

# Insurance/Tort Newsletter

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**"Selective Tender" Rule Applies to Excess Insurance**

As recognized in many recent Illinois Appellate and Supreme Court decisions, under Illinois law, an insured is permitted to make a "selective tender" of its defense to a primary insurer of its choosing, if the insured is covered under more than one policy.

Until recently, no appellate court decision had addressed the issue of whether the "selective tender" rule applies not only to primary insurance policies, but also to excess insurance policies. In *North River Insurance Company v. Grinnell Mutual Reinsurance Company*, 369 Ill.App.3d 563, 860 N.E.2d 460 (1<sup>st</sup> Dist. 2006), the Illinois Appellate Court held that the selective tender rule applies to excess insurers as well as primary insurers.

The facts of the *North River* case were that Kajima Construction Services was the general contractor for a construction project in Bolingbrook, Illinois. Kajima had a subcontract with Shelco Steel Works and Shelco, in turn, subcontracted its obligations to American Miscellaneous Steel (AMS). Kajima was an additional insured under the CGL policies of both subcontractors. When a suit was filed against Kajima for personal injuries sustained on the project by an employee of AMS, Kajima tendered its defense to the insurers of both of the subcontractors and each of the insurers agreed to assume the defense of Kajima.

As the case progressed, the primary insurers advised Kajima that the limits of their primary policies would not be sufficient to settle the case and the insurers suggested that Kajima's own primary insurer, Tokio, contribute to the settlement. Tokio refused to contribute towards the settlement, because its coverage had not been invoked by Kajima. Eventually, the case was settled for a total of \$4,000,000.00, \$1,000,000.00 from each of the subcontractor's CGL policies and \$2,000,000.00 from Shelco's umbrella policy. Following the settlement, the umbrella insurer filed a declaratory judgment action, seeking a finding that it was entitled to recover from Kajima's primary carrier up to the limits of its policy. In a prior related case, the appellate court held that Kajima was required to exhaust all of its primary insurance, including its own, before its excess insurers were obligated to contribute towards the settlement.

In this case, the Appellate Court held that after the primary coverage had been exhausted, Tokio was entitled to selectively target the then available excess coverage. Accordingly, Kajima's own excess insurer was not obligated to contribute towards the excess portion of the settlement.

While there are still issues remaining regarding application of the "selective tender" doctrine, the basic ground rules have now been firmly established. They are: (1) the insured, rather than its insurer, has the ability to selectively target or tender its defense to the primary insurers of its choosing; (2) even where a "selective" or "targeted" tender of defense has been made to certain primary insurers, the insured is still required to exhaust all of its primary coverage, including that coverage not targeted, before any excess insurance applies; and (3) where all primary coverage has been exhausted, the insured has the right to "target" what excess coverage will apply in excess of the primary coverage.

### Unsolicited Fax Claim Covered By CGL Policy As An “Advertising Injury”

Given the explosion of cases involving the Telephone Consumer Protection Act (TCPA), it was only a matter of time before a coverage issue came before the Supreme Court of Illinois. In *Valley Forge Insurance Co., et. al., v. Swiderski Electronics, Inc.*, 223 Ill.2d 352, 860 N.E.2d 307 (2006), the Illinois Supreme Court was asked to decide whether policies issued by Valley and Continental Casualty (an excess carrier) provided coverage to Swiderski for alleged violations of the TCPA.

In an underlying suit filed by Ernie Rizzo (on behalf of an uncertified class), the defendant, Swiderski, was accused of violating the TCPA by sending unsolicited faxes for services and products. Swiderski tendered the suit to its primary and excess carriers (Valley and Continental) and both filed declaratory judgments seeking an order that they had no duty to defend the suit. Both policies provided coverage against any suit seeking damages for “personal and advertising injury.” Said injuries could arise out of “oral or written publication, in any manner, of material that violates a person’s right of privacy.” Both policies also covered suits seeking damages because of “property damage.” Rizzo’s suit claimed that the plaintiffs sustained property damage because of the loss of toner and paper with each fax transmission. Defendant Swiderski claimed that the claims were covered by its insurance because they alleged property damage and also alleged an invasion of privacy of the persons who received unsolicited fax transmissions.

