

# Insurance/Tort Law Newsletter

April 2009

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## News

On March 20 and March 27, 2009, the firm co-hosted two seminars with Willis HRH, entitled "Running Your Construction Business in a Difficult Economy". The seminars included a Bankers Round Table Discussion, featuring our guest speakers: Phil Jones (EVP - Inland Bank), Neil Prendergast (SVP - Fifth Third Bank), Hillary Robbins (VP - Chase Bank), and James Augustine (VP - Chase Bank), who provided an insider's view on the critical issue of "Can I Get A Loan?" Firm attorneys addressed a variety of legal topics that are particularly important in the current troubled economy.

The firm wishes to thank our very informative guest speakers and our clients who attended.

## Case Results

On March 31, **Geoff Bryce** and **Terry Madden** obtained a significant Appellate Court victory when the First District Appellate Court vacated a \$4.4 million judgment against the firm's client, the designer of an allegedly defective railroad car component that allegedly caused a freight train derailment. The derailment resulted in approximately \$8.8 million in damages, including damage to sport utility vehicles that were destroyed in the derailment and other damage to the railroad's property and freight cars. Prior to trial, two co-defendants settled with the plaintiff for \$5.2 million. The settling defendants obtained a "good faith" finding under the Illinois Contribution Act, which resulted in the dismissal of our client's claims for contribution that were pending against the settling parties. When the case proceeded to trial several months later, the court applied Arizona law, at the request of the Plaintiff's attorneys and over our objection. Following a jury verdict against our client, the trial court refused to grant our Defendant a \$5.2 million offset, arising from the prior settlement, concluding that under Arizona law, our client was not entitled to an offset. Upon appeal,

Geoff and Terry argued that regardless of what state's law applied at trial, our client was entitled to a \$5.2 million offset because our client's right to that offset was set forth in the order that the trial court entered in conjunction with the settlement and that order had never been appealed. Although the Illinois Appellate Court initially affirmed the judgment against our client, Geoff and Terry filed a Petition for Rehearing that was granted. After oral argument of the case on rehearing, the Appellate Court reversed its prior decision and concluded that our client was indeed entitled to a \$5.2 million offset, which resulted in the adverse judgment being reduced to zero, since the offset exceeded the judgment against our client. It is extremely rare for the Appellate Court to grant a Petition for Rehearing and even rarer for the Appellate Court to reverse its initial decision, but that is the result that Geoff and Terry obtained in this case.

On March 13th **Terry Madden** obtained a not-guilty verdict in a malpractice case against a chiropractor who was charged with both negligence and battery. Plaintiff was seen by the chiropractor on eight occasions during which she received traction and ultrasound to the lower back for pain. She claimed that although her condition was improving, on her ninth visit the doctor performed an adjustment of her lumbar spine without her consent. She claimed that as a result of the adjustment, a pre-existing herniated disc moved to a point in the spine where it was compressing nerves in the lumbar area, resulting in complaints of leg pain and eventually leading to neurological deficits. Plaintiff had disc surgery as a result. In defending the case, Terry argued that his client never performed any adjustment of the plaintiff's lumbar spine and that what the plaintiff perceived as an adjustment was nothing more than a motion palpation test of the lumbar area. Terry also argued that plaintiff consented to all of the doctor's treatment and that the need for surgery was solely a result of a well documented pre-existing herniated disc. The jury deliberated only one hour and ten minutes, including lunch, before returning a verdict in favor of our client. The Plaintiff requested damages of \$439,000. No offer was made on the case.

### **Illinois Supreme Court Clarifies Its Decision in *Ready-Sole Proximate Cause Defense Not Abolished by the Court's Prior Decision.***

In our December 2008 Newsletter, we reported on the Illinois Supreme Court's decision in *Ready v. United/Goedecke Services, Inc.*, No. 103474 (Ill. 112508). In its decision, the Supreme Court held that the fault of parties who settle with the Plaintiff prior to trial is not considered in determining whether the liability of non-settling defendants is joint and several or only several. Because the Supreme Court's decision affirmed that part of the Appellate Court's decision which had held that the trial court acted properly in excluding evidence of the fault of settling defendants, the Supreme Court's decision appeared to hold that the sole proximate cause defense was no longer a viable defense, at least where it is predicated on the fault of settling defendants.

