Nahrstadt**, *Lipe, Lyons, Murphy, Nahrstadt & Pontikis, Ltd.*, Chicago

8:30–9:30 a.m. *The Magnificent Seven: Liability Analysis for Construction Managers—Seven Ways to Distinguish*
Calloway v. Bovis
Presented by: **R. Howard Jump**, *Jump & Associates, P.C.*, Chicago

9:30–10:30 a.m. *Building & Ensuring the Alamo: Top 10 Construction Contract & Insurance Issues Every Illinois Lawyer Should Know*
Presented by: **Aleen Tiffany**, *Aleen R. Tiffany, P.C.*, Crystal Lake

Friday, February 7, 2014

6:45–9:00 a.m. Buffet Breakfast

7:15–7:30 a.m. Welcome & Announcements

7:30–8:15 a.m. *Gunfight: Dealing with the Plaintiff's So-Called "Revolution"*
Presented by: **Timothy A. Weaver**, *Pretzel & Stouffer, Chartered*, Chicago

8:15–8:50 a.m. *High Plains Drifter: Amendments to FRCP 45, Federal Non-Party Subpoena Requirements*
Presented by: **McKenzie Wallace**, *Thompson & Knight LLP*, Dallas

8:50–9:25 a.m. *Fistful of Dollars: Selected Strategies for Defending the Class Action Suit*
Presented by: **David H. Levitt**, *Hinshaw & Culbertson LLP*, Chicago

9:25–10:10 a.m. *The Good, the Bad and the Ugly: Managing Litigation Stress and Other Things I Wish I'd Known 25 Years Ago*
Presented by: **Greg W. Curry**, *Thompson & Knight LLP*, Dallas

Saturday, February 8, 2014

6:45–9:00 a.m. Buffet Breakfast

7:15–7:30 a.m. Welcome & Announcements

7:30–8:05 a.m. *Maverick: Voir Dire*
Presented by: **Mehaffy Weber**, Beaumont, TX

8:05–8:35 a.m. *Rustler's Rhapsody: Trends in Litigation—An Expert's Point of View*
Presented by: **Micayla Brooks**, *Rimkus Consulting*, San Antonio, TX

8:35–9:10 a.m. *The Wild Bunch: Do's and Don'ts from the Bench*
Presented by: **Hon. Carlos Cortez**, *44th Judicial District*, Dallas

9:10–9:55 a.m. *Tombstone: Legal Malpractice—Causes and Avoidances*
Presented by: **Thomas E. Ganucheau**, *Beck Redden LLP*, Houston, TX

9:55–10:30 a.m. *The Return of Desperado: Preservation of Error*
Presented by: **Belinda Arambula** & **David Brenner**, *Burns Anderson Jury & Brenner, L.L.P.*, Austin, TX

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Engineering Systems Inc.

2014 Winter Seminar

This winter, disconnect from life's aggravations and reconnect with what life is really all about! Visit Crested Butte, CO, and you will find that the laid back community will clear your head the moment you arrive. World-class skiing with some of Colorado's best snow, best grooming, and an abundance of scenic trails await you. Or, enjoy a relaxing time at the spa. Whatever your choice, you'll return home invigorated and refreshed!

We are pleased to bring back the Winter Seminar for 2014. Our first venture out West was a terrific time. This winter, we invite you to head West with us again for the 2014 IDC Winter Seminar, February 5-8, 2014 at the Elevation Resort and Spa in Crested Butte, CO.

Located at the base of Crested Butte Mountain Resort, just steps from outdoor and village pursuits, the Elevation Hotel & Spa features a modern mountain luxury experience with warm service and a relaxed pace. This distinctive ski-in/ski-out resort property effortlessly blends aspects of a cozy ski lodge with hip, urban décor and contemporary design. Known as "Colorado's Last Great Ski Town," Crested Butte is located in Gunnison County in southwestern Colorado at an elevation of 8,885 feet. The Town is surrounded by spectacular mountain scenery and is a recreational paradise.

Accommodations

Rooms may be reserved directly with the Elevation Hotel & Spa at **888-443-6715**.
We encourage you to make your room reservations as soon as possible.