The trial court decided that there was a duty to defend under the “advertising injury” portion of the policy and did not reach the “property damage” issue. The appellate court affirmed on that basis. On remand (in the declaratory judgment), the case went to trial and Swiderski was successful. The insurers were ordered to pay defense costs incurred through trial and were also ordered to advance future defense costs pending the outcome of an appeal.

The Supreme Court was asked to consider both provisions of the policy, but never reached the “property damage” issue. The Court ruled that there was a duty to defend under the “advertising injury” provision of the policy because of the allegations in the underlying complaint of violations of the right to privacy. The Court observed that its decision was consistent with the majority of federal cases applying coverage for TCPA fax-ad claims and specifically declined to follow *American States* and *Erie*, prior Illinois cases that had declined to provide such coverage.

### Illinois Supreme Court Changes Law Regarding Coverage For Contribution Claims Against Employer Under a CGL Policy

As summarized in our January, 2007 *Insurance Coverage News Flash*, in *Virginia Surety Company v. Northern Insurance of New York*, \_\_N.E.2d\_\_, 2007 WL 121161 (Ill. January 19, 2007)), the Illinois Supreme Court held that contribution claims against employers of injured parties should not be covered by a CGL policy, even where the employer had voluntarily agreed to waive its *Kotecki* defense, and that contribution claims should be properly covered by the employer’s liability policy. For a further discussion of this decision, please see our January, 2007 *Insurance Coverage News Flash*.

### Open and Obvious Danger Of Product Not Enough To Avoid Liability

A three year old twin, left alone by its mother, died after a fire was started by the other twin using a utility lighter. The lighter was manufactured by Tokai and distributed by Scripto. The mother sued the joint company, Scripto-Tokai, alleging strict liability and negligence. In *Calles v. Scripto-Tokai*, \_\_N.E.2d\_\_, 2007 WL 495315 (Ill. February 16, 2007), the Illinois Supreme Court was asked to decide whether the open and obvious nature of the alleged defect precluded a jury from finding in favor of the plaintiff. The trial court had granted summary judgment to the defense, but the appellate court had reversed.

Under Illinois law, in a defective design product liability case, a plaintiff can establish liability in two ways, under the “consumer expectations” test or under the “risk-utility” test. In this case, the defendant contended that where a product functions as intended and where the alleged risk is open and obvious, only the “consumer expectations” test should apply. The Illinois Supreme Court refused to adopt such a rule.

On the strict liability claim, the Supreme Court found that despite the lighter functioning as it was designed, there was evidence presented that a child-proof design could have been used and that liability could be found under a “risk-utility” test. As to the negligence claim, the Court held that the open and obvious danger of the product was only one factor to consider and would not, in and of itself, negate any common law duty to exercise ordinary care in the design, manufacture and distribution of the product. The Supreme Court concluded that the case involved disputed questions of fact and that summary judgment was not proper. The case was remanded to the trial court for a trial.

### Racial Motivations In Jury Selection Under Close Scrutiny

The *Batson v. Kentucky* decision of the United States Supreme Court in 1986 set a very strict standard for attorneys to overcome when dismissing jurors in what appears to be a racially-motivated situation. Under that case, if a party suspects that such activity is occurring, and a judge sees fit, a three-part hearing is conducted by the court to determine: 1) a *prima facie* case for purposeful discrimination; 2) race-neutral reasons for the exclusions; and 3) findings of the court.

