

Insurance/Tort Law Newsletter

February 2010

News/Events

Save the Date

A “must-attend” conference will be presented on March 25 & 26, 2010, at a location to be determined. This is the first seminar co-presented by the Illinois Association of Defense Counsel and the Illinois Insurance Association. This two-day seminar and networking event will present a variety of interesting topics. Please circle the dates on your calendar to make sure you attend what promises to be an excellent event. Please check our website, as well as this newsletter, for updated information about this seminar.

Illinois Supreme Court Holds That “Caps” On Damages in Malpractice Cases are Unconstitutional

As indicated in our recent Newsflash, on February 4, 2010, the Illinois Supreme Court issued its decision in *LeBron v. Gottlieb Memorial Hospital*, (No. 105-741). In a 4-to-2 decision, the Supreme Court affirmed the holding of a Cook County trial court judge that the caps in malpractice cases were unconstitutional. The “caps” limited “non-economic” damages to \$1,000,000 in cases against hospitals and \$500,000 in cases against doctors and other individuals. The Court concluded that the caps violated the separation of powers clause of the Illinois Constitution. According to the court, in common law cases, limitations of damages are a judicial rather than a legislative function.

This is the second occasion on which the Supreme Court has addressed legislative efforts to limit non-economic damages in tort cases. In its prior *Best* decision in 1997, the Court held that similar legislation that addressed all tort cases in general, was unconstitutional. The legislation at issue in the *LeBron* case represented an attempt by the legislature to limit damages in a way that would be constitutional. The legislation involved in *LeBron* was directed only to medical malpractice

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cases. The Supreme Court's decision clearly suggests that the Court will not approve any efforts to limit damages in tort cases. Absent an attempt by the legislature to amend the Illinois Constitution, this likely represents the end of legislative efforts along those lines in Illinois.

Illinois Appellate Court Holds that Additional Insured Coverage for a General Contractor May Provide Only Excess Coverage

The relationship between additional insured coverage and a "targeted tender" has been the subject of many recent Illinois Appellate decisions and the subject of many of the articles in our prior newsletters.

The "targeted tender" doctrine provides where a party, most often a general contractor, is insured as an additional insured under policies of others, it may make a "targeted tender" to the insurer providing the additional insured coverage, rather than invoking coverage under its own CGL policy. Where a targeted tender is made, the insurer that is a subject of the targeted tender may not invoke the coverage of the contractor's own coverage pursuant to the "other insurance" provisions of the policy because that coverage is not "available."

In *River Village v. Central Insurance Companies*, 919 N.E.2d 426 (1st Dist. 2009), the Illinois Appellate Court held that even where a targeted tender is made, the additional insured coverage may only provide excess coverage and the coverage of the tendering party may still provide coverage on a primary basis. In *River Village*, the general contractor was named as an additional insured under coverage provided by a subcontractor. The additional insured coverage, however, provided that it was excess over any other valid and collectable insurance available to the additional insured unless a contract specifically required that the additional insured coverage be primary or primary and non-contributing. The contract between the contractor and the subcontractor did not contain such a provision. Accordingly, the Appellate Court held that the additional insured coverage was only excess coverage

and the contractor still had to look to its own insurance as providing primary coverage.

The Appellate Court in *River Village* based its decision on a recent Illinois Supreme Court decision, *Kajima Construction Services v. St. Paul Fire & Marine Insurance Company*, in which the Illinois Supreme Court held that the "Horizontal Exhaustion" doctrine applied even in the context of additional insured coverage. The Horizontal Exhaustion doctrine requires that an insured exhaust all of its primary coverage before it can look to any excess insurer to provide coverage for a loss. In *River Village*, the Appellate Court held that the doctrine applied because the additional insured coverage provision provided that it was excess to other available coverage.

The *River Village* decision is a very significant one because in many cases it may result in the party relying upon the additional insurance coverage losing the benefit of that coverage. If the additional insured coverage provides that it is excess, unless it is required to be primary by a contract between a contractor and a subcontractor, the additional insured coverage may be only excess coverage.

Although the *River Village* Appellate Court relied upon the Supreme Court's decision in *Kajima*, the decision appears to be inconsistent with *Kajima*. In *Kajima*, the Illinois Supreme Court drew a definite distinction between "true" excess coverage, which is always excess coverage and "incidental" or "accidental" excess coverage, where a primary policy may become excess because of the provisions of the other insurance clause. *Kajima* held that the Horizontal Exhaustion doctrine applied only as to "true excess policies." The situation in *River Village* did not involve a "true" excess policy because the additional insured coverage was potentially primary and became excess only because of the application of the "other insurance" provisions.

Practice Pointer

In making or responding to any targeted tender, the parties should carefully analyze the potential for the insurer providing the additional insured coverage claiming that its coverage is only excess, rather than primary. This may turn, as it did in *River Village*, upon the terms of the underlying agreement between the contractor and the subcontractor with respect to the nature of the additional insurance coverage that was required. General contractors wishing to avoid this dilemma should carefully provide in their subcontracts that additional insurance coverage must be primary and non-contributory.

Illinois Appellate Court Concludes That Statutory Immunity for Snow Removal From Sidewalks Does Not Include Driveways

After a significant snowfall, the defendant condominium association, through the defendant landscaping company, plowed the plaintiff's condominium driveway. The plowing created an unnatural accumulation of snow in front of the plaintiff's garage door, impeding his ability to access the garage by car. He parked his car on the street and, while walking up the driveway to assess the situation, slipped and fell on an unnatural formation of sheer packed ice created by the earlier plowing.