On March 23, 2009, the Illinois Supreme Court issued a revised decision on rehearing in *Ready*. In that decision, the Supreme Court remanded the case to the Appellate Court for it to determine whether the trial court erred in precluding the jury from being instructed on the sole proximate cause defense. We will have to await the Appellate Court's ruling on that issue and presumably the Supreme Court's subsequent review of that issue. However, for present purposes, the sole proximate cause defense remains a viable defense even where it is based on the fault of settling parties.

### **Illinois Supreme Court Explains Distinction Between Single and Multiple Occurrences Under a CGL Policy**

In *Addison Insurance Company v. Fay*, No. 105752 (January 23, 2009), the Illinois Supreme Court analyzed the question of whether the deaths of two teenage boys involved a single or multiple occurrences. The boys became stuck in quicksand while taking a shortcut through an excavation pit on their way home from a fishing trip. They died from drowning and hypothermia. Their estates sued the owner of the excavation pit, alleging negligence in

failing to properly safeguard the dangerous premises. The landowner was insured under a CGL policy that had liability limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate. The insurer agreed to settle the claims for the total limits of its policy, but the parties disputed whether the deaths of the boys constituted one or two occurrences. The insurance company filed a declaratory judgment case to resolve that issue. The trial court found that the deaths of the boys involved two occurrences, but the Appellate Court reversed, finding that their deaths arose from the same cause and therefore constituted a single occurrence.

In analyzing the issue, the Supreme Court noted that there are competing theories utilized by courts to determine the number of occurrences under an insurance policy. Under the “cause theory” injuries or damages resulting from the same cause will generally be considered a single occurrence. Under the “effect theory” the number of individual claims or injuries resulting from an accident will determine the number of occurrences. Illinois has previously adopted the cause theory. However, the Supreme Court also noted that the “cause theory” is subject to several refinements. Specifically, the court held that in applying the cause theory one must consider whether the cause and the result are simultaneous or so closely linked in time and space as to be considered one event by the average person.

The Court also explained that where negligence is the result of an ongoing omission rather than separate affirmative acts, a time and space test effectively limits what would otherwise potentially be a limitless bundling of injuries into a single occurrence. For example, the same negligent maintenance of property could give rise to injuries occurring months apart, and they would typically be considered to be separate occurrences.

In determining whether the death of the boys involved one or multiple occurrences, the Court also noted that the burden of establishing coverage under an insurance policy is initially upon the claimant. In this case, there was no question but that the insurance policy applied to the loss. The only issue was

whether the suit involved one or multiple occurrences. The Court further held that once the claimant has established application of the policy, the burden then shifts to the insurance company to prove any limitations upon the scope of coverage, including limiting the claim to a single occurrence limit.

The Court ultimately concluded that the insurance company had not met its burden of proving that the deaths of the boys were so closely related in time in space that they constituted a single occurrence. The evidence in the case established that the boys left their homes together, but police investigators could not determine how closely in time the boys became trapped. They could have been trapped seconds or minutes apart and according to the evidence there was no way to know. Accordingly, the Court found that the insurance company had not proven that the two boys’ deaths were so closely linked in time and space as to be considered one event.

**Actual Notice of Suit by Insurer Does Not Excuse Insured From Complying With Notice Conditions of Policy.**

In *West American Insurance Company v. Yorkville Bank*, No. 3-07-0104 (3d Dist. Feb. 27, 2009), the Appellate Court considered whether an insured is required to provide written notice of suit as required by policy conditions even if oral notice of the suit has been provided to the insurer.

A defamation action was filed against Yorkville Bank on September 24, 2001, but the Bank did not provide written notice of the suit to its insurer, West American, until January 19, 2004. The insurer filed a declaratory judgment action, claiming that the Bank had breached the notice conditions of the policy, which required that notice of suit be provided to the insurer as soon as practicable. The Bank contended that even though it did not provide written notice to West American until January 19, 2004, it had orally notified the insurer of the filing of the suit on six prior occasions. It argued that oral notice of suit was sufficient to comply with the policy conditions. The insurer denied that it had

received oral notice and claimed that even if it had, the insured was still required to comply with the notice conditions of the policy. The trial court agreed with the Bank, and found that the insurer did have a duty to provide coverage. The trial court relied upon the Illinois Supreme Court's decision in *Cincinnati Insurance Company v. West American Insurance Company* (1998), in which the Supreme Court had held that as to tenders of defense, the insured is not required to make a formal tender of defense to an insurer. An insurer, according to the *Cincinnati* case, is under a duty to defend upon receipt of "actual notice" that a suit has been filed.