In *Mack and Furlough v. Anderson, et. al.*, 861 N.E.2d 280 (1<sup>st</sup> Dist. 2006), the Illinois First District Appellate Court was asked to review the *Batson* hearing conducted in a trial in Cook County. The case involved a medical malpractice death claim against multiple defendants. During jury selection, Defendants’ attorneys excused five African-American jurors, which raised flags in the mind of Plaintiffs’ attorney. He made a motion pursuant to *Batson* and a hearing was conducted. Most of the race-neutral reasons stated by defense counsel for excusing the jurors had to do with their conduct during questioning on damages, such as by nodding in apparent agreement during questioning by plaintiff’s counsel. One juror was excused for her “litigiousness,” having filed a workers’ compensation claim. The trial judge found that there was not a *Batson* violation, because viable race neutral reasons were given for excusing the jurors, and denied Plaintiffs’ motion. The case went to verdict and resulted in a not guilty finding against all defendants.

Plaintiffs appealed, claiming that the dismissal of three of the five jurors violated *Batson*. Two were excused under the “plaintiff-friendly conduct” theory and one for her prior filing of a worker’s compensation claim. The appellate court held that excusing the two jurors for their “nodding” at questions on damages was “pretextual and a denial of equal protection” because white jurors who also nodded in apparent agreement with the questions of plaintiff’s counsel were not excluded. The court also held that simply because the third juror had filed a prior suit, she was not litigious and was not properly excluded on this basis. The case was therefore reversed and remanded for a new trial.

Justice Murphy dissented from the majority opinion and specifically pointed-out that unless you are present during the *voir dire* process, it is impossible to note all the subtleties of what a juror did when questioned and only the most obvious reactions would be noted in a court reporter’s transcript of the proceedings. Justice Murphy felt that this “cold record” could not overcome the determination made by the trial court and thus, would not overturn the trial court’s ruling.

This decision emphasizes the importance of defense counsel documenting race neutral reasons for using peremptory challenges to excuse African-American or other minority jurors. Failure to do so may result in the reversal of a favorable jury verdict.

### Indiana Supreme Court Holds That Employer Of Injured Party Not Liable For Spoliation Of Evidence

An employee of Midwest Material Services was killed when an electric pump he was working with exploded. After the accident, Midwest Material Services discarded the pump, even though it was instructed not to do so by a representative of Indiana OSHA. The estate of the deceased worker filed an action against the company that had designed and manufactured the pump and also against Midwest Material Services for negligent and intentional spoliation of evidence. Midwest moved to dismiss the spoliation of evidence claim, contending that the Workers' Compensation Act provided the exclusive remedy for claims by the deceased worker against an employer. The trial court denied the motion to dismiss, but certified issue for interlocutory appeal to the appellate court, which affirmed the trial court's decision. In *Glotzbach v. Froman*, 854 N.E.2d 337 (2006), the Indiana Supreme Court held that the exclusive remedy bar of the Workers' Compensation Act precluded claims against an employer for either intentional or negligent spoliation of evidence. In reaching its decision, the Indiana Supreme Court found that there was no common law duty on an employer to preserve potential evidence that might benefit an injured employee in an action against a third-party.

### Employer Potentially Liable For Rape Of Employee By Co-Employee

Georgia Erickson worked as a payroll and benefits specialist at the Oregon Correctional Center of the Wisconsin Correctional Center System. The facility was an all-male minimum security prison. The prison permitted some inmates, who were determined to be "low risk", to work in the front office of the facility to perform janitorial tasks. John Spicer, considered to be a "low risk" inmate, was performing janitorial tasks in the front office one evening while Ms. Erickson was working. While Ms. Erickson was alone in the front office with Ms. Spicer, she became uncomfortable because of the way that Mr. Spicer was looking at her. Later that evening, Ms. Erickson met with management employees at a local bar after work to celebrate the holidays. She advised the group of what she thought was Mr. Spicer's odd behavior and stated that she was "scared and really freaked" by the incident. One week later, while working with Mr. Spicer in the front office again, Ms. Erickson was brutally raped. She brought a Title VII action against the Department of Corrections for sexual harassment.