Reversing the trial court's dismissal of the complaint for failure to state a claim upon which relief may be granted, the Illinois Appellate Court in determined that the use of the word "sidewalk" in the Snow and Ice Removal Act did not include driveways. *Gallagher v. The Union Square Condominium Homeowner's Assn., et al.*, 2010 WL 338816 (Ill. 2nd Dist. 2010). The Court analyzed the 2008 amendment to the Act, noting that it was in derogation of common law by its addition of immunity for injuries resulting even from unnatural accumulations of snow and ice unless the actions of snow removal were willful and wanton. Disagreeing with and distinguishing the First District decision in *Flight v. American Community Mgmt.*, entered prior to the 2008 amendment, the Court instead strictly

construed the statute's use of the term "sidewalk" and held that the Act did not provide immunity for injuries sustained on driveways.

Illinois Appellate Court Holds That Franchisor May Be Liable For Criminal Assault Of An Employee Of The Franchisee But Not Civil Liability

Renee Lawson, who worked at a McDonald's franchise, parked her car in the restaurant's parking lot, where employees were supposed to park. Before she was able to enter the restaurant, she was robbed, abducted and assaulted. She alleged that her injuries were caused by negligence of the franchisor, (McDonald's) and the franchisee (Schmitt Boulder Hill) that operated the restaurant. Both parties moved to dismiss her Complaint and the trial court granted both motions. *Lawson v. Schmitt Boulder Hill Inc.* (No. 2-09-0026).

In her Complaint, Lawson alleged that McDonald's published security requirements for employee parking lots that its franchisees were required to follow. She also alleged that McDonald's monitored compliance with its security requirements. McDonald's filed a motion to dismiss, which was supported by an affidavit, which claimed that McDonald's was simply the franchisor, did not employ the Plaintiff and had no right to control the restaurant's day-to-day operations. Plaintiff submitted a counter affidavit, stating that representatives of McDonald's visited the restaurant and spoke with managers about compliance with various rules and regulations that franchisees were required to follow.

Although the trial court granted McDonald's motion to dismiss, the Appellate Court reversed. The Appellate Court found that McDonald's had not proven that as a franchisor, it had no duty to the Plaintiff. Generally, a franchisor has no duty of care to employees of the franchisee. However, according to prior decisions, a franchisor may face liability where it maintains mandatory security procedures. The Appellate Court found that

McDonald's had not met its burden of proving that it had not implemented mandatory security procedures and it therefore faced potential liability.

With respect to Plaintiff's claims against the franchisee, the Appellate Court affirmed the dismissal of Plaintiff's Complaint. The Court concluded that the action was barred by the exclusive remedy provision of the Worker's Compensation Act.

Practice Pointer:

Because this case arose from a motion to dismiss, McDonald's might still be able to establish at trial that it had not assumed any duty of care to the Plaintiff or was not negligent. However, the case illustrates the burden of proof placed upon a moving party in order to obtain a dismissal of a cause of action. Here, McDonald's simply failed to present the court with adequate proof that it had not implemented security procedures for its franchisees.

Recent Trial Statistics Include Some Surprises

The Cook County Jury Verdict Reporter recently released statistics regarding trial results for the year ending in September 2009.

Although the conventional wisdom is that plaintiffs fare better in counties outside of Cook County, the statistics did not prove that out. Plaintiffs won exactly 50% of cases that went to trial in Cook County, compared to a victory rate of 57% of cases outside of Cook County.

For the year, there were 396 cases taken to verdict in Cook County, which were split exactly 50/50 between plaintiff and defendant. 109 of the cases were medical malpractice cases and the defendants in the malpractice cases won 2/3 of the cases. Defendants, however, won less than 50% of malpractice cases outside of Cook County, winning 11 out of 26 decided cases.

While these statistics reflect results only for a single year, they suggest that Cook County may not be as unfavorable a forum for defendants as is often thought to be the case.

Civil Settlements and Medicare Setaside

CMS has announced that it will delay Mandatory Insurer Reporting in civil lawsuits and cases until 1/1/2011. While the reporting deadline has been delayed what needs to be reported has not changed. Nevertheless, no tangible benefit arises from delaying production of the information sought by Medicare.

There remains substantial uncertainty among plaintiffs and defendants' counsel and their clients as to what affirmative obligations lie with the parties to protect and address Medicare interests associated with **future** payments which might be made by Medicare. Some take the position that the parties must setaside a specific amount of the settlement for any future projected medical expenses which Medicare might be requested to pay. Others say no such obligation exists. What everyone currently agrees upon is that there is no existing mechanism to submit any proposed Medicare setaside to CMS, the wing of Medicare which addresses this topic in workers' compensation cases.

The more prudent approach is to consider, address and where appropriate designate a certain amount of the settlement funds within the settlement release and settlement payment as a setaside amount for plaintiff's future medical needs.

Our firm has substantial experience with Medicare setasides and CMS and we encourage you to contact us or others with such experience whenever you have any questions in this confusing, emerging area in civil lawsuits.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov LLC is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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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) or Terrence J. Madden (tmadden@brycedowney.com) at 312.377.1501 or any member of our General Liability team. © Copyright 2010 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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