In this case, however, in a 2 to 1 decision, the Appellate Court concluded that the *Cincinnati* decision applies only to tenders of defense, but does not apply to the duty of an insured to comply with notice obligations of a policy. According to the Court, the notice conditions of the policy must be followed, even if the insurer has "actual notice" of a suit.

This decision appears to conflict with the decision by the Supreme Court in *Cincinnati Insurance Company*, and the Appellate Court suggested that the Illinois Supreme Court grant leave to appeal to clarify the issue. Until the Supreme Court addresses the issue, an insured should assume that it is required to comply with all written notice obligations, even if the insurer has actual notice of a suit. Conversely, insurers should insist on full compliance with all notice conditions of their policies notwithstanding actual notice of a suit.

### **Employer Has Right to Waive Its Open Workers' Compensation Lien and Extinguish Liability After Trial Judgment**

In the case of *Baltzell v. R&R Trucking Co., et al*, the Federal Seventh Circuit Court affirmed the long-standing law in Illinois that an employer can waive its workers' compensation lien following an adverse trial judgment against the employer. *Baltzell*, 554 F.3d 1124 (7<sup>th</sup> Cir. 2009). The Court also held that this right to "waive and walk" was appropriate even when the employer's workers' compensation lien was not

yet final because it had an obligation to pay ongoing and/or future workers' compensation benefits.

The jury in *Baltzell* returned a verdict in favor of the plaintiffs, husband and wife, in the amount of \$13,980,120, of which \$11,980,120 was for the husband's personal injury claim and the remaining amount was for the wife's loss of consortium claim. The jury found the direct defendants 70% at fault and the employer, The Ensign-Bickford Co., 30% at fault. Ensign moved to waive its workers' compensation lien, which totaled approximately \$900,000 at the time of trial.

The federal district trial court denied the motion, reasoning that the employer had a continuing obligation to pay ongoing workers' compensation benefits and could not take advantage of the 1997 Illinois Supreme Court decision in *LaFever v. Kemlite Co.*, 706 N.E.2d 441 (Ill. 1998), which first allowed this "waive and walk" practice by an employer at any stage of the civil case proceedings, including post trial judgment.

The Seventh Circuit Court overturned the lower court and held that the right to waive a lien and thereby extinguish any further civil liability consistent with *Kotecki* applied equally to instances where an employer's workers' compensation obligation and corresponding lien rights involve future workers' compensation benefits yet to be paid out.

The Court referenced two Illinois appellate court decisions – the Illinois Supreme Court has yet to rule on the issue – that have similarly held that an employer can waive its lien in a post-trial motion, despite the fact that the total workers' compensation obligation had yet to be determined

Post trial, the employer in *Baltzell* submitted an estimate of future workers' compensation obligations totaling slightly over \$3 million which was not challenged by the other parties and was adopted by the court. Its combined lien (current & projected) was slightly under the \$4.19 million accorded by the jury to the employer.

On a separate issue, the Court held that although the direct defendants would be entitled to a set-off from the judgment by the amount of workers' compensation benefits already received by the plaintiff employee, there could be no current set-off for yet to be determined future workers' compensation benefits unless the parties so stipulated as to the future obligation. Accordingly, the court suggested (but did not instruct) the parties to consider the approach adopted by an Illinois Appellate court in *Pekin Ins. Co. v. Hiera*, 540 N.E.2d 1236 (Ill App. 2005) where the parties agreed that any future workers' compensation benefits received by the plaintiffs would be held in trust and distributed to the defendants consistent with the defendants' pro rata liability.

**Practice Tip:** Several practical considerations are raised by the *Baltzell* case. First, why did the employer not waive its lien in advance of trial and avoid the considerable litigation expense of proceeding through a lengthy trial? It must have presumed its share of liability would be substantially less. Second, what if the parties had not stipulated to the projected future workers' compensation obligation? Would a contested hearing before the federal trial judge on that issue have become necessary and how equipped would a federal judge to make a finding on a potentially complex combination of workers' compensation elements?

It ultimately is to both the employer's and plaintiff's advantage to try to agree upon as low as possible projected future workers' compensation payout as might be accepted by the direct defendants and court.

**Indiana Supreme Court Holds that Wrongful Death Action Based on Products Liability Claim Must Comply With Wrongful Death Act Statute of Limitations.**

The Indiana Supreme Court, in *Technisand, Inc. v. Jessie Melton, Personal Representative of the Estate of Patty Melton, Deceased*, 898 N.E.2d 303 (Ind. 2008), held that where a wrongful-death action is based on a products liability claim, the statute of limitations that applies is the Wrongful Death Act

("WDA") limitations period rather than the limitations period that applies to product liability claims.