Registration Fees

Registration Fees include CLE credit hours (including Professionalism Credit) and the Wednesday Evening Reception with defense counsel from the TADC.

Registration is priced as follows:

IDC Member $375
Spouse/Guest/Child .....Complimentary
Spouse/Guest Requesting CLE $375

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IDC Winter Seminar Registration

Name: _____

Firm: _____

Address: _____

City, State, Zip: _____

Email: _____

Phone: _____

Spouse/Guest/Child(ren)'s Name(s): _____

_____

Special Dietary or Accessibility Needs: _____

_____

Registration	Fee	Qty	Total
IDC Member	$375	____	$_____
Spouse/Guest/Child	Comp	____	$_____
Spouse/Guest Requesting CLE	$375	____	$_____

Payment Information
Enclosed is check number _____ for $_____.

Please charge $_____ to my credit card.

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Exp. Date: _____ **CSC:** _____

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Please return this form with payment to:
Illinois Association of Defense Trial Counsel
PO Box 588, Rochester, IL 62563-0588
Questions? Call 800-232-0169 or email idc@iadtc.org

Welcome

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

Stephen R. Ayres
Heyl, Royster, Voelker & Allen, P.C., Chicago
- Sponsor: Stephen Heine

Kevin Michael Birkenmeier
HeplerBroom LLC, Edwardsville
- Sponsor: Patrick Stufflebeam

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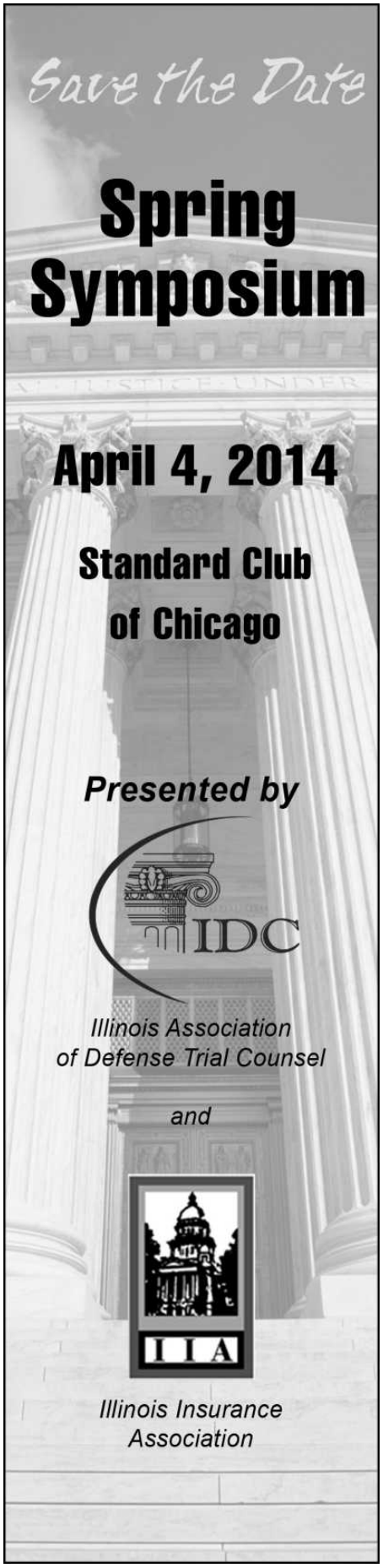

