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Insurance/Tort Law Newsletter

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Bryce Downey & Lenkov News

We are pleased to announce the addition of **Hannah Barnard** and **Jack O'Grady** as new attorneys in our Merrillville, Indiana and Chicago offices. In addition to defending our clients on workers' compensation matters they will also be assisting our clients on liability matters in Indiana and Illinois respectively.

Bryce Downey & Lenkov Case Results

We were retained to defend a large retailer in a case involving a claim that Plaintiff fell from a ladder on a construction site that was allegedly owned and maintained by our client. Quickly after we were retained **Christopher M. Puckelwartz** successfully tendered the client's defense to co-defendant's insurance carrier based on the indemnification and insurance provisions of the subject construction contract.

Without having to conduct any discovery **Storrs Downey** secured with prejudice the dismissal of a lawsuit in Indiana against a church and its agent involved in an automobile accident.

Case Law Update

Illinois Appellate Court Refuses to Adopt Post Sale Duty to Warn of Defective Conditions That Were Not Known to Manufacturer at the Time of Sale

In *Jablonski v. Ford Motor Company*, No. 11096 (September 22, 2011), Mr. & Mrs. Jablonski were driving a Lincoln Town Car which while stopped was struck from behind by another car traveling at high rate of speed. As a result of the impact, a pipe wrench that was in the trunk of the car penetrated the fuel tank, causing the car to erupt in flames. Mr. Jablonski was killed and his wife seriously injured. A suit was filed against Ford, alleging various

defects in the Town Car, including a claim that the Ford was negligent in the design of the fuel tank.

At trial the plaintiffs presented a number of liability theories, including a claim that Ford was negligent for not warning purchasers of defective conditions Ford learned of after the vehicle was sold. Specifically, plaintiffs contended that after the vehicle was sold by Ford, Ford became aware that the design of the fuel tank was potentially dangerous because objects in the trunk could penetrate the fuel tank in rear end collisions, causing fires. Ford learned of that possibility and issued warnings to police forces that had purchased comparable vehicles, but did not issue warnings to civilian purchasers, believing that the risk of fires in police vehicles was much higher than in civilian vehicles because police vehicles were involved in many more rear end collisions.

The jury found for the plaintiffs and awarded 28 million dollars in compensatory damages and 15 million dollars in punitive damages.

Ford appealed on a number of grounds, including the claim that the jury had been improperly instructed on the duty to warn issue. The jury instructions permitted the jury to find Ford liable for failure to warn of defective conditions that it did not learn of until after the vehicle was sold. Ford claimed that under existing law it had no duty to warn purchasers of defective conditions that it did not know of or should not reasonably have known of at the time the vehicle was sold. The appellate court rejected that argument and affirmed the judgment in favor of the plaintiffs. The Supreme Court, however, reversed, holding that a manufacturer has no duty to warn of defective conditions that were not known or should not reasonably have been known at the time of sale. The duty to warn applies only to defective conditions, which the manufacturer new or reasonably should have known of at the time a product is sold. The Supreme Court did not rule out the possibility that Illinois law might be modified in the future to recognize such a post sale duty to warn.

Illinois Appellate Court Holds That CGL Pollution Exclusion Is Ambiguous As Applied to Emissions Within Levels Permitted By Environmental Protection Agency Permit

Imperial Marble Corporation manufactures marble vanities and countertops and other synthetic products. In its manufacturing processes, it utilizes chemicals that are dispersed into the atmosphere. The emissions are authorized under a permit issued by the Illinois Environmental Protection Agency.

Imperial Marble was sued in a class action lawsuit for personal injury and property damage allegedly due to emissions from its manufacturing operations. The complaint alleged that the emissions were part of Imperial's normal business operations, but also alleged that the emissions exceeded levels permitted under its EPA permit.

Imperial’s CGL insurer, Erie Insurance, filed a declaratory judgment action, claiming that the suit was not covered because it fell within the terms of the pollution exclusion. The pollution exclusion was a standard one, excluding coverage for bodily injury or property damage arising out of the dispersal of “pollutants". “Pollutants” were defined broadly to include “any solid, liquid, gaseous or thermal irritant for contaminants, including smoke, vapor, fumes, chemicals…."

The trial court granted summary judgment in favor of Erie Insurance and Imperial Marble appealed. Among its arguments in the appellate court, Erie claimed that the pollution exclusion was ambiguous as applied to pollution within levels permitted by the Environmental Protection Agency. In *Erie Insurance Exchange v. Imperial Marble Corporation*, No. 3-10-0380 (Ill. 3rd Dist. 2011), the Illinois Appellate Court agreed with Imperial, concluding that it was unclear whether permitted emissions constitute “traditional environmental pollution" that is excluded under the policy. The appellate court therefore held that the insurance company was under a duty to defend the underlying suit.