Patty Melton was diagnosed with chronic myeloid leukemia in December 2001 and died on July 25, 2002. Until December of 2001, she worked as an assembler and inspector for Keihin IPT Manufacturing, Inc. ("KIPT"). In July 2003, KIPT provided Jessie's counsel with a letter from KIPT and a Material Safety Data Sheet for resin-coated sand made by Technisand. The letter stated that Patty might have been exposed to the resin-coated sand which could create formaldehyde fumes and that formaldehyde was a carcinogen.

Jessie Melton, Patty's husband, filed suit against KIPT and another company in October 2003, and added other companies in April 2004. Technisand had not been sued at this point. Jessie's counsel received a letter from Patty's doctor on January 12, 2005 which disclosed that formaldehyde exposure "may have placed Patty at a greater risk for leukemia." On February 16, 2005, the trial court granted leave to add Technisand as a defendant.

Technisand raised a statute of limitations defense in its answer and later filed for summary judgment, arguing that the Wrongful Death Act required Jessie's claim be brought within two years of Patty's death. The trial court denied the motion for summary judgment. The Court of Appeals affirmed, holding that the Indiana Products Liability Act ("PLA") (IC §34-20-3-1(b)(1) (2004)), which included a longer limitations period, not the Wrongful Death Act, provided the relevant limitations period for Jessie to file a claim against Technisand.

The Supreme Court found that the injuries forming the basis for the substantive tort claim, i.e., products liability, caused Patty's death. However, her products liability claim against Technisand terminated at her death and only the Wrongful Death Act claim survived. The Wrongful Death Act requires that a wrongful death action be commenced within two years of the decedent's date

of death. Jessie conceded that he did not bring suit against Techisand within two years of Patty's death. The Indiana Supreme Court held Jessie could not use the Products Liability Act statute of limitations as an alternative to the statute of limitations contained in the Wrongful Death Act and concluded that the claim against Technisand was not timely filed.

**Practice Tip:** In defending a wrongful death claim arising from an underlying products liability claim in Indiana, the defendant and its insurer should confirm that the action was filed within two (2) years of the decedent's death and should move to dismiss it if was not.

### **Illinois Appellate Court Holds That Property Owner Entitled To Summary Judgment In Slip And Fall Case Where Plaintiff Cannot Establish Source Of Moisture On Floor**

In *Richardson v. Bond Drug Company of Illinois d/b/a Walgreens*, 901 N.E.2d 973 (1<sup>st</sup> Dist. 2009), the Illinois Appellate Court upheld summary judgment for the Defendant retailer in a slip and fall case, holding that: (1) Plaintiff failed to show with any reasonable probability that liquid was on the floor prior to his fall; and (2) Plaintiff failed to establish sufficient evidence of a causal nexus between his injuries and Defendant's conduct.

Plaintiff testified during his deposition that he assumed that the floor was wet, since he noticed that his clothes were wet after his fall. However, he did not know the color, size, length, or texture of the substance that caused him to fall. The Walgreens store manager acknowledged that Plaintiff's knees were wet, but stated that she did not notice any liquid on the floor before Plaintiff's fall. She further noted that it was snowing lightly that day and that she assumed Plaintiff's shoes were slippery because it was wet outside.

**Practice Tip:** This case could be used in support of a motion for summary judgment in a slip and fall case where the plaintiff fails to establish that the defendant had notice of a condition that caused the floor to be wet. This case is consistent with the seminal case of *Kimbrough v. Jewel Co.*, 416 N.E. 328 (1st Dist.

1981), which held that it was not enough for the customer to show that she fell, but that the customer must go further and prove that some condition caused the fall and said condition was caused by the storeowner.

### **The Condominium Property Act Allows Plaintiff To Bring Suit Against A Condominium Association Prior To The Election Of Its Initial Board of Directors**

The Illinois First District Appellate Court in *Glickman v. Teglia*, No. 1-08-0392 (1<sup>st</sup> Dist. 2009), ruled in favor of a woman who sued her condominium Association (the Association) for injuries sustained in a slip and fall that occurred prior to the election of the Association's board of directors.

Plaintiff, Bridgette Glickman, slipped and fell fracturing her ankle in a common stairwell of her condominium building. The common elements of the building, including the subject stairwell, were maintained by the Association. Ms. Glickman filed a negligence action against the developer of the building, the designer of the building, the contracted snow and ice removal service, and the Association. In her complaint, Ms. Glickman alleged that the building's down spouts, gutters, and drainpipes were negligently designed and that the Association failed to properly maintain the premises, failed to warn residents of the ice in the common areas, and failed to safely secure the common areas where the ice was located.