In order to recover for sexual harassment by co-workers, an employer is held to a negligence standard. The employer can be found liable only if it had a reasonable basis to believe that sexual harassment might occur. The Department of Corrections filed a motion for judgment, arguing that Ms. Erickson's advice that she was "scared and really freaked" by Mr. Spicer's prior conduct was not sufficient notice to require it to take corrective action. The trial court denied that motion and the Seventh Circuit Court of Appeals affirmed in *Erickson v. Wisconsin Department of Corrections*, 469 F.3d 600 (7<sup>th</sup> Cir. 2006). The Appellate Court concluded that the employer was not entitled to judgment in its favor because a jury could reasonably conclude that the employer had enough information available to think that there was some probability that the Plaintiff was being sexually harassed, but took no remedial action as was required by Title VII.

### Trial Judge Committed Reversible Error By Refusing To Give Collateral Source Jury Instruction

A recent Illinois appellate court decision addressed the issue of whether a collateral source instruction should have been given to a jury. In *Baraniak v. Kurby*, \_\_\_ N.E.2d \_\_\_, 2007 WL 403832 (Ill. February 6, 2007), the Plaintiff was rear-ended by defendant and sustained injuries resulting in medical payments of over \$51,000. At the time the attorneys were presenting jury instructions to the trial judge, Plaintiff requested that Illinois Pattern Instruction 30.22 (collateral source) be given to the jury, instructing them not to consider what benefits Plaintiff may have received from other sources. The judge de-

clined to give the instruction, finding that it was not warranted because there was no evidence of payment of expenses by other parties.

The jury returned not one, but two questions to the court, asking whether the Plaintiff or her insurance company had paid for the medical bills. The trial judge continued to decline to give the instruction, telling the jurors only that they "have received all of the evidence and instructions in the case." The jury found in favor of the plaintiff, but awarded only \$8,201.50 in expenses. Plaintiff appealed, claiming that the failure to give IPI 30.22 made a difference in the award and explained why the jury awarded only a fraction of the proven medical expenses.

The appellate court found that the initial failure to give instruction 30.22 was not an abuse of discretion, but further concluded that the continued failure to give the collateral source instruction after the jury asked two times who paid the medical expenses was prejudicial error, warranting a new trial.

### **Illinois Senate Takes First Step To Amend The Joint And Several Liability Statute**

Section 2-1117 of the Illinois Code of Civil Procedure establishes when tort defendants are jointly and severally liable and when they are only severally liable. The statute provides that a defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff and any other third-party defendant except the plaintiff's employer shall be severally liable. A defendant whose fault exceeds 25% is jointly and severally liable, meaning that it can be held liable for the entire amount of the verdict.

As discussed in our November, 2006 *Insurance/Tort Newsletter*, there is a split in the Illinois Appellate Courts as to how this statute should be applied where some of the defendants have settled with the plaintiff prior to trial. Some appellate courts have held that the fault of defendants who have settled should not be considered in determining whether remaining defendants are jointly liable or jointly and severally liable. Other appellate courts have held that even the fault of settling defendants should be considered in making that determination.

Senate Bill 1296 would resolve this conflict. The bill provides that the apportionment of fault under the statute only applies to parties still remaining in the case at the time of the final determination by the trier of fact and does not apply to parties who have settled with the plaintiff before trial. Although the bill has passed in the Senate, in order to become law, it must still pass in the Illinois House of Representatives and be signed by the governor.

If enacted, the bill would have a significant impact on certain cases. For example, in a two-defendant case, if a tortfeasor who is 95% responsible for the plaintiff's injury settled with the plaintiff prior to trial for the sum of \$1,000,000.00, and if the case proceeded to trial against the non-settling defendant, that defendant would face liability for the entire amount of the verdict. If the jury returned a verdict for \$3,000,000.00, the non-settling defendant would be liable for the entire amount, whereas under the current statute, the non-settling defendant would be responsible for only 5% of the verdict. However, even under the proposed revised statute, the non-settling defendant would still be entitled to an offset for amounts paid in settlement by the other defendant. Nevertheless, the bill would work a profound change in some tort cases. The bill would have no impact on medical malpractice cases, where defendants are always jointly and severally liable.

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