Practice Tip: The appellate court in this case appeared to go out of its way to find potential coverage for the insured. It could easily have concluded, as did the trial court, that the underlying suit alleged pollution, falling squarely within the terms of the pollution exclusion. Thus, in responding to complaints involving pollution issues, before making any coverage decisions insurers should determine whether the pollution at issue was within levels permitted by an environmental permit.

Property Owner and Manager Under No Continuous Duty to Remove Snow or Ice from Apartment Building Stairs Where No Reliance on Defendants' Voluntary Undertaking by Plaintiff

In *Claimsone, v. Professional Property Management, LLC, et al.*, 2011 WL 4064594, (Ill. App. 2d Dist. 9/12/11), plaintiff workers' compensation carrier brought a subrogation action for recovery of benefits paid to an employee of its insured housekeeping company resulting from personal injuries the employee allegedly sustained when she slipped and fell on a rear apartment staircase that was covered with snow and ice. Applying the Illinois "natural accumulation" rule, the trial court granted summary judgment in Defendants favor. The Second District affirmed.

Under the natural accumulation rule, property owners and business operators do not have a duty to remove natural accumulations of snow or ice. One exception to this rule is a voluntary undertaking. Under this exception, where a person voluntarily agrees to perform a service necessary for the protection of another person or their property, a duty may be imposed on the party undertaking that service. Such a party must perform the service in a manner as not to increase the risk of harm to the other person who relies on the undertaking. One who is negligent in the undertaking will be held liable for the foreseeable consequences of the act if another suffers harm because they relied on the undertaking.

The exception applies to cases involving both nonfeasance (failure of performance by omission) and misfeasance (negligent performance). A plaintiff may recover for nonfeasance for a gratuitous undertaking where the plaintiff reasonably relied on the promise. Reliance may be shown where there is a deceptive appearance that performance had been made, where a representation of performance is made to plaintiff by defendant or where plaintiff is otherwise prevented from obtaining knowledge or substitute performance of the undertaking. However, plaintiff must be unaware of the actual circumstances and not equally capable of determining such facts.

In *Claimsone*, defendants had removed snow and ice from the stairs at the subject apartment building for years prior to the incident but failed to do so on the date of loss. Thus, plaintiff argued that it voluntarily assumed a duty to keep the stairs free of ice and snow on the date of loss. Defendants argued that the prior gratuitous snow and ice removal did not create a continuing duty to clear the stairs every time there was a natural accumulation. The Second District agreed. It noted that the existing conditions were obvious and known by plaintiff's subrogor as shown by her testimony. She also had no knowledge of the defendants' prior snow and ice removal. Thus, the court found that plaintiff could not show the requisite reliance and therefore the voluntary undertaking exception to the natural accumulation rule did not apply.

Practice Tip: The *Claimsone* case is useful for defense of natural accumulation and voluntary undertaking cases. Plaintiff will be unable to establish reliance if plaintiff knew or should have known that the voluntary undertaking was not performed by defendant or if plaintiff had no knowledge of the defendant's prior voluntary undertaking.

Illinois Appellate Court Rejects Insurer's Claim That Malicious Prosecution Claim Is Not Covered By CGL Policy

In *Illinois Farmers Insurance Company v. Stukel, No*. 090484 (Ill. 3rd Dist.) (2011) the defendant/insured was sued for malicious

prosecution and tendered his defense to Illinois Farmers insurance company. Illinois farmers refused to defend, claiming that the tort of malicious prosecution involved an intentional act that was excluded from the policy. The Illinois appellate court rejected that claim. Noting that the personal injury coverage section of the policy expressly provided coverage for malicious prosecution, the court concluded that to hold that malicious prosecution claims were subject to the intentional act exclusion would render the coverage for malicious prosecution illusory.

Illinois Appellate Court Holds That Release Contained in Bicycle Race Agreement Was Enforceable and Barred Claims By Injured Cyclist

In *Hallweg v. Special Events Management*, No. 1-10-3604 (Ill. 1st Dist. 2011), an Illinois appellate court considered whether an exculpatory provision barred the personal injury claims of a cyclist participating in a bicycle race.