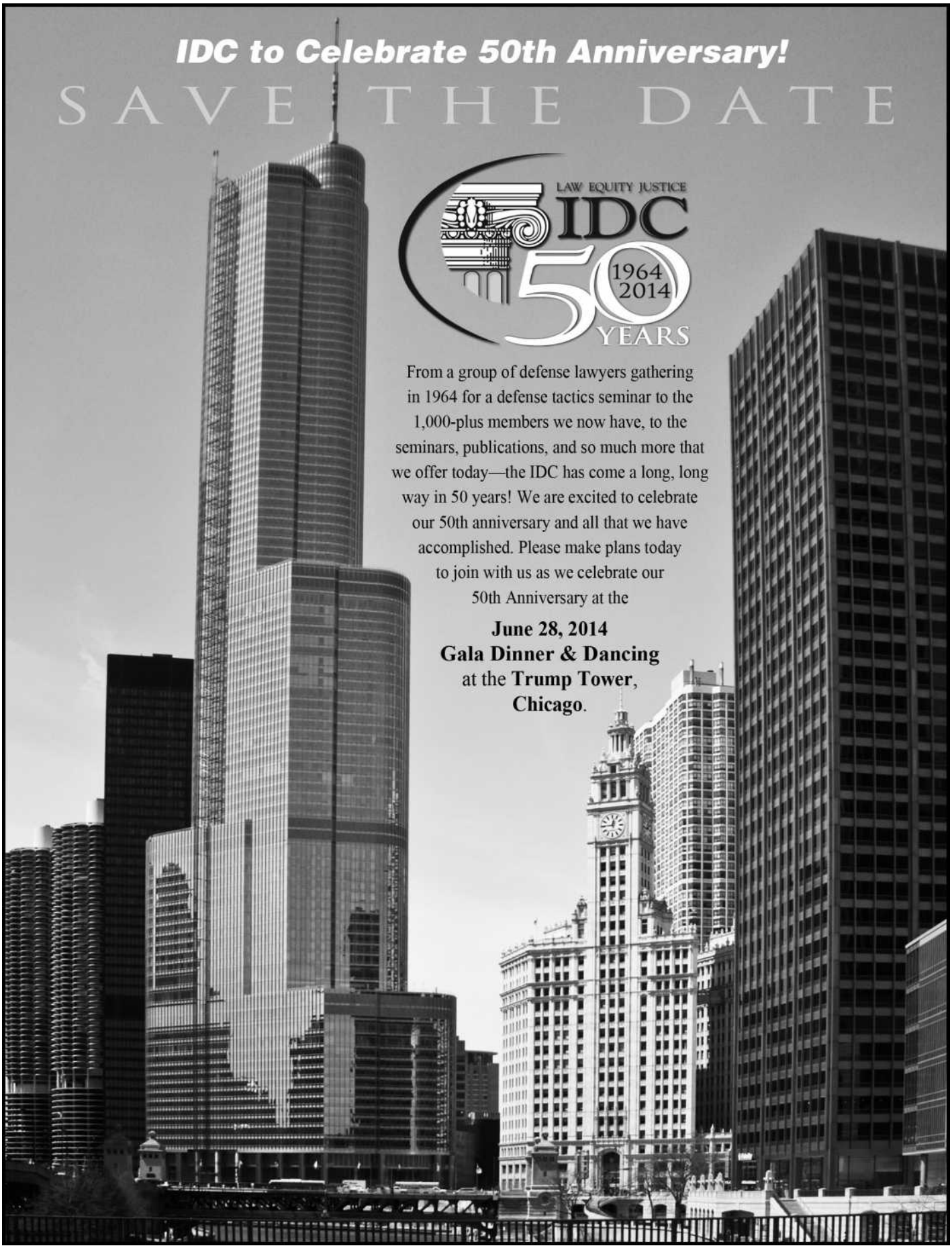
IDC to Celebrate 50th Anniversary!
SAVE THE DATE
LAW EQUITY JUSTICE
IDC
1964
2014
50
YEARS
From a group of defense lawyers gathering in 1964 for a defense tactics seminar to the 1,000-plus members we now have, to the seminars, publications, and so much more that we offer today—the IDC has come a long, long way in 50 years! We are excited to celebrate our 50th anniversary and all that we have accomplished. Please make plans today to join with us as we celebrate our 50th Anniversary at the
June 28, 2014
Gala Dinner & Dancing
at the Trump Tower,
Chicago.

Illinois Association of Defense Trial Counsel

MEMBERSHIP APPLICATION

Membership in the Illinois Association of Defense Trial Counsel is open to Individuals, Corporations, Educators, and Law Students. For a list of qualifications, visit www.iadtc.org or phone the IDC office at 800-232-0169. Applicants shall be admitted to membership upon a majority vote of the Board of Directors.

