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Illinois Supreme Court Clarifies When An Amended Complaint Will Relate Back Under The Statute of Limitations

Frequently, after a complaint has been filed and the statute of limitations has expired, plaintiffs' attorneys will file an amended complaint, clarifying or adding new theories of liability to the case. In *Porter v. Decatur Memorial Hospital*, No.104441 (January 25, 2008), the Illinois Supreme Court established a new test to determine when an amended pleading would relate back to the initial filing for purposes of the statute of limitations. According to the Supreme Court's analysis, the allegations of a new claim will relate back to the date that the original complaint was filed if the new allegations, as compared with the timely filed allegations, show that the events alleged were close in time and subject matter and lead to the same injury.

The original Complaint in *Porter* charged Decatur Memorial Hospital with liability based on the alleged negligence of hospital personnel in failing to follow the orders of a staff doctor for frequent neurological status checks of an accident victim. After the limitations period expired, plaintiff's attorney filed an amended complaint that added a claim against the hospital based upon the alleged negligence of a radiologist in misinterpreting a CT scan. The hospital moved to dismiss the amended complaint, arguing that the new claim was time barred and did not relate back to the filing of the original complaint because it involved different facts. The trial court agreed and dismissed the amended complaint. A divided Appellate Court affirmed that decision, but the Supreme Court reversed. The Supreme Court concluded that even though the amended complaint did involve facts that were new and different from the original claim against the hospital, the new facts-the alleged negligence of the radiologist-were close in time and subject matter to the facts and injury pleaded in the original complaint and therefore related back to the original filing for statute of limitations purposes.

The *Porter* analysis applies only in situations where new allegations are being made against a defendant who was timely sued. The decision does not involve the addition of a new defendant after the expiration of the statute of limitations.

Illinois Appellate Court Holds That A Lower Level Excess Insurer May Owe A Duty to Settle a Case to A Higher Level Excess Insurer

Central Illinois Public Services v. Agricultural Insurance Company, 5-06-0181 (January 14, 2008), is the first Illinois Appellate decision addressing the issue of whether excess insurers may owe duties to each other to settle a case. In *Central Illinois,* the Appellate Court for the Fifth District held that under certain circumstances, a lower level excess insurer may be under a duty to settle to a higher level excess insurer. In that case, the insured, Central Illinois Public Services, filed a declaratory judgment action against its primary and excess insurers to resolve issues arising from a multimillion dollar settlement with the plaintiff. Agricultural Insurance Company, the highest level excess insurer, filed a counterclaim against Great American Insurance Company, a lower level excess insurer, claiming that Great American did not exercise good faith in attempting to settle the claim within its excess limits, resulting in Agricultural having to contribute a larger portion of its excess policy towards an ultimate settlement than otherwise would have been necessary. The trial court dismissed the counterclaim, finding that the lower level excess carrier had no duty to the higher level carrier.

In addressing the issue of whether an excess insurer may be under a duty to a higher level excess insurer to settle a case, the appellate court noted that the duty imposed upon primary insurers to exercise good faith in attempting to settle a case is based upon the control of the primary insurer over the litigation. In *Central Illinois*, according to the allegations of the counterclaim of Agricultural Insurance, Great American had taken control of the litigation after the lower level primary and excess insurers had contributed their limits towards prior settlements with certain of the plaintiffs. Because Great American was then in the position of a primary insurer, having control of the litigation, the appellate court held that an issue of fact was presented as to whether it had exercised good faith in settlement negotiations. The court therefore reversed the dismissal of the counterclaim and remanded for further proceedings.

The appellate court also held that the duty of a lower excess carrier to exercise good faith was not limited to those situations where the lower level excess insurer could have settled the case within its own policy limits. The court stated that the complaint at issue raised a fact question as to whether the lower level insurer failed to participate in settlement negotiations in a meaningful way, thereby exposing the higher level excess insurer to greater damages.

Although this decision establishes a new duty on behalf of lower level excess insurers to higher level insurers, according to the court's rationale that duty will arise only where the lower level excess insurer has assumed the defense of the underlying suit and is thus in a position comparable to that of a primary insurer.