Plaintiff signed up to participate in a bicycle race to be conducted on municipal streets. Promotional material indicated that the race would be on a "closed course." While participating in a warm-up session, plaintiff collided with another bicyclist, who was not participating in the race and who should not have been on the course. Plaintiff sued the organizers of the race for negligence, claiming that they were negligent in permitting that bicyclist on the course during warm-up sessions. The defendants moved to dismiss, arguing that a general release signed by the plaintiff to participate in the race barred the plaintiff's claims. Plaintiff argued that the particular risk giving rise to his accident was not foreseeable and the release therefore did not apply. The appellate court however, found the release enforceable and the particular risk at issue foreseeable. The release specifically released all claims, including claims arising from collisions with pedestrians or other bicyclists.

In reaching its conclusion, the appellate court noted that general releases are valid, provided that they are clear and not contrary to any public policy.

Practice Tip: The general rule under Illinois law is that exculpatory provisions are enforceable and this case followed that general rule.

Contractor Under Possible Duty To Preserve Evidence in Construction Site Accident

In Terry Martin, et al. v. Keeley & Sons, Inc., et al,, No. 100117, (Ill. App. 5th Dist. 9/20/11), plaintiffs were installing a handrail on a bridge that defendant Keeley was reconstructing pursuant to a contract with the Illinois Dept. of Transportation. Plaintiffs were injured when they fell from scaffolding supported by an I-beam that collapsed and fell. The plaintiff injured workers brought suit against defendants alleging that they negligently manufactured the I-beam, negligently designed the bearing assembly that supported the beam and breached their duty to preserve the beam by destroying it. The trial court denied plaintiffs' summary judgment motion on the spoliation of evidence claims. The Fifth District reversed and remanded.

There is thus a two-part test for determining when there is a duty to preserve evidence. First, a party must establish that a duty to preserve evidence arose by agreement, contract, statute, special circumstance or voluntary undertaking. Second, such a duty is found, then the 'foreseeability' prong of the test is used to determine whether that duty extends to the evidence at issue – i.e., whether a reasonable person should have foreseen that the evidence was material to a potential civil action. Unless both prongs are satisfied, there is no duty to preserve the evidence at issue.

In Terry Martin, the Fifth District found that the 'relationship' prong of the test was met because Defendant Keeley preserved the subject I-beam for its own purposes and thus voluntarily undertook to preserve it for other potential litigants. However, the court found that whether plaintiffs could meet

the 'foreseeability' prong, i.e., whether a reasonable person in Defendant Keeley's position should have foreseen that the I-beam was material to a potential civil action, was a question for the trier of fact and not suitable for resolution on a summary judgment motion.

The Fifth District noted that none of the work-site inspections indicated that the I-beam had contributed to the accident. Under those circumstances, once could find that it was reasonable for Defendant to conclude that the beam was not material to a potential civil action and arguably any duty to preserve it might have ended after IDOT and OSHA inspected it. However, Defendant knew that workers' compensation claims would stem from the accident. Defendant also took photographs of the beam and was thus aware that it was important to document the scene. There was also evidence that the injured plaintiffs heard a 'pop' sound immediately prior to the bridge collapse and that a weakened beam could explode under stress.

The Fifth District noted that where reasonable persons might draw different inferences from the undisputed facts from which a duty to preserve evidence might be found, whether the foreseeability prong has been met is a question for the trier of fact.

Practice Tip: The Martin case is useful for defense of spoliation of evidence cases. Defendants must be careful to avoid incurring a duty to preserve evidence which would not otherwise exist by voluntarily undertaking to preserve it. If a defendant does decide to preserve evidence, it should be careful to make sure that it does so properly to avoid a spoliation claim.

Illinois Appellate Court Applies Expansive Statute Of Limitations In Product Liability Case

The issue involved in *Mitsias v. Hi-Flow Corporation*, No. 1-10-1126 (Ill. 1st Dist. 2011) was whether a product liability claim that was filed, eight years after the injury was time barred where the plaintiff could not have known of the possible cause of action at the time of the occurrence because the existing science at the time did not support the contention that the product liability defendants may have caused the injury.

The plaintiff had shoulder surgery in 2001 and experienced destruction of cartilage in the shoulder joint after surgery. Plaintiff filed a malpractice action in 2003 against the operating surgeon. During his deposition in 2007 the surgeon testified that the administration of an anesthetic agent through a continuous infusion device, known as a pain pump, was associated with loss of cartilage. He also testified that recent medical literature suggested that possibility. Within two years after obtaining that information, the plaintiff then amended his complaint to add product liability claims against the manufacturers of the pain pump. Those defendants moved to dismiss the complaint, arguing that it was time barred by the two-year statute of limitations. They argued that plaintiff at least knew that he had been wrongfully injured as of the date that he filed suit in 2003 and at that time he was under the obligation to investigate possible causes of action against all defendants and bring them into the suit within two years. Plaintiff argued, however, that that general rule could not be applied in cases where the existing scientific knowledge would not have supported a cause of action at the time and argued that the plaintiff could not be charged with reasonable knowledge that the product liability defendants may have been partially responsible for his injury until the scientific literature raised that possibility.