I am (We are) applying for membership as a(an) (Select Only One):

Individual Attorney, in practice:
- ❍ 0-3 years ($100)
- ❍ 4-5 years ($150)
- ❍ 6-9 years ($225)
- ❍ 10+ years ($250)

Governmental Attorney, in practice:
- ❍ 0-3 years ($75)
- ❍ 4-5 years ($100)
- ❍ 6-9 years ($160)
- ❍ 10+ years ($190)

Corporation, with:
- ❍ 1-2 Affiliates ($250)
- ❍ 3-5 Affiliates ($500)
- ❍ 6-10 Affiliates ($750)
- ❍ 11-15 Affiliates ($1,000)
- ❍ 16-20 Affiliates ($1,500)

- ❍ **Student** ($20)
- ❍ **Educator** ($75)

Individual Applicant Information – Attorneys & Governmental Attorneys

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Firm or Government Agency _____

Address _____

City _____ State _____ Zip Code _____ County _____

Firm or Agency Line _____ Direct Line _____ Fax Line _____

Email _____ Website _____

Area of Practice _____ # of Attorneys in Firm _____

IDC Sponsor Name and Firm _____

Law School _____ Admitted to the Bar in the State of _____ Year _____ ARDC # _____

Home Address _____ City, State, Zip Code _____

Home Phone _____ Alternate Email Address _____

Corporate Applicant Information

Corporation Name _____ Business or Service Provided _____

Address _____ City, State, Zip Code _____

Phone _____ Fax _____ Website _____

On a separate sheet of paper, please list all individuals who are to be affiliated with this Corporate Membership. Be sure to include Name, Address (if different than the corporate address), Phone, Fax, and Email Address for all affiliates.

Educator and Law Student Applicant Information

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Law School _____ Anticipated Graduation Date _____

Address _____ City, State, Zip Code _____

Email Address _____ Phone _____

Biographical Information

IDC is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which one of the following may best describe them:

Race _____ Gender _____ Birth Date _____

Free DRI Membership

In addition to joining the IDC, you can take advantage of the DRI Free Membership Promotion! As a new member of the IDC and if you've never been a member of DRI, you qualify for a 1 year free DRI Membership. If you are interested, please mark the box below and we will copy this application and send it to DRI. Also, if you have been admitted to the bar 5 years or less, you will also qualify to receive a Young Lawyer Certificate which allows you one complimentary admission to a DRI Seminar of your choice.

❍ Yes, I am interested in the Free DRI Membership!

(Application continued on next page)

Illinois Association of Defense Trial Counsel

COMMITTEE INVOLVEMENT

All Substantive Law Committees are open to any IDC member. Event and Administrative Committees are generally small committees and members are often appointed by the Board of Directors. Substantive Law Committees are responsible for writing the Monograph for the *IDC Quarterly* and may submit other Feature Articles. Committees keep abreast of current legislation and work with the IDC Legislative Committee, as warranted. Committees also serve as a resource to seminar committees for speakers and subjects and, if and when certain issues arise that would warrant a specific "topical" seminar, the committee may produce such a seminar.

Please select below the committees to which you would like to apply for membership:

Substantive Law Committees

- ❍ Commercial Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Local Government Law
- ❍ Tort Law

Administrative Committees

- ❍ Events
- ❍ Legislative
- ❍ Membership
- ❍ Young Lawyers

Event Committee

- ❍ Events

Membership Commitment

By providing a fax number and email address you are agreeing to receive faxes and emails from the association that may be of a commercial nature. I certify that :

- ❍ As an **Individual Attorney**, I am actively engaged in the practice of law, that at the present time a substantial portion of my litigation practice in personal injury and similar matters is devoted to the defense.
- ❍ As a **Corporate Member**, we will support the purpose and mission of the Association.
- ❍ I am currently a **Professor** or **Associate Professor** of law at an ABA accredited law school.
- ❍ I am currently a **Student** enrolled in an ABA accredited law school.

Signed _____ Date _____

Membership Investment

Membership Dues ..... $ _____

Voluntary Political Action Committee Donation * ..... $ _____

Total Amount Due ..... $ _____

* **Recommended Amount:**
<3 years in practice..... $15
4-5 years in practice..... $25
6-9 years in practice..... $55
10+ years in practice..... $75

Please Note: IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. The IDC estimates that 2.5% of your dues are not deductible because of the IDC's lobbying activities on behalf of its members.