The Association recorded its declarations and by-laws on July 18, 2003, and it was incorporated on February 20, 2004. The developer was named as a director of the Association, and was to serve in this capacity until the election of the board of directors (board) at the Association's first annual meeting. The Association elected its initial board on March 6, 2005.

In response to the complaint, the Association filed a 2-619 Motion to Dismiss, alleging that any duty it owed to its residents did not arise until the initial

board was elected on March 6, 2005. The Trial Court granted the Motion to Dismiss and Ms. Glickman appealed.

The Appellate Court held that the Association, through the developer, owed a duty to Ms. Glickman to maintain the common areas of the building prior to the election of the Board of Directors. The Court found that by statute, prior to the election of the initial Board, the developer acts in the capacity of the Board. Thus, the developer is charged with holding and performing the duties of the Association on behalf of the Association, and it is the Association that owes a duty to safely maintain the common areas of the building to Ms. Glickman and the other residents from the date of its creation on July 18, 2003.

**Practice Tip:** This case effectively shifts a condominium developer's liability for potential premises claims based on property maintenance of common areas to the condominium Association once the condominium Association records its declaration and by-laws.

### **Medicare Set Asides In The General Liability Setting**

For those involved in the handling of general litigation and tort cases, two new acronyms will soon become part of our lexicon. These are "MSA" and "CMS". The first is Medicare Set Asides and the second is the Central Management Service office, which administers the set-asides. On October 1, 2009, CMS will commence enforcement of federal legislation commonly known as the Medicare Secondary Payer Act with respect to general litigation and tort claim settlements. Those familiar with the administration of workers' compensation claims are likely familiar with this act. Our office has handled dozens of MSA claims in the workers' compensation setting over the past several years.

Basically, Medicare cannot make payments for medical benefits if payment has been made or is reasonably expected to be made under liability policies or plans. (Note, this includes "self-

insurance" plans as well) The law provides that Medicare has a priority lien recovery right for amounts paid against both payers and receivers of third-party payments. This includes not only actual parties to litigation but providers, insurers and attorneys as well. The present focus of the regulations appears to be primarily on reporting cases and/or claims likely to fall within its recovery jurisdiction to CMS.

There are several categories of cases which will be the subject of these reports. These include at least the following:

- If the recipient (typically a plaintiff) is 62 years of age or older and is expected to receive Medicare benefits within 30 months.
- If the claimant is already receiving social security benefits and has an expectation of receiving Medicare benefits within 24 months, irrespective of age.
- If the person is 65 years of age or older, and is already receiving Medicare benefits, reporting must be done immediately.

However, lest anyone feel that this is merely a matter of reporting the existence of such claims, please do not become too complacent. If, as expected, regulations are implemented that are similar to those adopted for workers' compensation cases, this will involve substantial paperwork, substantial waiting periods, and will likely increase the difficulty in resolving claims subject to the reporting requirement. Medicare anticipates recovering or saving millions of dollars, and the present economy suggests that there will undoubtedly be a substantial effort at enforcement.

There are presently no regulations in place for these procedures and we therefore cannot provide concrete analysis and recommendations. However, we wish to make very certain that all of our clients are aware of these forthcoming requirements. The penalties for non-reporting are very severe—up to \$1,000 per day for each claim that is not reported.

In addition, there could well be repayment liability for anyone who issues or receives any part of a settlement subject to the statutory requirements. We will keep our clients up to date on both proposed and

final regulations on this matter as they become available.



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| Corporate/LLC/Partnership Organization and Governance | Medical Malpractice    |
| Construction                                          | Professional Liability |
| Employment and Labor                                  | Real Estate            |
| Insurance Coverage                                    | Workers' Compensation  |

*The attorneys at Bryce Downey & Lenkov constantly strive to keep you updated regarding the latest developments in Insurance and Tort law in Illinois, Indiana and other states. If you would like more information on any of the topics discussed above or have any questions regarding these issues, please contact Storrs W. Downey ([sdowney@brycedowney.com](mailto:sdowney@brycedowney.com)) or Terrence J. Madden ([tmadden@brycedowney.com](mailto:tmadden@brycedowney.com)) at 312.377.1501 or any member of our General Liability team. © Copyright 2009 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*

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