The appellate court agreed with the plaintiff and reversed the trial court, which had granted the product liability defendants' motion to dismiss.

Practice Tip: Generally, the law is that if the plaintiff has reason to believe that he or she has been wrongfully injured, he or she is under an obligation to investigate and determine all parties who may be at fault and to bring suit against them within two years. This case involves a rare exception to that rule in those cases where a party could not reasonably know of a potential cause of

action within two years, because the science or knowledge at the time did not support the claim.

Take-Home Toxic Torts: A Defense Win

In a prior issue of this newsletter, we wrote of a decision of a downstate appellate district holding that employers owed immediate families of their employees a duty to protect against take-home asbestos exposure. *Simpkins V. CSX*, 401 Ill. App. 3d 1109 (Ill. App. 5th Dist. 2010). In that article, we noted that this was a case of first impression in Illinois.

In a recent decision, *Estate of Holmes v. Pneumo Abex*, 2011 WL 2517420 (Ill. App. 4th Dist.) (2011), another downstate appellate court held exactly the opposite under similar facts. The central issue was whether there was a duty on the part of the exposing entities to avoid the risks to an employee's family members of contracting asbestos-related conditions. The doctrine espoused in the cases has become know as "take-home asbestos" liability.

In a relatively detailed analysis of that duty, the Fourth District Appellate Court looked at a number of issues, including the requirement of a relationship between the parties. However, the Court noted that even if a relationship had existed, it was not reasonably foreseeable that an employee working in the confined spaces of an asbestos-producing factory would leave that premises, travel through the fresh air of the outside world then expose inside the home to whatever amount of asbestos remained on his clothing at levels causing an asbestos illness. Holding essentially that the lack of forseeability vitiated any duty, the appellate court vacated a 7-figure jury award to the family in its ruling.

As is typical in cases of this nature, the Court analyzed the state of knowledge of the asbestos industry from decades ago. (The 1960's in this case) Advances in scientific knowledge make it eminently clear that a lack of foreseeability argument would likely not prevail had the exposure occurred in a later era.

The decision included a dissenting opinion indicating that the earlier Fifth District opinion was correct. In the dissenter's mind, the issues of foreseeability should have been resolved against the defendant.

Practice Tip: Perhaps the primary point to be learned by this case is to not be dismayed by clear but non-binding precedent disfavoring a particular defense position. While such fights are typically uphill, they are not hopeless, as this case demonstrates. The opinion makes it clear that its ruling was fact-based. Accordingly, the case cannot be read as a holding that "take-home toxic torts" cannot ever stand in Illinois. Each case must be analyzed with reference to the specific facts presented.

No Evidentiary Hearing Needed to Recover Employer's Lien

Amidst all the recent changes to the Workers' Compensation Act, the First Appellate Court recently reaffirmed that an employer's lien was not subject to an evidentiary hearing before recovery following a third-party civil lawsuit. In *Johnson v. Tikuye*, 2011 WL 1501562 (Ill. App. 1st Dist.) (2011), an employee was injured in a work-related car accident. The employee filed a workers' compensation claim, which was ultimately settled with his employer. The employee then filed a civil lawsuit against a third-party defendant who was involved in the car accident. After the civil lawsuit was filed, the employer filed a motion to enforce its lien against any award pursuant to section 5(b) of the Workers' Compensation Act, "the Act."

The civil lawsuit proceeded to binding arbitration in which the employee was awarded $94,960.00 after a 20% reduction for comparative fault. Pursuant to the Act, the employer should have been entitled to $71,220.00, which represented the employee's arbitration award less 25% for statutorily prescribed attorney fees.

Following the award, the employer sought to enforce its subrogation right. The employee filed a

response arguing that the trial court should evaluate the arbitration award to determine what portion was related to the injuries resulting from the accident, as distinguished from any subsequent acts, because the employer's lien can only attach to those proceeds from the work-related accident. The trial court conducted an evidentiary hearing and found that the employer was only entitled to $42,286.88.

Fortunately, the First District Appellate Court held that the Act simply does not provide for the attempted lien reduction imposed by the trial court. The trial court's decision to conduct an evidentiary hearing to determine whether there was any portion of the arbitration award not related to the work-injury was not provided for by the Act under these circumstances. The only instance in which it is necessary for the trial court to conduct an evidentiary hearing is when the settlement proceeds are not allocated amongst all the claims, such as for loss of consortium brought by a spouse. This was not the case in *Johnson*.