Indiana Collateral Source Rule

In a very recent decision, the Indiana Court of Appeals decided the issue of what amount of medical damages is properly submitted as evidence to a jury. *Butler v. Indiana Department of Insurance, et. al.,* 875 N.E.2d 235 (Ind. App. 2007). In this case, Plaintiff argued that the proper amount of medical bills to be submitted to a jury as evidence of damages would be the amount "billed" rather than the amount paid. Obviously, with health care insurance reductions, co-pays and write-offs, there can often be a great disparity between the amount billed for a given service and the final amount that is paid. Defendant took the opposite position and argued that the amount paid would be the appropriate amount to submit into evidence.

In *Butler*, a husband filed a medical malpractice suit for his deceased wife, who had been misdiagnosed. She had cervical cancer which was missed and could not be treated effectively once it was finally diagnosed. Plaintiff alleged that the failure to properly diagnose and treat resulted in many surgical procedures, emotional distress and great medical expenses, as well as her death at age 37.

Plaintiff incurred a total of $410,062.46 in medical bills, but only $122,161.18 was paid out to the various providers. The majority of payments came from Medicare and a total of $287,901.28 was written off as "unpaid" by the providers. At trial, the judge held that the estate could not seek to recover the amounts written-off by the providers and precluded these amounts from being introduced into evidence. It did, however, allow introduction of the Medicare/Medicaid write-off amounts, over the objection of the Plaintiff. The Estate appealed these decisions.

The Appellate court held that it was proper to exclude the aggregate write-off amount and that the introduction of the Medicaid/Medicare write-off amounts was harmless error. Applying the Indiana Collateral Source Rule, the Court cautioned against "windfall" or "double" recoveries based upon artificially inflated numbers that were not representative of what was really paid. Because the amount of the write-offs would never be paid by anyone, those amounts were properly excluded from evidence as damages to be considered by the jury.

In Illinois, if medical expenses are paid by a private insurance company, plaintiff may submit evidence of the amount of the original bills, but must also submit evidence that the amount was reasonable. The defendant may produce counter evidence. However, where bills are paid by Medicare or Medicaid, only the amount actually paid is recoverable and plaintiff may not submit evidence of the original amount of bills that were discounted by Medicare or Medicaid.

This topic is under close scrutiny in many states. BryceDowney, LLC will continue to follow this topic in Indiana and Illinois as more cases are likely to press the issue for both sides' positions.

Prejudgment Interest: Indiana vs. Illinois

Indiana but not Illinois permits prejudgment interest in personal injury actions.

In Indiana, the prejudgment interest statute applies to "any civil action arising out of tortious conduct". Ind. Code Ann. §34-51-4-7 (West Supp. 1998). The rate must be set no lower than 6% and no higher than 10% simple interest. Such interest is not available in cases against the State or political subdivisions thereof. Interest begins to run as of the later of: 1) 15 months after the accrual of the action; b) six months after suit is filed; or c) 180 days after a medical review panel is formed to review the claim. In any case, the period of assessment cannot be greater than 48 months, regardless of which accrual date applies.

By statute in Indiana, offers of judgment and demands for settlement may limit interest. First, no interest may be awarded if the defendant has made an offer that was rejected of at least two-thirds of the judgment. Second, if the plaintiff fails to make a demand exceeding the judgment by no more than one-third, no interest will be awarded. These restrictions are intended to promote effective settlement of cases prior to trial and to reward those parties who attempt to settle the case in good faith prior to trial.

Also important to note is the fact that Indiana will not award interest on any portion of an award that is attributed to punitive damages. From our experience, few plaintiffs' attorney attempt to seek such interest, and it remains within the trial judges discretion whether to award same.

Illinois statutes permit an award of prejudgment interest in contract but not tort lawsuits.

There is current legislation being circulated in Illinois that seeks to bring Illinois in line with what Indiana currently provides for tort cases. The Bill is only in the early stages of drafting, however, and has not been brought to a vote in either the House or Senate. BryceDowney will continually monitor the progress of this legislation and update its clients on any changes to current law.

