

Insurance/Tort Newsletter

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No Release of Illinois Workers' Compensation Claim Without Commission Approval

The Illinois Appellate Court recently reinforced the well-established rule that any attempt to settle or extinguish an Illinois workers' compensation claim through any means other than submission to and approval by the Illinois Workers' Compensation Commission of an agreed to settlement shall not be valid or enforceable. *Maxit Inc. v. John and Kelley Van Cleve*, No. 2-06-1025 (Ill. App. 2d Dist. 8/22/07).

In *Maxit*, a truck driver sustained a back injury in a motor vehicle accident while in the course and scope of his employment for Maxit Inc. He had filed a workers' compensation claim and also a claim under his employer's underinsured motorist insurance policy. He later settled the under-insured motorist claim and as a part of the settlement agreed to a "release of claims". Thereafter, he sought to further pursue his workers' compensation claim, but Maxit brought a suit alleging that the settlement release extinguished the employee's claim for workers' compensation benefits.

The trial court granted Maxit's motion for summary judgment, but the appellate court overturned same and held the release was unenforceable to bar the ongoing workers' compensation claim. Without the formal approval of the employee's release of such a claim by the Workers' Compensation Commission, it was not extinguished. The court quoted the statutory language of the Workers' Compensation Act which provides there can be no waiver of any right to workers' compensation benefits "except after approval by the Commission".

Any attempted settlement or extinguishment of a workers' compensation claim, whether it be large or small, must come through the process of submission to and approval of an executed settlement contract by the Illinois Workers' Compensation Commission. This holds true for any attempted settlement of a workers' compensation claim between the employer and employee even with monetary consideration – regardless of the amount – that does not involve formal Commission approval of same. If an employer wants finality as to a claim, it should submit the settlement terms to the Commission for approval.

Duty to Defend Additional Insured Examined—When Additional Insured Coverage May Only Be Excess

In *State Auto Mutual Insurance Company v. Habitat Construction Company*, 2007 WL 2769209 (Ill. 1st Dist. September 24, 2007), the Appellate Court addressed two important issues regarding additional insured coverage: (1) what allegations are sufficient to trigger an insurer's duty to defend an additional insured; and (2) under what circumstances may the additional insured coverage be only excess coverage.

The case involved a typical additional insured scenario. Habitat was the general contractor on a project and Central Building And Preservation was a subcontractor. Central was required to add Habitat as an additional insured on its CGL policy with State Auto. The State Auto policy contained a blanket additional insured endorsement, which provided that "who is an insured" was amended to include any organization which the named insured was required to name as an

additional insured under the policy by a written contract or agreement. The endorsement also provided that the additional insured was covered only for liability arising out of the work of the named insured for the additional insured. The endorsement also provided that the coverage available to the additional insured would be excess over any other valid and collectible insurance available to the additional insured unless a contract specifically required that the insurance be non-contributory and/or primary.

An employee of Central was injured on the job and he sued Habitat. His complaint alleged that he was working on the premises when he was injured in furtherance of work of his employer, Central. He alleged various acts of negligence by Habitat as the general contractor. There were no specific allegations of any negligence by Central – not surprisingly since Central was not a defendant. Habitat tendered its defense to State Auto. State Auto denied the tender but filed a declaratory judgment action seeking a finding of no coverage. The trial court concluded that State Auto had no duty to defend Habitat since the complaint did not allege any negligence by the named insured. On appeal, the appellate court initially engaged in a summary of numerous cases involving the duty to defend issue. The court explained that in determining whether the allegations against an additional insured are sufficient to trigger the duty to defend, the court must first look to the language of the additional insured endorsement. The court noted that there are two types of endorsements that are commonly used. One simply provides coverage to the additional insured for liability arising out of the negligence of the named insured. A second, common type of additional insured endorsement adds exclusionary language, providing that the coverage available to the additional insured does not apply to liability resulting from the negligence of the additional insured itself.

In applying these endorsements, the appellate court explained that where a complaint alleges only negligence by the additional insured and does not allege any negligence by the named insured, there may be coverage under the broader or more expansive form of the additional insured endorsement, as long as there are allegations that the Plaintiff's injury was related to his employment with the named insured. On the other hand, if the complaint alleges only negligence by the additional insured, coverage would be excluded by the more narrow type of the additional insured endorsement, even if the claim arose out of the work of the named insured. This aspect of the court's decision means that to determine whether there is a duty to defend any particular case one must examine both the particular language of the additional insured endorsement and the allegations of the underlying personal injury complaint.

A second important aspect of the court's decision dealt with the issue of whether additional insured coverage is primary or excess coverage. The State Auto additional insured endorsement provided that it was excess coverage if there was other insurance available to the additional insured, unless a contract required that the State Auto policy be primary and non-contributory. The additional insured argued that the State Auto policy should be considered primary because it had made a selective or targeted tender of its defense to State Auto, but the appellate court held that the targeted tender rule applies only to primary policies and not to excess policies, because all primary policies must be exhausted before any excess policy can be reached. Therefore, if the State Auto policy would be considered only excess coverage, it would not be subject to a targeted defense. In order to resolve that issue, the court concluded that further proceedings were needed to determine if there was a contractual requirement that the State Auto policy be primary and non-contributory. It remanded the case for those further proceedings.

This is an extremely important issue because given the right additional insured language, the additional insured coverage may become only excess coverage unless there was a contractual requirement that the additional insured coverage be primary and non-contributory. While construction or other contracts frequently contain such a requirement, often they do not.