In reinstating the employer's proper lien recovery of $71,220.00, the *Johnson* Court noted it is of the utmost importance to protect an employer's workers' compensation lien.

Practice Tip: Even though an employer has a statutory right to recover its workers' compensation lien resulting from a third-party award, this case reminds us of the importance of an employer filing a petition to intervene to formally put all parties on notice of the lien and ensure that all settlement negotiations are conducted in good faith with an interest in ensuring maximum recovery of the employer's lien.

Pilot Program: Contemporaneous Expert Disclosures

Effective September 1, 2011, the Circuit Court of Cook County Law Division has announced a 9-month pilot program relating to disclosure and discovery relating to expert witnesses. The present system is very much like that encountered in most jurisdictions. Plaintiff discloses experts who are then deposed. Following this, defendants disclose experts and those experts are then deposed. Recently, that system has fallen under criticism from various judges. Their concern is based upon the need to continually refine opinion disclosures which, in turn, result in supplemental expert depositions. It is the hope of those who crafted the pilot program to eliminate what one judge called the "death spiral of discovery."

Under the new system, a select group of larger cases (known as "Category II" cases) will be subject to the following rules.

1. 60 days after close of discovery, all parties will be required to declare experts and opinions contemporaneously.

2. Within 30 days thereafter, each party is entitled to "supplement" its previously-disclosed expert opinions, presumably in light of what various adversaries have disclosed. (Note: The rule itself does not mention retention or disclosure of additional experts that might be necessary or desirable)

3. Within 60 days after the supplemental disclosure, all experts are to have been deposed.

While the desire of the judges who initiated this program to cut litigation time and expenses laudable, it is questionable whether the program as outlined will accomplish that goal.

On its face, the program appears to put defendants to the unreasonable burden of anticipating each avenue of every possible expert-based attack which plaintiff's may embark upon in both the liability and damage aspects of a case. For example, a contractor in a construction accident would currently have to retain one or more experts to cover any conceivable avenue of attack under any theory which might be aimed at that party. If that same construction accident were to involve a crane, it is conceivable that every defendant would need to obtain a general safety expert, a crane

safety/product expert, and conceivably an OSHA expert nearly upon liability issues.

The corollary problem arises also in preparation of the defendants' damage case. If the plaintiff injured in the above construction accident was not presently working or working in some reduced capacity (very likely due to the economy impacting construction employment) the defendants will nevertheless likely have to retain a medical expert to opine on the plaintiff's ability to work. It is equally probable that a rehabilitation expert would have to be retained to proffer opinions that Plaintiff was employable. Moreover, if the injuries involved multiple body parts or multiple systems (such as a closed head injury coupled with orthopedic issues) multiple medical experts would have to be retained, provided with full records, and put forward under the appropriate rules as a full defense expert.

Obviously, the potential strategic and economic unfairness of this situation is that the defendants will have no specific awareness as to who Plaintiff's experts will be, what fields they present expertise in, OR what they will say as to each or any of them from a liability standpoint. In some cases, plaintiff's theories will be evident at the close of fact discovery. In others, they will be far less so. Some have argued (correctly, in this authors opinion) that the rule shifts the threshold burden of proof to defendants in terms of expert disclosure as they must defend a broadside general attack rather than one with any specificity involved.

Practice Tip: The details of the program are still being fine tuned by the court. It is anticipated that as the program moves forward, some of these issues and concerns may be addressed by the courts and in certain cases, informally by counsel. For now, we must necessarily advise our clients that budgeting of both outside expenses for expert fees and attorney's time in locating experts and proffering their opinions will increase, perhaps drastically in certain instances.

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, 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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- Environmental Law
- Insurance Coverage
- Insurance Litigation
- Intellectual Property
- Medical Malpractice
- Professional Liability
- Real Estate
- 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) or Terrence J. Madden (tmadden@brycedowney.com) at 312.377.1501 or any member of our General Liability team. *© Copyright 2011 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*

Chicago Office:	Indiana Office:		Memphis Office:	Atlanta Office:
200 N. LaSalle Street Suite 2700 Chicago, IL 60601 Tel: 312.377.1501 Fax: 312.377.1502	2646 W. Lincoln Hwy Suite B Merrillville, IN 46410 Tel: 219.756.8100 Fax: 219.756.5100	BRYCE DOWNEY & LENKOV	1922 Exeter, Suite 5 Germantown, TN 38138 Tel: 901.753.5537 Fax: 901.732.6555	P.O. Box 800022 Roswell, GA 30075-0001 Tel: 770.642.9359 Fax: 678.352.0489