Lienholder Stand Tall and Protect Itself

We commonly see judges and mediators who attempt to strong arm the workers' compensation lienholder, whether represented by us or another law firm. Such an example occurred in the case of *Smith v. Louis Joliet Shoppingtown, LP,* 377 Ill.App.3d 5, 877 N.E.2d 789 (1st Dist. 2007).

The plaintiff in that case settled her slip and fall injury claim with the direct defendant for $110,000 and then that judge adjudicated the workers' compensation lien recovery at $30,000 despite the lien totaling $143,000. The parties disputed exactly how this came about, but the lienholder attorney was not present when the judge made this determination. (As an aside, we strongly recommend that a lienholder's attorney be present for all court and mediation settlement conferences to avoid such a circumstance).

On appeal, the First District court overturned the trial judge's adjudication and held that the lienholder was entitled to its full 75% statutory lien recovery on the full settlement proceeds. The court noted that the statutory protection of Section 5(b) of the Illinois Workers' Compensation Act ensured that a trial judge could not adjudicate or receive a lienholder's lien without its consent.

The *Smith* decision reinforces several points: (1) A trial judge or mediator cannot force a lienholder, any more than a plaintiff or defendant, to accept a certain amount in settlement of its lien; (2) the attorney or representative for the lienholder should be present for all settlement conferences; and (3) petitions to intervene with counsel representation can avoid the situation in *Smith* occurring if step 2 is also addressed.

Surveillance Usage Leads To Invasion Of Privacy Claim

Defense attorneys involved in personal injury suits or workers' compensation cases that involve claims for permanent injury or inability to work on a permanent basis often engage the use of a private investigator to perform surveillance on the Plaintiff. A recent Illinois Appellate case addressed the issue of whether the defendant could be sued under a theory of invasion of privacy for performing surveillance on a workers' compensation claimant. *Burns v. Masterbrand Cabinets, Inc., et. al.,* 369 Ill.App.3d 1006 (4th Dist. 2007) *app'l den.* 224 Ill.2d 572.

In this case, *Defendant*, Masterbrand Cabinets, hired a private surveillance company to investigate its employee's activities. The investigator sought entry into the employee's home under a false pretense that he was looking for a missing child. Once in the home, the investigator kept up the pretense, but was secretly videotaping the claimant with a hidden camera. The video, and the testimony of the investigator, was used at the workers' compensation trial as to the alleged physical limitations of the claimant.

The *claimant* filed a civil suit against the defendant and the investigation company, alleging that they both committed a tort of "intrusion upon seclusion" of another. The trial court dismissed the complaint, finding that such a tort was not viable. On appeal, however, the Illinois Fourth District Appellate Court recognized the validity of this tort, as had other Illinois Appellate Courts that had addressed the issue previously.

The elements *of* the claim are as follows: 1) an unauthorized intrusion or prying into the plaintiff's seclusion; 2) the seclusion must offensive or objectionable to a reasonable man; 3) the matter upon which the intrusion occurs must be private; and 4) the intrusion causes anguish and suffering. The Appellate Court, in this case, felt that the trial court erred in dismissing the complaint and remanded the case for further proceedings.

Obviously, *surveillance* is a critical and important tool used by Defendants to counter the claims of Plaintiffs. However, when the investigators cross the line, it subjects the defendant to additional litigation and liability for such action. Extreme caution must be exercised and clear instructions communicated for any surveillance.

BryceDowney is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations every day while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Memphis, Atlanta and an office soon to open in Minneapolis and attorneys licensed in multiple states, BryceDowney is able to serve its clients' needs with a regional concentration while maintaining a national practice.

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The attorneys at BryceDowney constantly strive to keep you updated regarding the latest developments in Tort and Insurance Coverage law in Illinois and Indiana . If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of Illinois and Indiana General Liability or Insurance Coverage law, please contact Storrs W. Downey at (312)377.1501 or sdowney@brycedowney.com, or any member of our General Liability Team. *© Copyright 2008 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*