Update on Natural Accumulation Duties

Janine Judge-Zeit was an employee at the University of Chicago Hospitals and regularly parked in the adjacent parking garage facility. This garage was operated and managed by Interpark. Interpark contracted with Rick's Automotive for snow removal, despite the fact that the contract between the Hospital and Interpark did not require snow removal. On one day, when Ms. Zeit was arriving for work, she parked on the open fifth level of the garage. It was snowing at the time and an employee of Rick's had not yet finished plowing the top level. While walking to the elevator on that floor, Ms. Zeit slipped and fell, herniating a disc which led to the need for surgery.

Ms. Zeit filed suit against Interpark, alleging several theories of negligence. *Janine Judge-Zeit v. Interparking, Inc.*,

__ N.E.2d __, 2007 WL 2791696, (Ill. 1st Dist., September 26, 2007). Plaintiff argued that Interpark caused or exacerbated an unnatural accumulation of snow due to the fact that there were indentations on that level that would not be cleared by plowing. She also argued that Interpark breached their duty to her by not plowing the top level by the time she arrived for work. Finally, she argued that there was a contractually created duty to remove natural accumulations of snow under the various contracts applicable to the parking garage.

The trial court awarded summary judgment for the Defendant and denied Plaintiff's motion to amend the complaint. The Appellate Court upheld the entry of summary judgment by the trial court and specifically held: 1) although common law imposed a duty on a landowner to provide a safe means of egress from property, this duty did not impose an obligation to plow the property; 2) neither the Hospital/Interpark or Interpark/Rick's contract imposed a duty on Interpark to plow the facility due to the lack of express language; 3) it was irrelevant whether snow accumulated in the depressions because Plaintiff did not fall there; 4) Plaintiff failed to establish that an unnatural accumulation of snow existed.

Illinois Appellate Court Examines Constitutionally-Protected Speech

When Thomas Rose was fired as the Publisher and CEO of the Jerusalem Post, he was not missed by the editor-in-chief, Stephens who sent the following e-mail to his editorial staff:

“As some of you may have heard already, Tom Rose was this Tuesday terminated as Publisher and CEO of The Jerusalem Post. CFO Mark Ziman has taken his place as publisher on an interim basis. For those of us who have seen up close the damage Tom did to this newspaper, this is a happy event indeed. For those Tom damaged personally, with his abusive behavior and bizarre management style, it is happier still. So good riddance, Tom, good riddance. You will not be missed. So many of us have been waiting for this day, and fighting for it, that we may be forgiven for thinking that Tom's departure brings our problems to an end. It does not. It will be some time before we can undo the damage he has wrought: To our finances, to our reputation, to our business relationships, to our morale, to the quality of our editorial product. What we can say is that, with Tom gone, we can begin to address our problems in a rational and purposeful way. Improvements will not necessarily come quickly. But I'm confident they will, in time, come. I hope each of you has a pleasant holiday. I look forward to seeing you next week.”

Rose sued for defamation and charged that this email was forwarded to freelance journalists around the world as well as other individuals in Illinois and New York. *Rose v. Jerusalem Post, et. al.*, 847 N.E.2d 202, 314 Ill.Dec.292 (Ill. App. 1st Dist. 2007). Excerpts from the e-mail were published in two newspaper articles readily available on the internet. Rose alleged that Stephens made these remarks with the intent to interfere in his efforts to gain employment and to injure him personally. The trial court dismissed the defamation count, holding that the statements were expressions of Stephens' opinions and protected by the First Amendment.

The Appellate Court concluded that the statements in the email were protected expressions of opinion rather than statements of fact. Although the Court acknowledged it was a “close call”, they found that no reasonable person could see Stephens' e-mail as anything but a “mean-spirited sendoff” of Rose, made for no apparent institutional reason. The Court upheld the lower court's dismissal of the defamation count.

Indiana Allows Damages for Wrongful Malpractice Suit

In Indiana, unlike many other states, before a medical malpractice action (seeking over \$15,000) can be filed, the action must be submitted to and reviewed by a medical review panel. Statutes allow for contemporaneous filing of the two, but the defendant cannot be specifically identified in the civil suit. In a recent Supreme Court decision, Indiana upheld an award of damages against a patient who improperly identified the physician in the civil suit.

In *Kho v. Pennington, et. al.*, __ N.E.2d __, 2007 WL 2713765 (Ind., September 19, 2007), a medical doctor, Dr. Kho, was named in a complaint filed with the Indiana Department of Insurance claiming medical negligence. Instead of waiting for the medical review panel to review the case, the doctor, through her attorneys, filed suit in Circuit Court. Eventually, Dr. Kho was voluntarily dismissed once it was learned that he had not provided care to Ruby Miller (the claimant).

Dr. Kho then filed suit for damages associated with his being falsely named in the malpractice suit. Summary judgment was granted in favor of Ms. Miller and Dr. Kho appealed. On appeal, the court affirmed the lower court's decision to grant summary judgment. Dr. Kho sought transfer to the Supreme Court and transfer was granted solely on the issue of whether violation of the defendant identity confidentiality provision of the code gave rise to an action for damages.

The Supreme Court held that the portions of the code in question supported the doctor's cause of action for negligence. Ruby Miller and her attorneys (who were also named in the lawsuit) argued that the code did not create new causes of action. The Court pointed to provisions within the State Constitution upholding the right to seek a remedy for damage to one's reputation, and found for Dr. Kho on the issue of the right to proceed with a statutory negligence claim, but declined to opine on whether the statute created a private cause of action.

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