Payment Information

— Do Not Fax or Email Credit Card Information —

❍ Enclosed is check # _____ in the amount of $ _____ . ❍ Visa ❍ MasterCard ❍ AmEx

❍ Please charge Credit Card # _____ in the amount of $ _____ Exp. Date ____/____

Name as it appears on the Card _____ Card Security Code _____

Billing Address _____ City, State, Zip Code _____

Thank you for your interest in joining the Illinois Association of Defense Trial Counsel. Your application will be presented to the Board of Directors for approval at their next regular meeting. Until that time, if you have any questions, please contact the IDC office at:

Illinois Association of Defense Trial Counsel
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.iadtc.org

ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

The Voice of the Defense Bar in Illinois

Promoting a level playing field in civil litigation

Representing the interests of business and industry in Illinois

Dedicated to improving the quality of the legal profession

To learn more about the Illinois Association of Defense Trial Counsel, Visit us online at

www.iadtc.org

What is the IDC?

We are the premier association of attorneys in Illinois representing business, corporate, professionals, and other individual defendants in civil litigation. The IDC is an exceptional community of defense attorneys dedicated to improving the judicial system and the practice of law.

The IDC is a reasoned and independent voice for fairness in the legal system. We work with the business, insurance, and medical communities to ensure a fair and equal justice system for all litigants.

The IDC is

- An advocate for the legal profession
- 1,000 members strong
- Looked to for advice and support by the judiciary
- A resource for legislators

How is the IDC Making a Difference?

The IDC strengthens the practice of law and improves the skills of lawyers that defend individuals and businesses in Illinois. We enhance the knowledge of defense attorneys through our nationally respected publication the *IDC Quarterly* and the new *Survey of Law*, by our continuing legal education programs, and committees that focus on specialty practice areas like **Civil Practice**; **Commercial Law**; **Employment Law**; **Municipal Law**; and **Tort Law**.

The IDC is working to protect the Illinois legal system, demanding a level playing field and resisting attempts to dismantle the jury system. The IDC is a respected resource providing:

- Fact sheets on the impact of pending litigation
- Expertise to legislative committees and political leaders
- Amicus briefs on legal issues pending before the Illinois reviewing courts

IDC members are as diverse as the clients we represent

From big firms and small and all corners of the state, attorneys join the IDC based on our common issues and a common desire to improve our legal system.

Over the past four decades, we have grown from an organization of mostly insurance defense attorneys to a broad based association of litigators who represent an entire range of business and industry throughout Illinois and the United States. The diversity of our membership and clientele informs our independent and balanced view of Illinois's judicial system and the litigation that affects it.

What are Our Core Values?

- To promote and support a fair, unbiased and independent judiciary
- To take positions on issues of significance to our membership, and to advocate and publicize those positions
- To promote and support the fair, expeditious and equitable resolution of disputes, including the preservation and improvement of the jury system
- To provide programs and opportunities for professional development to assist members in better serving their clients
- To increase its role as the voice of the defense bar of Illinois, and to make the IDC more relevant to its members and the general public
- To support diversity within our organization, the defense bar, and the legal profession

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CALENDAR
of Events

- **January 24** — **Young Lawyers Division CLE** • "Pitfalls of Legal Malpractice/Ethical Violations" Swanson, Martin & Bell, LLP • Chicago
- **February 5 – 8** — **Winter Seminar** • Crested Butte Mountain Resort • Crested Butte, CO
- **March 25** — **Executive Committee and Board of Directors Meetings** Hinshaw & Culbertson LLP • Chicago
  Legislative Reception • Sangamo Club • Springfield
- **April 4** — **Spring Symposium** • Standard Club • Chicago
- **April 11** — **Executive Committee and Board of Directors Meetings** Location TBA • Chicago
- **April 17** — **Judicial Reception** • Location TBA
- **May 29** — **Executive Committee Meeting** • Location TBA • Chicago
- **May 30** — **Annual Meeting, Board Meeting, and Awards Luncheon** Location TBA • Chicago
- **June 27** — **IDC After Hours** • Location TBA • Chicago
- **June 28** — **50th Anniversary Gala** • Trump Towers • Chicago